THE STATE OF NEW HAMPSHIRE
TRUST DOCKET, 6TH CIRCUIT – PROBATE DIVISION – CONCORD

TRUST U/W/O MARY BAKER EDDY – CLAUSE 6

TRUST U/W/O MARY BAKER EDDY – CLAUSE 8

CASE NO. 317-1910-TU-0001

APPENDIX TO BRIEF *AMICUS CURIAE* OF
THE SECOND CHURCH OF CHRIST SCIENTIST, MELBOURNE (AUSTRALIA)

APPENDIX
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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS PROBATE COURT

IN RE
TRUST UNDER THE WILL OF

MARY BAKER EDDY

SEP 22

STIPULATION FOR ORDER

The Attorney General, Director of Charitable Trusts, and the undersigned as attorneys for the trustees under the will of Mary Baker G. Eddy and as attorneys for the First Church of Christ, Scientist, stipulate that the Court may enter the following order on the Specification of Cause for Appearance filed in this case by the Attorney General, Director of Charitable Trusts, dated November 5, 1992. The undersigned, by their attorneys, enter into this Stipulation for Order in their dual capacities as trustees of the trust (the "Trustees") established by Mary Baker G. Eddy in clause 8 of her last will and testament dated September 13, 1901 (the "Trust"), and as representatives duly authorized by the governing body of the First Church of Christ, Scientist, (the "Church") to execute this Stipulation and to do or cause to be done what is stipulated to herein on behalf of the Church, its governing body, and the successors in office of the undersigned.

1. The Church shall repay the Trust from its unrestricted funds the sum of $5,000,000 in successive annual payments on May 1 of each year on the following schedule:

May 1, 1994	$ 500,000
May 1, 1995	$ 500,000
May 1, 1996	$1,000,000
May 1, 1997	$1,000,000
May 1, 1998	$2,000,000
	$5,000,000

2. The Church shall pay interest to the Trust on the unpaid principal balance at the prime rate as appears in the Wall Street Journal in monthly payments, beginning as of October 19, 1991, and continuing until the principal has been repaid in full.

3. The cost of keeping in repair the Church building and the building at 385 Commonwealth Avenue, Boston, Massachusetts (or any substitutes therefor) shall be paid exclusively from the income of the Trust so long as the trust income is sufficient for that purpose.

4. If at the end of any accounting year of the Trust there remains income in the Trust, after payment of all costs of repair, the unexpended income may be applied by the Trustees of the Trust in their discretion to promoting and extending the religion of Christian Science.

5. The Trustees shall not after the date of this order lend the funds of the Trust to the Church.

6. The Trustees shall not invade, or permit to be invaded, the principal of the Trust without the prior approval of the Probate Court of Merrimack County; and no invasion of trust principal shall be in an amount which would frustrate the purpose of the Trust by reducing the trust principal to a level incapable of producing income sufficient to pay the costs of all repairs in any given year.

7. Upon approval by the Merrimack County Probate Court of this Stipulation, the Attorney General, Director of Charitable Trusts, shall withdraw any objection to allowance of the trustees' account and the specification of cause for appearance.

8. The parties agree that this Stipulation is not to be considered as an admission of any impropriety in the administration of the Trust, and that the parties enter into the Stipulation for the sole purpose of resolving the issues raised in the Specification of Cause for Appearance filed by the Attorney General, Director of Charitable Trusts.

Respectfully submitted,

The State of New Hampshire
Jeffrey R.Howard, Attorney General

Dated: August 23, 1993

William B. Cullimore, Director
Division of Charitable Trusts
Office of Attorney General
25 Capitol Street
Concord, NH 03301
(603) 271-3591

John L. Selover, Olga M. Chaffee, Richard C. Bergenheim, and Virginia S. Harris, as Trustees under the Will of Mary Baker G. Eddy
and
The First Church of Christ, Scientist
By Their Attorneys
Upton, Sanders & Smith

Dated: August 21, 1993

By: _____
James F. Raymond
10 Centre Street
P.O. Box 1109
Concord, NH 03302-1109
(603) 224-7791

Stipulation approved and entered as Court Order on the 14th day of September A.D. 1993.

Donald W. Goodnow
Judge of Probate

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COPY

STATE OF NEW HAMPSHIRE

MERRIMACK, SS. PROBATE COURT

IN RE TRUST U/W/O MARY BAKER EDDY--CLAUSES VI AND VIII

Docket No. ~~22099~~ (1910-0001) 01-633

PETITION BY TRUSTEES UNDER THE WILL OF MARY BAKER EDDY, CLAUSES VI AND VIII, FOR APPROVAL OF POOLED INVESTMENTS

NOW COME John L. Selover, Olga M. Chaffee, Virginia S. Harris, Walter D. Jones, and Paul D. Grimes, Co-Trustees of the trusts created under Clauses VI and VIII of the will of Mary Baker Eddy (the "Trustees"), by their attorneys, and respectfully request that this Honorable Court authorize the Trustees to invest trust assets in pooled funds that also contain assets held by the Christian Science Trustees for Gifts and Endowments. In support thereof, the Trustees state:

1. The Trustees hold and administer the assets of trusts established under Clauses VI and VIII of the will of Mary Baker Eddy (the "Trusts"). The assets of each trust are separately managed by investment management firms chosen by the Trustees. The two Trusts have different purposes:

A. Clause VI: The income and principal of the trust under Clause VI may be used to provide "free instruction for indigent, well-educated, worthy Christian Scientists at the Massachusetts Metaphysical College and to aid them thereafter until they can maintain themselves in some department of Christian Science." The trust has a current market value of approximately $450,000.00.

1

DISK

B. Clause VIII: The income and principal of the trust under Clause VIII may be used first "for the purpose of keeping in repair the church buildings and [Mrs. Eddy's] former house at 385 Commonwealth Avenue" and second "for the purpose of more effectually promoting and extending the religion of Christian Science as taught by [Mrs. Eddy]." The trust has a current value of approximately $13,600,000.00.

2. The Trustees separately account to this Court for each trust.

3. The Trustees individually are also the members of the Christian Science Board of Directors. In 1926, the Board of Directors established a separate board of trustees, the Christian Science Trustees for Gifts and Endowments, to hold and manage gifts donated for the benefit of The Mother Church of The First Church of Christ, Scientist.

4. The Christian Science Trustees for Gifts and Endowments invest the funds held by them primarily in stock and bond funds managed by professional investment management firms, and audited annually by independent certified public accountants. The total amount currently held by the Christian Science Trustees for Gifts and Endowments is approximately $210,000,000.00.

5. The Trustees and the Christian Science Trustees for Gifts and Endowments have similar investment goals and purposes. Therefore, the Trustees would like to invest the assets held by them in the professionally managed pooled funds of the Christian Science Trustees for Gifts and Endowments.

6. Using the pooled funds for investment of the Trusts' assets will have several benefits, including:

A. The Trustees will be able to obtain greater investment diversification, resulting in a significant reduction in investment risk and the possibility of greater long term rates of return;

B. By using the same professional managers and investment funds as are used by the Christian Science Trustees for Gifts and Endowments, the Trustees will obtain greater efficiencies and reduced costs in accounting and oversight of the Trusts' assets.

7. The Trustees will continue to have independent audits of each trust performed annually, and the Trustees will continue to file annual probate accounts separately accounting for the shares of the pooled investments allocated to each Trust.

8. This Court has previously approved a stipulation for order, dated August 23, 1993, requiring this Court's approval of any invasion of principal, but the Trustees are unaware of any other restriction imposed by this Court on the type or form of investment that the Trustees may make.

9. The Trustees believe that their investment of the Trusts' assets in pooled funds, together with assets of the Trustees for Gifts and Endowments, is prudent and is consistent with their obligations and powers under RSA 564-A:3 and 3(b).

WHEREFORE, the Trustees respectfully request that this Honorable Court:

A. Approve of their investment of the Trusts' assets in pooled funds containing assets invested by the Christian Science Trustees for Gifts and Endowments; and

B. Grant such further relief as is just.

Respectfully submitted,

Date: May 24, 2001

John L. Selover, Olga M. Chaffee,
Virginia S. Harris, Walter D. Jones, and
Paul D. Grimes, Co-Trustees

By Their Attorney,

James F. Raymond
Upton, Sanders & Smith
10 Centre Street, P.O. Box 1090
Concord, NH 03302-1090

ORDER

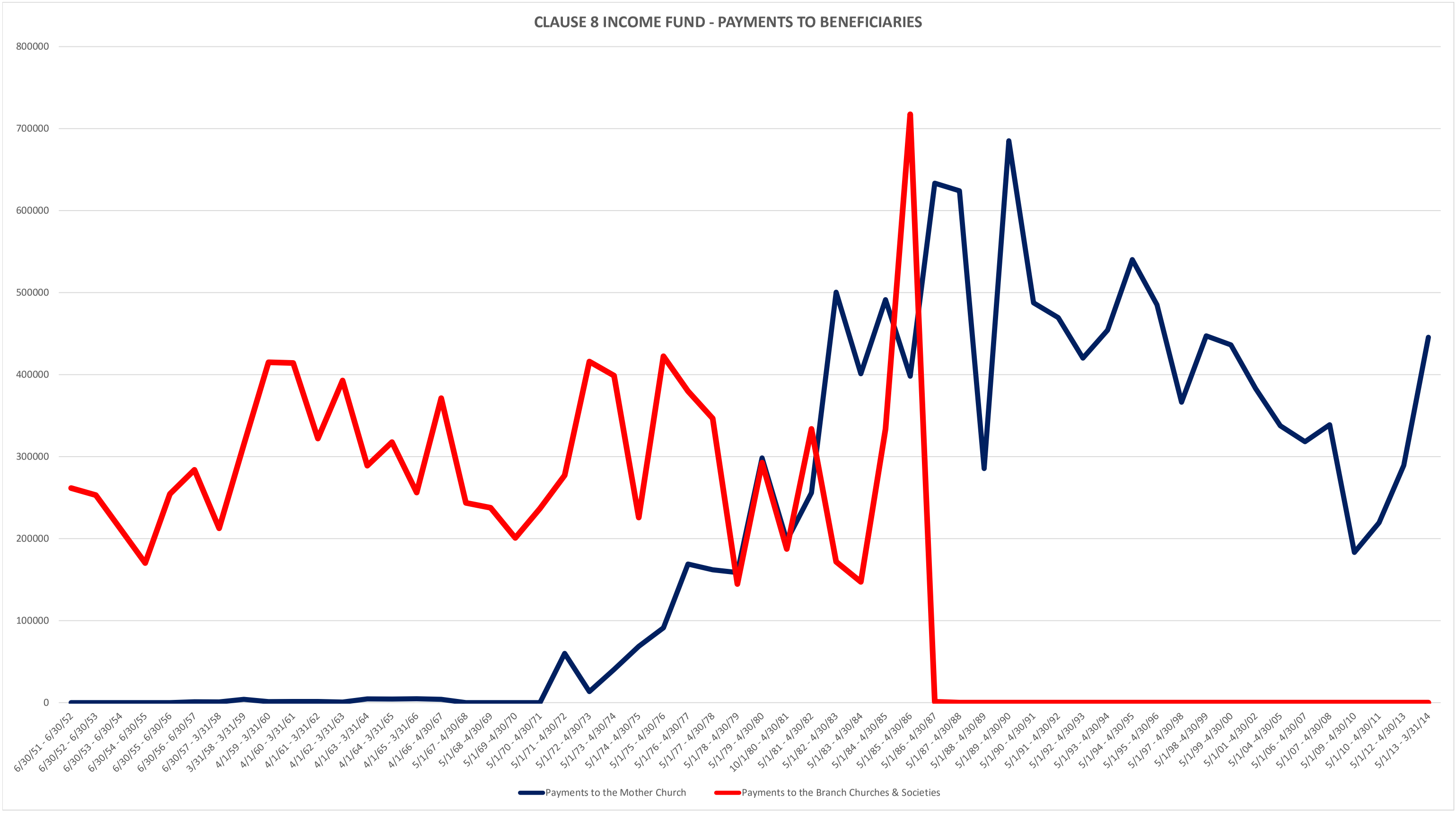
Petition granted.

Date: 8-23-01

Judge of Probate

revised to May 24, 2001

G:\JFR\PROB EDDY-TR PLEADING POOLING PET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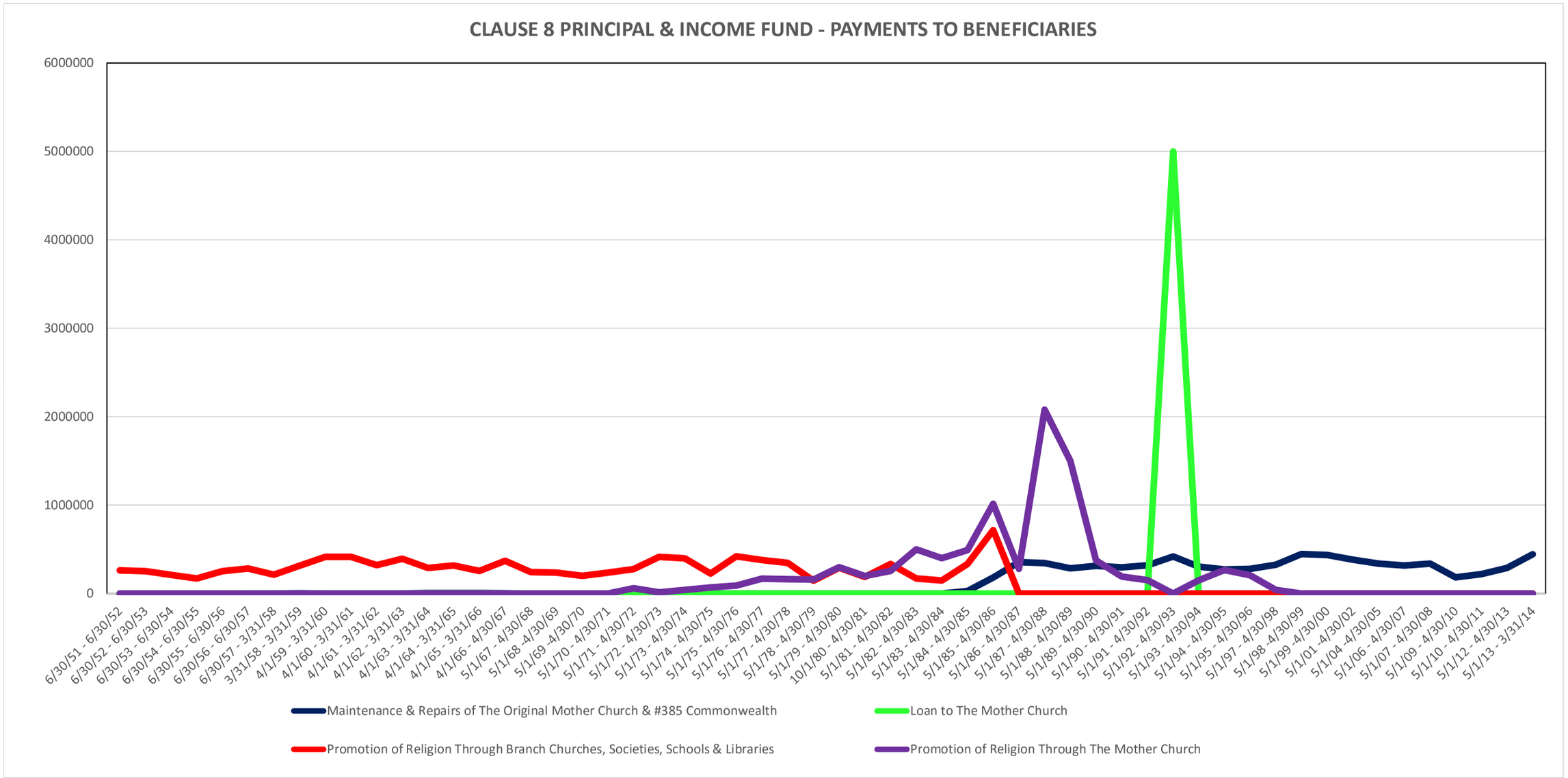
Payments to the Mother Church
Payments to the Branch Churches & Societies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Maintenance & Repairs of The Original Mother Church & #385 Commonwealth
Loan to The Mother Church
Promotion of Religion Through Branch Churches, Societies, Schools & Libraries
Promotion of Religion Through The Mother Church

Audited Financial Statements

Trustees Under Clauses 6 and 8 of the Will of Mary Baker Eddy

April 30, 1992

ERNST & YOUNG

MBE CONC 4074

Audited Financial Statements

TRUSTEES UNDER CLAUSES 6 AND 8 OF THE WILL OF MARY BAKER EDDY

April 30, 1992

MBE CONC 4075

ERNST & YOUNG

200 Clarendon Street
Boston
Massachusetts 02116-5072

Phone: 617 266 2000
Fax: 617 266 5843

REPORT OF INDEPENDENT AUDITORS

Trustees Under Clauses 6 and 8 of
the Will of Mary Baker Eddy

We have audited the accompanying balance sheet of the Trustees Under Clauses 6 and 8 of the Will of Mary Baker Eddy as of April 30, 1992, and the related statements of revenues, expenditures and changes in fund balance of income fund, and of changes in fund balance of principal fund for the year then ended. These financial statements are the responsibility of the Trustees. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Trustees Under Clauses 6 and 8 of the Will of Mary Baker Eddy and the results of their operations and the changes in their fund balances for the year then ended in conformity with generally accepted accounting principles.

Ernst + Young

June 5, 1992

BALANCE SHEET

TRUSTEES UNDER CLAUSES 6 AND 8 OF THE WILL OF MARY BAKER EDDY

April 30, 1992

	Clause 6	Clause 8
ASSETS		
Investments--at lower of cost or market (market value of $208,101 for Clause 6 and market value of $3,242,162 for Clause 8)		
Corporate notes		$ 890,986
Common stocks		1,930,078
Mutual funds		1,028
Certificates of deposit	$208,101	
	208,101	2,822,092
Cash	3,880	40,243
Accrued investment income	172	52,213
Loan receivable from The Mother Church--Note C		5,000,000
	$212,153	$7,914,548
LIABILITIES AND FUND BALANCES		
LIABILITIES		
Accounts payable		$ 8,830
Due to the Mother Church		168,485
		177,315
FUND BALANCES		
Principal Fund	$121,456	7,737,233
Income Fund	90,697	
	212,153	7,737,233
	$212,153	$7,914,548

See notes to financial statements.

NOTES TO FINANCIAL STATEMENTS

TRUSTEES UNDER CLAUSES 6 AND 8 OF THE WILL OF MARY BAKER EDDY

NOTE A--PURPOSE OF TRUSTS

The Will of Mary Baker Eddy provides that the income of Clause 6 be used to support free instruction to needy students in Christian Science teachings and other support as necessary. The income of Clause 8, as specified in the Will, is used to repair and maintain certain Church buildings and to promote and extend Christian Science teachings. Both trusts allow disbursements of principal, as needed, to support the objectives of the trusts.

NOTE B--ACCOUNTING POLICIES

The accounts of the Trustees are maintained on an accrual basis. Realized net gain or loss on sales of investments is determined on the basis of average cost.

NOTE C--DUE FROM THE MOTHER CHURCH

During fiscal year 1992, Clause 8 made a loan of $5,000,000 to The Mother Church for the purpose of extending and promoting the religion of Christian Science. Interest is payable monthly at the current prime rate.

TRUSTEES UNDER THE WILL

of

MARY BAKER EDDY

Clause 8

Financial Report

April 1, 1992 - April 30, 1992

MBE CONC 4082

Clause 8
Balance of Principal
March 31, 1992

Name	Face value/ Shares	Cost since/ Market Value at 5/1/91	Market Value at 3/31/92
Stocks			
American Express	3,900	97,500.00	89,212.50
Burlington Northern	3,000	86,370.00	122,625.00
Burlington Res Inc.	2,300	86,250.00	85,100.00
Corestates Financial Corp.	2,400	91,497.00	107,100.00
Federal National Mtg. Assn.	1,400	63,700.00	89,775.00
Ford Motor Company	3,300	107,250.00	126,637.50
International Paper Co.	1,400	88,023.00	103,075.00
Phillips Pete Co.	4,000	109,490.00	93,000.00
Reynolds Metals Co.	1,600	94,998.00	91,400.00
Suntrust Banks Inc.	2,500	70,947.50	89,687.50
Westvaco Corp.	2,600	78,331.00	89,700.00
Total Stocks		974,356.50	1,087,312.50
Bonds			
US Treas. Nt. 7.625%, 12/31/93	1,000M	1,013,120.00	1,035,620.00
US Treas. Nt. 8.000%, 01/15/97	1,000M	1,009,370.00	1,041,560.00
Total Bonds		2,022,490.00	2,077,180.00

Market Value of Stocks	1,087,312.50
Market Value of Bonds	2,077,180.00
Cash Equivalents	109,456.60
Total Securites	3,273,949.10
Interest and Dividends Receivable	41,513.79
Amount Due from The Mother Church-Principal	5,000,000.00
Amount Due from The Mother Church-Interest	180,355.80
Amount Due from The Mother Church-Commission Costs	11,138.80
Amount Due to Income Fund	(426,296.73)
Balance of Principal March 31, 1992, Clause 8	8,080,660.76

MBE CONC 4085

Clause 8, Schedule G
Balance of Principal
April 30, 1992

Name	Face value/ Shares	Cost since/ Market Value at 4/1/92	Market Value at 4/30/92
Stocks			
American Express	3,900	89,212.50	87,750.00
Burlington Northern	3,000	122,625.00	135,750.00
Burlington Res Inc.	2,300	85,100.00	95,162.50
Corestates Financial Corp.	2,400	107,100.00	108,600.00
Federal National Mtg. Assn.	1,400	89,775.00	87,850.00
Ford Motor Company	3,300	126,637.50	149,737.50
International Paper Co.	1,400	103,075.00	104,300.00
Phillips Pete Co.	4,000	93,000.00	99,500.00
Reynolds Metals Co.	1,600	91,400.00	96,000.00
Suntrust Banks Inc.	2,500	89,687.50	94,375.00
Westvaco Corp.	2,600	89,700.00	95,550.00
Total Stocks		1,087,312.50	1,154,575.00
Bonds			
US Treas. Nt. 7.625%, 12/31/93	1,000M	1,035,620.00	1,039,690.00
US Treas. Nt. 8.000%, 01/15/97	1,000M	1,041,560.00	1,046,870.00
Total Bonds		2,077,180.00	2,086,560.00

Market Value of Stocks	1,154,575.00
Market Value of Bonds	2,086,560.00
Cash Equivalents	1,027.49
Total Securites	3,242,162.49
Interest and Dividends Receivable	52,213.06
Amount Due from The Mother Church-Principal	5,000,000.00
Amount Due to Income Fund	(137,072.29)
Balance of Principal April 30, 1992, Clause 8	8,157,303.26

MBE CONC 4096

FINANCIAL STATEMENTS

Trusts Under Clauses 6 and 8 of The Will of Mary Baker Eddy

Year ended April 30, 2003

Trusts Under Clauses 6 and 8 of
The Will of Mary Baker Eddy

Audited Financial Statements

Year ended April 30, 2003

Contents

Management's Responsibility for Financial Statements

To the Trustees of the Trusts Under Clauses 6 and 8 of
The Will of Mary Baker Eddy

Management of The First Church of Christ, Scientist ("The Mother Church") is responsible for the administration of the Trusts Under Clauses 6 and 8 of The Will of Mary Baker Eddy (the "Trusts"), as well as the preparation and integrity of the accompanying financial statements. These statements have been prepared in accordance with accounting principles generally accepted in the United States of America, and include certain amounts that are based on management's best estimates and judgments.

The Mother Church's accounting systems include extensive internal controls designed to provide assurance of the reliability of its financial records and the proper safeguarding and use of its assets. Such controls are based on established policies and procedures, and are implemented by trained, skilled personnel with an appropriate segregation of duties. Management is dedicated to ensuring that high standards of financial accounting and reporting are maintained.

I have prepared the accompanying statements of financial position of the Trusts as of April 30, 2003, and the related statements of activities and cash flows for the year then ended. I am not independent with respect to The Mother Church or the Trusts.

Robert S. Bishop, CPA

Robert S. Bishop, CPA
Audit and Tax Services Manager
August 8, 2003

THE FIRST CHURCH OF CHRIST, SCIENTIST, 175 HUNTINGTON AVENUE, BOSTON, MA, U.S.A. 02115-3187 • (617) 450-2000

Trusts Under Clauses 6 and 8 of The Will of Mary Baker Eddy

Statements of Financial Position

April 30, 2003

	Clause 6	Clause 8
Assets		
Cash and cash equivalents	$ 21,236	$ 138,711
Investments, at market value	224,941	12,815,123
Interest and dividends receivable	446	27,304
Total assets	$ 246,623	$ 12,981,138
Liabilities and Net Assets		
Due to The Mother Church	$ 304	$ -
Total liabilities	304	-
Unrestricted net assets	246,319	12,981,138
Total liabilities and net assets	$ 246,623	$ 12,981,138

See accompanying notes.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Hallett v. Moore, Mass., April 4, 1933

212 Mass. 555
Supreme Judicial Court of Massachusetts, Suffolk.

CHASE et al.
v.
DICKEY et al.

Oct. 9, 1912.

Case Reserved from Supreme Judicial Court, Suffolk County.

Bill in equity by Stephen A. Chase and others against Adam H. Dickey and others, praying that plaintiffs may be decreed to be entitled and able to hold certain real estate bequeathed by Mrs. Mary G. Baker Eddy to the First Church of Christ, Scientist, in Boston. Case reserved for the full court. Bill dismissed conditionally.

West Headnotes (11)

[1] **Appeal and Error**
Cases or Questions Reported, Reserved, or Certified

Reservation for the full court of all questions raised by the record *held* to bring before the court for review all material matters disclosed on the record which must be ultimately decided, and which have been argued.

Cases that cite this headnote

[2] **Charities**
Promotion of Religion

Gift in trust for repair of "church" building held charity but cannot be determined whether devise for promotion of Christian Science as taught by donor contravenes public policy without inquiry into character of donor's teachings.

6 Cases that cite this headnote

[3] **Charities**
Capacity of Trustees or Donees to Take

Devise in trust for proper purpose is not void because devisee has no capacity to take under Rev.Laws, c. 37, § 9, and devise in trust for branch of Christian Science religion will not be permitted to fail, where discretion of particular trustee was not of essence of gift.

2 Cases that cite this headnote

[4] **Charities**
Gifts for Promotion of Religion

Devise in trust for repair of church buildings and for promotion of Christian Science "as taught by me" held not void for indefiniteness, even though repair of buildings was private and not charitable use, and canot be assumed to be void for indefiniteness in advance of determination as to what donor's teachings in fact were.

6 Cases that cite this headnote

[5] **Charities**
Persons Entitled to Question Validity of Gift

Devise in trust to church corporation, beyond its power to take, can be questioned only by commonwealth in direct proceeding, and is good against every one else.

1 Cases that cite this headnote

[6] **Charities**
Purposes of Gift

Devise to church for keeping its buildings in repair and promoting Christian Science held not gift for special needs of particular church, but gift in trust for purpose specified.

1 Cases that cite this headnote

[7] **Charities**
Actions for Administration or Enforcement

Donor's heirs at law are usually necessary parties to any proceeding involving inquiry whether good charitable trust is created, and they were entitled to intervene in suit to determine capacity of church corporation to take property devised in trust. Determination of corporation's capacity to take devise held determinable in suit by it in which Attorney General intervened.

6 Cases that cite this headnote

[8] **Wills**

Restrictions on Devises and Bequests for Charitable or Religious Purposes

Rev.Laws, c. 37, § 9, held to affect only the power of church corporations to receive and hold gifts, and not to constitute a limitation on testamentary capacity.

Cases that cite this headnote

[9] **Wills**

Devises and Bequests Within Statute

A devise of property to a church in trust is a gift "to" the church, within the meaning of Rev.Laws, c. 37, § 9.

1 Cases that cite this headnote

[10] **Wills**

Corporations and Persons to Whom Applicable

Deacons, wardens, and other similar church officers, deemed bodies corporate by Rev.Laws c. 37, § 1, held to be subject to the limitation provided by section 9, as to the amount of property which a church corporation has capacity to take.

2 Cases that cite this headnote

[11] **Wills**

Agreements of Parties Interested

Though all the heirs of a person joined in a covenant not to contest the will, or to release their claim to a share in the estate, they may claim a share in intestate property, or show that the property is intestate property.

1 Cases that cite this headnote

Attorneys and Law Firms

***568** Elder, Whitman & Barnum, of Boston, Streeter, Demond & Woodworth, of Concord, N. H. (Wm. A. Morse and Leon M. Abbott, both of Boston, of counsel), for plaintiffs.

James M. Swift, Atty. Gen., and Fred T. Field, of Boston, for the Commonwealth.

Choate, Hall & Stewart, of Boston, for respondents.

Wm. E. Chandler, of Concord, N. H., John D. Long, Herbert Parker, and Henry H. Fuller, all of Boston (Hannis Taylor, of Washington, D. C., De Witt C. Howe, of Concord, N. H., and John W. Kelley, of Portsmouth, N. H., of counsel), for petitioners for leave to intervene.

Streeter, Demond & Woodworth, of Concord, N. H., for executor.

Opinion

***556** RUGG, C. J.

This is a suit in equity, in which the plaintiffs aver that they are 'the 'Christian Science Board of Directors' in charge of all the spiritual and temporal affairs and of the property of the First Church of Christ, Scientist, in Boston, Mass., also known as the 'Mother Church,' an unincorporated religious society in said Boston maintaining regular religious services in its church edifice, and that their duties are similar to those of deacons ***557** or wardens of churches or religious societies, and that they as such, with their successors, constitute a corporation under section 1 of chapter 37 of the Revised Laws.' The original respondents were the executor of the will of Mary Baker G. Eddy, and Dickey, McLellan and Fernald, trustees under deeds from the testatrix.

Mrs. Eddy, the founder of 'Christian Science,' so called, conveyed certain real estate, the net annual value of which is largely in excess of $2,000, to the respondents, Dickey, McLellan and Fernald, to hold in trust for certain uses during her 'earthly life and at the termination thereof to

dispose of the same in accordance with the provisions of' her 'last will and the codicils thereto.' She has deceased, and her last will and codicils have been allowed in New Hampshire, the state of her domicile, and admitted to ancillary probate in this commonwealth. The language of the residuary clause of her will now material is: 'I give, bequeath and devise all the rest, residue and remainder of my estate of every kind and description to the Mother Church, the First Church of Christ, Scientist, in Boston, Massachusetts, in trust for the following general purposes: I desire that such portion of the income of my residuary estate as may be necessary shall be used for the purpose of keeping in repair the church building and my former house at number 385 Commonwealth avenue in said Boston, which has been transferred to said Mother Church, and any building or buildings which may be by **412 necessity or convenience substituted therefor, * * * and I desire that the balance of said income and such portion of the principal as may be deemed wise shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me.'

The bill alleges a request upon the trustees for a conveyance to the plaintiffs of the real estate, a willingness on their part to make it, but a refusal without an order of court on the ground that the petitioners are incapable of holding it by reason of R. L. c. 37, § 9. The language of this section is: 'The income of the gifts, grants, bequests and devises made to or for the use of any one church shall not exceed two thousand dollars a year exclusive of the income of any parsonage land granted to or for the use of the ministry.' The prayer of the bill is for a conveyance of this real estate *558 to the petitioners as entitled thereto under the will of Mrs. Eddy. The respondent trustees admit the allegations of the bill and pray the instructions of the court. The executor avers that the personal estate of the testatrix is amply sufficient to pay all debts and legacies, and that there will be no occasion to sell the real estate here in question for that purpose, and otherwise adopts the answer of the trustees.

The Attorney General became a party, and demurred on the ground that the next of kin of Mrs. Eddy were necessary parties. This demurrer was overruled.

The Attorney General then answered, admitting the substantial allegations of fact in the bill, but setting up R. L. c. 37, § 9, as a bar to its maintenance.

George W. Glover and Ebenezer J. Foster [Eddy], being all the next of kin and heirs at law of the testatrix, have petitioned for leave to intervene, reciting the appearance of the Attorney General and his contention under the statute, and further setting up (1) that the residuary clause in the will is of no effect by reason of the statute; (2) that it is in contravention of the public policy of the commonwealth; and (3) that it is 'vague, indefinite and incapable of enforcement as a valid testamentary disposition.' Wherefore, they say, the legacy has failed, and the property is intestate and vested in them as the sole heirs at law of Mrs. Eddy.

The complainants and all the respondents, except the Attorney General, objected to the allowance of the petition to intervene, on the ground that the heirs at law made what are termed 'family settlements' with Mrs. Eddy during her life, according to which they each received from her and still retain large sums of money and other valuable rights, and in consideration thereof released and extinguished all claims as heirs against her estate, and covenanted not to contest any disposition of her property that she might make.

The case was heard upon the pleadings before a single justice, who reserved 'all questions raised by the record * * * for the consideration and determination' of this court.

1. It is not necessary to consider the demurrer of the Attorney General. All the heirs at law have petitioned to be made intervening parties, which presents the questions of substance raised by the demurrer.

*559 [1] 2. The heirs at law should be allowed to intervene to the extent of being heard upon the validity of the trust. If for any reason the residuary clause of the will is ineffective, the estate must go somewhere. It is either intestate property or, possibly, liable to escheat to the commonwealth. It is not necessary to decide its devolution. In any event the subject is one in which the heirs at law are interested, and hence are entitled to a hearing. It may be assumed that if the commonwealth had not become a party, the heirs at law alone would not be parties in interest as to the effect of the inhibition of the statute against the gift to a church. It would not be for them to raise that question, for the reason that the commonwealth alone has a right to challenge such a gift. Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025. But here the Attorney General has been made a party. He

has raised expressly the point that the petitioners are not entitled to a conveyance because of the invalidity of the residuary clause. Hence the hostile attitude of the state is disclosed. This gives the heirs at law a standing, because if the contention of the Attorney General is sustained, it is possible that the heirs may take.

[2] Their kinship is not extinguished by their so-called family settlement agreement. They are not of necessity precluded by their covenants and the advancements to them from presenting arguments as heirs at law touching intestate property or from showing that in truth the property is intestate. It may be assumed that a covenant not to contest a will or to release all claim to share in the estate of an ancestor based upon an adequate advancement freely made with sufficient knowledge of the facts and without fraud would be enforced. Quarles v. Quarles, 4 Mass. 680. But this principle fails when all the heirs have joined in a similar covenant and there is intestate estate. While it might be insisted upon for the benefit of heirs who had not covenanted in like manner, when all heirs are in this regard on the same footing, there is no one in whose behalf the covenant may be invoked. This is not an initial contest touching the execution of the will, testamentary capacity or other grounds for opposing the allowance of the will, as to which different rules of law would arise. It is a question whether the instrument, allowed as the will, disposes of the estate in a valid way, or whether it is inoperative in law. ****413**

[3] The heirs at law commonly are necessary parties to any proceeding ***560** where the inquiry is whether a good charitable trust is created. Cassidy v. Shimmin, 122 Mass. 406, 411; Jackson v. Phillips, 14 Allen, 539, 571; Packard v. Marshall, 138 Mass. 301, 303; Kent v. Dunham, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667; Whitwell v. Bartlett, 211 Mass. 238, 98 N. E. 98. This principle also applies under the circumstances of this case. The heirs at law are necessary parties in the determination of the question whether the trust is so contrary to public policy that it cannot be carried out, or so indefinite and vague as to be incapable of administration as a public charity.

[4] [5] 3. The validity of the residuary clause, so far as dependent upon the church statute (R. L. c. 37, § 9) is open upon this record. A gift like the present to a corporation beyond its power to take can be questioned in the first instance by the commonwealth alone. It is good against everybody else. The restrictions upon the powers of a corporation to hold property imposed either by the terms of its charter or by general law can be taken advantage of only in a direct proceeding by the creating sovereign power. Jones v. Habersham, 107 U. S. 174, 188, 2 Sup. Ct. 336, 27 L. Ed. 401; Davis v. Old Colony R. R. Co., 131 Mass. 258, 273, 41 Am. Rep. 221; Evangelical Baptist Benevolent & Missionary Society v. Boston, 204 Mass. 28, 33, 90 N. E. 572. This proceeding is in that sense direct and immediate. The Attorney General has become a party. He is a proper party. No objection has been or could be made justly against his appearance. He raises peremptorily the question of corporate capacity to take. The particular form of the proceeding is not material. The substantial inquiry is whether it is of such nature that the material questions are open as they would be in an action instituted by himself for that purpose. This proceeding is sufficient for that end. It is distinguishable from Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025, in fundamental respects. There not only was the Attorney General not a party, but the state acting through its legislative department had waived its rights and legalized the gift by the enactment of a statute.

[6] [7] [8] 4. The petitioners set out as the ground of their right to a conveyance that they are a corporation under R. L. c. 37, § 1. The material allegations are that their duties are similar to those of deacons or wardens of churches or religious societies, and that these and similar officers under the statute are 'deemed' a body 'corporate for the purpose of taking and holding in succession all gifts, grants, bequests and devises of real or personal estate ***561** made either to them or their successors, or to their respective churches, if unincorporated, or to the poor of their churches.' The substance of this section is found first in Prov. St. 1754-55, c. 12, where it was prefaced by a preamble indicating that its enactment was induced by doubts whether grants and donations to such officers or to churches would go in succession, Going v. Emery, 16 Pick. 107, 118, 26 Am. Dec. 645; Weld v. May, 9 Cush. 181, 185; Earle v. Wood, 8 Cush. 430, 437; Stebbins v. Jennings, 10 Pick. 172, 189. Section 1 of the original act was and has remained in successive re-enactments and revisions in substance the same as the present law. The prohibition in section 3 of the original act was against an annual income from gifts in excess of £300. There was a further provision that donations, bequests and devises, not made in accordance with the statute, should be void; but this was repealed by St. 1785, c. 51. This is the nearest approach

to a real mortmain act in Massachusetts. As is pointed out in Hubbard v. Worcester Art Museum, 194 Mass. 280, 284, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025, the limitations upon the power of corporations in this commonwealth to hold property, while probably growing out of the mortmain legislation of early times in England, has been narrow in scope, and has been based upon considerations of public policy and in the interest of the state alone. The slight changes in phraseology of the statute in its successive enactments do not indicate any intent by the Legislature to change the law in the parts now under consideration. The natural construction of the language of R. L. c. 37, §§ 1 and 9, is that unincorporated churches and religious societies may receive donations up to the limited amount, and as against the commonwealth they have no right to receive and hold gifts in excess of this amount. It is plain that a gift directly to a church for its own benefit is within the prohibition. The residuary clause of this will makes a gift to the First Church of Christ, Scientist, 'in trust' to be devoted to the repair of church buildings and 'the purpose of more effectually promoting and extending the religion of Christian Science as taught by' the testatrix. This latter purpose in substance is not a gift to the particular ecclesiastical organization for its special needs. It manifests a broader design, and authorizes the use of the gift for spreading the tenets of faith taught by the testatrix over an area more extensive than could possibly be gathered in one congregation. It includes ***562** the most catholic missionary effort, both as to territory, peoples and times. It is the founding of a trust of comprehensive scope for the upbuilding of the sect which the testatrix made the object of her bounty. While in a general sense it may be said that every church is devoted to 'promoting and extending the religion' of the denomination to which it belongs, a gift to the particular ****414** use described in this will is not a gift to the church to do with as it chooses. The testamentary statement of the purpose of the gift when coupled with its magnitude and express fiduciary words manifests an intent that it shall be devoted as a trust fund to the specified ends. The gift is stated to be 'in trust.' That this is its real meaning is confirmed by reference to the clause of the will and to the second codicil by which substantial legacies are given directly or without restriction to the same First Church. The will shows a plain appreciation by its maker of the vital distinction between an absolute gift and a trust. The question, then, is: Does the statute prohibit a gift to a church of property of more than two thousand dollars annual income to be held by it in trust, and not for its own special uses? It may be conceded that a gift upon these trusts would not be so alien to the objects of a church as to be beyond its power to take and hold apart from the statute. Parishes, which are religious societies, have been held competent to receive gifts in trust for the maintenance of schools. First Parish in Sutton v. Cole, 3 Pick. 232; White v. South Parish in Braintree, 13 Metc. 506; Boxford Religious Society v. Harriman, 125 Mass. 321. It is within the undoubted power of a church or kindred organization to devote its unappropriated resources to the aid of other domestic or foreign churches, missions or other religious purposes.

It was said by Mr. Justice Gray in Jones v. Habersham, 107 U. S. 174, 182, 2 Sup. Ct. 336, 343 (27 L. Ed. 401): 'It is a novel proposition as inconsistent with the rules of law as it is with the dictates of religion, that a Christian church or religous society cannot receive and distribute money to poor churches of its own denomination so as to promote the cause of religion in the state in which it is established.' Sohier v. Wardens and Vestry of St. Paul's Church, 12 Metc. 250, 258; Baker v. Fales, 16 Mass. 488, 495; McAllister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158. But this consideration is of small weight. Apart from statute, no bound is fixed to the amount of property which a charitable ***563** or other corporation may hold. The statute prohibits donations above the stipulated amount 'to or for the use of any one church.' These words in their usual sense apply as much to gifts in trust as to gifts outright. There is nothing in the history of the statute or its context to indicate that they are employed in any restricted sense. In ordinary speech, a gift to a church is one to it by name. Of that description is the present devise. The history and the arrangement of R. L. c. 37, indicate that sections 1 and 9 are complementary of each other. So far as deacons, wardens and other similar church officers are clothed with corporate power to receive donations under section 1, to that same extent they act under the limitation and inhibition set forth in section 9. This view is confirmed by other statutes of a kindred nature. R. L. c. 37, § 10, creates monthly meetings of Friends bodies corporate for the purpose of holding donations 'to the use of such meeting or to the use of any preparative meeting belonging thereto,' but the annual income of property so held 'shall not exceed five thousand dollars a year.' R. L. c. 36, §§ 40 and 41, limit the power of trustees of the Methodist Episcopal Churches to hold property in trust for religious uses (outside of church buildings) to such as

yields a yearly income not in excess of $4,000. R. L. c. 36, § 44, limits the property of Roman Catholic church corporations to $100,000, exclusive of church buildings. Church corporations thus are restricted by general law as to the amount of property which may be held. Laws of general scope respecting charitable corporations limit the amount of property which they may hold. R. L. c. 125, §§ 7 and 8; Id. c. 124, § 19. The policy of the commonwealth appears to have been declared in its early days, and steadfastly adhered to through the intervening years, to maintain direct control over the amount of property which should be vested in its church and charitable corporations. Its manifest purpose has been to establish a limit for the accumulation of property in the hands of any one such corporation. Many special acts of incorporation scattered through the acts of the Legislature, year by year, almost from the beginning, fixing limitations of varying extent, show a similar policy. The conclusion seems irresistible from these considerations that the petitioners as a body corporate under R. L. c. 37, § 1, when objection is made by the commonwealth, are restrained ***564** from taking and holding the property described in the bill by reason of section 9. In Kinney v. Kinney, 86 Ky. 610, 6 S. W. 593, Morgan v. Leslie, Wright (Ohio) 144, and Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699, relied on by the petitioners, the state was not a party, and a statute different from ours was under consideration. Hence it is not necessary to review these cases.

[9] 5. It is contended by the Attorney General that, it being determined that the petitioners cannot take, the petition must be dismissed. But the reservation should not be so narrowly construed. It presents for decision 'all questions raised by the record.' So far as other material matters are disclosed upon the record with sufficient fullness, which must be decided ultimately and which have been argued by the parties in interest, they are ripe for decision now under the terms of the report.

[10] 6. The church statute affects only the power of the church to receive and hold as against the commonwealth, and is not a limitation upon testamentary capacity. ****415** This follows inevitably from the grounds of decision in Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025. The difference in phraseology between R. L. c. 125, § 8, the statute there considered, and the one in question in the case at bar, are immaterial upon this point. This statute is not an amendment to the statute of wills. To the same effect is Glover v. Baker, 76 N. H. 393, 83 Atl. 916.

[11] 7. Nor is the devise void simply because of the church statute. The petitioners are prevented from taking advantage of the will because of the statute, and not because of any infirmity inherent in the devise. The statute does not strike at the gift itself and declare that void. It only determines the right of the pertitioners as devisees. It does not undertake to affix any designation to the devise. Its validity must be considered on its own merits. A different question might arise if the gift had been absolute to the church. But where it is a trust which is created, its soundness must be considered as a question by itself.

[12] 8. It is contended that the devise is void, under the principle that if under the language of the will the property may be applied to other than strictly charitable uses, then it is too indefinite in a legal sense for the court to execute. Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; Wilcox, v. Attorney General, 207 Mass. 198, 93 N. E. 599, Ann. Cas. 1912A, 833; Dunne v. Byrne, [1912] A. C. 407, 411. The second codicil, which removes ***565** the Pleasant View estate from the corpus of the trust and revokes the provisions of the will touching it, simplifies this branch of the case. But it is suggested that the provisions for the repair of the Commonwealth avenue house (which is averred to be the parsonage of said church) and of the church building are private and not charitable uses, and hence that the whole devise fails under the rule just stated. Even if it be assumed that this premise is sound, the result does not follow.

The provision of the will is equivalent to making the repair of the Commonwealth avenue house and of the church a charge on the main fund. The clause as a whole indicates care for the house and church as one purpose, but the final residuary purpose is the promotion and extension of the religion of Christian Science. The word 'balance' in this connection is employed in the two-fold sense, of indicating first the subsidiary nature of the repair of the church and house as compared with the other object, and, second, the essentially residuary character of the ultimate testamentary design. Hence, if the first two objects fail or are unenforceable, the last becomes the true residuary provision of the will, sweeping in all those that are void or lapse for any other reason. In this aspect, the case at bar comes within the rule applied in Dexter v. Harvard College, 176 Mass. 192, 196, 57 N. E. 371, and cases cited, and In re Rogerson, [1901] 1 Ch. 715.

This construction is confirmed by the further provision that for the chief residuary purpose of 'promoting and exending the religion of Christian Science' any portion of the principal of the fund may be used, a power not attaching to the other objects. The clause read as an entirety manifests a purpose to make this the dominating and real residuary purpose of the testatrix. This conclusion does not impinge in any degree upon the thoroughly well established principle that where a fund is left for the support in perpetuity of several trusts, one private and others charitable, the whole fails (Rotch v. Emerson, 105 Mass. 430, 433, Chamberlain v. Stearns, 111 Mass. 267), and its corollary that where property is to be distributed by executors among objects, some, of which are private and others charitable, the gift fails as a charity (St. Paul's Church v. Atty. Gen., 164 Mass. 188, 195, 41 N. E. 231; Minot v. Atty. Gen., 189 Mass. 176, 75 N. E. 149; and Gill v. Atty. Gen., 197 Mass. 232, 236, 83 N. E. 676). ***566** [13] We are of opinion, however, that a gift for the repair of a church, in the modern sense of that word, as a place for public worship, open to everybody and established for the promotion of religion and morality among all people, whether regularly connected with its ecclesiastical organization or not, is a charity. 'A gift to a church eo nomine is a gift to a charity.' St. Paul's Church v. Attorney General, 164 Mass. 188, 197, 41 N. E. 231; Dexter v. Gardner, 7 Allen, 243, 247; Osgood v. Rogers, 186 Mass. 238, 71 N. E. 306; McAlister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; Sears v. Atty. Gen., 193 Mass. 551, 79 N. E. 772, 9 Ann. Cas. 1200, and cases cited. In the latter case the restriction of Old South Society v. Crocker, 119 Mass. 1, 20 Am. Rep. 299, and like cases to their special facts is referred to. Bartlett, Petr., 163 Mass. 509, 514, 40 N. E. 899; Teele v. Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401. Indeed, 'repair of churches' is not only one of the charities mentioned in St. of 43 Eliz. but has been made the basis of a considerable class of charitable uses. Jackson v. Phillips, 14 Allen, 539, 552.

In England it is settled that the building and repair of a church and the repair of a parsonage are charitable objects. Atty. Gen. v. Bishop of Chester, 1 Bro. C. C. 444. Sinnett v. Herbert, L. R. 7 Ch. App. 232; Vaughan v. Vaughan, 33 Ch. Div. 189.

But the petitioners are precluded from taking, even if a devise for the repair of a church building devoted to public worship and of a parsonage is a devise to a charity, ****416** because it appears that other legacies in this will to the First Church of Christ, Scientist, equal the amount it is permitted to hold under the statute, and it is averred that the estate is of such size that the legacies will all be paid in full. Moreover, we understand the petitioners to concede in their bill of complaint that the fund is not needed for the repair of the church building and the Commonwealth avenue house and is to be devoted 'exclusively for more effectually promoting and extending the religion of Christian Science.' Hence that is the only aspect of the case which requires further consideration. The devise is not void because of reference to these two objects.

[14] [15] 9. The residuary trust as thus interpreted is not void for general indefiniteness. The promotion of 'the religion of Christian Science' is as definite as many donations which have been upheld as public charities. Relief of spiritual destitution and religious or moral ignorance, intolerance or perversity, is a good public charity. The spread of the Christian religion and of its various denominations ***567** and sects has been held many times to be a charitable use for trusts. Baker v. Fales, 16 Mass. 488, 495; Going v. Emery, 16 Pick. 107, 26 Am. Dec. 645; Hinckley v. Thatcher, 139 Mass. 477, 488, 1 N. E. 840, 52 Am. Rep. 719; Commissioners for Special Purposes of Income Tax, [1891] A. C. 531, 572. Christian Science as a denomination of Christianity may be assumed to be no more difficult of ascertainment than many other sects. It is argued, however, that because the testatrix confined her benefaction to the spread of Christian Science as taught by her, there is thereby involved an inquiry into oral utterances of such vagueness and dependent upon such uncertainty of recitals by hearers that indefiniteness in a legal sense must be inevitable. Certainly this cannot be presumed in advance of a determination of what her teachings in fact were. It is not to be assumed that they are more difficult of ascertainment than those of most other sects of Christendom, nor that a court of equity would encounter any insurmountable difficulty in administering the trust.

[16] 10. The facts disclosed on the record and appearing in the will do not lead to the conclusion that the intent of the testatrix was fixed on the donee named so profoundly that if the donee fails, the gift fails. The purpose of the gift and the trustee are not so inextricably combined that they must stand or fall together. The support of a branch of the Christian religion being the declared purpose of the trust

and this being a public charity, the gift will stand unless it appears that the discretion of the particular trustee named is of its essence. There is disclosed no exceptional reliance upon the particular corporation named beyond that which appears commonly. The establishment of the trust does not seem to depend upon the particular instrument for execution nominated in the will. It is the not unusual case of a plain charitable intent, where the legatee is incapable of taking, and the trust is not permitted to fail for lack of a trustee. Bliss v. American Bible Society, 2 Allen, 334, 337; Winslow v. Cummings, 3 Cush. 358; Richardson v. Mullery, 200 Mass. 247, 86 N. E. 319. It does not fall within the class of cases where the administration of the trust is of its essence, and where it cannot be administered in any other way than that pointed out in the will. The situation here presented distinguishes the case plainly from Stratton v. Physio-Medical College, 149 Mass. 505, 21 N. E. 874, 5 L. R. A. 33, 14 Am. St. Rep. 442; Bowden v. Brown, 200 Mass, 269, 86 N. E. 351, 128 Am. St. Rep. 419, and like cases.

[17] 11. In this opinion heretofore it has been assumed without deciding that the words of the will, 'the religion of Christian Science as taught' by Mrs. Eddy describe a denomination of Christianity, which stands upon the same footing in respect of being a proper subject for charity as other Christian sects. One of the objections to the validity of the trust stated by the petitioners to intervene is that these teachings of the testatrix were 'in contravention of the public policy of the commonwealth.' This aspect of the case has not been argued by the petitioners to intervene nor by the Attorney General. In view of the peculiar language of the will in limiting the gift to the promotion and extension of Christian Science as taught by Mrs. Eddy, an inquiry into the character of her teachings is necessary. Two books written by her have been called to our attention. Neither of these purport in terms to be the exclusive authoritative statements of her teachings. Quotations from other of her writings are found in the petitioners' brief. There appears not to be enough in the present record to furnish a basis for the determination of the point whether the 'religion of Christian Science as taught by' Mrs. Eddy is contrary to the public policy of the commonwealth. That question is therefore left open.

12. Upon the frame of the bill as it now stands it must be dismissed. All parties who can have any interest in the trust are before the court, except a competent trustee. By proper amendments to the bill, it would seem that all the remaining issues can be raised. Leave may be granted for such amendments to be filed within 30 days from the filing of this rescript. Otherwise the bill may be dismissed.

So ordered.

All Citations

212 Mass. 555, 99 N.E. 410

KeyCite Yellow Flag - Negative Treatment
Distinguished by Portsmouth Hospital v. Attorney General, N.H., March 6, 1962

77 N.H. 108
Supreme Court of New Hampshire.

FERNALD
v.
FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, et al.

Oct. 7, 1913.

Transferred from Superior Court, Merrimack County; Pike, Judge.

Petition by Josiah E. **Fernald**, administrator with the will annexed of Mary Baker G. Eddy, deceased, against the First Church of Christ, Scientist, in Boston, for advice as to disposal of the funds in his hands on the final settlement. Case transferred from the superior court without a ruling. Advice given, and case discharged.

West Headnotes (6)

[1] Charities
Trustees or Donees

As towns can act as trustees only in case of charitable trusts, the adoption, subsequent to Pub.St.1901, c. 198, § 1, providing that "every trustee to whom any estate, * * * is devised in trust for any person, shall give bond," of section 2, declaring that no town shall be required to give a bond when appointed trustee, was in effect a legislative declaration that section 1 applied to charitable trusts as well as to those "for any person."

3 Cases that cite this headnote

[2] Courts
Exclusive or Concurrent Jurisdiction

Merely because the trustee nominated in a will resides in another state is not decisive that the trust fund must be administered in that jurisdiction.

Cases that cite this headnote

[3] Courts
Exclusive or Concurrent Jurisdiction

A trust created by will for promoting and extending Christian Science, as taught by testatrix, to all parts of the world, should be administered in the state of its origin, being as much for the benefit of it as for any place.

Cases that cite this headnote

[4] Judgment
Persons Not Parties or Privies

That a church was not a party to a suit in which it was decided that it was testatrix' intention not to give property to it, furnishes no reason for re-examining the question in a case to which it is a party, nothing said or written therein causing the court to doubt the soundness of its views previously expressed.

4 Cases that cite this headnote

[5] Trusts
Bond

Before an administrator with the will annexed is authorized to pay over funds in his hands given by the will in trust, the trustee must have qualified by giving a bond, as required by Pub.St.1901, c. 198, §§ 1, 4.

2 Cases that cite this headnote

[6] Wills
Intention of Testator

Intent of testator must be ascertained and given full force and effect, unless contrary to law.

Cases that cite this headnote

Attorneys and Law Firms

***706** Streeter, Demond, Woodworth & Sulloway, of Concord, for plaintiff. Elder, Whitman & Barnum, William A. Morse, and Leon M. Abbott, all of Boston, Mass., for defendant church. James P. Tuttle, Atty. Gen., and Robert L. Manning, of Manchester, for defendant beneficiaries.

Opinion

PER CURIAM.

[1] [2] The church contends that this fund should be paid to it "without any further proceeding"; the Attorney General, that the plaintiff should hold it until the court appoints a trustee to administer it. The question as to which of these contentions, if either, is sound depends on Mrs. Eddy's intention; for it is the court's duty to effectuate her intention in so far as it can be ascertained and is legal. Adams v. Page, 76 N. H. 96, 79 Atl. 837; French v. Lawrence, 76 N. H. 234, 81 Atl. 705. The question of her intention was considered at length in Glover v. Baker, 76 N. H. 393, 83 Atl. 916, and it was held that she did not intend to give this property to the church (76 N. H. 401, 83 Atl. 916), but to create a public trust for promoting and extending Christian Science as taught by her to all parts of the world (76 N. H. 425, 83 Atl. 916). It is probably technically true, as the church contends, that it was not a party to that suit, and that the matters decided are not res adjudicata in so far as it is concerned, but that in and of itself furnishes no sufficient reason for re-examining the questions. Nothing that has been said or written in this case has caused the court to doubt the soundness of the views already expressed, that Mrs. Eddy did not intend to give this property to the church to administer as a part of its corporate assets, but to create a public trust to be administered by the church under the direct supervision of the court.

[3] [4] The other question raised on this branch of the case is whether the trust is to be administered under the supervision of the courts of this state or those of Massachusetts. The claim that the fund should go to Massachusetts because the gift is to a resident of that state is disposed of by what has already been said. The gift is not to the defendant, but to a charity. The trust is not for the benefit of residents of that state, nor are the funds to be expended or the proposed work done there, any more than in any other part of the world. Glover v. Baker, 76 N. H. 393, 424, 83 Atl. 916. The mere fact that the trustee nominated in the will resides in a certain state affords no sufficient ground for a decision that the trust fund must be administered in that jurisdiction. No well-considered case has been found holding to such a rule. If the trust were one to be executed in Massachusetts, a different question would be presented. The cases relied upon are substantially all of this class. They involved gifts for certain designated schools, hospitals, and colleges, for the poor of a certain parish, and the like. These are plainly gifts for the benefit of one locality only, or else are to be locally administered. But here one state or one nation might as well be called the situs of the execution of the trust as any other. This trust, being as much for the benefit of this state as for any place, should be administered here, since this is the jurisdiction of its origin.

[5] "Every trustee to whom any estate, real or personal, is devised in trust for any person, shall give bond to the judge of probate." P. S. c. 198, § 1. "Any person appointed a trustee who shall neglect or refuse to give bond when required shall be considered as having declined the acceptance of the trust." Id., § 4. These provisions, if applicable to charitable trusts, prescribe certain things which must be done before this administrator is authorized to pay over the funds in his hands. The trustee must have qualified as the statute requires.

[6] But it is said the statute does not apply to charitable trusts, but only to those "for any person." If this might be thought to be the intent of the act as it stood before 1891 (Drury v. Natick, 10 Allen [Mass.] 169), it plainly has not been so since that time. The provision that "no town or city in this state shall be required to give a bond when appointed trustee" (P. S. c. 198, § 2) was then adopted as a part of the revision of the statutes. House and Senate Jour. 1891, p. 963. As towns can act as trustees only in the case of charitable trusts (Sargent v. Cornish, 54 N. H. 18; P. S. c. 40, § 5), this provision exempting them from the obligation to give a bond was in effect a legislative declaration that the general statute as to trustees' bonds applies to charitable trusts. The plaintiff is advised that he should hold the property in his hands on the settlement of his final account until a trustee or trustees are appointed by the probate court.

Case discharged.

All Citations

77 N.H. 108, 88 A. 705

J. Brown

F. 302 394 2341

F 610 552 7241

SUPREME COURT.

NO. 1122

MERRIMACK, SS. 1913 TERM.

JOSIAH E. FERNALD, ADMINISTRATOR OF MARY BAKER G. EDDY.

v

THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, ET AL.

BRIEF FOR THE STATE.

STATEMENT OF FACTS.

The case presents a petition by the Administrator with the will annexed of the late Mary Baker G. Eddy for instructions as to whether he may safely and lawfully pay over and deliver to the five directors of The First Church of Christ, Scientist, the whole or any part of the residue of the funds and property now held by him in his trust capacity until such directors have duly qualified as trustees in the Probate Court in the County of Merrimack within whose jurisdiction the funds and property are now held.

The claim is made that such instructions to the Administrator have become necessary for the reason that the settlement of this estate has been nearly completed and that a demand has been made upon him by these directors for such payment and delivery. These directors claim authority to make the demand and to receive the funds and property under and by virtue of an Act of the Commonwealth of Massachusetts approved February 18, 1913, entitled

AN ACT

To Authorize the First Church of Christ, Scientist, in Boston, to Take and Hold Property under the Will of Mary Baker G. Eddy.

"SECTION 1. The First Church of Christ, Scientist, in Boston, is hereby authorized to take and hold real and personal estate devised and bequeathed to it by the will, duly admitted to probate, of its founder, Mary Baker G. Eddy, late of Concord, New Hampshire, deceased; to be held and administered by its board of directors, subject to the trusts created by said will.

"SECTION 2. This act shall take effect upon its passage."

The position of the State of New Hampshire is that however the Act in question may affect the standing and holding capacity of this Church and these directors as to the property forming a part of this estate in the Commonwealth of Massachusetts,—it in no wise affects or changes the standing of the parties or the conditions of the trust in question so far as the State of New Hampshire and the duties of its officers and courts are concerned.

STATEMENT OF THE LAW.

The testamentary domicile of the testatrix was New Hampshire. Her will was duly proven, allowed, and established in the Probate Court of Merrimack County. The validity of the residuary clause of this will has been tested in and sustained by the Supreme Court of New Hampshire. The trust as to all of the property in New Hampshire has been assumed by the courts of New Hampshire and they cannot, with any due regard for the wishes of this testatrix and a like regard for the true objects of her bounty, relieve themselves of the sacred obligation thus created. The trustees, whoever they may be, cannot escape the supervision of the New Hampshire courts—the New Hampshire courts cannot forsake this sacred trust.

But for the wisdom and the patient toil and research of this Court, this property might already have become scattered to the four winds of Heaven, and the beneficent wishes and plans of this queenly almoner have been forever blasted.

In *Glover v. Baker*, 76 N. H. 416, this Court said:

"While courts may not often be called upon to investigate the doctrines of a particular religion, if it becomes necessary to do so to see that a trust is administered according to the intention of its creator, they do not hesitate to undertake the task. If necessary, no reason occurs why the 'tenets' of Chris-

tian Science may not be as readily passed upon as the creed of Congregationalism or the faith of Unitarianism." *Dublin Case*, 38 N. H. 459; *Hale* v. *Everett*, 53 N. H. 9.

Counsel for the Church and these five directors in their brief seem to lay great stress upon the fact that they have obtained the passage of the Act above referred to, as though this accomplishment in some way changed or qualified the terms of this trust; as though an enactment of a Massachusetts Legislature could lay down a rule of action for this Court to follow in a matter where the rights of the the parties and the condition of a trust had already become fixed and perpetual.

A church, like any other corporation, can only act through its directors or other duly authorized and accredited representatives.

In discussing the power conferred by our New Hampshire church statute in *Glover* v. *Baker*, on page 411 *et seq.* this Court said further:

> "Section 8 decares that the trustees, deacons, church wardens or other similar officers of all churches or religious societies, if citizens of the United States, shall be deemed bodies corporate for the purpose of taking and holding, in succession, all grants and donations, whether of real or personal estate, made either to them and their successors or to their respective churches, or to the poor of their churches." * * * * * "The act is comprehensive and complete and justifies the conclusion of Judge Smith in *Hennessey* v. *Walsh*, 55 N. H. 515, 531, that 'provision is made whereby defects in a church organization are supplied, so that the property donated for pious purposes cannot fail of reaching the objects intended by the donors.'"

In the face of these observations it is difficult to see how the situation or power of this board of directors is in any way changed by the Act referred to so far as the power and duty of this court is concerned with respect to the great charity in question.

The question for this Court is not what the language of this Massachusetts statute means, but what did the New Hampshire church statute mean to the Legislature which enacted it in 1842.

> "Upon this question the history of legislation upon the subject, the circumstances under which the act was adopted, and the other provisions accompanying it are competent evidence." *Weed* v. *Wood*, 71 N. H. 581.

Again, in *Glover* v. *Baker*, on page 404, the Court said:

> "But it is unnecessary to decide at this time whether under Massachusetts law an unincorporated religious society may not act as trustee for a purpose not

foreign to the objects of its association. The gift is not to the Church, but in trust, and unless it is sustainable as a charitable trust, it is invalid, and whether the Church could act as trustee if the trust were valid is immaterial; while if the will creates a valid trust, the refusal of the trustee named in the will to act because of incapacity under Massachusetts law, or otherwise, will not avoid the trust, which cannot fail merely because of disability of the trustee. 'It is a rule without exception that equity never allows a legal and valid trust to fail for want of a trustee.' *Campbell* v. *Clough* 71 N. H. 181, 184; *Chapin* v. *School District*, 35 N. H. 445; *Hubbard* v. *Art Museum*, 194 Mass. 280, 290; *Vidal* v. *Girard*, 2 How. 127, 180. The only limitation to the rule is, when it appears that the trustee intended a personal trust in the trustee named in the will (*Fontain* v. *Ravenel*, 17 How. 369, 382), a conclusion which cannot be reached here because no person has been named as trustee. The trustee named is an association, and the testatrix must have intended the trust to be executed by the persons (whoever they might be) who from time to time might constitute the association or be its managers. The trust may be permanent, because the use may be restricted to the income; and the testatrix had in mind, consequently, succession in the individuals in control and did not intend to limit the discretion conferred to any particular person. *Lorings* v. *Marsh*, 6 Wall. 33, 354; 2 Per. Tr. ss. 721, 722. The testatrix intended the trust to be administered by persons professing the belief she desired to promote. Such persons it would be the duty of the court to appoint should occasion arise, or at least none in hostility thereto should be permitted to undertake the execution of the trust."

"In this view the New Hampshire statute only is material, for Massachusetts cannot determine the extent to which New Hampshire permits or authorizes its citizens to dispose of property by will." *Glover* v. *Baker*, 76 N. H. 403.

In the brief for the Church it seems to be conceded that occasions may arise for the supervision of the trustees under this will, whoever they may be, for counsel say, on page 5,—

(a) "Here, therefore, we have a religious corporation holding the title to property which is managed by one set of men who may be *visited* by another set, and, consequently, we have an organiation for the administration of a charitable trust which the law so far regards as complete in itself that it has hitherto imposed no restraints upon it other than the general equity jurisdiction of the courts to regulate and corect any abuses of the trust. This, however, is not done through the giving of bond and periodic accounting to the court, whether of prohate or equity, but through the attorney-general."

Also, on page 5, —

(b) "The right and power of visitation, subject to the supervisory control of a court of equity, takes the place, in public charitable trusts of the power given to probate courts in private trusts. For example, should the directors, with the assent of the visiting body, see fit to invest the funds of the trust in hazardous or unproductive securities, or such as would not be approved as trust investments by a probate court in this state, neither the attorney-general nor the court itself would have any right to control their action or judgment. It is only when the directors invest such funds in illegal enterprises that the court can interfere."

Again, on page 7,—

(c) "The interposition of the court is properly referable to its general jurisdiction as a court of equity to prevent abuse of a trust, and not to any original right to direct the management of a charity or the conduct of a trustee."

And, lastly, on page 10,—

(d) "There are no parties interested other than the attorney-general either of this State (New Hampshire) or Massachusetts, an he has no *rights* in the funds other than as representing the public to restrain abuses."

The sum and substance of these presentations seems to be that, while admitting the possible occasion for action by the attorney-geeral "to restrain abuses," counsel seem to be groping for reasons why the Church and its directors should be permitted to escape the supervision of the courts of New Hampshire.

In *Haynes v. Carr* (70 N. H. 463), cited by counsel for the Church, it appeared that the testator left a portion of the residue of his estate to three trustees "to expend, in their discretion, in such sums, at such times, and in such manner as may seem to them advisable, the income of my said estate . . . . for the benefit of the poor and destitute in said State of New Hampshire." In considering this trust and the duty of the court in respect thereto, it was said,—

> "What he intended was that these trustees and their successors should expend this income for such of certain specified charitable objects as to them seemed most worthy. This was his thought, as evidenced by his act. This, and this, only, is the intent to be carried out. There is no practical difficulty in performing the judicial act of determining whether this intention is carried into effect, and the trust is not to be held invalid on this ground. 'There is a wide distinction between a gift to *charity* and a gift to a *trustee* to be by *him* applied to *charity*. In the first case the court has only to give the fund to charitable institu-

tions, which is a ministerial or prerogative act; in the second case, the court has jurisdiction over the *trustee*, as it has over all ttrustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable.' "

In the case last cited it would appear that the court then considered that it (the court) has a duty to perform,—"to see that he (the trustee) does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable."

In this case (*Haynes* v. *Carr*, p. 482) this court also said,—

"If there is a breach of trust, the public can appear through its appointed officers. This rule is in force here to such an extent that no decree affecting such public right is effective unless the attorney-general is a party to the proceedings."

The trust in question is, in its legal aspects, not dissimilar from that dealt with in *Haynes* v. *Carr*. In that case (p. 484) the court said,—

"The object is the relief of the poor and destitute in the State of New Hampshire, and for educational and charitable purposes therein. The individual beneficiaries are uncertain, as they must always be in the case of a charitable trust; but the objects are clearly defined, and there can be no difficulty in determining whether a given purpose comes within the prescribed classes."

In this case the testatrix said,—

"I desire that the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me."

Of this provision of her will this court has said,—

"Mrs. Eddy had the constitutional right to entertain such opinions as she chose, and to make a religion of them, and to teach them to all others; and their rights of belief are as extensive as hers. Her legal right to teach was not ended with her death. She might dispose of her property by a gift to any public charity 'for any use that is not illegal.' " (*Glover* v. *Baker*, 76 N. H. p. 420).

The final conclusion of the court in that case is expressed in the following language (p. 425),—

"Upon the facts before the court the residuary clause creates a valid trust. Unless the plaintiff amends his bill, the executor should be advised to pay over the balance of the estate to trustees found duly qualified and appointed by the Probate Court."

6

The State claims that the real and vital conditions concerning this trust and its future conservation, management and application are the same today as they were on May 7, 1912, when the opinion in *Glover* v. *Baker* was rendered. The law of this State now in respect to the correct methods of procedure with respect to the due administration of trusts of this character is the same as then. Although it is true that this great religion from small beginnings has spread itself "from the Occident to the Orient and to all the islands of the sea," it is also true and is a matter of common knowledge that there are today, within the borders of New Hampshire, twenty Christian Science churches, more than twice that number of Christian Science practitioners, and several thousand devout believers and worshippers according to the "tenets" of the Christian Science faith.

It is understood that these five directors of the First Church are at the present time residents of the Commonwealth of Massachusetts. But is there any certainty that they, or their successors, will continue to be residents of that Commonwealth? Should the occasion for action ever arise and should it become the duty of the attorney-general, "as representing the public, to restrain abuses" in the administration of this trust, must he, perforce, become a "wanderer on the face of the earth" in a vain effort "to restrain abuses?" To ask this question plainly suggests what the answer ought to be. And if we rightly understand the meaning of the English language this court has already answered the question, not only *inferentially* in the recent case of *Glover* v. *Baker* (p. 425), but *directly* in the earlier case of *Carr* v. *Corning*, 73 N. H. 365, wherein the following rules were laid down,—

> "It is the duty of the Probate Court to administer trusts created by wills. P. S., c. 198. This duty necessarily carries with it that of appointing the trustees needed to execute such trusts (P. S., c. 185, s. 2, cl. XII; Ib., c. 198, s. 6), and that of removing them if they become incapable or unfit to perform their duties. Ib., c. 198, s. 8. Since it is the duty of the court to remove trustees who are unfit to administer their trusts, it cannoot be the duty of the court to appoint a person to that position unless it appears that he is fit for it, notiwthstanding he is named as trustee in the will which creates the trust; for it would be a manifest absurdity to say that it is the duty of the court to appoint a person trustee, when it would be its duty to remove him as soon as he was appointed. So it must always appear that the person named in the will is a fit person to execute the trust, for otherwise it would be the duty of the court to refuse to appoint him. In other words, it is the duty of the Probate Court to appoint trustees whenever they are needed to administer trusts created by wills: but its authority in that respect is limited to persons who are suitable to execute the trusts, both when the trustees are named in the will which creates the trust and when the will contains no provision for the appointment of the trustees. Therefore the suitability of the trustee is a fact that must be proved in every case, before the court

is authorized to make the appointment. In other words, the Probate Court must decide that the person named in the will is a suitable person to administer the trust before it can appoint him to that position. This is the statutory rule in respect to appointing the executors who are named in a will. P. S., c. 188, s. 2, cl. 1; Ib., c. 188, s. 3. There is no more reason for requiring the court to examine into the suitability of executors to administer a deceased person's estate than there is for requiring it to inquire into the suitability of trustees to administer a trust the deceased person created. The fact that the statute makes it the duty of the Probate Court to inquire as to the suitability of the person named as executor before appointing him to that position tends to prove that the legislature intended that the court should inquire as to the suitability of the person named as trustee before appointing him to that position."

Mrs. Eddy was a woman of remarkable business capacity. She provided, in her will that the executor therein named should be excused from giving any sureties on his official bond. She did not provide that those acting in behalf of the Church as trustees should be excused from giving a bond. Having in mind her remarkable intelligence and far-sightedness, this omission is strikingly significant. It is possible that the Probate Court of Merrimack County may deem this Church, as represented by these five directors, "suitable to execute the trust," but this does not necessarily follow because counsel so state in their brief nor because the Massachusetts Legislature passed the enactment of February 18th, above quoted. This court fully considered in *Glover* v. *Baker, supra*, the residuary clause of Mrs. Eddy's will which creates this trust, and, as before quoted, said,—

"The testatrix intended the trust to be administered by persons professing the belief she desired to promote. Such persons it would be the duty of the court to appoint, should occasion arise, or at least none in hostility thereto should be permitted to undertake the execution of the trust."

This language plainly carries with it the implication that it might become the duty of the court "to appoint persons not in hostility to the belief she desired to promote," other than these five directors. It may be premature to discuss this feature until the question is presented directly in the Probate Court, but the magnitude of the trust is such and the interest of the Christian Scientists in New Hampshire is such that it seems to be our plain duty to urge that the interests of all who may expect to reap the benefit of this charity may be as well protected and the interests of those of New Hampshire may be better protected by the appointment of one or more New Hampshire trustees who either profess, or are not hostile to, the belief she desired to promote, to act in conjunction with these five directors and their successors under such bonds to the Probate Court as may be determined to be reasonable.

STATE OF NEW HAMPSHIRE,
By JAMES P. TUTTLE,
Attorney-General.

47 N.H. 88
Superior Court of Judicature of New Hampshire.

WALTER FRENCH, APPELLANT,
v.
MOODY CURRIER, GUARDIAN, APPELLEE.

December, 1866.

Opinion

****1** ***88** In appeals from the judge of probate, this court will only investigate those questions which come within some of the special reasons for the appeal.

Where a guardian receives the stocks, or other funds belonging to his ward, he must hold and account for the same as a *trust,* at the price at which he took them, and if any be disposed of, then at the highest price received by the guardian; also for any and all dividends, or income, that may be realized from said funds.

The guardian is to be charged six per cent. interest upon all receipts, and allowed the same on all expenditures, and also a credit of one per cent., which is understood to be his reasonable commission in this State; his account to be made up with annual rests.

If the guardian has invested any of the moneys of his ward in unproductive stocks, it must be his own risk; the ward is not obliged to assume them when he arrives at 21 years of age.

West Headnotes (4)

[1] **Appeal and Error**
Necessity

The supreme court has the right to investigate only those questions which come within some of the reasons assigned for the appeal.

2 Cases that cite this headnote

[2] **Executors and Administrators**
Assignment and transfer of rights of action

An administrator cannot make a sale of stocks belonging to the estate unless he has obtained license from the probate court to sell, or unless he has assumed the whole inventory of the estate at the appraised value.

Cases that cite this headnote

[3] **Guardian and Ward**
Investments

A guardian, holding stocks as the property of his wards, will be held responsible for them and to account for them at the price at which he took them; and, if he has sold a part, he must account for them at the price received by him, and also for any and all dividends or income received by him during his guardianship.

5 Cases that cite this headnote

[4] **Guardian and Ward**
Investments

If a guardian has invested any of the moneys of his wards in unproductive stock, it will be at his own loss.

1 Cases that cite this headnote

Attorneys and Law Firms

S. N. Bell, for appellee.

This is an appeal from the decree of the judge of probate allowing the account of M. Currier as guardian of Walter H. French.

***89** The grounds of the appeal as filed are:

I. Because the said guardian in said account has not charged himself, nor was he charged by said court with the full amount of dividends received by him from bank stock and gas stock transferred to him by Abram French, administrator of the estate of Walter French, late deceased; said stocks being received by said guardian as part of the interest of the petitioner in the estate of his father, said Walter French, to be held in trust by him for his benefit.

**2 II. Because said guardian in said account has not charged himself, nor was he charged by said court with the full amount of money received by him as interest upon the money of his said ward in his hands, said money having been by him intermingled with his own.

III. Because the said guardian has not in said account charged himself with the full amount of interest or dividends received by him from investments made with the money of his said ward in his hands.

IV. Because the said guardian was allowed the gross sum of twenty-five dollars for his services as guardian, there being no specification of what those services were or when rendered.

V. Because there is an error in the computation of the interest, the said guardian not having computed the full amount of interest, with which he should have been charged.

VI. Because the said guardian was allowed interest on the several amounts paid out by him for his ward during each year.

The guardian has stated his account, charging himself with all sums received, and adding interest from the date of the receipt, to the end of the year at 5 per cent., and claiming an allowance for payments made, with interest on the same, at the same rate, to the end of the year, and carrying the balance forward at the end of the year, according to the practice of the courts of this State. *Gordon v. West,* 8 N. H. 455; *Wendell v. French,* 19 N. H. 211; *Stark v. Gamble,* 43 N. H. 465.

He has not claimed any allowance for the time the fund remained uninvested, after its receipt, as he might reasonably have done when the sums were less than $500, as was the case in many instances. *Stark v. Gamble,* 43 N. H. 465; *Robbins v. Hayward,* 1 Pick. 528, note; *Karr v. Karr,* 6 Dana. 3; *White v. Parker,* 8 Barb. Sup. Ct. 48; *Worrall's Appeal,* 23 Penn., (11 Harris) 44; *Armstrong v. Walkup,* 12 Gratt. (Va.) 608; *Ringold v. Ringold,* 1 Har. & G. 11; *Huffer's Appeal,* 2 Grant's Cases, (Penn.) 341.

The administrator of Walter French's estate caused the estate of the deceased to be appraised. And he took the whole of the estate at the appraisal (not having procured license to sell within six months) and *90 accounted for it as cash at the appraisal in the settlement of his administration account in the probate court. Rev. Stat. ch. 159, sec. 5.

After that settlement which left a balance in the hands of the administrator, he paid that balance over to the guardian, June 6, 1855, the sum of $10,500, part in money, part by note, and part by stocks.

**3 The auditor, to whom the cause was referred, attempts to report the evidence on the question how the stocks were taken by Mr. Currier, leaving that question of fact to be determined by the court.

Upon the first ground of appeal, the question is presented, did Mr. Currier take the bank stock and gas company stock as part of the estate of the late Walter French, and to be held by him in trust for his ward or was it simply a payment to him of so much money by the administrator, wherein he took the stocks as the representative of so much money? The auditor's report shows that he took them from Abram French, as being the balance in the hands of the administrator, and not as property specifically held by the administrator.

The administrator had taken the whole estate at the inventory, including these stocks. He had disposed of part of them by sale, and accounted for those transferred to Mr. Currier as cash. In effect the administrator had paid for the stocks, and they were his property. Nor was there any authority of law to warrant the administrator in turning over the stocks to the guardian otherwise than as cash.

The receiving the stocks by the guardian otherwise than as cash, or the investing the funds of his ward in such stocks on any pretext, was a breach of trust. Hill on Trustees, 378 and note; Pamphlet Laws, ch. 1963, June, 1857; Pamphlet Laws, June, 1866, ch. 4250. The guardian testifies that he received the stocks as a payment as cash, and his whole course of action, subsequently shows that he so understood the transaction. He had his attention called to the fact that such investments were not permitted by the court. The transfer was to him as an individual, and not in his representative capacity. The receipt given was for money. He charged it in his cash account as money (merely noting the fact how much was cash, notes, &c.) He refused to take it at the appraisal, but did take it at a different rate--refused to take some part of the stock the administrator had taken of the estate, at any price. He took it at a premium, which he would not have done if he was to account for it specifically, leaving the loss, if any,

to fall on himself. The dividends due soon after, he took to his own use, charging himself with the interest on the sum due from the administrator. And the whole course of the transaction shows that the parties then all understood it as a payment.

The action of Walter H. French shows that he understood it the same, as did his agent, Luther H. French, both when he settled his own account and when he settled that of Walter, and transmitted a copy of the account to him, in both instances treating the $10,500 as a cash payment. The attention of both Luther and Walter being then called to the fact that the stock was treated as cash and the dividends not included in the account, and explanation given as to the mode in which the account was made up, and particularly by the fact that Luther then ***91** claimed that the guardian should have accounted for 8 per cent. No objection was made then to the correctness of the account, nor for more than five years after the account of Walter was settled, and about seven years after the settlement with Luther.

****4** Their statements, after that lapse of time, as to the manner they understood the transaction was to be, before it was actually completed, are not entitled to much weight when they are clearly contradicted by their whole course of action, while the affair was comparatively recent, and at a time when they were informed of all the facts or had such information as should have put them on inquiry.

Upon all the evidence in the report, and in the supplementary report, it is clear that the stocks were the property of Abram French, and that Mr. Currier received them as a payment, as the equivalent of money, as he would have taken bank notes, legal tenders, checks or other evidence of property for the same amount.

The investments of trust funds in bank and other stocks being illegal, Hill on Trustees, 378, &c, and those here in question being then the property of Abram French, it will be presumed that the administrator and guardian both understood the law and made the transfer in accordance with it. The stocks were not then the property of the estate, nor of the wards, and the guardian, after they came into his hands, was under no obligation to account for the dividends. The correctness of this position is fully shown by the enactment of the statute of June session, 1857, ch. 1963, authorizing such a transfer to be made under a decree of the probate court.

The general principle that courts of equity will scrutinize all settlements made out of court by a guardian with his ward at or about the time of his coming of age is not controverted. But it is equally as well settled, that, if there is no substantial unfairness, the court will not disturb such settlement after a lapse of many years, and an acquiescence on the part of the ward with full knowledge of the facts, or with such information at the time of the settlement as should have put him on inquiry. *Boynton v. Dyer,* 18 Pick. 1; *White v. Parker,* 8 Barb. Sup. Ct. 48; *Whedbee v. Whedbee,* 7 Jones' Law (N. C.) 14.

The stocks were not in the hands of the administrator as trustee for the heirs. And the case of *Perry v. Hall,* cited by defendant does not sustain the proposition. It was the duty of the administrator either to have sold them by license or to account for them at the appraisal. Rev. Stat. eh. 159, sec. 5. If sold by license he is to account for the proceeds of the sale; if taken at the appraisal they become the property of the administrator. No harm occurs to the estate or to the heirs by the latter course, as all the value such property is understood to have by reason of the amount of income it produces, is included as a premium in the sum at which it is appraised.

The stocks not being the property of the wards nor held in trust for them; their use as a mode of payment by the administrator to Currier was a transaction neither void nor voidable any more than a payment in any other kind of funds.

****5** The cases cited by the defendant to sustain the position that a purchase ***92** by a guardian of his ward's estate is voidable, fail to have any application, because the facts do not show such to have been the nature of the transaction.

The question is raised, if the guardian did not invest the funds of his ward in these stocks, where did he invest them? It was used by him, as his own funds were, and constituted the larger part of the estate for which he was taxed, and which was principally in land and buildings, which probably did not yield an income exceeding four per cent.

There was no evidence to show that the funds in the hands of Mr. Currier have been made to earn more than 6 per cent. He made some good investments and some bad ones in stocks. He has investments in real estate to a considerable amount, as the amount for which he

is taxed shows. Since the stock in the Print Works, in the Amoskeag Manufacturing Co., the Stark Mills, and Amoskeag Gas Lt. Co., and the Blodgett Edge Tool Co., being all manufacturing corporations, are not taxed directly to him, but the taxes are paid by the corporations respectively. Compiled Statutes, ch. 41, sec. 3, ch. 42, sec. 5. And the amount of those investments forms no part of the sum for which the taxes against Mr. Currier were assessed, while in fact a large part of the fund for which they were assessed, is derived from the "estate of these wards in his hands."

An argument is attempted that because the guardian did not speeifically render an account of the taxable estate of his wards so that it might be taxed separately, that he is lacking in honesty and integrity towards his wards. He inadvertently fails to render to the assessor a statement of his wards' estate and his own separately, by reason whereof the whole burden of the tax falls on himself, and that is claimed to be dishonesty towards his wards; and on the other hand when in 1865 he did return his wards' estate separate from his own so that it was taxed to them, that is also claimed as unfair dealing toward his wards.

The ward's property was liable to taxation. Rev. Stat. ch. 40, sec. 12; *Payson v. Tufts,* 13 Mass. 493. The tax on the ward's estate was in fact paid by the guardian; who, in the settlement from which this appeal is made, claimed no allowance for such payment, and yet the counsel for the ward claim that it was the duty of the guardian to have in some way sheltered the ward's property from taxation, and for the pecuniary benefit of his wards to have adopted a course of dishonesty from year to year and cheated the assessors and the public in the assessment of taxes on his ward's estate.

The moral sense must be strangely obtuse which permits a party to gravely come into court and present such a scheme, as being the care, prudence and good faith in the management of the funds of his wards which honesty, integrity and the law required the guardian to exercise.

****6** In the defendant's brief it is said, that, in the matter of the taxation, the guardian was guilty of unfairness and dishonesty; there would be as much reason and honesty, and probably as mnch truth, if it were said that this whole matter of appeal were a speculation, and attempt to satisfy an old grudge, in which, if successful, there is no reasonable cause for belief that these wards will be in any way benefited.

***93** None of the other grounds of appeal are insisted upon in the argument, and it may be assumed that those discussed are the only ones on which the defendants claim to maintain their appeal.

In the matter of the $25.00 charge for services. It was allowed by the judge of probate as being a reasonable sum in his discretion upon consideration of the facts that from December, 1853, to June, 1855, the guardian had paid out for his wards more than he had received, and had made no other charge for services and expenses in procuring the appointment, attending probate court, settling with the administrator and the services which must necessarily have been rendered. For these services and the expenses necessarily incident thereto, it is apparent the sum claimed is no more than a fair equivalent.

The effect of the mode of stating his account adopted by the administrator is to give him one per cent. as his commission, and no reason is shown why he is not entitled to retain that sum as a fair compensation for his services.

A question is raised in the defendant's brief as to the amount of compensation to be allowed to the guardian. No appeal was claimed on that ground, except as to the $25 claim. Beyond that the question is not open. *Mathes v. Bennett,* 21 N. H. 200; *Hatch v. Purcell,* 21 N. H. 544.

If the guardian should be held to account for these stocks as taken by him specifically, he should be credited by delivering them to the heirs, at the same rates that he took them from the administrator, and Luther H. French and Walter H. French should account to him for the difference between the price at which they took the stock transferred to them and the price allowed in the transfer from the administrator. The evidence and the facts reported by the auditor show that the account as rendered by the guardian and allowed by the probate court is substantially correct, and that there is no just ground for the defendant's appeal.

Should the opinion of the court be that the account ought to be corrected, no difficulty will arise in settling the accounts of this defendant and the other wards under the guardianship of the plaintiff, upon such principles as the court may determine to be just.

Morrison, Stanley & Clark, for appellant.

"The relation existing between guardian and ward is such, that the principles of a sound public policy require a close and rigid supervision on the part of courts of equity,

of all gifts or conveyances to the guardian by his ward, on coming of age. The case is much stronger for relief, than is that of parent and child; because the guardian is not supposed to be under the influence of that affection for his ward, which the parent has for his child; and, consequently, has not that check upon his selfish feelings. The court acts upon the broad principle of public utility, for the purpose of discouraging all such transactions; and will relieve against them, although in the particular instance, there be no actual unfairness or imposition." The Law of Trusts and Trustees, Tiffany and Bullard, 134.

****7** ***94** In the case of *Hylton v. Hylton,* 2 Vesey 547, Lord Hardwicke said: "Where a man acts as guardian or trustee in the nature of a guardian, for an infant, the court is extremely watchful to prevent that person from taking any advantage immediately upon his ward coming of age, and at the time of settling accounts or delivering up the trust, because undue advantage may be taken." See also *Stark v. Gamble,* 43 N. H. 467.

The parties in this case stand in the relation of guardian and ward; and two questions arise upon the facts found by the auditor in his report:

First. Who is entitled to the dividends received upon the bank and gas stock by the guardian during the continuance of the guardianship?

Second. What commission is the guardian entitled to retain as compensation for his services, upon the facts shown in the case?

I. As to the bank and gas stock. By the report of the auditor it appears that on the sixth day of June, 1855, the administrator of the estate of Walter French transferred to the guardian, 50 shares of the Amoskeag Bank stock, 20 shares of the Appleton Bank stock, and 20 shares of the Manchester Gas Light Co.'s stock, and the guardian charged himself on his book of accounts, under that date, with these stocks. The auditor also finds that these stocks were all retained by the guardian, up to the time of the settlement with Luther H. French, one of his wards, of his account as guardian of the said Luther H. and Walter H. French, when 20 shares of Amoskeag Bank stock were transferred by him to said Luther, and 10 shares of the same stock to said Walter, and the residue of said stock still remains in said guardian's hands. The auditor also finds that at the time of the transfer of the stock by the administrator to the guardian, June 6, 1855, it was understood by the administrator and the heirs that the *stock* was to be held by the guardian for the benefit of the heirs, that it was a *transfer* or *assignment* merely, and not a *sale* of the stock to the guardian, but that the guardian understood that it was a *sale* of the stock to him. The evidence upon this point is reported by the auditor, but we do not regard it material, because upon the facts found by the auditor there was no legal sale of the stock. To constitute a sale, both parties must have understood and intended the transaction as a sale.

While these stocks remained in the hands of the administrator, they were held by him as trustee for the heirs. *Perry v. Hale,* 44 N. H. 369. And even if he had undertaken to sell them, Currier, being at that time the guardian, could not be the purchaser of the property of his wards. The sale might not have been absolutely *void,* but it would have been *voidable,* and the heirs would have been at liberty to avoid it, as the appellant in this case now seeks to do. *Wormley v. Wormley,* 5 Curtis 469, 8 Wheat. 421; *Michoud v. Girod & al.,* 16 Curtis 188, 4 How. 513; *Sparhawk v. Allen,* 21 N. H. 9, and cases cited.

****8** But if the guardian purchased the stocks, with whose money did he pay for them? Whose money did he invest? Clearly that of his wards. ***95** If he did not invest it there, where did he invest it? And if their funds were invested in these stocks, then, upon the facts found in this case, they are entitled to the dividends which accrued upon the stocks, according to the rule laid down in the cases already cited.

The principle applicable to this case is, we believe, correctly laid down in *Barney v. Saunders,* 16 Howard 535; Curtis' Decisions of the Supreme Court of the U. S., vol. 21, page 292, in the following language: "It is a well settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui que trust* for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will enure to the *cestui que trust.*"

II. What commission is the guardian entitled to retain as compensation for his services upon the facts shown in this case?

Section 36 of chap. 159 of the Compiled Statutes, provides that "every guardian shall be allowed a reasonable compensation for all proper expenses and services in the discharge of his trust."

In cases where the guardian has faithfully discharged the duties of his trust the rule seems to have been adopted in this State, of allowing him a commission of one per cent. for taking care of the funds of his wards; or, in other words, the legal rate of interest being six per cent. the guardian is charged five per cent. on the funds in his hands, when nothing appears to show that the funds have earned more than the legal rate of interest. And when it appears that the funds have in fact earned nothing, but have been suffered by the guardian to lie idle in his hands, the guardian will be charged with interest at the rate of five per cent. on the ground that he should have invested them, and he is charged with the legal rate of interest and allowed his commission of one per cent. *Stark v. Gamble,* 43 N. H. 468.

But if it appear that the profits of the funds have in fact exceeded six per cent., then the excess belongs to the wards according to the doctrine of the cases we have already cited.

The auditor reports that "the guardian has not kept the funds of his wards separate from his own, except such as remain invested in said stocks, but mingled the moneys received from the administrator indiscriminately with his own, which he invested in stocks, some good and others not good." The report also shows that with a single exception, that of the Blodgett Edge Tool Co., the guardian's investments have yielded large dividends, amounting to eight per cent. semi-annually, and some much larger than that. Upon these facts the wards are entitled to the benefit of the best investments of the guardian, so far as he has mingled their funds with his own. The law will not allow the guardian to say that he has invested his own funds to more advantage than he has those of his wards. 2 Kent's Com. 229 and 231; Tiffany and Bullard's Trusts and Trustees, 594.

****9** The guardian in this case cannot claim that the court should exercise any unusual leniency, or in any degree relax the rule in his behalf. The ***96** balance of funds in his hands at the end of each year, the amount of property for which he was taxed in the city of Manchester, the amount of the taxes assessed against him, and the amount of the taxes charged by him to his wards during each year from 1855 to 1865, as reported by the auditor, furnish abundant evidence that the guardian has failed to exercise that care, prudence and good faith in the management of the funds of his wards, which honesty, integrity and the law required him to exercise.

In 1864, the whole amount of property for which said Currier was taxed, including the funds of his wards, was $25,150; and at that time he had in his hands funds of his wards, as shown by his own books, to the amount of $26,095.77. The taxes upon the whole property for that year amounted to $363.17, and he charged to his wards, as their portion of the taxes for 1864, $379.92, *sixteen dollars and seventy-five cents more than he paid upon their property and his own.* That he had a large estate of his own at that time is shown by the fact that the next year, 1865, he returned his own taxable property, separate from that of his wards, at $21,600. By a comparison of the other years his unfairness and dishonesty will be equally apparent though perhaps in a less degree. The burdens of taxation which the law imposed upon him, he endeavored to transfer to his wards. His own estate, already large, he has attempted to increase by withholding from his wards, funds which legally, equitably and morally belonged to them. It does not now avail the guardian to say that his account of taxes charged was withdrawn at the hearing before the judge of probate. He had charged them year after year and had settled with Luther H. French upon that basis; and his withdrawal of the claim before the judge of probate, when he found that a full examination of his acts as guardian was to be made is only a confession that his attempt to defraud had not succeeded.

The decision of the court in this case will determine the basis upon which the settlement of the guardian's account, in the case of the other wards, is to be made; and it will be necessary that a master should be appointed to state the accounts between the parties, when the principles applicable to this case have been settled.

NESMITH, J.

This is an appeal from the decree of the judge of probate in this county, allowing the account of said Currier as guardian of his ward, Walter H. French. There are six grounds of appeal filed by the appellant. They are correctly stated in the counsel's brief for the appellee. The case has been referred to an auditor, and his report, as amended, is before us, and presents certain facts and questions proper for our consideration. We have a right to investigate only those questions which come within some of the reasons assigned for the appeal. *Bean v. Burleigh,* 4 N. H. 550; *Mathes v. Bennett,* 21 N. H. 200.

**10 Under the facts reported by the auditor, it appears that the appellee was duly appointed guardian of the said Walter, on the 6th day of December, A. D., 1853, and accepted and held that trust until the second day of December, A. D., 1858, when the appellant became 21 years of age. The said Currier was also during this time guardian of several *97 other minor brothers and sisters of the appellant. The auditor's report finds that, on the 6th day of June, A. D., 1855, the said Currier received from Abram French, the administrator of the estate of the father of the appellant, the following described personal property, viz.:

50 shares of the Amoskeag Bank stock, appraised at $108 per share,	$5400.00
20 shares Manchester Gas Light Co. stock, $110 per share,	2200.00
20 shares Appleton Bank stock, $105 per share,	2100.00
Note for $550, and interest thereon, $57.75,	607.75
Cash,	192.25
	$10,500.00

For which said property, the said Currier executed to the said administrator the following receipt:

June 6, 1855. Received of Abram French, administrator of the estate of Walter French, ten thousand five hundred dollars.

(Signed) MOODY CURRIER, Guardian of the children.

The said guardian also charged himself in his book of accounts as follows:

1855. June 6.	To cash of A. French,	$192.25
	To stocks and note,	10,307.75
		$10,500.00

The certificates of said stock were transferred to said Currier by due assignment on the back thereof, signed by the administrator, Abram French.

Under this, and the other evidence of the case, the guardian claims that the aforesaid shares of stock were delivered to him, as his own private property, and that he was to account for the same, at their estimated value, as so much cash, in his settlement with his wards. On the other hand, the said administrator and his ward allege that they did not so understand the transaction, but rather that the aforesaid shares of stock were to remain in the hands of the guardian, as the property of his wards, and that he was to account in his settlement with his wards for the same specific stock, and all the dividends which in the meantime might accrue thereon. Upon the consideration of the circumstances of this part of the case, and the law applicable thereto, we cannot find that the said Currier became entitled to hold said shares, as his private property. There was no express assent on the part of the administrator to a sale of this nature. Nor does it appear that the administrator had sufficient legal power to sell any part of said stock at private sale. If he would make a legal sale and transfer of said stock, as administrator, he must strictly pursue one of two courses. He must *98 either assume the whole inventory of the personal estate of the intestate, at the appraised value; or, he must, under the license of the judge of probate, sell the same at public auction and upon a sufficient previous notice of the sale. In this case, there is no evidence of any license to sell at public auction, nor does it appear that the administrator assumed the inventory of the whole personal property. On the contrary, the administrator so managed with the Manchester Gas Light Co. stock, and

with that of the Vermont & Canada Railroad stock, as to dispose or transfer the stock of both corporations, at a price far less than their appraised value. The course adopted by the administrator is not sanctioned by the statute law. And it is enough to say, that the administrator is liable to account for the aforesaid stocks at the inventory price. And a resort may be had in the first instance to the administrator, and he may be required to show cause why a deduction in the price of said stocks has been claimed by him, or allowed to him.

**11 Trusts of this nature are enforced not only against persons who are rightfully possessed of trust property, but against all persons who come into possession bound by the trust, or with notice of the trust, and whoever so comes into possession is considered as bound with respect to that special property to the execution of the trust. 1 Story's Equity, sec. 533; *Hill v. McIntyre,* 39 N. H. 416.

Chancellor Kent says, the guardian's trust is one of obligation and duty, and not one of speculation or profit, and is governed by strict rules. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he has been guilty of any negligence in keeping, or disposing of the wards' money, he must bear the loss himself. 2 Kent's Com. 2 ed., 246, and note; *Sparhawk v. Allen,* 21 N. H. 9, and cases cited; *Barney v. Sanders,* 16 Howard 535.

The guardian in this case may, therefore, be considered as the holder of the stocks in question not as his own, or held in his own right, as a purchaser, but as the property of his wards, and, therefore, must be held responsible for them, and to account for them at the price at which he took them; or if any have been actually sold by said guardian, he must account for them at the price received by him, and also for any and all dividends or income received by him during his guardianship. The dividends, as reported by the auditor, are presumed to be faithfully reported by the auditor, both as to their amount, and the date of their reception, and can be adjusted by the guardian by opening new and separate accounts with each ward, and apportioning the amount belonging to each one, upon the principles suggested in *Stark v. Gamble,* 43 N. H. 467.

As to the commission, or compensation, which the guardian may be entitled to demand of his ward, we would remark, that, upon the evidence before us, it does not appear to us that the omission to credit the wards with the whole amount of dividends received by him on the stocks in his hands, has originated from any corrupt intent to defraud his wards, but rather from a mistake, or misapprehension, as to the true *99 character and extent of his contract with the administrator upon the estate, and the legal consequences incident thereto.

Therefore, our conclusion is, that the guardian's account be so far corrected, that he be charged with the said stocks at the rates mentioned in his receipt, or if any shares be sold, at the highest amount actually received therefor, also for the dividends received on said stocks from and after their receipt, with five per cent. interest on said sales or receipts, at annual rests, deducting the expenditures made by him for the benefit of his wards and interest thereon at the same rate and times. Or, in other words, that the guardian be charged with six per cent. interest on all his receipts, and allowed a credit of one per cent., which is understood to be the common reasonable commission in this State in like cases. *Stark v. Gamble,* 43 N.H. 465

**12 If the guardian has invested any of the moneys of his wards in unproductive stocks, it must be his own loss. The wards are not obliged to take them from the guardian. *Kimball, apt. v. Reding,* 31 N. H. 352; Hill on Trustees, 378.

The charge of $25.00 made by the guardian for special services in furnishing his letters of guardianship, and for time, &c., in preparing his account for settlement, has been allowed by the auditor, and we approve of the same as being reasonable and consistent with common usage in this class of cases.

From A. D. 1855 to 1866, inclusive, the said guardian had more or less property in his possession, belonging to his several wards, liable to assessment for public taxes. The appellant's share of the taxes for A. D. 1864, would not be large, in consequence of a previous payment made to his ward under a partial settlement previously made with him. It is not pretended that the guardian can claim anything for taxes, assessed prior to 1864. For the just amount of taxes assessed on the appellant's share of the estate liable to be rated for public taxes, which remained in the hands of his guardian, in April, 1864, the said guardian has now a good claim. The auditor will investigate the proportion of the appellant's taxes for the year 1864, and if anything be legally assessed since that year upon the appellant's estate, he will allow it accordingly.

The report of the auditor will be recommitted accordingly, and he will make up a statement of the appellant's account on the principles here suggested.

All Citations

47 N.H. 88, 1866 WL 1969

76 N.H. 393
Supreme Court of New Hampshire.

GLOVER
v.
BAKER et al.

May 7, 1912.

Transferred from Superior Court, Merrimack County; Wallace, Chief Judge.

Bill by George W. Glover against Henry M. Baker, executor, and others. The bill was demurred to, and the case transferred without a ruling. Bill ordered dismissed, and case discharged.

West Headnotes (52)

[1] Appeal and Error
Nature of questions in general

The superior court, on a petition for the construction of a will, and for advice as to the validity of certain provisions and the right to receive property disposed of thereby, held empowered to transfer, without ruling, questions raised by a demurrer to the bill denying plaintiff's right to sue, and also to transfer the question whether the bill maintainable, and upon what grounds, in case such question was not raised by the demurrer.

Cases that cite this headnote

[2] Charities
Validity of gifts and trusts in general

It is no objection to the validity of a charitable gift that it is made up of several parts which are to be administered together, the income to be divided in the discretion of the trustee.

Cases that cite this headnote

[3] Charities
Validity of gifts and trusts in general

Gift to trustees of a Christian Science church for the promotion of the doctrines of Christian Science held not illegal, as a violation of Laws 1901, c. 16, § 2, or Laws 1897, c. 63, section 11 of which expressly excludes from its restriction persons practicing "Christian Science so-called."

Cases that cite this headnote

[4] Charities
Purposes of Gift

A gift for the benefit of the public generally is valid.

1 Cases that cite this headnote

[5] Charities
Purposes of Gift

A gift to a Christian Science church in trust for the promotion of Christian Science held valid as a gift for a general public use.

1 Cases that cite this headnote

[6] Charities
Education

One interested in an educational scheme that might be legally published and promoted in his lifetime held entitled to extend and promote it by publishing his writings or other lawful means after his death.

Cases that cite this headnote

[7] Charities
Promotion of religion

A gift in trust for the repair of a church and for the repair of church buildings held valid.

1 Cases that cite this headnote

[8] Charities
Promotion of religion

In determining the validity of a charity, there is no distinction between the promotion of "piety" and of "religion"; the two words being synonymous.

Cases that cite this headnote

[9] **Charities**
Promotion of religion

A gift to trustees of a Christian Science church for the promotion of the doctrines of Christian Science held not invalid as a charity, because the promotion of Christian Science was in some sense a business owned and carried on by the church.

Cases that cite this headnote

[10] **Charities**
Promotion of religion

Where the necessary effect of a gift in trust to a Christian Science church for the promotion of Christian Science would be to enrich any private owners thereof, the gift could not be sustained as a charity.

1 Cases that cite this headnote

[11] **Charities**
Voluntary unincorporated associations

Gifts in trust to an unincorporated association are sustained in equity.

Cases that cite this headnote

[12] **Charities**
Voluntary unincorporated associations

Under legislation relating to religious societies, and especially under Pub.St.1901, c. 152, § 2, held, that such societies might act as trustees for purposes not incompatible with the objects of their organization.

Cases that cite this headnote

[13] **Charities**
Voluntary unincorporated associations

Pub.St.1901, c. 152, entitled religious societies, held not intended to limit or destroy gifts for pious uses, but to promote and effectuate them.

1 Cases that cite this headnote

[14] **Charities**
Municipal bodies or corporations

Towns, like other corporations, may act as trustees for purposes not incompatible with the objects of their organization.

Cases that cite this headnote

[15] **Charities**
Purpose discretionary with trustee

The fact that a charitable gift is to trustees, whose discretion the donor intended should determine the manner in which the gift should be applied to effect their charitable purpose, relieves the gift of uncertainty which might otherwise defeat it.

Cases that cite this headnote

[16] **Charities**
Gifts for promotion of religion

A gift in trust to "the First Church of Christ, Scientist," for the promotion of the "religion of Christian Science as taught by me," construed in connection with the term "church" and the allegations of a bill, admitted by demurrer, that the church existed with a large membership and was organized by testatrix for the promotion of Christian Science doctrines, ascertainable from books published by testatrix, held not indefinite as to its object.

4 Cases that cite this headnote

[17] **Charities**
Acceptance by trustee or donee

On the creation of a valid testamentary trust, the refusal of the trustee to act will not avoid the trust, since equity never allows a legal and valid trust to fail for want of a trustee, except when a personal trust was intended.

Cases that cite this headnote

[18] **Charities**

Nonuser or misuser

Under a charitable trust for the repair of a church and church buildings, held, that the purchase of material therefor in open market would not be an application of the trust fund to a purpose not charitable, so as to avoid the gift.

1 Cases that cite this headnote

[19] **Charities**

Nonuser or misuser

Where the object of a gift to trustees for charitable purposes, leaving to their discretion the means to be employed, is itself lawful, it will not be inferred, that unlawful means were intended to be employed.

Cases that cite this headnote

[20] **Charities**

Trustees or donees

A gift in trust to a religious association for repair of the church, etc., and to promote Christian Science, held intended to be executed by the persons who from time to time might constitute the association, and not limit to the discretion of any particular person.

Cases that cite this headnote

[21] **Charities**

Purposes of gift

A gift in trust to a charitable or religious organization, without more, is in trust for the purposes of the organization.

Cases that cite this headnote

[22] **Charities**

Judicial appointment of trustees

Where testatrix intended a gift in trust to a religious association, to be administered by persons professing the belief she desired to promote, it would be the duty of the court, in appointing a trustee, not to appoint any one in hostility to such purpose.

Cases that cite this headnote

[23] **Charities**

Persons entitled to enforce charitable trust

Where a valid charitable trust is created, an heir of the creator has no concern as to the manner in which or the persons by whom the trust is carried into effect.

1 Cases that cite this headnote

[24] **Constitutional Law**

Nature and scope in general

Constitutional Law

Policy

The lawmaking power of the state is alone invested with the authority to determine its public policy.

2 Cases that cite this headnote

[25] **Constitutional Law**

Inquiry Into Legislative Judgment

The questions of the wisdom, justice, policy, or expediency of a statute are for the Legislature alone.

1 Cases that cite this headnote

[26] **Constitutional Law**

Particular Issues and Applications

Under Bill of Rights, art. 5, recognizing the right of religious freedom, held, that one had the constitutional right to entertain such opinions as he chose, to make a religion of them, and to teach them to others.

Cases that cite this headnote

[27] **Courts**

Courts invested with probate jurisdiction

The superior court has no power to require an executor to account for his administration upon a bill in equity or to revise proceedings in the probate court, except on appeal.

2 Cases that cite this headnote

[28] **Courts**
Decedents' Estates, Administration of

Under Const. pt. 2, art. 79 [80], and Pub.St.1901, c. 182, § 2, the probate court has exclusive original jurisdiction of the probate of wills and the settlement and distribution of the estates of deceased persons.

4 Cases that cite this headnote

[29] **Courts**
Wills

Until the settlement of an executor's account, the probate court has entire jurisdiction of the necessary procedure.

1 Cases that cite this headnote

[30] **Executors and Administrators**
Breach or fulfillment of condition

Where an executor, on settlement of his account, refuses to pay to any person sums to which he may be legally entitled, such person has a complete remedy upon the administration bond.

Cases that cite this headnote

[31] **Pleading**
Conclusions of law and construction of written instruments

Demurrer does not admit inferences or conclusions of law.

1 Cases that cite this headnote

[32] **Statutes**
Construction in View of Effects, Consequences, or Results

Statutes
Unintended or unreasonable results; absurdity

Where possible, a statute will not be construed so as to lead to evil, unjust, oppressive, or absurd consequences or to self-contradiction.

3 Cases that cite this headnote

[33] **Statutes**
Clarity and ambiguity; multiple meanings

Where there are two permissible constructions of a statute, one working injustice and the other equity and fairness, the latter will be adopted upon the presumption that the Legislature did not intend to work injustice.

Cases that cite this headnote

[34] **Statutes**
Statute as a Whole; Relation of Parts to Whole and to One Another

Whole statute must be considered together.

Cases that cite this headnote

[35] **Statutes**
Related provisions

Statutes
History of statute

In the construction of a statute, the history of legislation upon the subject, the circumstances under which the act was adopted, and the other provisions accompanying it, are competent evidence.

1 Cases that cite this headnote

[36] **Religious Societies**
Statutory provisions

Pub.St.1901, c. 152, § 10, limiting the income from gifts to religious societies, held not derived from the mortmain act, 9 Geo. II, c. 36, and hence that the English decisions interpreting that act had no bearing on its construction.

Cases that cite this headnote

[37] **Trial**
Separate Trials in Same Cause

Whether all or a part of the issues in an action tried by the court shall be tried together, and the order in which they shall be tried, are questions

of convenience, to be settled by the superior court.

1 Cases that cite this headnote

[38] **Wills**
Amount or portion of estate

A gift of all the property of an estate not otherwise disposed of to a church in trust for repair of the church, etc., and to extend Christian Science, held a gift for religious purposes, and not a gift to a church, and not within the terms of Pub.St.1901, c. 152, § 10, limiting the income of any gift to a church to $5,000 a year, nor within R.L.Mass., c. 37, § 9, limiting it to $2,000.

2 Cases that cite this headnote

[39] **Wills**
Amount or portion of estate

Under Pub.St.1901, c. 186, § 1, and Pub.St.1901, c. 152, § 2, held, that a gift in excess of $5,000 made by a resident testatrix to a religious association in Massachusetts was not prohibited.

Cases that cite this headnote

[40] **Wills**
Full or partial probate

Objection to a part of a will offered for probate defeats the will only to the extent of the proof, and it may be probated as to the part to which the objection is not proven.

Cases that cite this headnote

[41] **Wills**
Right of action to contest or set aside will or probate

Whether a paper presented for probate was the will of the testator, or the product of other minds operating upon hers through fraud or undue influence, is a question which could have been raised in opposition to its probate.

1 Cases that cite this headnote

[42] **Wills**
Collateral attack on probate or judgment

The judgment of the probate court allowing a will held not open to collateral attack for fraud and undue influence in securing its execution.

2 Cases that cite this headnote

[43] **Wills**
Conclusiveness of Probate or Record

The decree of the probate court allowing a will is a judgment establishing the instrument to be the will of the alleged testator, and so long as it stands is conclusive of the genuineness and validity of the will.

Cases that cite this headnote

[44] **Wills**
Intention of Testator

Intent of testator must be ascertained and given full force and effect, unless contrary to law.

1 Cases that cite this headnote

[45] **Wills**
Situation and relations of testator and circumstances connected with making of will

A court is not entitled to pronounce an instrument ambiguous until it has brought to its aid in its interpretation all the light afforded by the collateral facts and circumstances.

Cases that cite this headnote

[46] **Wills**
Words Necessary or Sufficient to Create Trust

The words of a will to create a trust must be imperative, must make the subject certain, and the object as certain as the subject.

Cases that cite this headnote

[47] **Wills**

Words Necessary or Sufficient to Create Trust

A gift of all of an estate not otherwise disposed of by the will is sufficiently certain as to the subject of the trust.

Cases that cite this headnote

[48] **Wills**

Right of Action

A plaintiff, who is not a trustee or a beneficiary under a trust created by a will and who does not ask the declaration of a trust in his favor, held not entitled to the advice of the court as to the true construction and effect of the will.

Cases that cite this headnote

[49] **Wills**

Right of Action

A court, in construing a will, does so as part of the determination of the cause, but is not required to advise every one who alleges an interest under or adverse to the will.

Cases that cite this headnote

[50] **Wills**

Right of Action

An heir claiming in hostility to a will has no such interest in its interpretation that he can require the advice of the court as to his rights in the estate by bill in equity for its construction.

Cases that cite this headnote

[51] **Wills**

Right of Action

On a bill against an executor showing a special case for equitable relief, a party may have his beneficial interest under his claim as heir to a distributive share in funds in the executor's hands declared.

Cases that cite this headnote

[52] **Wills**

Review

On the transfer from the superior court on demurrer of a bill for advice as to the construction of a will and plaintiff's right thereunder, held that the executor's concession that the proceeding was maintainable in some form authorized the court to express its opinion on the material questions argued, notwithstanding the bill was dismissed so far as plaintiff's right to maintain it.

2 Cases that cite this headnote

***920** Bill in equity, brought by George W. Glover, for the construction of the will of his mother, Mary G. B. Eddy, and for advice as to the validity of certain provisions thereof. The defendants are the executor, Henry M. Baker, and five residents of Massachusetts, who constitute the board of directors of the First Church of Christ, Scientist, in Boston. The Attorney General, claiming for the state by escheat, George W. Baker, a nephew of the testatrix, John B. Baker, her grandnephew, and George W. Glover, Jr., a son of the plaintiff, were given leave to intervene. Transferred from the April term, 1911, of the superior court upon demurrer, without a ruling, by Wallace, C. J., who also of his own motion transferred the question whether the bill can be maintained, and, if so, upon what grounds, in case such question is not properly presented by the demurrer.

For disposition of plaintiff's motion to remand, see 76 N. H. 261, 81 Atl. 1081.

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Opinion

PARSONS, C. J.

Mary Baker Eddy died December 3, 1910. On the 14th of that month her will was duly probated in this county. The defendant Baker has been appointed executor and has qualified by giving bond. January 12, 1911, the plaintiff, a son of the deceased, commenced this proceeding against the executor and five persons alleged to be the directors of the First Church of Christ, Scientist, in Boston, Mass. The plaintiff in his bill (or petition, as he names it) alleged the above facts, argumentatively stated that the property of the deceased exceeds $2,000,000 in value, and alleged that the will attempts to dispose of the great bulk of the estate by gifts to said church, or its directors, directly and in trust, and attacked the validity of the clauses of the will making such gifts. The prayer of the bill is for the advice of the court as to the true construction, meaning, and effect of the will, and the right of the plaintiff to receive any of the property which the will attempts to dispose of by the clauses attacked. The defendants demurred, pleaded in bar, and answered. It does not appear from the record which has been sent to this court that there has been any joinder on, or answer to, the various pleadings. There is no replication to the answer. The case has not been set for hearing upon the bill and answer, or for argument upon the plea. The only progress in the superior court appears to have been a motion by the plaintiff for a hearing upon the demurrer.

[1] [2] Whether all or a part of the issues in an action shall be tried at one time, and the order in which they shall be tried if determined separately, is a question of justice and convenience, usually settled by the superior court. Owen v. Weston, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547; Glover v. Baker, 76 N. H. 261, 81 Atl. 1081. Although ***921** the defendants' plea presented matter claimed to bar the plaintiff from making any claim to his mother's estate, in the situation of the case the superior court was of the opinion that the progress of the cause would be advanced by first securing a final determination of the questions of law raised by the demurrer, and transferred those questions to this court, with the suggestion that if the defendants' demurrer does not raise the question whether the bill can be maintained, and, if maintainable at all, upon what grounds it may be maintained, those questions were specially reserved by the presiding justice of his own motion. The power of the court to make such a transfer has already been determined. Glover v. Baker, 76 N. H. 261, 81 Atl. 1081.

No ground appears upon which to question the ruling as a finding of fact of proper procedure, even if upon portions of the pleadings other questions were presented to the trial court for decision. The defendants' plea went merely to the maintenance of this action by the plaintiff. It did not support the validity of the bequests. The plaintiff concedes that, if the bequests are lawful, he has barred himself from questioning the will. If the bequests are unlawful, such as the law will not permit to be carried into effect, whether in that case the plaintiff is or is not entitled to share in the estate thereby left undisposed of by the will is a question between him and the other parties who have been permitted to join in the litigation—the more remote heirs of Mrs. Eddy and the state. Especially in view of the claim of escheat now made by the state, is it clear that the validity of the bequests must at some time be determined. If they are valid, the litigation is ended. If they are invalid, the legatees have no further interest in the cause.

[3] The question transferred is the right of the plaintiff to maintain the bill, and that is the only question transferred. The prayer of the bill is for advice as to the plaintiff's rights. The defendants demur, for the reason that it appears on the face of the bill that the plaintiff does not occupy any fiduciary position entitling him to the advice and direction of a court of equity. The only parties who can call on the court for advice are those in a fiduciary position. Questions are prospectively determined by a court of equity only in behalf of trustees who in the execution of a trust are entitled to its protection. Greeley v. Nashua, 62 N. H. 166, 167; Ellis v. Aldrich, 70 N. H. 219, 222, 47 Atl. 95; Bailey v. McIntire, 71 N. H. 329, 52 Atl. 446; Drake v. True, 72 N. H. 322, 56 Atl. 749; Harvey v. Harvey, 73 N. H. 106, 59 Atl. 621.

The plaintiff is not a trustee, nor is he a beneficiary of the trusts attempted to be created by the will, nor does he ask in terms that a trust be declared for his benefit in the property in question. He is not entitled to the advice of the court. The defendants did not insist upon this objection in argument, but appear to concede in the brief, and in fact did concede in oral argument, that if the plaintiff might have an interest in the estate he could require a construction of the will. The plaintiff claims in his brief that “there can be no possible question either as to the jurisdiction of the superior court or as to the form of the bill in the present case.” But while, in view of the attitude of the parties to the cause, the court may perhaps properly proceed to the consideration of the validity of the questioned clauses of this will, an examination of the cases cited by the plaintiff does not so clearly sustain

the proposition above quoted that the question can properly be passed without some consideration. The procedure in this case ought not to be permitted to stand as authority for the proposition that immediately upon his appointment an executor can be dragged into court and compelled to litigate against his will questions which certainly cannot arise until the estate is ready for distribution, unless it is clear such is the law.

[4] When questions as to the meaning or validity of the clauses of a will come before a court in the exercise of its ordinary jurisdiction, such an instrument is construed as part of the determination of the cause. But this does not require the court to advise every one who may think he has an interest under or adverse to a will or other instrument. The only case of similar procedure found in this state is Haynes v. Carr, 70 N. H. 463, 484, 49 Atl. 638. In that case the executors filed an answer, which they asked to have considered as a cross–bill, asking the advice of the court, and the case was disposed of by ordering the dismissal of the plaintiffs' bill, with a decree advising the executors.

[5] In Bowers v. Smith, 10 Paige (N. Y.) 193, it is said, in substance as quoted in the plaintiff's brief: "An executor takes the legal estate in the personal property of the testator as trustee for the legatees or next of kin; and the court of chancery having general jurisdiction in cases of trusts, any person having an interest in such property, either as a legatee or distributee of the decedent, may file a bill in that court against the executor, to have the construction of the will settled, or to have the question as to the validity of any of its provisions determined, so far as concerns the interest of the complainant in the property, and to have a decree against such executor for such parts or portions of the property as he is legally and equitably entitled to receive." This statement was not involved in the decision of the case, but was merely "asserted by the chancellor." Read v. Williams, 125 N. Y. 560, 566, 26 N. E. 730, 21 Am. St. Rep. 748. The New York cases are in conflict, and the jurisdiction appears finally to be rested upon ***922** the provisions of the Code. Read v. Williams, supra. See Wager v. Wager, 89 N. Y. 161; Horton v. Cantwell, 108 N. Y. 255, 267, 15 N. E. 546.

The correct rule, in the absence of statute, which is followed here, is set forth in Chipman v. Montgomery, 63 N. Y. 221, 230: "The plaintiffs, as heirs at law and next of kin claiming in hostility to the will, have no interest in the interpretation of that instrument, and have no standing in court in an action for that purpose, but must assert their rights directly by proper action at their peril, taking the chances of being subjected to costs in case of failure, as in other controversies. *** A court of equity has an incidental jurisdiction in respect to wills, and does not take jurisdiction of an action brought merely for the construction of a will or other instrument at the instance of every person who claims to be directly or indirectly interested in the subject–matter of the instrument. The rule is that to put a court of equity in motion there must be an actual litigation in respect to matters which are proper subjects of the jurisdiction of that court, as distinguished from a court of law. *** Hence one who claims real property must bring his action of ejectment or other proper action for its recovery, and he who has a right to personalty, or to any debt or duty which is the subject of an action at common law, must resort to the appropriate remedy by action for the specific property, debt, or duty, or damages for the infringement of his right. It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers, as an incident of that jurisdiction, take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy." "It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts." Folger, J., in Bailey v. Briggs, 56 N. Y. 407, 413.

[6] [7] [8] In no case that has been cited is it held that an heir claiming in hostility to a will can require the advice of the court as to his right in the estate. The only principle that has been laid down is that he may under some circumstances bring a bill to declare his beneficial interest, under his claim as heir to a distributive share in funds in the executor's hands. In Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362, it is held: "An administrator is a trustee for heirs and creditors; and this court, sitting as a court of chancery, has power over trusts of that description, upon a proper case for enforcing the rights of those interested in the trusts" But a bill in equity cannot be maintained against an executor merely upon the ground of the trust implied by law. A special case must be shown calling for equitable relief. Walker v. Cheerer, 35 N. H. 339; Joslin v. Wheeler, 62 N. H. 169. By the Constitution and the statute, the probate court has exclusive, original jurisdiction of the probate of wills and the settlement and distribution of the estates of deceased persons. Knight v. Hollings, 73 N. H. 495, 497, 63 Atl. 38: Const. pt. 2, art. 79 (80); P. S. c. 182, § 2. Until the settlement of the executor's account, the probate court has entire jurisdiction of the necessary procedure. Hayes v. Hayes, 48 N. H. 219, 224, 225.

[9] [10] The superior court has no power to require the executor to account for his administration upon a bill in equity, or to revise proceedings in the probate court, except upon appeal. Reed v. Prescott, 70 N. H. 88, 46 Atl. 457; Ayer v. Messer, 59 N. H. 279. If, upon settlement of the executor's account, the executor refuses to pay the plaintiff any sums to which he may be legally entitled, the plaintiff has a complete remedy upon the administration bond. If in such case the executor withholds from an heir property to which the heir lays claim, it may not be very material under New Hampshire practice whether the heir at its inception denominates his proceeding a bill in equity or some action at common law; but an attempt to bring the executor to account in equity traverses jurisdictional provisions established by the Constitution.

[11] But the plaintiff does not ask for an accounting by the executor, or for a decree requiring payment to him. His sole request is for advice as to his rights. As the plaintiff is not entitled to such advice, the petition should be dismissed so far as any proceeding thereunder is based upon the plaintiff's right to maintain it. But when the question of construction has been fully argued by all parties interested, and both desire the opinion of the court, a court may express its opinion although dismissing the petition. Austin v. Bailey, 163 Mass. 270, 39 N. E. 1022. And where the parties in conflict have brought in the administrator and fully tried their case, for the protection of the administrator the opinion of the court, as advice to him, has been given to dispose of the controversy. Day v. Washburn, 76 N. H. 203, 81 Atl. 474. Upon this ground alone, in the final argument for the plaintiff, is it claimed the proceeding is maintainable.

In this case the executor is a party represented by counsel. The plaintiff and the claimants under the will have fully presented the opposing views in argument. All persons understood to be interested are represented before the court or have had notice of the proceeding. The executor has not insisted in argument upon the technical objection to the maintenance of the proceeding by the plaintiff. The rights of the parties are not so clear that it would not be his duty to ***923** them, as well as to himself, to obtain at the proper time a judicial determination of their conflicting claims. Tilton v. Society, 60 N. H. 377, 49 Am. Rep. 321. In this view, the concession in argument by counsel for the executor that the proceeding is maintainable in some form may be treated as a request for advice, which authorizes the court to express for his benefit the opinions formed upon the material points argued.

The plaintiff attacks the fourth, sixth, and eighth (or residuary) clauses of the will. It is conceded that the fourth and sixth clauses of the will are valid, if the residuary clause can be sustained. It will be unnecessary, therefore, to discuss them until the residuary clause is found invalid. The residuary clause contained a provision as to Pleasant View, the testatrix's residence in Concord, which was revoked by the second codicil. Omitting this provision, the residuary clause reads: "I give, bequeath, and devise all the rest, residue, and remainder of my estate, of every kind and description, to the Mother Church —the First Church of Christ, Scientist, in Boston, Massachusetts—in trust for the following general purposes: I desire that such portion of my residuary estate as may be necessary shall be used for the purpose of keeping in repair the church building and my former house at No. 385 Commonwealth avenue, in said Boston, which has been transferred to said Mother Church, and any building or buildings which may be, by necessity or convenience, substituted therefor; *** and I desire that the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me."

[12] The legatees stand upon the will. The plaintiff in his bill has stated the facts upon which he claims that the bequests attempted to be made by the will are invalid. The demurrer admits all facts well pleaded, but does not admit the conclusions of law attempted to be drawn therefrom. Although the bill admits that in the lifetime of his mother, in consideration of payments made to him, the plaintiff agreed that she might, if she saw fit, dispose of her property in any lawful way, no agreement in writing is set forth in the bill, nor does the plaintiff admit any agreement, debarring him from prosecuting the claim he makes upon the ground upon which he seeks to place it. The validity and effect of the agreements set forth in the plea are questions not raised by the demurrer, and not now before the court. It is elementary that upon demurrer the facts must be taken as alleged by the opposing party and cannot be varied or answered by allegations of fact. Tappan v. Evans, 11 N. H. 311, 322, 323; Sto. Eq. Pl. § 448; 1 Dan. Ch. Pr. *598.

[13] [14] One ground upon which the plaintiff attacks the residuary bequest is that it was obtained by fraud, concealment of what are alleged to be material facts, and undue influence. These issues of fraud and undue influence in securing the execution of the will are not open in this proceeding. The decree of the probate court allowing the will is a judgment establishing the document to be the will of Mrs.

Eddy. That judgment is not open to collateral attack. Spofford v. Smith, 59 N. H. 366; Poplin v. Hawke, 8 N. H. 124. As long as the decree stands, "it is conclusive of the genuineness and validity of the will." Knight v. Hollings, 73 N. H. 495, 500, 63 Atl. 38. Except in a direct proceeding to set the probate aside, evidence of facts inconsistent with the validity of the decree is incompetent. Kent v. Hunt, 74 N. H. 74, 65 Atl. 386; Simmons v. Goodell, 63 N. H. 458, 2 Atl. 897.

[15] [16] Whether the paper presented for probate was Mrs. Eddy's will, or the product through fraud or undue influence of other minds operating upon hers, is a question which could have been raised in opposition to its Probate as her will, and which, whether raised or not, is conclusively determined by the judgment. If the objection went only to a portion of the will—to the bequests to the legatees who are defendants—it would have defeated the will only to the extent of the proof, and the probate of the will could have been limited to the portions, if any, not found to have been so induced. Owen v. Weston, 63 N. H. 599, 603, 4 Atl. 801. 56 Am. Rep. 547; Marston v. Marston, 17 N. H. 503, 508, 43 Am. Dec. 611; Sumner v. Crane, 155 Mass. 483, 484, 29 N. E. 1151, 15 L. R. A. 447; Post v. Mason, 91 N. Y. 539, 550, 43 Am. Rep. 689; Allen v. McPherson, 1 H. L. C. 191. The only matters open here are the construction of the disputed clause, ascertaining upon competent evidence what the testatrix meant by the words she used, and the inquiry, when the testatrix's purpose is ascertained, if it can be, whether that purpose is one that can be carried into effect.

[17] If the donor's purpose can be ascertained, and is legal, it is the duty of the court to give it effect. Adams v. Page, 76 N. H. 96, 79 Atl. 837. The testatrix gave the bulk of her property in trust to be devoted and used for the purpose of promoting and extending the religion of Christian Science as taught by her. Her understanding that she was not making in the residuary clause a direct gift to the legatee is made certain, if anything beyond the language of the clause itself were needed, by the direct gift of $50,000 to the legatee in the sixth clause. It is argued that the object of the legatee, the First Church of Christ, is the extension and promotion of the religion of Christian Science, and that the subject of the gift to it in trust for the purpose named must be used for the same purpose as if given to it directly. This may be so.

***924** [18] A gift to a charitable or religious organization, without more, is in trust for the purposes of the organization. Hale v. Everett, 53 N. H. 9, 77, 16 Am. Rep. 82; 2 Per. Tr. (2d Ed.) § 733. But for some reason the testatrix saw fit to make more certain the purpose of her residuary gift by declaring the trust upon which it was given. The language she used cannot be disregarded. Uncertainty as to the corporate capacity of the legatee to hold directly and administer for the purposes of its organization so large a fund may have inspired the express definition of the trust.

The allegations of fact of the bill and amendments are reduced by counsel for the plaintiff in argument to two fundamental propositions, which, however, are in direct conflict with each other: (1) The legatee, the First Church of Christ, Scientist, is an unincorporated religious society for the promotion of Christian Science as taught by Mrs. Eddy. (2) The legatee is not a charitable organization, but a business organization for the purpose of practicing and vending a system of faith cure invented by Mrs. Eddy, the religious feature of which is only for the commercial purpose of giving vogue and salability to the cure. The first proposition is that of the original bill; the second is deduced from the facts alleged in the numerous amendments. No objection has been made to this double aspect of the facts claimed to be presented by the bill.

[19] Under the first view, that the legatee is a church, from which it follows that the scheme it is organized to promote is a religion, alleged to be that taught by Mrs. Eddy, the plaintiff claims the gifts are void, because prohibited by statute law. The Massachusetts statute relied upon is: "The income of the gifts, grants, bequests, and devises made to or for the use of any one church shall not exceed two thousand dollars a year." R. L. Mass. c. 37, § 9. The New Hampshire provision is: "The income of any grant or donation made to or for the use of a church shall not exceed five thousand dollars a year." P. S. c. 152, § 10. The facts alleged do not bring the case within the terms of the statutes. The residuary clause in its principal feature is not a gift to a church, or for the use of a church. It is on its face a gift for religious purposes. Whether a church may or may not act as trustee of such a trust, or whether the language of the will creates a valid trust or not, neither question is expressly concluded by the words of the statutes.

[20] [21] But "it is a very familiar rule in the interpretation of statutes, that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction, in others enlarged, and sometimes the construction may be even contrary to the letter. *** What is within the legally proved intention of the Legislature is within the statute, though not within the letter; and what is within the letter, but not within the intention, is not within

the statute." State v. Banks, 75 N. H. 27, 31, 70 Atl. 542, 544 (21 Ann. Cas. 1204). The claim is that the sections cited are not merely regulations of or limitations upon the corporate holding power conferred upon the deacons and other similar officers of churches by the statutes of which they are a part; but, construed according to the purpose of the Legislature as evidenced by their history and source, they also are intended to be and are limitations upon testamentary power. In this view the New Hampshire statute only is material, for Massachusetts cannot determine the extent to which New Hampshire permits or authorizes its citizens to dispose of property by will. Consequently the Massachusetts statute is material only as a limitation of the power of the testamentary trustee.

[22] The history of these sections, later more fully considered, shows them to be part of legislation enacted because of doubt of the validity of gifts in trust to unincorporated associations —a doubt no longer entertained, since grants or gifts to an unincorporated association are sustained in equity. Bartlett v. Nye, 4 Metc. (Mass.) 378; 1 Per. Tr. § 46. In Sohier v. St. Paul's Church, 12 Metc. (Mass.) 250, it is held that, under the Massachusetts statute declaring that the deacons "be deemed bodies corporate," a church is authorized to execute a trust for a purpose not foreign to those of its organization.

[23] [24] The same result appears to follow from the conclusion of the historical argument of the plaintiff's counsel, that the purpose and effect of the legislation upon the subject has been to transfer to these religious societies the parochial functions of towns—a conclusion which was pointedly enforced by the citation of the existing statute (P. S. c. 152, § 2) authorizing such societies to raise money by taxation of their members. This means that such societies are towns so far as such powers existing in towns prior to the legislation may extend. From this it would seem to follow, as towns, like other corporations, may act as trustees for purposes not incompatible with the objects of their organization (Sargent v. Cornish, 54 N. H. 18; Dublin Case, 38 N. H. 459, 577; 1 Per. Tr. §§ 42, 43), that the religious societies having their parochial powers might so act.

In view of the suggestion that the precise question as to the competency of this church is now pending before the Massachusetts court between the same parties, this court would not attempt to pass upon it in advance of that court, unless it were essential to the rights of the parties that it ***925** should do so without delay. Moore v. Casualty Co., 74 N. H. 47, 64 Atl. 1099. But it is unnecessary to decide at this time whether under Massachusetts law an unincorporated religious society may not act as trustee for a purpose not foreign to the objects of its association, but alleged to be identical therewith. [25] The gift is not to the church, but in trust, and unless it is sustainable as a charitable trust it is invalid, and whether the church could act as trustee if the trust were valid is immaterial; while, if the will creates a valid trust, the refusal of the trustee named in the will to act because of incapacity under Massachusetts law, or otherwise, will not avoid the trust, which cannot fail merely because of disability of the trustee. "It is a rule without exception that equity never allows a legal and valid trust to fail for want of a trustee." Campbell v. Clough, 71 N. H. 181, 184, 51 Atl. 668, 669; Chapin v. School District, 35 N. H. 445; Hubbard v. Art Museum, 194 Mass. 280, 290, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025; Vidal v. Girard, 2 How. 127, 180, 11 L. Ed. 205. The only limitation of the rule is when it appears that the testator intended a personal trust in the trustee named in the will (Fontain v. Ravenel, 17 How. 369, 382, 15 L. Ed. 80), a conclusion which cannot be reached here because no person has been named as trustee.

[26] The trustee named is an association, and the testatrix must have intended the trust to be executed by the persons (whoever they might be) who from time to time might constitute the association or be its managers. The trust may be permanent, because the use may be restricted to the income; and the testatrix had in mind, consequently, succession in the individuals in control, and did not intend to limit the discretion conferred to any particular person. Lorings v. Marsh. 6 Wall. 337, 354, 18 L. Ed. 802; 2 Per. Tr. §§ 721, 722.

[27] The testatrix intended the trust to be administered by persons professing the belief she desired to promote. Such persons it would be the duty of the court to appoint should occasion arise, or at least none in hostility thereto should be permitted to undertake the execution of the trust. Smith v. Nelson, 18 Vt. 511, 569. As the case stands, the incapacity of the church to act as trustee may be taken as sufficiently alleged as a fact by the bill and admitted by the demurrer.

[28] If a valid trust is created, the plaintiff is not concerned as to the manner in which or the persons by whom the trust is carried into effect. Burnham's Petition, 74 N. H. 492, 494, 69 Atl. 720. The question of trustee will be settled at the proper time, upon the facts as they may then appear. As the gift is not to the church for its own use, it is unnecessary to consider the question, argued at length, whether the state alone may take

advantage of a limitation upon the corporate holding power of a corporation.

[29] Does the law of this state limit the amounts that may be given to pious uses? "Every person of the age of twenty–one years, of sane mind, may devise and dispose of his property, real and personal, and of any right or interest he may have in any property, by his last will in writing." P. S. c. 186, § 1. This chapter, under the title "Wills," does not restrict this general disposing power by limitations of the amount that may be given to educational, charitable, pious, or superstitious uses, or to any one corporation or individual. There is no such statutory limitation, unless contained in the section above quoted from chapter 152, Public Statutes, entitled "Religious Societies," whose purpose is, it has been said, to make provision "whereby defects in a church organization are supplied, so that property donated for pious purposes may not fail of reaching the objects intended by the donors." Hennessey v. Walsh, 55 N. H. 515, 521. In other words, the purpose of the chapter is not to limit or destroy gifts to pious uses, but to promote and effectuate them.

The section upon which the plaintiffs rely was enacted here in 1842, and was doubtless taken from the Revised Statutes of Massachusetts of 1836. The argument that the income–limiting provision of the section is intended to make void gifts to any church which might produce an income in excess of the limit is based upon the claim that its provisions originated in section 1 of the English statute (9 Geo. II, c. 36) commonly called the Georgian mortmain act. The evil at which this act was aimed, as set forth in the preamble, was the alleged fact that many large and improvident dispositions of their property were made by languishing and dying persons to uses called charitable uses, to the disherison of their lawful heirs; and the remedy enacted was to declare void all conveyances of land, or of money to be laid out in land, to any person or persons, corporate or otherwise, in trust for the benefit of any charitable use whatever, unless made by deed executed and delivered 12 months before the death of each donor or grantee and enrolled within 6 months after its execution. This section of the English statute does not treat in any form of the income corporations may hold. The New Hampshire statute does not declare any gifts in trust void. The only possible connection between them comes through the Massachusetts provincial statute of 1754–55. Ancient Charters and Laws Mass. Bay, p. 605; 2 Mass. Laws (Ed. 1807) p. 1037. This act is defined in the title as "An act for the better securing and rendering more effectual grants and donations to pious and charitable uses." Section 1 declares that the deacons ***926** of Protestant churches shall be deemed so far bodies corporate as to take in succession all grants and donations "made either to their several churches, the poor of their churches, or to them and their successors," thereby resolving the doubt expressed in the preamble of the act whether such gifts would go in succession, although so intended. Section 2 provides that the annual income of the grants made or to be made to any one such body politic for pious and charitable uses shall not exceed the sum of three hundred pounds, and also "that all such donations hereafter made by deed, which shall not be recorded in the register's office, in the county where the lands lie, three calendary months before the death of the donor, and all such bequests or devises which shall not be made *** at least three months before the death of the testator, shall be utterly void and of no effect; anything in this act contained to the contrary notwithstanding."

[30] It seems very probable that this latter clause was inspired by the section of the English act before quoted; and if this clause had remained in the Massachusetts law, or had ever been enacted in New Hampshire, the English decisions interpreting the English statute would be of value. But in 1786 the Massachusetts statute was revised and re–enacted in a new statute, which omitted the clause which declared deeds and wills void unless made three months before the death of the donor or testator. 1 Mass. Laws (Ed. 1807) p. 282. This provision was never adopted here, and there is no foundation for the claim that the New Hampshire "church statute" is derived from the Georgian mortmain act.

It was said in Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99 (1815), that the provisions and restrictions of the act of 1754–55 (28 Geo. II) related only to gifts and devises to the bodies politic created by that act; that donations or bequests to others could not reasonably be brought within the act; from which it would follow that gifts to charitable uses generally were not understood to be within the act. The point was not decided, because it was held that the act of 1786 repealed the provisions of the act of 1754–55 contended to render void a bequest to the American Board of Commissioners, "to promote the pious objects thereof." In Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645 (1834), the purpose of the statute was said to be to remove doubts concerning the legal estate and to declare and confirm the same to these quasi corporations created out of the church officers; that the statute "implies that such gifts were good in principle and in substance, but might be defeated by the ignorance or unskillfulness of the grantors, in not creating proper trustees, in whom the legal estate might vest, in order to support and carry out the charitable intent." The careful student of the

Massachusetts law was therefore informed, at the time the Massachusetts provisions were adopted here in 1842, that their purpose was to promote and preserve certain gifts to pious uses, and that the provisions restricting generally the power of testators to bequeath or devise to charitable uses, if any had such effect, had been stricken from the act. This is the conclusion of the Massachusetts court. Hubbard v. Art Museum, 194 Mass. 280, 284, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025.

The plaintiff's answer is that the Massachusetts court made a plain mistake. If so, they have been consistent therein since 1815. If the legislation is approached from the viewpoint of its declared purpose—the promotion and preservation of gifts to or for churches—the income limitation is easily understood as a limitation upon the corporate power created by the act. If the act is viewed, as the plaintiff attempts to consider it, as an intended restraint upon such gifts, an intent to defeat absolutely gifts in excess might be extracted from the act, even after the express removal of the words declaring the gifts void, which cannot be found in the act since 1786. But as the purpose is plainly declared in the preamble, the plaintiff's construction cannot be read into it.

[31] But the question for this court is not what the language meant in Massachusetts in 1754–55, 1786, or 1836, or now means, but what did it mean to the Legislature which made it New Hampshire law in 1842? Upon this question the history of legislation upon the subject, the circumstances under which the act was adopted, and the other provisions accompanying it are competent evidence. Stanyan v. Peterborough, 69 N. H. 372, 373, 46 Atl. 191; Weed v. Woods, 71 N. H. 581, 583, 53 Atl. 1024. "The public worship of God and public instruction in morality and religion were recognized in the Bill of Rights in the Constitution as 'giving the best and greatest security to government'; and to promote these the Legislature is empowered 'to authorize, from time to time, the several towns, parishes, bodies corporate, or religious societies within this state to make adequate provision, at their own expense, for the support of public Protestant teachers of piety, religion, and morality.' Bill of Rights, art. 6. Prior to and at the time of the adoption of the Constitutions of 1784 and 1792, public religious worship was very generally supported by a tax laid by the several towns. The town was the parish or religious society, which, by authority of legislative acts, furnished the meeting house and contracted with and paid the minister. The provincial statute of 1714 (Acts and Laws of the Province 1696–1725, p. 51) empowered towns to choose ministers and raise money by tax for their support, subject to the right and liberty of conscience. The same power, ***927** of enabling towns to support public worship by means of a tax, was fully set forth in section 10 of the act of February 8, 1791 (Laws 1792, p. 167) entitled 'An act for regulating towns and the choice of town officers,' and which provided that the legal voters, at any regular meeting of the town, might, agreeably to the Constitution, 'grant and vote such sum or sums of money as they should judge necessary for the settlement, maintenance, and support of the ministry, schools, meeting houses, the maintenance of the poor, for laying out and repairing highways, for building and repairing bridges, and for all the necessary charges arising within the said town, to be assessed on the polls and estates in the same town as the law directs.' The support of the ministry and of houses of public worship was then on the same footing as that of schools, highways, and the support of the poor. With a gradual change arising from the multiplying of religious sects and the larger exercise of freedom of opinion, the system of supporting religious worship through the parochial functions of towns was by degrees abandoned, though authorized by law, until the act of 1819 repealed section 10 of the act of 1791, and empowered religious societies of every Christian sect 'to raise money by taxes upon the polls and ratable estate of the members' for maintaining houses of public worship and supporting the ministry." Franklin Street Society v. Manchester, 60 N. H. 342, 347, 348; Holt v. Downs, 58 N. H. 170, 175; Hale v. Everett, 53 N. H. 9, 64–68, 16 Am. Rep. 82; Dublin Case, 38 N. H. 459, 475.

The exemption from taxation for the support of teachers of another sect, persuasion, or denomination, guaranteed to the individual of any one particular sect or denomination by article 6 of the Constitution and recognized in the early statute (Prov. Laws [Ed. 1771] pp. 55, 138; Act 1770 [Supp. Same] p. 49), was not always in practice effected under the act of 1791, authorizing taxation by towns for the support of the ministry. The question of fact remained for the decision of a jury, whether the objecting individual was of a different persuasion from the minister of the town. Sanborn, Hist. N. H. 287, 289; Barstow, Hist. N. H. 422–427. The first attempt at relief was a legislative declaration recognizing persons of particular religious belief as distinct religious sects or denominations entitled to the protection of the Constitution and the laws. Free Will Antipedo Baptists, December 7, 1804; Universalists, June 13, 1805; Methodists, June 15, 1807; Laws (Ed. 1815) p. 46. Another remedy was the incorporation of various religious societies, with authority to tax their members for the support of religious instruction of the particular kind favored by them. These incorporations at first gave little beyond the power to assess and collect taxes for the purpose named; but in time the powers conferred were enumerated with greater

detail, and in nearly every instance the charters conferred in various terms authority upon the incorporations to receive and hold for their own use subscriptions, grants, or donations of real and personal property not exceeding a fixed amount, or of a limited annual income. In 1819 and the years immediately preceding, these incorporations are very numerous. Index Laws N. H. 468–472; Mss. Laws N. H. vols. 20, 21. These acts being simply acts of incorporation, the limitations contained therein were purely limitations upon corporate power.

The toleration act of 1819 (chapter 76) was urged, not only upon the ground of religious freedom, guaranteed by the Constitution, but denied in practice, but as a remedy for the abuse of special religious incorporations which was beginning to be felt. Section 3 of the act provided for the incorporation without special act of societies of each religious sect or denomination of Christians in the state. The act was a general incorporation act, as well as an act of religious toleration. This act, like the earlier special incorporations, gave merely the power to raise money by taxation of the members of the societies so incorporated, "and to collect and appropriate the same for the purpose of building and repairing houses of public worship, and for the support of the ministry." The legislation transferred the power conferred upon towns by the act of 1791 to the societies to be formed under it. But the act was seen to be incomplete, and in 1823 (chapter 60, § 1) such societies were authorized "to collect and receive by voluntary contribution or by devise, and hold for the uses of such society, a permanent fund not exceeding the sum of ten thousand dollars, the annual income of which shall be appropriated towards erecting or repairing a place of public worship for such society and for the support of the ministry in such society."

The act of July 3, 1827, repealed the acts of July 1, 1819, and July 3, 1823, authorizing the creation of religious societies and defining their corporate powers (Laws 1827, c. 36, § 4; Laws [Ed. 1830] tit. 99, § 4), but re–enacted with some modifications and extensions the provisions as to their organization and powers. Section 1 provided that societies organized as provided in the act should be bodies corporate, with power "to take, hold, and possess, to them and their successors, for the use and benefit of such society, by purchase, gift, grant, devise, or otherwise, any real or personal estate, for the purpose of erecting and repairing a house of public worship, and a parsonage house, and other buildings necessarily connected therewith, and for supporting the ministry in such society; and shall have power to improve, sell, and convey and dispose of the same for the sole use and benefit of such society: Provided always, that the annual value or income ***928** of the estate of any one society shall not at any one time exceed one thousand dollars."

The commissioners who made the revision of 1842 reported with some rearrangement the provisions of the act of 1827, which was entitled "An act empowering religious associations to assume corporate powers," as chapter 147 of title 17 ("Of Corporations"), and it was enacted with some verbal changes as the first five sections of chapter 144 of the Revised Statutes. Section 2 provides that the corporations organized under it "may take, hold, and possess by purchase, gift, grant, devise, or otherwise, any real or personal estate" for purposes stated, "provided that the annual value or income of all the estate of such society shall not exceed two thousand dollars." Up to this point it is clear that the only subject receiving legislative consideration is the property–holding capacity of this class of corporations. In the Legislature title 17 ("Of Corporations") was referred to a special committee of ten, who reported a large number of amendments. House Jour. Nov. Sess. 1842, pp. 122, 213, 334. In the passage of the act through the Legislature, sections 6 to 15 were added to the chapter. These sections are shown, by comparison with chapter 20 of the Revised Statutes of Massachusetts of 1836, to have been taken bodily from that act. In case of a gift or grant to an unincorporated religious society, section 7 makes such society a corporation for the purpose of managing, using, and employing the same, or to prosecute and sue for the same, and was taken from section 25 of the Massachusetts statute, but contains a provision not found in that section, as follows: "Provided that the income of the donations, gifts, or grants to any one of such unincorporated religious societies shall not exceed the sum of two thousand dollars a year"—identical in effect with the like provision as to the holdings of incorporated religious societies under section 2 of the chapter. Section 8 declares that "the trustees, deacons, church wardens, or other similar officers of all churches or religious societies, if citizens of the United States, shall be deemed bodies corporate for the purpose of taking and holding, in succession, all grants and donations, whether of real or personal estate, made either to them and their successors, or to their respective churches, or to the poor of their churches." This section, except for the insertion of the word "trustees" as an additional term descriptive of church officers, is identical with section 39, c. 20, Revised Statutes of Massachusetts. The remaining sections correspond, respectively, with this addition when appropriate, with the remaining sections of the Massachusetts statute. Section 14, upon which the plaintiff relies, is: "The income of any such grant or donation, made to or for the use of any church, shall not exceed the sum of two thousand dollars a year, exclusive of the income of any

parsonage lands granted to or for the use of the ministry"—and is identical with section 45, c. 20, Revised Laws of Massachusetts.

Title 19 of the Commissioners' Report on the Revised Statutes of New Hampshire ("Of Probate and the Estates of Deceased Persons"), which includes chapter 159 ("Wills"), was referred to and reported from the committee on the judiciary. House Jour. Nov. Sess. 1842, p. 126. It would seem to be clear that the Legislature of 1842, in dealing with, through a separate committee, and amending the title "Corporations," which included the chapter "Of Religious Societies," must have understood they had corporate power, rather than testamentary capacity, under consideration. That chapter, as completed, provided for the voluntary incorporation of religious societies, with a limitation upon their property–holding power; second, that in case of a gift to an unincorporated religious society, such unincorporated society should have the same power as an incorporated society to hold and control the same, with the same limitation upon the income upon the property authorized to be held, though somewhat differently expressed; and, third, recognizing the well–understood distinct entity of church and society (Holt v. Downs, 58 N. H. 170), and the possibility that a gift might be made to the officers of the church or society, or both, provided (sections 8, 9) that such officers, as the case might be, should be deemed bodies corporate "for the purpose of taking and holding in succession" all such grants and donations, with the same proviso that the income of such grant or donation should not exceed $2,000 a year. The difference in expression arising from copying the Massachusetts language in the latter section does not authorize the conclusion that any different purpose was understood to be attached to the limitation of the income of grants or donations to any church than that intended to be expressed in the proviso of section 2, "that the annual value or income of all the estate of such society shall not exceed two thousand dollars," whose history shows it is nothing more than a limitation of corporate power. The statute appears to have been intended to provide for all possible cases of gifts to religious societies or churches, whether incorporated or unincorporated, and whether the gift be made to the society or church, or to the officers of either or both. The act is comprehensive and complete, and justifies the conclusion of Judge Smith in Hennessey v. Walsh, 55 N. H. 515, 531, before quoted, "that provision is made, whereby defects in a church organization are supplied, so that property donated for pious purposes may not fail of reaching the objects intended by the donors."

In the chapter of the Public Statutes entitled "Religious Societies" (chapter 152), the first three sections of chapter 144 of the Revised Statutes, providing for voluntary incorporation of such societies, are omitted, ***929** though their substance is found in the General Statutes and the General Laws; but in chapter 147 of the Public Statutes the purpose for which voluntary corporations might be formed is extended to include any charitable or religious cause. Such a corporation may hold property, without special authority from the Legislature, to the value of $500,000. The present situation of the legislation upon the subject, therefore, is that a religious society or church which incorporates itself under the general law may hold property to the amount of $500,000; and unincorporated religious societies, or the quasi corporations created by gifts to the officers of a society or church, may hold property whose annual income does not exceed $5,000, the limit having been increased since 1842.

[32] Considering these provisions as limitations of corporate power, there is reasonable ground for permitting greater power to a formally incorporated body than to one whose incorporation results merely from the fact that a gift is made to it or its officers. But a statute intended as a limitation upon testamentary power, with the purpose of preserving an estate for the heirs, which should define the limits of such power, not by the character of the gift or the relation of its amount to the whole property of the decedent, but solely by the amount which could be given to a single corporate entity, varying that by the degree of corporate organization, leaving the testator free to dispose of all his property for pious or superstitious uses by the simple expedient of extending his charity to a sufficiently large number of corporate entities of the same class, or by selecting some other as trustee, would be so poorly adapted to execute such a purpose that it cannot be reasonably interpreted as enacted with such end in view. If one view which may be taken of legislative language produces an absurd and unreasonable result, that fact is evidence no such purpose was within the legislative purpose, if the language used is capable of a construction neither absurd nor unreasonable. Opinion of the Justices, 75 N. H. 613, 616, 72 Atl. 754.

[33] Considering all the competent evidence furnished by the language used, the prior history of legislation, the circumstances under which the law was passed, other provisions of apparently similar purpose adopted at the same time, and assigning a reasonable meaning to the language, it is more probable that in 1842, and the subsequent re–enactments of the section relied upon by the plaintiffs, the legislative intent was to regulate the property–holding

capacity of the quasi corporations created by the act, and not to limit the testamentary capacity of the inhabitants of the state. If the New Hampshire statute, by limiting the corporate holding power of a church, indirectly restrains the power of individuals to give directly to such an organization, the restraint relates only to gifts to New Hampshire churches, and cannot in any way be construed to limit the testamentary capacity of a New Hampshire citizen to give to other churches. As the gift is not to a New Hampshire church, and as no statute limiting general testamentary power as to gifts for charitable or religious uses is found, the gift is not invalid because of the statute.

[34] [35] [36] This disposes of the grounds urged against the validity of the gift in the original bill and, it may be inferred, of the principal objections to the bequest. In the amendments to the original bill, and in argument, the validity of the bequest as a gift to charitable or religious uses is questioned. "The rule for determining whether the words of a will create a trust or not is: First, the words must be imperative: second, the subject must be certain: and, thirdly, the object must be as certain as the subject." Goodale v. Mooney, 60 N. H. 528, 533, 49 Am. Rep. 334. In this case the subject is certain—all of the testatrix's estate not otherwise disposed of by the will; and that the gift is in trust is distinctly declared. The objects are twofold: The repair of the church building and another definitely described building of the First Church of Christ, Scientist, in Boston, Mass., and of any building or buildings that may be substituted therefor: and "promoting and extending the religion of Christian Science as taught by me."

The first objection taken to the validity of the gift as a public charity is to the indefiniteness of the language used. It is said that the gift for the repair of the church buildings is invalid, and, as it is impossible to ascertain how much will be required for this purpose, the sum given for the promotion of religion is uncertain. "St. 43 Eliz. c. 4 (A. D. 1601), contains an enumeration of charitable objects, all of which have since been considered charitable; also many other uses, not named within the strict letter of the statute, but which come within its spirit." Goodale v. Mooney, 60 N. H. 528, 533, 49 Am. Rep. 334. "Charitable trusts include all gifts in trust for religious and educational purposes in their ever–varying diversity." Carter v. Whitcomb, 74 N. H. 482, 486, 69 Atl. 779, 782 (17 L. R. A. [N. S.] 733). The repair of churches is one of the charitable objects and purposes specially enumerated in the statute of Elizabeth. 2 Per. Tr. § 692. "The only reference that the statute makes to religious uses as charitable is to the 'repair of churches.' *** But in a Christian community, of whatever variety of faith and form of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spreading, and teaching of Christianity, or for the convenience and support of worship or of the ministry, have been held charitable." Id. § 701. The inapplicability of the Massachusetts cases ***930** cited, which hold that certain conveyances did not constitute public trusts under the control of the Attorney General, is shown by one case cited, McAlister v. Burgess, 161 Mass. 269, 271–273, 37 N. E. 173, 174 (24 L. R. A. 158), in which it is said: "In none of these cases, however, was it contended that the gifts or devises were void"—and that the cases are not "authority for the position that a gift for the benefit of a church, simpliciter, is not a public charity," while the case itself explicitly holds that a gift for the benefit of a church is a public charity. The relation of the building, No. 385 Commonwealth avenue, Boston (the building which is to be kept in repair as well as the church), to church purposes is not disclosed; but being the property of the church, in the absence of allegation to the contrary, maintaining it in a state of repair must be assumed to be a benefit to the church.

[37] The trust for repair being valid, both trusts created by the residuary clause are to be administered together. "It is no objection to the validity of a charitable gift that it is made up of several parts which are to be administered together, the income to be divided according to the discretion of the trustee." Haynes v. Carr, 70 N. H. 463, 479, 49 Atl. 638, 640; Webster v. Sughrow, 69 N. H. 380, 383, 45 Atl. 139, 48 L. R. A. 100; Gafney v. Kenison, 64 N. H. 354, 357, 10 Atl. 706.

[38] [39] The claim that the expression "the religion of Christian Science as taught by me" constitutes a patent ambiguity is without merit. It may be that, without study, the term does not present as clear an image to the minds of the court as would either of the terms Congregational, Episcopal, or Unitarian. But the image, if hazy, is probably more clearly defined than would be that of the recipient of a gift to John Jones, to a mind which had never heard of Jones. But Jones does not lose his legacy because the court does not know him. Neither can the religion of Christian Science be deprived of the gift to promote it because of the court's lack of knowledge, if its identity can be ascertained. "Words cannot be said to be ambiguous because they are unintelligible to a man who cannot read; nor is a written instrument ambiguous or uncertain merely because an ignorant or uninformed person may be unable to interpret it. It is ambiguous only when found to be of uncertain meaning by persons of competent skill

and information. Neither is a judge at liberty to declare an instrument ambiguous because he is ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. *** No judge is at liberty to pronounce an instrument ambiguous until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts and circumstances." 1 Gr. Ev. § 298. A gift having been made for the benefit of needy members of churches forming upon the apostolical doctrines brought forward by the late Edward Irving, a reference was directed to inquire what those doctrines were, and to ascertain other facts necessary to the interpretation of the will and the establishment of the trust. Attorney General v. Lawes, 8 Hare, 32.

The bill concedes the existence of the First Church of Christ, Scientist, as a religious society "based upon Christian Science which originated in the year 1866," and that the church embraces about 50,000 members, widely distributed, and sets out a portion of the Church Manual, from which it appears that in April, 1879, Mrs. Eddy and her followers voted "to organize a church *** which should reinstate primitive Christianity and its lost element of healing," that the church itself was organized December 23, 1892, and that the doctrines of Christian Science are to be ascertained from a book published by Mrs. Eddy, called "Science and Health with Key to the Scriptures," the Church Manual, and other publications. The Church Manual, which is thus by reference made a part of the bill, has been furnished the court, and contains the tenets or creed of the church, to be signed by those uniting therewith. This declares the inspired word of the Bible as a sufficient guide to eternal life, acknowledges the existence of God, his son, Christ, and the Holy Ghost, God's forgiveness of sin, the atonement of Jesus, and his crucifixion and resurrection. It is also alleged in the bill that this church was organized for the promotion of the doctrines of Christian Science—the purpose of the bequest under consideration. "The very term 'church' imports an organization for religious purposes." Baker v. Fales, 16 Mass. 488, 495. In the light of the admissions of the bill, it is unnecessary to consider whether as the case is presented the court should or could take judicial notice of the believers in Christian Science as a sect or denomination of Christians, because the bill admits the existence of a body of at least 50,000 members organized for religious purposes and united in a belief claimed to be founded upon the truth of the Bible and the revelations of the New Testament. As it is conceded the religion of Christian Science founded by Mrs. Eddy exists, there is no want of definiteness as to what she meant by "the religion of Christian Science as taught by me."

While courts may not often be called upon to investigate the doctrines of a particular religion, if it becomes necessary to do so to see that a trust is administered according to the intention of its creator, they do not hesitate to undertake the task. If necessary, no reason occurs why the "tenets" of Christian Science may not be as readily passed upon as the creed of Congregationalism or the faith of Unitarianism. ***931** Dublin Case, 38 N. H. 459; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82. Its briefer history would probably render much less extensive the necessary investigation. But, as already suggested, the administration of the trust does not concern the plaintiff.

[40] The ingenious and extended argument of the counsel for the plaintiff in support of the claim that this trust is invalid, because too indefinite, loses sight of the fact that the gift here is to trustees, whose discretion the testatrix intended should determine the manner in which the gift should be applied to effect her charitable purpose, and thereby the gift is relieved of the uncertainty which otherwise might defeat it. 2 Per. Tr. §§ 720, 732. If there are authorities to the contrary, they are not followed here. French v. Lawrence, 76 N. H. 234, 81 Atl. 705; Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334.

[41] The argument also omits to consider that a gift for the benefit of the public generally is valid. 2 Per. Tr. § 704; Bisp. Eq. §§ 59, 123. Where the benefit intended is one in which all mankind may share, it is not necessary that some smaller class of humanity be selected. "An establishment for the increase of knowledge among men" (President of United States v. Drummond, cited in 7 H. L. C. 155), "for the benefit, advancement and propagation of education and learning in every part of the world" (Whicker v. Hume, 7 H. L. C. 123; Russell v. Allen, 107 U. S. 163, 172, 2 Sup. Ct. 327, 27 L. Ed. 397), "the furtherance and promotion of the cause of piety and good morals" (Saltonstall v. Sanders, 11 Allen [Mass.] 446), "for the preaching of the gospel of the blessed Son of God, as taught by the people known now as Disciples of Christ" (Sowers v. Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418), "for the advancement and benefit of the Christian religion" (Miller v. Teachout, 24 Ohio St. 525), are examples of valid trusts whose benefits were not limited to a particular class. The beneficiaries of the trusts for printing and publishing the works of Joanna Southcote (Thornton v. Howe, 31 Beav. 14), or of Henry George (George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 6 L. R. A. 511, 14 Am. St. Rep. 754), could only be those who might read

the published volumes, or the general public, because of the common advantage resulting from the dissemination of the doctrines therein advocated.

[42] It may be conceded that if the will permits the trustees, in their discretion, to apply the whole or a portion of the fund to objects which are not charitable, the gift is void. Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334. The application of the numerous cases cited by counsel to this proposition is not perceived. No objects are within the purview of the bequests except the repair of the church buildings and the extension of the religion of Christian Science. If the trustees attempt to apply the fund to other objects, they will violate the trust committed to them. The argument seems to be that it will be possible to promote and extend Christian Science by means that are not charitable. This means (if it means anything) that in the administration of the trust the money may be paid out to persons who are not and who could not be beneficiaries. This is true in all cases where the trust is not performed by delivery of the money directly to the beneficiaries. The latter is rarely the case. To execute the trust for the advancement of Christianity among infidels (Attorney General v. London, 1 Ves. Jr. 243), it could not have been required that the money should be paid to the infidels. Conversion by purchase was not the purpose. In keeping the church in repair the purchase of the necessary materials in the open market would not be an application of the fund to a purpose not charitable, even if the transaction were beneficial to those dealing in such articles. It is the purpose of the expenditure—whether the act has any reasonable prospect of promoting the object of the trust—which must be the test which limits the power of the trustees.

[43] The claim that there is a distinction between the promotion of piety and of religion is not sustained by any authorities. The two words are used as synonymous. Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Bisp. Eq. § 122. If there is a distinction from the derivation of the words in some uses between duty to man and duty to God as well as our fellows (Soule, Eng. Syn. 311, 349), there is no distinction in the meaning in common use by which to test the validity of a charity.

[44] The next contention is that the purpose of the gift is the pecuniary profit of the donee. This is not a fact admitted by the demurrer, but a legal conclusion to be drawn from the will under the circumstances competent for consideration. Assuming that it is sufficiently alleged that the promotion of Christian Science is in some sense a business owned and carried on by the First Church of Christ, Scientist, that fact does not destroy its charitable character. Dartmouth College is in a sense a business. It receives between $100,000 and $200,000 annually for tuition. It may be said to be in the business of selling education to that extent yearly. But that fact does not destroy its character as a public charity. The reason is the absence of private ownership. It is not alleged that any persons, as stockholders or private owners of the First Church of Christ, Scientist, are entitled to personal profit from its alleged business. The allegations all point in the opposite direction: That as a voluntary religious organization ***932** its property is all held for the charitable purposes of the association.

[45] If the necessary effect of promoting Christian Science were to enrich its private owners, the gift could not be sustained as a charity. Haynes v. Carr, 70 N. H. 463, 483, 49 Atl. 638. The facts essential to such conclusion are not alleged. The case is here on d emurrer, and, if material facts have been omitted, the plaintiff will be permitted to amend.

[46] The allegation that Christian Science is not a religion, but a system of faith cure for disease, does not help the plaintiff. Whether the extension and promotion intended is of a religion or a system of therapeutics, or a combination of the two, whether its aims to benefit mankind by insuring their happiness in a future state, or by rendering their existence more tolerable in this world, it is equally a gift for a general public use, and within the definition of Judge Gray in Jackson v. Phillips, 14 Allen (Mass.) 539, 556; A gift "for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, [or] by relieving their bodies from disease, suffering, or constraint."

[47] Even if Mrs. Eddy's scheme were merely educational, if it were such that she might legally publish and promote it in her lifetime, there would be no legal objection to gifts by herself or others to extend and promote it by publishing her writings, or by other lawful means after her death. Thornton v. Howe, 31 Beav. 14.

[48] "By 'public policy' is intended the policy of the state as evidenced by its laws. When the issue is its policy in respect to any question, the only matters which can be considered are its Constitution and statutes and the provisions of the common law as evidenced by the decisions of its courts; for the common law, as modified by the statutes of the state, is the law of the state." Spead v. Tomlinson, 73 N. H. 46, 58, 59 Atl. 376, 379 (68 L. R. A. 432), and authorities cited.

"The question what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ." Vidal v. Girard, 2 How. 127, 197, 11 L. Ed. 205. When, therefore, it is said that "the residuary bequest is void because it is contrary to the public policy of this state," the meaning must be either that the promotion and extension of the religion of Christian Science as taught by Mrs. Eddy is forbidden by the law of the state, or that it is impossible to promote or extend it except by unlawful methods.

[49] If the object itself is lawful, and may be accomplished by lawful methods, it is no objection that unlawful methods might be employed for such purpose; for it will not be inferred, unless expressly declared, that unlawful means were intended to be employed. Jackson v. Phillips, 14 Allen (Mass.) 539. Here the means to be employed are left to the discretion of the trustees. The use of unlawful methods by them would be a violation of their trust.

[50] With the truth of the religious theories inculcated the court has no concern. Even if, upon examination of Mrs. Eddy's writings, the members of the court should entertain the opinion expressed by Sir John Romilly of Joanna Southcote in Thornton v. Howe, and believe her to be "a foolish, ignorant woman," and her teachings absurd and illogical delusions, the personal opinions of the members of the court would not affect the question. Mrs. Eddy had the constitutional right to entertain such opinions as she chose, and to make a religion of them, and to teach them to all others; and their rights of belief are as extensive as hers. Her legal right to teach was not ended with her death. She might dispose of her property by a gift in public charity "for any use that is not illegal." Whether her opinions are theologically true "the courts are not competent to decide." Dublin Case, 38 N. H. 459, 509. "To suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty. *** It is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." 12 Hening's Stat. Va. 84, quoted in Reynolds v. United States, 98 U. S. 145, 163, 25 L. Ed. 244. "Whilst legislation for the establishment of a religion is forbidden and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not less odious because sanctioned by what any particular sect may designate as a religion." Davis v. Beason, 133 U. S. 333, 345, 10 Sup. Ct. 299, 301 (33 L. Ed. 637); State v. White, 64 N. H. 48, 50, 5 Atl. 828, 829. "Every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason, *** provided he doth not disturb the public peace, or disturb others in their religious worship." Bill of Rights, art. 5; Hale v. Everett, 53 N. H. 9, 61, 16 Am. Rep. 82. With the worship of God according to the belief of Christian Science no fault is found.

[51] [52] [53] It is not suggested that Mrs. Eddy's teachings lead to immorality or irreligion, or tend to a breach of the peace or to disturb the religious worship of others. As mere belief cannot constitutionally be made ***933** a crime, the only possibility of offense must be looked for in some overt act necessarily resulting from, or peremptorily inculcated as part of, her system. That act is claimed to be found in the cure of disease without drugs or instruments, which may be said to be an essential element of a belief founded on the rediscovery of the lost art of healing exhibited in the miraculous cures of Jesus Christ recounted in the New Testament. The allegations upon this point are found in paragraphs numbered 5 and 25 in the bill, with the further reference to the contents of the book "Science and Health" before referred to. In this connection it seems necessary again to remark that it is only facts duly alleged that are admitted by the demurrer. Allegations as to what the plaintiff is advised by his counsel, or as to the conflict of Mrs. Eddy's teachings with "the great body of common, statute, and municipal law designed to improve and preserve the health and save and lengthen the lives of the people," are merely arguments. The material facts are: What overt acts are committed under and in pursuance of Mrs. Eddy's teachings? These being presented, whether they are in violation of law is for the court.

Paragraph 5 sets out the existence of a band of about 5,000 Christian Science practitioners, who claim to heal all manner of diseases, practicing upon the following principles: "(1) That no medicines whatever shall be given, and (2) no physical act performed; (3) that the treatment can be carried on as well when the practitioner is absent from the patient as when he is present; and (4) that the healing is effected solely by the exercise of Christ's divine power of working miracles, which disappeared after two or three centuries, but was rediscovered by the testatrix and by her taught to her disciples." The mode of procedure is more fully elaborated in paragraph 25, the short of which is that the cures claimed

to be effected are produced by mental effort through some mysterious action of the book "Science and Health." In short, as counsel describe it, Mrs. Eddy teaches, and her disciples have practiced, a system of faith cure for disease—a system of mental therapeutics. It is also alleged that the system taught by this book denies and reprobates all scientific, preventive, and remedial medicine. In paragraph 27 it is again alleged that the treatment prescribed must be purely mental.

If the court have legislative power to make the law, the natural inquiry would be: What are the results of the system? Five thousand practitioners, collecting $5,000,000 yearly, must have done some business—treated some cases. Have the public been helped or harmed thereby? The only allegations (paragraph 16) are that the system "has been tried upon a large scale, and in many cases has prevented sick persons and young children from being properly treated by regular physicians," reiterated in substance in other paragraphs. In argument, counsel has given a history of two cases where the system was applied with disastrous results. It does not seem necessary to undertake an extensive discussion of Mrs. Eddy's theories as set forth in her writings, because the system may be reduced to the simple principle of treatment of disease without the use of drugs or instruments, or its extirpation by belief in its nonexistence. Is the system against the policy of the state? Is it a crime to attempt to cure physical ills without drugs or surgery? The close association between mental health and physical ills in many cases is common knowledge. The plaintiff does not attempt to say no good has been effected by the system. His distinguished counsel candidly admitted in argument that Mrs. Eddy had done great good; that there were many cases of at least apparent or supposed disease which her system had relieved; but his objection was that she went too far when she professed to be able to cure or extirpate all disease.

Bulletin 30, a Report on National Vitality by Prof. Irving Fisher (a government publication cited by the plaintiff), has been furnished the court. In it (pages 67, 68) the author comments upon the public demand for "drugless treatment" and criticises physicians who fail to see and meet that demand as far as it is rational. He says: "The public will go and should go to those who will render the most effective help. *** There is a quackery that is villainous and injurious. This should be suppressed. But there is another quackery which is well–intentioned and which in spite of ignorance manages to do some good. The good in it should be appropriated by the profession. By always promptly absorbing the best, the profession will be in a position to cast out the worst in 'irregular' systems of therapeutics. It may then recover the ground which it has too often lost. There was no reason why it should have lost hundreds of thousands of patients to Christian Science, except that these patients were for the most part benefited, and greatly benefited, by Christian Science, after having received no benefit, often injury, from the profession. 'Easily, physicians, without knowing it, can produce sickness by pessimistic prophecies, by anxious looks or words.' Had the profession made use of mental therapeutics, not only could they have saved themselves the enmity of these hundreds of thousands, but they could have nipped in the bud the crude metaphysics which teaches the nonexistence of disease and death and the uselessness of any therapeutic agent except those employed by the promulgator."

The beneficial effects to some extent in some diseases appearing by the absence of denial in the bill, the admissions of counsel ***934** in argument, and the authorities furnished the court by them, the case would seem to be one for regulation, either as to the cases in which the system might be used, or the intelligence and education of its practitioners, rather than one requiring absolute prohibition, if law were needed upon the subject. But "it must be remembered that the lawmaking power of the state *** is alone invested with the authority and must determine its public policy. With this power the courts have not been intrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it."Carroll v. East St. Louis, 67 Ill. 568, 571, 16 Am. Rep. 632. "It is not within the power of any court, state or federal, to prescribe what rules and regulations are needful to the welfare, peace, health, safety, and morals of the state." State v. Coal Co. (C. C.) 96 Fed. 353, 368; People v. Hawkins, 157 N. Y. 1, 12, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736.

What is the law of the state, as shown by specific enactments or the general course of legislation, as to the prohibition or regulation of the practice of Christian Science? March 16, 1897, the Legislature passed an act to regulate the licensing and registration of physicians and surgeons, with stringent provisions for the examination and regulation of persons proposing to practice medicine or surgery. Laws 1897, c. 63. By section 11 of the act, persons practicing "Christian Science, so called," were expressly excluded from its restrictions. It thus appears that the practice of Christian Science was brought to the attention of the Legislature 15 years ago, and that neither at that time nor at any time since has the Legislature considered the public good required its practice should be prohibited or regulated. No inference can be drawn, except that in the opinion of the Legislature

restrictive legislation is not required. This conclusion of the Legislature binds the court.

No person could be convicted of crime upon an indictment charging the practice of Christian Science healing, because there is no law which forbids it. Whether a Christian Science practitioner may be found guilty of negligence for unsuccessfully attempting to treat disease, in a suit by the state (Spead v. Tomlinson, 73 N. H. 46, 59, 60, 59 Atl. 376, 68 L. R. A. 432), is a different question. The law permits and regulates the practice of medicine and surgery by express provisions. Laws 1897, c. 63. The possession by the respondent of a license to practice medicine and surgery, duty issued under that act, would not be an answer to an indictment for manslaughter through culpable negligence, under section 8, c. 278, Public Statutes. That a Christian Science practitioner might be liable under the same statute does not establish that the practice of Christian Science is forbidden by law. Nor does Mrs. Eddy teach that all persons believing in the principles of Christian Science are competent to heal all diseases by drugless treatment. Science and Health, 459, 460. If she believed all disease was a mere erroneous mental conception, curable by correcting the mental error, she did not teach that all Christian Science practitioners could cure all diseases in all persons. “If patients fail to experience the healing power of Christian Science, and think they can be benefited by certain ordinary physical methods of medical treatment, then the mind physician should give up the case.” Science and Health, 443; Church Manual, 47.

The plaintiff has not called attention to any statute which the practice of Christian Science contravenes. The defendants cite section 2, c. 16, Laws 1901, requiring any person, knowing or having reason to believe that a person in any of certain relations to him has any malignant communicable disease, to give notice to a health officer. Nothing in Mrs. Eddy's teachings has been pointed out requiring her disciples to violate this law, and it is unnecessary to recite the passages set out in the defendants' brief advising obedience to the laws of the land.

The truth of Mrs. Eddy's science or religion is not to be determined by the court. As a religion, she had the right to believe and teach it. If the scientific principles she believed in run counter to the general belief of the time, she had equal right to believe and teach them. In the absence of legislative reprobation, found in express enactment or in the general course of the legislation of the state, action in accordance with her teachings is not illegal. As neither her belief nor the acts under it are necessarily illegal, the trust to promote the principles she attempted to inculcate is not illegal.

Upon the facts before the court, the residuary clause creates a valid trust. Unless the plaintiff amends his bill, the executor should be advised to pay over the balance of the estate to trustees found duly qualified and appointed by the probate court. With this decree the plaintiff's petition should be dismissed.

Case discharged.

WALKER, J., did not sit. The others concurred.

All Citations

76 N.H. 393, 83 A. 916

KeyCite Yellow Flag - Negative Treatment
On Rehearing Hollis v. Tilton, N.H., May 31, 1939

90 N.H. 119
Supreme Court of New Hampshire.

HOLLIS
v.
TILTON. *

March 7, 1939.

Transferred from Superior Court, Belknap County; Young, Judge.

Action by Franklin Hollis, guardian ad litem, against Frank P. Tilton, guardian, wherein plaintiff moved for reopening of previous accounts of defendant which had been allowed. From a denial of the motion, plaintiff appeals. The superior court transferred questions of law without ruling.

Case discharged.

West Headnotes (37)

[1] **Guardian and Ward**
Management of Estate

If the duties of self-denial, integrity above mercenary motives, diligent attention, and a single eye to interest of ward are not violated, there can be no just claim of guardian's dereliction.

1 Cases that cite this headnote

[2] **Guardian and Ward**
Individual Interest in Transactions

A guardian's duty to protect ward's rights imposes no duty to make personal contributions not fairly derived from office of guardian and not fairly involving a conflict between personal and fiduciary interests.

2 Cases that cite this headnote

[3] **Guardian and Ward**
Individual Interest in Transactions

As respects guardian's right, as agent of surety company signing guardianship bond, to commission on bond as such agent, the ward's right, although more extensive than the right not to suffer actual injury, is not a right to an inequitable benefit from honest dealings in which no imputation of taking advantage of guardian's office may be reasonably charged.

Cases that cite this headnote

[4] **Guardian and Ward**
Individual Interest in Transactions

A guardian should be allowed to retain gains of his personal business when conflict with fiduciary obligations is nebulous as a practical matter.

Cases that cite this headnote

[5] **Guardian and Ward**
Individual Interest in Transactions

Whether a guardian should be allowed to retain gains of his personal business in connection with transactions with ward's estate, where there is no practical conflict with fiduciary obligations, depends upon the circumstances of each case.

Cases that cite this headnote

[6] **Guardian and Ward**
Nature and Form of Proceeding for Accounting

A guardian's account is a proceeding "in rem," since all parties interested in the subject matter are bound by it.

Cases that cite this headnote

[7] **Guardian and Ward**
Operation and Effect

The statute requiring guardian to settle account with probate court as often as once in three years contemplates that account shall be

complete and final for the period it covers, and the decree upon the accounting has full force of "final judgment." Pub.Laws 1926, c. 289, § 5.

Cases that cite this headnote

[8] **Judgment**
Jurisdiction of Subject-Matter

A judgment in an in rem proceeding with no notice of proceeding is a nullity.

Cases that cite this headnote

[9] **Mental Health**
Form and Sufficiency

In proceeding in an adjudication of insanity, notice of petition for adjudication and of return day for hearing must be served upon person alleged to be insane, as well as of time and place for his examination by committee of inquisition. Pub.Laws 1926, c. 291, §§ 1, 2.

Cases that cite this headnote

[10] **Mental Health**
Individual Interest in Transactions

Where guardian was agent of surety company which was authorized to do business locally and which signed guardianship bond, premiums on which were paid out of insane ward's estate, guardian was entitled to retain commissions received as such agent on execution of bond. Pub.Laws 1926, c. 310, § 2.

1 Cases that cite this headnote

[11] **Mental Health**
Proceedings for Accounting

Service of notice on ward, either personally or by publication, of filing of guardian's accounts would have been a nullity because of ward's insanity, and hence ward was not chargeable with default. Pub.Laws 1926, c. 289, § 5.

Cases that cite this headnote

[12] **Mental Health**
Proceedings for Accounting

Mental Health
Necessity of Appointment

A ward's incompetency did not deprive ward of right to have ward's interests protected through representation in guardian's accounting proceeding, and default could not be entered against ward.

Cases that cite this headnote

[13] **Mental Health**
Opening or Vacating

As respects right of guardian ad litem to have previous accounts of guardian reopened, which accounts were allowed after publication by notice but with no appointment of guardian ad litem, appearance entered by attorney for insane ward's brother, for brother, which was not shown to have been in ward's behalf, did not show that ward was represented in accounting proceedings.

1 Cases that cite this headnote

[14] **Mental Health**
Opening or Vacating

Decrees entered in guardian's accounting proceedings, in which there was publication by notice, but no appointment of guardian ad litem to represent insane ward, were not conclusive upon ward, and ward was entitled to have them reopened as though there had been no hearings or decrees upon them.

Cases that cite this headnote

[15] **Mental Health**
Opening or Vacating

Where accounts filed by guardian were allowed after publication by notice but with no appointment of guardian ad litem to represent insane ward, subsequently appointed guardian ad litem who had accounts reopened could raise question of guardian's duty to account for commissions

which guardian, as agent of surety company which signed guardianship bond, received as such agent.

Cases that cite this headnote

[16] **Mental Health**
Actions

Insane persons are peculiarly under care and protection of court because of incapacity.

Cases that cite this headnote

[17] **Mental Health**
Guardian Ad Litem or Next Friend

The office of next friend has no common-law standing except in bringing actions.

Cases that cite this headnote

[18] **Mental Health**
Propriety of Representation

When one non sui juris becomes a party to a proceeding not instituted by him, any representation for him must have official authorization, and unless otherwise provided by statute, a guardian ad litem is the more appropriate representation.

1 Cases that cite this headnote

[19] **Mental Health**
Propriety of Representation

The authority of a next friend to act in such capacity on behalf of insane person must be denied unless he so acts under judicial appointment in a proceeding not brought by him.

1 Cases that cite this headnote

[20] **Mental Health**
Necessity of Appointment

Upon filing of guardian's account, insane ward, being non sui juris, could not appear and oppose or default, since notice to ward was impossible, nor could the court properly represent ward, and hence, to give decree effect as valid judgment, guardian ad litem must be appointed.

1 Cases that cite this headnote

[21] **Mental Health**
Necessity of Appointment

A known incompetent should be represented in probate proceedings on guardian's account.

Cases that cite this headnote

[22] **Mental Health**
Necessity of Appointment

A guardian's accounting proceeding, although "in rem," is "in personam" as between guardian and ward as respects insane ward's right to be represented by a guardian ad litem therein.

Cases that cite this headnote

[23] **Mental Health**
Necessity of Appointment

Where it definitely appears that incompetent's rights and interests will be affected by probate decree, guardian ad litem must be appointed.

2 Cases that cite this headnote

[24] **Mental Health**
Necessity of Appointment

A guardian seeking allowance of his account stands as a claimant, and ward, in any contest over it, stands as defendant, seeking to defeat claim against guardian, and guardian must establish merits of the account, and hence ward has right to representation through guardian ad litem.

Cases that cite this headnote

[25] **Penalties**
Imposition and Grounds in General

Penalties are disfavored in civil matters.

Cases that cite this headnote

[26] **Process**
Institution of Action or Proceeding

In proceeding in rem, rights of parties interested in the res are affected and parties are entitled to notice, though it be only constructive, regardless of whether property is seized in the proceeding or is already under court's control.

Cases that cite this headnote

[27] **Process**
Institution of Action or Proceeding

Notice may be dispensed with in cases of practical necessity or special expediency, in which case a right of appeal exists, at least in some form to test validity of the action.

Cases that cite this headnote

[28] **Process**
Persons Against Whom Process May Issue

"Notice" implies delivery and receipt of information given either actually or constructively, and if there can be no receipt of notice by reason of legal incapacity or incompetency, then there can be no notice, even by legislative fiat, in which case "due process" requires a substitution for notice through appointed representation.

Cases that cite this headnote

[29] **Process**
Requisites and Validity of Writs or Other Process in General

While manner and form of notice in an in rem proceeding may differ from that in one in personam, it must be reasonably efficient to lead to actual notice so far as information and circumstances permit.

Cases that cite this headnote

[30] **Process**
Inability to Make Personal Service

Generally, constructive notice, as by publication, is insufficient if personal notice in some form is reasonably practical.

Cases that cite this headnote

[31] **Trusts**
Individual Interest in Transactions

The principle that a fiduciary can make no profit out of the trust estate is generally held to be strict and rigid.

3 Cases that cite this headnote

[32] **Trusts**
Individual Interest in Transactions

The rule that a fiduciary can make no profit out of the trust estate should not be applied so as to produce inequitable results of undue hardship, and fiduciary should not be required to bestow gifts upon trust and sacrifice his personal interests.

1 Cases that cite this headnote

[33] **Constitutional Law**
Guardianship

"Due process" requires that insane ward have opportunity, in reasonable manner, to be represented upon filing of guardian's account, and court was under duty to appoint guardian ad litem.

Cases that cite this headnote

[34] **Constitutional Law**
Proceedings

Requirements of "due process" are not intended to affect proceedings in probate court which do not require notice, at least if right of appeal is secured, but such procedure is exceptional.

Cases that cite this headnote

[35] **Constitutional Law**
Process or Other Notice

"Notice" is a constitutional requirement of "due process" which includes regular allegations, opportunity to answer, and trial according to some settled course of procedure. Const. pt. 1, art. 15.

Cases that cite this headnote

[36] **Courts**
Nature and Scope of Jurisdiction in General

The jurisdiction of probate courts is that of superintendence.

Cases that cite this headnote

[37] **Courts**
Review and Vacation of Proceedings

The statutory right of appeal from final decree or order of probate judge indicates legislative purpose to endow all final action in probate court with same attributes of a judgment which final action in superior court has upon appeal. Pub.Laws 1926, c. 311, § 1.

Cases that cite this headnote

***31** Probate appeal. The defendant is the guardian of an insane person. He filed three successive accounts each of which was allowed, after publication by notice, but with no appointment of a guardian ad litem to represent his ward. A fourth account has been filed and as a party to it the plaintiff as the ward's guardian ad litem appointed on the petition of a relative of the ward has entered appearance. Incident thereto he moved that the three previous accounts be reopened. The appeal is from the denial of the motion.

The Superior Court (Young, J.) has transferred without ruling certain questions of law. Two of them are whether, by reason of the ward having no guardian ad litem appointed to represent her, the decrees allowing the three accounts are void or voidable, and whether the plaintiff may contest the accounts as though there had been no hearings or decrees. As bearing on these questions, one of the admissibility of certain evidence offered by the defendant and stated in the opinion is also transferred. Another question is of the defendant's chargeability for a special item which the opinion discloses.

Attorneys and Law Firms

Demond, Sulloway, Piper & Jones, of Concord, and Franklin Hollis, pro se, for plaintiff.

Richard F. Upton, of Concord, Fred A. Tilton and Frank P. Tilton, pro se, both of Laconia, and Robert W. Upton, of Concord, for defendant.

Opinion

ALLEN, Chief Justice.

[1] The defendant asserts that the statute (Pub.Laws, c. 289, § 5) requiring a guardian to settle an account with the Probate Court as often as once in three years, contemplates that the account shall be complete and final for the period it covers. And he also asserts that the decree upon the accounting has the full force, standing and attributes of any final judgment. These positions are correctly taken. The accounts are more than provisional and tentative. The statutory requirement is "to settle" them, and no distinction is made between an interim and a final one. Whatever the character of a trustee's annual account as required by his bond (Pub.Laws, c. 309, § 1, subd. 2), it does not indicate any statutory purpose that a guardian's account shall not cover all accountable matters for the period it covers, and the decree thereon not be final.

[2] It is conceded that the ward had no notice of the accounts sought to be re-opened. Her insanity would have made any personal service of notice on her a nullity, and the notice by publication could no more, if as much, be notice to her. And having no notice, she is not chargeable with a default.

The subject of notice in legal proceedings of a special character has had much ***32** divergency of treatment, and the complexity of applicable considerations has been productive of much difficulty in determining its requirements in such proceedings. Failure to correlate and coordinate the considerations, with emphasis on some in disregard of others, accounts in substantial measure for the confusion and inconsistency that is found in any

effort of reconciliation and consistency. Any formulated test which has been declared encounters qualifications and exceptions, declared by reason of peculiar features but not always with adherence to basic principles.

[3] At the outset, it is to be observed that notice is a constitutional requirement of due process, Const. pt. 1, art. 15, "No one can be deprived of his rights or property by judicial process, without notice and an opportunity to make his defence." Holbrook v. Bowman, 62 N.H. 313, 322. "It is a first principle of justice, everywhere recognized, that no judgment or decree, affecting the rights of any person, and by which his rights may be concluded, shall ever be rendered without notice to him of the proceeding." Brown v. Sceggell, 22 N.H. 548, 552. "'Due process of law' generally implies and includes regular allegations, opportunity to answer, and a trial according to some settled course of proceeding." Holman v. Manning, 65 N.H. 228, 229, 19 A. 1002, 1003. "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." Stuart v. Palmer, 74 N.Y. 183, 30 Am. Rep. 289.

"But it is clear that the fourteenth amendment [to the federal constitution, U.S.C.A.] in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided." Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 393, 16 S.Gt. 344, 345, 40 L.Ed. 467. "If it be said that it rests with the legislature of the state in which the attachment is issued to declare what shall be a sufficient notice, the answer is that that may be so, provided there be a reasonable and bona fide provision for giving notice. But certainly a legislature cannot enact that no notice need be given, or make that a notice which is no notice at all. To do that would be a fraud on the constitution." Martin v. Central Vermont R. Co., 50 Hun 347, 350, 3 N.Y.S. 82, 83.

Whether a judgment in rem is in ultimate reality a form of a judgment in personam, or whether it is a judgment against property or an adjudication of a status, impersonally, regarding the property or status as a party to the proceeding, and the distinctions between judgments in rem and judgments quasi in rem do not here demand consideration. The conflicting views, one that "All proceedings, like all rights, are really against persons" (Tyler v. Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814), and one that "The property itself is in such actions [of an in rem character] the defendant" (Freeman v. Alderson, 119 U.S. 185, 187, 7 S.Ct. 165, 166, 30 L.Ed. 372), call for no preference of acceptance.

[4] [5] [6] [7] As a practical matter the conflict is in general more of statement than of substantial difference. It is not intended to suggest that a judicial proceeding may not result in a judgment which determines the rights and liabilities of persons, even everyone, in respect to the subject matter of the proceeding, in addition to those who are immediate parties to it. In an in rem proceeding, the rights of parties interested in the res are affected, and they are entitled to notice, though it be only constructive. Windsor v. McVeigh, 93 U.S. 274, 278, 279, 23 L.Ed. 914; Hassall v. Wilcox, 130 U.S. 493, 504, 9 S.Ct. 590, 32 L.Ed. 1001. "The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard." Pennington v. Fourth Nat. Bank, 243 U.S. 269, 272, 37 S.Ct. 282, 283, 61 L.Ed. 713, L.R.A.1917F, 1159. Whether property is seized in the proceeding or is already under the court's control, does not make a material difference. While the manner and form of notice in an in rem proceeding may differ from that in one in personam, yet it must be reasonably efficient to lead to actual notice, so far as information and circumstances permit. A judgment in an in rem proceeding with no notice of the proceeding is a nullity as much as in an in personam one. In general, constructive notice as by publication, is insufficient if personal notice in some form is reasonably practical.

***33** [8] Notice implies delivery and receipt of information, given either actually or constructively, and if there can be no receipt of notice by reason of legal incapacity or incompetency, then there can be no notice, even by legislative fiat. Due process would then seem to require a substitution for notice through appointed representation. An example is found in the statute relating to the sale of real estate of which there is conditional ownership including possible future interests of possible unborn persons, for whom a next friend is appointed. Pub.Laws, c. 213, §§ 28-32. It is process sufficient to satisfy the constitutional requirement.

[9] A guardian's account has been held to be a proceeding in rem, for the assigned reason that "all parties interested in the subject-matter" are bound by it. Clark v. Courser, 29 N.H. 170, 173. An administrator's or executor's account has also been held to be of the same character. Starkey v. Kingsley, 69 N.H. 293, 39 A. 1017. But there is a practical difference between an account of a guardian and one in settlement and distribution of an estate. In the former, "Whether the ward's property has been judiciously and legally managed and invested by the guardian is a proper subject of investigation and inquiry upon the adjustment of the guardian's accounts in the probate court, ***." Pendexter v. Cate, 66 N.H. 556, 557, 22 A. 560. In the latter, "The object of the proceeding thus provided [for distribution] is to establish the title to the fund in the possession of an executor or administrator, as against all the world". Starkey v. Kingsley, supra, page 294, 39 A. page 1017. This case related to a Massachusetts proceeding, but its reasoning is applicable to a local one of similar nature. The need of notice in the proceeding is thus discussed (page 294, 39 A. page 1017): "*** it is not always possible to give personal notice to all interested parties. The existence of an interest, or the names and residences of persons supposed to have an interest, are sometimes unknown, and cannot be ascertained, but the interest itself is a guaranty that the person having it will probably learn of the proceedings if public notice of their pendency is given. Hence, the law generally regards notices by publication as sufficient in respect to such parties, even if it fails to reach them in fact."

[10] [11] [12] Upon the filing of a guardian's account, the impossibility of notice to the ward even constructively, is apparent. If notice were possible, the ward, being non sui juris, could not appear and oppose. Nor can he default. Nor can the court properly represent him. The conclusion is inescapable that to give a decree effect as a valid judgment, a guardian ad litem for the ward must be appointed. Due process requires that the ward have the opportunity, in a reasonable manner, to be represented, and with the court's attention necessarily called to the lack of service upon the ward, its discretion to appoint a guardian ad litem becomes a duty to appoint. No sufficient reason for not appointing can be suggested. A failure to appoint could not be the exercise of a sound and just discretion. An appointment is no hardship on the guardian, but the failure of one is an undue denial of the ward's right to be represented. The occasion to appoint establishes the requirement if the decree is to have the attributes of a judgment. If substantial justice is the desired attainment, it is as important that a known incompetent should be represented in probate proceedings as well as when he is a litigant in other courts. "The orderly course of justice demands that a party apparently irresponsible should not maintain litigation in his own name." Moore v. Roxbury, 85 N.H. 394, 397, 159 A. 357, 359.

[13] The defendant claims there was notice, because the proceeding is in rem. But there has been no notice to the ward. As to her notice cannot be given. She cannot, by herself, become a party to the proceeding. But her incompetency does not deprive her of the right that her interests in the proceeding shall be protected. No default may be entered against her. She may have protection through representation, and she is entitled to it as the only method by which, as to her, an ex parte character of the proceeding may be avoided.

[14] [15] Notice may be dispensed with in cases of practical necessity or special expediency, but in them a right of appeal exists, at least in some form to test the validity of the action taken. La Bonté v. Berlin, 85 N.H. 89, 94, 154 A. 89. Tax assessments are not invalid for want of notice, nor are probate court proceedings when statutory authority to act without ***34** notice is granted. As to tax assessments, "*** whenever by the laws of a State *** a *** burden is imposed upon property for the public use, *** and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, ***." Davidson v. New Orleans, 96 U.S. 97, 104, 105, 24 L.Ed. 616. As to proceedings in the probate court not requiring notice, they accord with methods and practices pursuant to common law (Knight v. Hollings, 73 N.H. 495, 499, 63 A. 38), and the requirements of due process were not intended to affect them, at least if the right of appeal were secured. Such proceedings are exceptional to regular judicial procedure, and the reason and occasion for their special treatment are unavailable to bring the case here within their application. Neither necessity nor expediency may be successfully urged.

[16] The defendant says the account is not an adversary proceeding. This can hardly be so. So far as the guardian debits himself, the question is presented whether he has

sufficiently charged himself. So far as he credits himself, the question arises for examination whether the credits are proper. Whatever is allowed him is a charge against the ward's estate. His account is a claim that he should be charged for no more and be credited for as much as the account shows. The merits of the claim are to be judicially determined, and the decree affects the ward's estate. The guardian and the ward are two definite parties, in respective positions like those of plaintiff and defendant. As to the world, the proceeding may be in rem, but it is in personam as between the guardian and his ward, in any fair escape from "the tyranny of words". Their mutual rights and liabilities are in direct issue.

[17] [18] One ground urged for exception to the need of notice is that the settlement of the guardian's accounts was in the nature of an "administrative and ministerial" function rather than "judicial" in character. The jurisdiction of the probate courts is phrased as that of "superintendence." But the defendant's insistence that the decrees upon the settlement of the accounts were judgments with all the attributes of binding effect and conclusiveness upon the ward, concedes the judicial character of the proceeding. Furthermore, while it is said of courts of probate that "Originally their powers were almost entirely administrative and ministerial" (Wood v. Stone, 39 N.H. 572, 575), it has also been said that they are to be regarded as courts of general jurisdiction on the subjects upon which they have received authority to act, including that of guardianship, and are "entitled to all the presumptions in favor of their proceedings which are allowed in the case of other tribunals of general jurisdiction, more especially as they are now made, by statute, courts of record". Kimball v. Fisk, 39 N. H. 110, 120, 75 Am.Dec. 213, affirmed in Knight v. Hollings, 73 N.H. 495, 497, 498, 63 A. 38. The statutory right of appeal from any "decree, order, appointment, grant or denial of a judge [of probate], which may conclude" one's "interest and which is not strictly interlocutory" (Pub. Laws, c. 311, § 1), and which transfers the subject-matter of the appeal to the superior court de novo, is significant in its indication of the legislative purpose to endow all final action in the Probate Court with the same attributes of a judgment which final action in the Superior Court upon appeal has.

[19] The defendant suggests the proceedings in an adjudication of insanity as an analogous situation where no appointment of a guardian ad litem is required. The analogy fails because of faulty reasoning to support it. Notice of the petition for the adjudication and of the return day for hearing must be served upon the person alleged to be insane, as well as of the time and place for his examination by the committee of inquisition. Pub.Laws, c. 291, §§ 1, 2. At the hearing, if he contests the charge, no guardian ad litem may be appointed for him as a sane person, and none is needed for him if he is insane, since the only issue relates to sanity. Insanity being found, a general guardian's appointment follows. For an insane person to be represented by a guardian ad litem for the purpose of opposing a finding of insanity involves defective syllogism. The incidental issue of the suitability of the guardian proposed for appointment is a separate one, and there must be notice in respect to it. The statute authorizing certain ***35** cases to be acted upon without notice (Pub.Laws, c. 296, § 2) does not include the appointment of guardians of insane persons.

[20] The suggestion that a next friend of the ward may chance to be informed of the pendency of the account and may chance to be enough interested to appear for the ward, and thus obviate the need of the appointment of a guardian ad litem, has no persuasive force of merit. Insane persons and "infants are peculiarly under the care and protection of the Court" (Dow v. Jewell, 21 N.H. 470, 487) because of their incapacities, and a haphazard representation for them, when competents are entitled to definite notice and service of process, does not tend to secure such desired protection. Reasonable discretion cannot accept uncertainty as an equivalent for security.

[21] It is said that the long-established practice has been to dispense with the appointment of guardians ad litem in accounting proceedings. Assuming the practice, the error is too serious and basic to justify its continuance in respect to a guardian's accounting. Conceding that in the settlement of other probate accounts, an incompetent's interest does not in every instance demand the appointment, yet where it definitely appears that an incompetent's rights and interests will be affected by the decree, occasion to appoint a guardian ad litem for him is insistent.

The defendant has offered evidence to show that a copy of each of the first three accounts was sent to a brother of the ward, as her nearest relative, followed by his approval in each instance before any allowance by the court, and that when the third account was filed the brother appeared by an attorney, who later consented to the allowance of

the account. The purpose of the evidence is to support the claim that the ward was in fact represented in the settlement of the accounts by her brother as a next friend. [22] [23] [24] It does not appear that the brother undertook to act for the ward in such capacity. The appearance entered by his attorney was for him; as one who might be an heir of the ward if he survived her, he was interested only for himself, so far as is shown. Furthermore, when one non sui juris becomes a party to a proceeding not instituted by him, any representation for him must have official appointment or authorization, and unless otherwise provided by statute a guardian ad litem is the more appropriate representation. Except in bringing actions the office of next friend has no common law standing. This is the rule declared in Clarke v. Gilmanton, 12 N.H. 515, a case in which the procedural situation is substantially the same as in the case here.

[25] The defendant asserts that the ward is the "moving" party in any hearing on a guardian's account, but this position is untenable. The guardian, filing his account, and seeking its allowance, stands as a claimant, while the ward, in any contest over it, stands as a defendant seeking to defeat the claim against him. The guardian petitions that the account be allowed, while the ward joins issue in objection and protest. It is for the guardian to establish the merits of the account.

[26] Even if the distinctions between a guardian ad litem and next friend are regarded as belonging to an outworn technique, it remains that unless the next friend acts under judicial appointment in a proceeding not brought by him, his authority to act in such capacity must be denied. To hold that he may bind the ward would validate an irregular procedure and a shadowy authority. As a method of protecting the ward's rights, it is not to be commended or countenanced, when a more authentic and authoritative method is readily available. As already suggested, the effectiveness of a chance volunteer's assistance to meet the ward's need of help and protection seems illusory.

In Tripp v. Gifford, 155 Mass. 108, 29 N.E. 208, 31 Am.St.Rep. 530, it was held that a next friend of an infant could not compromise or settle a suit brought for the infant unless judicial sanction for his action affirmed it. The case here is on comparable equality with it. The ward's brother assumed no responsibility judicially imposed on him, and no judicial sanction for his consent to the accounts is shown. His consent to the account in connection with which he entered an appearance implied no responsible examination and investigation of it, nor was consent equivalent to a report in behalf of the ward as an incident of due procedure relied upon and adopted by the court. It was no more, in practical effect, than a withdrawal of appearance, leaving the ward without such uncertain and indefinite ***36** representation as the appearance may have furnished. In this respect the case is in no conflict with that of Beliveau v. Amoskeag Mfg. Co., 68 N.H. 225, 40 A. 734, 44 L.R.A. 167, 73 Am.St.Rep. 577. There an action instituted for a minor by a next friend was entered in court and thereafter settled by an agreement for judgment. The next friend in bringing the action required no actual official appointment, and judicial sanction of the settlement was implied from the entry of the agreement for judgment. Eaton v. Eaton, N.H., 3 A.2d 832. There was a dissent to the decision in the Beliveau case, and principle and justice permit no extension of the authority therein declared of a next friend when the authority is official only by strained implication, and is irregular, vague and superficial.

[27] The decrees allowing the three accounts are without conclusive effect upon the ward, and the appeal from the dismissal of the petition to have them reopened as though there had been no hearings or decrees upon them should be sustained.

[28] The defendant was the agent of the surety company which signed with him his guardianship bond. The annual premium charges by the surety have been paid from the ward's estate, and the defendant as its agent has received commissions thereon as such agent. The question is transferred whether the plaintiff may raise the question of the defendant's duty to account for the commissions as belonging to the ward. Since, as to the ward, there have been no proper hearings and no valid action taken upon the accounts under consideration, the question is answered affirmatively. In a literal limitation, the question calls for no determination of the alleged duty. But it is understood that the issue of the duty, if it might be raised, was also intended to be a matter of inquiry in the transfer, and it is considered.

[29] The principle that a fiduciary can make no profit out of the trust estate is generally held to be strict and rigid. "*** The guardian's trust is one of obligation and duty, and not one of speculation or profit, and is governed by strict rules. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit

in any contract, or purchase, or sale, as to the subject of the trust." French v. Currier, 47 N.H. 88, 98. The theory is that a trustee should not place himself in a position where the influence of self-interest may tempt him to take advantage of the beneficiary. "The rule in such cases springs from his [the trustee's] duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity." Magruder v. Drury, 235 U.S. 106, 119, 35 S.Ct. 77, 82, 59 L.Ed. 151.

[30] But the rule should not be applied in so arbitrary a manner as to produce inequitable results of undue hardship. While the trustee may not profit from the trust, he should not be required to bestow gifts upon it. "*** the policy of the law ought to be such as to induce honorable men, without a sacrifice of their personal interests, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character." 2 Story Eq.Jur. § 1268. The qualification that a trustee should not be called upon to sacrifice his personal interests is not so unreasonable that it should have no allowance.

[31] A corporate trust company would hardly be required to furnish rent free a safety deposit box for the securities of a trust of which it was the trustee. If a trustee of real estate has occasion to purchase materials for needed repairs, it would seem a harsh requirement that he could not buy them from a store in which he had an interest. If he were an insurance agent, the injustice of depriving him of commissions on policies of insurance for the building would seem even more striking. The beneficiary's claim to the commissions would be in the nature of a penalty, which the law disfavors in civil matters.

In Turnbull v. Pomeroy, 140 Mass. 117, 3 N.E. 15, 16, a partnership was allowed to retain commissions on the sale of goods consigned to it by a manufacturing business of which one of the partners was a trustee. One reason assigned for the allowance was that "there may be circumstances under which he [the trustee] may be allowed an additional sum for extraordinary services which it was not his duty ***37** to render; the allowances not standing on contract any more than in the common case, but being subject to the discretion and control of the court."

[32] In obtaining a bond and paying annual premiums, nothing was done which was not a proper charge and expense against the ward's estate, if another person had been the surety's agent. "Every guardian shall be allowed a reasonable compensation for all proper expenses and services in the discharge of his trust." Pub.Laws, c. 289, § 6. He must give a bond to the court with sureties, for the faithful discharge of his trust, in such amount as the court finds reasonable. Id. § 2. The protection thus afforded seems ample to meet any inducement to obtain a bond unreasonably large in amount or at an excessive premium rate. The duty to protect the ward's rights imposes no duty to make personal contributions not fairly derived from the office of guardian and not fairly involving a conflict between personal and fiduciary interests.

[33] [34] While the right of the ward is a right more extensive than the right not to suffer actual injury, it is not a right to an inequitable benefit from honest dealings in which no imputation of taking advantage of the office may reasonably be charged. If the duties of "self-denial", "an integrity that will be above mercenary motives", "diligent attention", and "a single eye to the interest of the wards" (Sparhawk v. Allen, 21 N.H. 9, 26) are not violated, there can be no just claim of dereliction.

[35] If a guardian may be compensated for extraordinary or special services, as in acting as an attorney in legal proceedings in which his ward's interests are involved (Wendell v. French, 19 N.H. 205, 210), it is consistent that he should be allowed to retain the gains of his personal business when conflict with his fiduciary obligations is nebulous as a practical matter.

[36] In Tucker v. New Hampshire Trust Co., 69 N.H. 187, 44 A. 927, a trust company which deposited funds of which, under statutory authority, it was the trustee, in its savings department, was held to have acted properly in so doing, and the deposit had no preference over other deposits in the subsequent insolvency of the trustee. The guardian here had to select a surety company which might do business locally. Pub.Laws, c. 310, § 2. Having selected such a company, he should be as much entitled to his commission as the trustee bank in the Tucker case had the right to deposit the trust fund in its own savings department.

[37] The equities of a case properly depend upon its special circumstances, and no defined line of application

may be drawn. The equities here are considered to be resolved to permit the guardian to retain the commissions. The principle that a fiduciary must not do business with himself personally is not discounted. The virtue of a general principle is often maintained, and at times strengthened, by exceptions to it.

Case discharged.

All concurred.

All Citations

90 N.H. 119, 5 A.2d 29

Footnotes

* Judgment affirmed on rehearing 6 A.2d 753.

35 S.Ct. 77
Supreme Court of the United States

ALEXANDER R. MAGRUDER
and Isabel R. Magruder, Appts.,
v.
SAMUEL A. DRURY and Samuel Maddox, Trustees.

No. 17
|
Argued October 27, 1914.
|
Decided November 30, 1914.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, overruling exceptions to the accounting of trustees as stated by an auditor. Reversed and remanded for further proceedings.

See same case below, 37 App. D. C. 519.

The facts are stated in the opinion.

West Headnotes (4)

[1] **Federal Courts**
Review of District of Columbia courts

Errors not of a fundamental character not presented to the Court of Appeals of the District of Columbia for consideration and which were waived, will not be considered on an appeal which lies only by reason of the amount involved.

4 Cases that cite this headnote

[2] **Federal Courts**
Review of District of Columbia courts

An allowance to two trustees appointed to perform testamentary trusts of 5 per cent. commission on the principal and 10 per cent. on the income will not be disturbed by the federal Supreme Court on appeal from the Court of Appeals of the District of Columbia, where such allowance was approved by both courts below.

8 Cases that cite this headnote

[3] **Trusts**
Individual Interest in Transactions

Trustees who invest trust funds in notes owned by a firm of real estate brokers in which one trustee is a partner, paying full face value, must account for commissions received by the firm from the makers of the notes when the loans were made which the notes represented.

88 Cases that cite this headnote

[4] **Judgment**
Effect of Judgments of State Courts in United States Courts

Expenses of administration of a decedent's estate allowed to executors by Massachusetts probate court in settling their accounts and turning their property over to trustees appointed under the will by the District of Columbia court in an equity cause, determining that the testator was last domiciled in that district, must be allowed to the trustees by the District of Columbia courts.

11 Cases that cite this headnote

Attorneys and Law Firms

****78** ***107** Mr. **Nathaniel Wilson** for appellants.

***108** Mr. **J. J. Darlington** for appellees.

Opinion

***110** Mr. Justice **Day** delivered the opinion of the court:

William A. Richardson, for some years before his death chief justice of the court of claims of the United States, died at Washington, District of Columbia, October 19th,

1896. By his last will and testament, dated August 9, 1895, he described himself as 'chief justice of the court of claims at Washington, a citizen and inhabitant of Cambridge, in the county of Middlesex and commonwealth of Massachusetts, and having property in said county.' By his will he appointed his brother George F. Richardson, of Lowell, Massachusetts, and Samuel A. Drury, of Washington, District of Columbia, as executors and trustees. The will was probated in the probate court of Middlesex county, Massachusetts, on the 28th day of October, 1896. It appears in the record that the deceased had a little real estate in Massachusetts, but the main portion of his estate was, and always had been, in the city of Washington. The probate of the will in Massachusetts seems to have been in deference to the expression in the will as to his place of residence. Subsequently, and upon certain proceedings being instituted to enforce taxation in Massachusetts of the estate in the hands of the executors, the supreme judicial court of Massachusetts held that the actual residence of Mr. Richardson could be inquired into in that proceeding, and upon the facts shown it was in the District of Columbia. Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224. That case grew out of the imposition of personal taxes amounting to $7,500 annually on the assets of the estate. As this would have nearly exhausted the income of the ***111** estate and cut off the support of the beneficiaries under the will, a bill for injunction was filed in this case in the supreme court of the District by the father in behalf of the present appellants, who were the beneficiaries under the will. An amended bill was subsequently filed, having for its object an injunction against the executors from paying out of the estate any taxes in the state of Massachusetts, it being stated that, notwithstanding the recitals of the will, William A. Richardson's place of residence and last domicil was in the District of Columbia, where the assets and personal securities of the estate were in the keeping of Samuel A. Drury, also a resident of the District of Columbia. In addition to the injunction, the bill prayed an account of the property ****79** of the estate which had come into the hands of the executors under the will, and that they might be required to file an account from time to time. Mr. George F. Richardson, one of the executors, being a resident of the state of Massachusetts, and declining to submit to the local jurisdiction, the amended bill was filed against Samuel A. Drury alone. The answer of Drury stated that he had the custody and control of the assets and personal securities, and expressed his willingness to account in the court or in any other jurisdiction in that behalf for the moneys received by him as executor and trustee. Such proceedings were had that, on April 1, 1899, a decree was made continuing the restraining order theretofore made in the case, and finding that the late William A. Richardson was last domiciled in the District of Columbia, where the beneficiaries lived, and it was ordered and decreed that Samuel A. Drury and Samuel Maddox, both of the District of Columbia, be appointed trustees to perform the trusts created in the will, and they were 'authorized and empowered to receive from the executors named in said will all the property whereof the deceased died seised and possessed, provided, nevertheless, that the said Samuel A. Drury and Samuel Maddox shall first give ***112** separate bonds in the penal sum of $25,000 each, with one or more securities to be approved by this court, conditioned for the faithful discharge of their duties as such trustees.' Some five reports were made by the auditor to whom the matter was referred to take accounts, and various proceedings were had, which are fully set out in the opinion of the court of appeals in this case (37 App. D. C. 519). It is enough for our purposes to state that the proceedings resulted in an order of reference to the auditor to state the account of the trustees. This order was made on January 17, 1909. The auditor named having died, a further order of reference was made to another auditor to 'state the final account of the trustees and the distribution of the trust estate in their hands, and report such commission or compensation to the trustees as may be appropriate and proper.' To this report certain exceptions were filed by the present appellants. Upon final hearing, a decree was entered by which these exceptions were overruled, and the court of appeals sustained this action of the supreme court (37 App. D. C. supra). Hence this appeal.

The argument has taken a wide range, and questions are discussed which are not embraced in the exceptions filed to the auditor's report which was the basis of action in the courts below, and in the court of appeals that court dealt with only three exceptions, stating that a number of exceptions were entered to the report, and that those relied upon in that court related to the allowance of a 5 per cent commission on principal and 10 per cent on income; to the $18,800 item allowed by the Massachusetts court; and to alleged profits made by the trustees in the purchase of notes for reinvestment.

Under the statute in force at the time of this appeal, owing to the amount involved, the decision of the court of appeals might be brought by appeal in review before

this court. This court therefore sits as an appellate court *113 for the purpose of reviewing the decree of the court of appeals, and that is the extent of the jurisdiction here. Original objections to the auditor's report and the decree of the supreme court, not brought forward in the court of appeals, cannot be made here. Alleged errors not of a fundamental or jurisdictional character, which were not presented to the appellate court for consideration, and which were waived, either expressly or by implication, will not be regarded as before this court. Montana R. Co. v. Warren, 137 U. S. 348, 351, 34 L. ed. 681, 682, 11 Sup. Ct. Rep. 96; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 98, 58 L. ed. 521, 523, 34 Sup. Ct. Rep. 229; Grant Bros. Constr. Co. v. United States, 232 U. S. 647, 660, 58 L. ed. 776, 784, 34 Sup. Ct. Rep. 452. We shall, then, consider the assignments of error which were brought to the attention of the district court of appeals.

First, as to the allowance to the trustees of 5 per cent commission on the principal, and 10 per cent on the income. As to this allowance, the auditor made a lengthy finding of fact, setting forth in detail the services rendered by the trustees over a period of ten years, finding, as to the character of the estate, that the great bulk thereof was second trust notes of small amounts, as to which the auditor says that the transactions were almost innumerable, the total number of notes approximating three thousand, and he sets forth in detail other services involving care of the real estate, looking after the repairs of the property, acquiring parcels of real estate, and the sale thereof, and saying in conclusion that he had no hesitancy in finding that the trustees were well entitled to the commissions allowed. This allowance met with the approval of both the District supreme court and the court of appeals, and seems to have the sanction of an earlier decision of this court, where it was said that such allowances were customary in Maryland and the District of Columbia. Barney v. Saunders, 16 How. 535, 542, 14 L. ed. 1047, 1050. We are not, **80 therefore, prepared to disturb the decree of the courts below in this respect.

*114 The next exception involves the allowance of the item of $18,800 in the probate court of Massachusetts, and charging the trustees with the balance of the estate after that allowance had been made. It appears that the executors Richardson and Drury appeared on April 4, 1899, in the Massachusetts probate court, and by petition set forth that they had been appointed and had given bond and due notice of their appointment as executors of the will of William A. Richardson; that there was not at the time of the grants of the letters testamentary, and had not been since, property belonging to the testator in the commonwealth of Massachusetts; that since the granting of letters testamentary Isabel Magruder, the only surviving child and heir at law of the said testator, had deceased, and that under and by the terms and provisions of said will it was provided that upon her decease the property of the testator should be held by the executors of said will for the benefit of the two minor children surviving the said daughter, namely, Alexander Richardson Magruder, of the age of sixteen years, and Isabel Richardson Magruder, of the age of about thirteen years; that these children, who were interested as beneficiaries in the trusts created by the will, at the time of the probate thereof and ever since had resided at Washington, in the District of Columbia; that Samuel Maddox and Samuel A. Drury had been appointed by the supreme court of the District of Columbia trustees for said minors, to carry out the provisions of said will in behalf of the said minors, and that Alexander F. Magruder had been appointed guardian of said minors; and they further represented to the court that William A. Richardson was not, at the time of his decease, a resident of Massachusetts, but of the District of Columbia, and that all the parties in interest under the will, at the time of the probate thereof, lived in Washington, as they had since and did then. They represented that the will should have been probatedat *115 Washington, in the District of Columbia, but either by accident or mistake, probate in the probate court of Middlesex county, Massachusetts, was had, and they asked an order that they be authorized to pay over the trust funds to the trustees appointed by the supreme court of the District of Columbia, and that, upon the payment of such funds to such trustees, they be discharged from further liability.

A decree was entered in the probate court of Massachusetts on April 11th, 1899, wherein it was found that by the decree of the supreme court of the District of Columbia, dated April 1st, 1899, Samuel Maddox and Samuel A. Drury had been duly appointed trustees to perform the trusts of the will, and that the beneficiaries were residents of Washington, and that the guardian of the minors had signified his consent to the granting of the petition, and that the laws of the District of Columbia secured the performance of the trusts, and Richardson and Drury, as executors, were authorized to pay over the trust funds to Maddox and Drury, as trustees. On April 25th, 1899, in the same probate court, Richardson and Drury, as executors, filed their first and final account, in which

they charged themselves with property in the aggregate of $415,458.37, and asked to be allowed sundry payments and charges. This account was indorsed with a request for its allowance, signed by Alexander R. Magruder and Isabel R. Magruder, by their guardian, Alexander F. Magruder, and by Maddox and Drury, as trustees. On the 25th of April, the probate court made the following order: 'The foregoing account having been presented for allowance, and verified by the oath of the accountant, and all persons interested having consented thereto in writing, and no objection being made thereto, and the same having been examined and considered by the court, it is decreed that said account be allowed.' The schedules attached show the property and the payments, charges, losses, and ***116** distributions, among others the item of $18,800, to which exception is made. This item states: 'Expense of administration, including care of property, the payment of debts, the making of final account, the collection of notes amounting to $226,607.54, the investment in trust notes of $166,958.21, the collection from interest and other sources of $58,168.94, the payment of about $50,000 for repairs on real estate, the taking up of prior mortgages, taxes, etc., including also the payments of moneys to Isabel Magruder and to Alexander F. Magruder, the guardian of their minor children, counsel fees incurred in the defense of suits for taxes in Massachusetts and for counsel fees in Washington, etc., . . . $18,800.'

The auditor held that he had no authority to disregard or change this item of credit; that the same had been included in the reports of his predecessors and confirmed by the court; and that the allowance, having been made in the probate court of Massachusetts, was not open to review.

The court of appeals of the District of Columbia, in the course of its opinion in this case, states that the appellants contended that there was no jurisdiction in the probate court of Massachusetts to probate the will, —a position which counsel ****81** for the appellant in this case disclaims in his brief filed herein, and says that the contention is that the order and decree in Massachusetts was not intended to be operative to diminish the accountability of the executors and trustees to the District of Columbia court. But we do not so interpret the proceedings. The account was filed in the Massachusetts court; and, the record recites, was examined and considered by the court and duly allowed. This order, reads in connection with the rules of the Massachusetts court set out at the head of the account, stating the authority of the court to allow reasonable expenses and compensation, shows that it was the intention of the probate court to make an ***117** allowance including such expenses and compensation. Apart from the concession of the jurisdiction here made, we have no doubt that the Massachusetts court, on the presentation of the will, had the right to determine its jurisdiction to receive and probate the same, and upon ordering the property turned over to the trustees appointed in the District of Columbia, to settle the account and fix the compensation of the executors, and order the balance turned over to the trustees. True, the Massachusetts court held, in the case of Dallinger v. Richardson, 176 Mass. 77, supra, that Richardson was not a resident of Massachusetts. In the course of the opinion in that case, the court points out that, for the purpose of the tax question, the matter of residence was not foreclosed by the adjudication of the probate court, whether in accordance with the truth or not.

It is well settled that the decree of the court which has acquired jurisdiction of an estate and settled an account cannot be collaterally attacked (Jennison v. Hapgood, 7 Pick. 1, 7, 19 Am. Dec. 258). In that case it was held that what assets came into the executor's hands, what debts he had paid, and so of every matter properly done or cognizable in the probate court, the judgment of that court is conclusive. See also Abbott v. Bradstreet, 3 Allen, 587. There was no attempt to probate the will in the District of Columbia, in which event the finding of the fact of domicil in the proceedings in Massachusetts would not have been conclusive here. Overby v. Gordon, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603. The trustees were authorized to receive the assets from the executors. The probate court in Massachusetts, and no other court, had authority to settle the executors' accounts and determine their compensation. Vaughan v. Northup, 15 Pet. 1, 10 L. ed. 639. We cannot agree with counsel for the appellant that the order of the probate court was based upon consent only, and that this is a case for the application of the rule that the trustees' consent to such a decree ***118** cannot work to the prejudice of the beneficiaries of the trust. Whether the guardian might give such consent, we do not find it necessary to decide, for the decree shows that the account was presented, verified by the oath of the accountants, and that it was examined and considered by the court.

The next exception involves the allowance of commissions on the notes purchased from Mr. Drury's firm. The contention before the auditor was that one trustee had

received compensation in connection with the handling of these investments, and that that should be taken into account. As to this exception, the auditor finds that 'the fact clearly appears from the testimony that Arms & Drury, as real estate brokers, made loans on trust notes, upon which loans they were paid by the borrowers a commission ranging from 1 to 2 per cent, according to the circumstances of the case, many being building loans; that subsequently, as notes of the trust estate were paid off, Mr. Drury would reinvest the moneys of the estate in trust notes held by Arms & Drury, paying the face value and accrued interest on the notes so purchased.' As a matter of law, the auditor concluded: 'No profit was made by the firm of Arms & Drury on sales of the notes to the trustees. . . . The transactions of Arms & Drury with the trustees were in the regular course of their business, in which they had their own moneys invested. They cost the estate not a penny more than if the transactions had been with some other firm or individual. If the firm of Arms & Drury, out of their own moneys, made loans on promissory notes, upon which loans were paid by the borrower the customary brokerages, those were profits on their own funds, in which this estate could have no interest, and in which it could acquire no interest by reason of the subsequent purchase of those notes by the trustees for their real value, any more than could any of the purchasers of such notes from Arms & Drury claim such an ***119** interest. No charge of malfeasance or misfeasance is made against the trustees, or that, by reason of these transactions, the trustees benefited in any manner out of the money of this estate. On the contrary, the relation of the firm of Arms & Drury to Drury and Maddox, trustees, benefited the estate, by enabling the trustees at all times to make immediate reinvestment of its funds, without loss of income, and by enabling the trustees to at all times readily procure reinvestments without payment of brokerage,—a brokerage not uncommonly charged the lender for placing his money, as ****82** well as the borrower for procuring his loan in times of stringency. The application of the well-known rule in equity should rather, therefore, be in favor of the trustees than against them with respect to these transactions. The objection narrows itself to a claim that Drury, by reason of his position as trustee, should, in addition to the benefit of his valuable services, commercial knowledge, and business acumen, make the estate a gift of profits on his individual moneys, to which the estate is in no wise entitled, and to which it could not make a semblance of reasonable claim had the trustees been other than Drury, or the agents of the estate been other than Arms and Drury.' This view seems to have met ruction of viaduct by railway company/. a like view was taken by the court of appeals of the District of Columbia (37 App. D. C. 505, supra).

It is a well-settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity. 'It therefore prohibits a party from purchasing on his own account that which his duty or trust required him to sell on account of another, ***120** and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells.' Michoud v. Girod, 4 How. 503, 555, 11 L. ed. 1076, 1099.

It makes no difference that the estate was not a loser in the transaction, or that the commission was no more than the services were reasonably worth. It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself. The findings show that the firm of which Mr. Drury was a member, in making the loans evidenced by these notes, was allowed a commission of 1 to 2 per cent. This profit was in fact realized when the notes were turned over to the estate at face value and accrued interest. The value of the notes when they were turned over depended on the responsibility and security back of them. When the notes were sold to the estate it took the risk of payment without loss. While no wrong was intended, and none was in fact done to the estate, we think nevertheless that upon the principles governing the duty of a trustee, the contention that this profit could not be taken by Mr. Drury, owing to his relation to the estate, should have been sustained.

We find no other error in the proceedings of the Court of Appeals, but for the reason last stated, its decision must be reversed, and the cause remanded to that court with directions to remand the cause to the Supreme Court of the District of Columbia for further proceedings in accordance with this opinion.

Reversed.

35 S.Ct. 77, 59 L.Ed. 151

All Citations

235 U.S. 106, 35 S.Ct. 77, 59 L.Ed. 151

164 N.H. 490
Supreme Court of New Hampshire.

Julie SHELTON and another
v.
Samuel A. TAMPOSI, Jr. and another.

No. 2010–634.
|
Argued: July 13, 2012.
|
Opinion Issued: Jan. 11, 2013.

Synopsis

Background: Trustee and beneficiary brought action seeking removal of investment directors of irrevocable trust, decoupling of trust assets from other subtrusts, costs related to purported breach of fiduciary duty, and attorneys' fees. The Probate Court, Hillsborough County, Cassavechia, J., dismissed complaint. Trustee appealed.

Holdings: The Supreme Court held that:

[1] trust instrument provided investment directors exclusive authority to disburse trust assets;

[2] any error in trial court's reliance upon extrinsic evidence of settlor's intent was harmless;

[3] on an issue of first impression, trustee lacked standing to contest trial court's ruling that litigation violated trust's in terrorem clause;

[4] trial court had statutory authority to assess legal fees against trustee in her personal capacity;

[5] beneficiaries who intervened in litigation were entitled to award of attorney's fees; and

[6] initiation and prosecution of litigation warranted removal of trustee.

Affirmed in part and remanded.

West Headnotes (22)

[1] Trusts
Application of general rules of construction

When the Supreme Court construes a trust instrument, the intention of a settlor is paramount, and the Court determines that intent, whenever possible, from the express terms of the trust itself.

1 Cases that cite this headnote

[2] Trusts
Application of general rules of construction

When construing a trust instrument, the Supreme Court rejects any construction of trust language that would defeat the clear and expressed intention of the settlor.

Cases that cite this headnote

[3] Trusts
Trial or hearing

When construing a trust instrument, the settlor's intent is a question of fact to be determined by competent evidence and not by rules of law.

1 Cases that cite this headnote

[4] Trusts
Limitations of authority imposed in creation of trust

Trust instrument granted investment directors, rather than trustee, exclusive authority to direct the retention or sale of trust assets, to direct the purchase of property with any principal cash reserves, and to determine the timing and amount of distributions to beneficiaries; trust instrument provided that the authority of the trustee was subordinate to that of the investment directors, that the trustee had authority to make dispositions of trust property only as directed in writing by

the investment directors, and that the trustee was specifically prohibited from assuming any responsibility for the management, control and handling of the trust assets.

Cases that cite this headnote

[5] Appeal and Error
Particular Actions or Issues, Evidence Relating to

Any error in trial court's reliance upon extrinsic evidence of settlor's intent was harmless error in dispute between trustee and investment directors regarding handling of trust assets, where reliance did not alter trial court's initial interpretation of the trust documents.

Cases that cite this headnote

[6] Appeal and Error
Representative or official capacity

Trustee lacked standing to contest trial court's ruling that litigation brought both by trustee in her official capacity and by a beneficiary of irrevocable trust violated in terrorem clause of the trust instrument; trustee had duty to administer the trust in a manner that was impartial with respect to various beneficiaries of the trust, in terrorem ruling affected only one of several beneficiaries of the trust, beneficiary had sufficient personal interest to enable her to appeal trial court's ruling to protect her own interests, and, that trustee's conduct may have contributed to violation of the in terrorem clause did not establish standing given that she did not suffer the loss of any legal right as a result of the in terrorem ruling. RSA 567–A:1.

Cases that cite this headnote

[7] Statutes
Plain Language;Plain, Ordinary, or Common Meaning

Generally, when construing statutes, the Supreme Court first examines the language used, and, where possible, the Court ascribes the plain and ordinary meanings to the words used.

Cases that cite this headnote

[8] Statutes
Superfluousness

The Supreme Court interprets statutes in the context of the overall statutory scheme and not in isolation; by doing so, the Court is better able to discern the legislature's intent and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme.

Cases that cite this headnote

[9] Appeal and Error
Attorney fees

The Supreme Court reviews a trial court's award of attorney's fees under the Court's unsustainable exercise of discretion standard, giving deference to the trial court's decision.

3 Cases that cite this headnote

[10] Appeal and Error
Attorney fees

To be reversible on appeal, the discretion in awarding attorney's fees must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party.

3 Cases that cite this headnote

[11] Appeal and Error
Questions of Fact on Motions or Other Interlocutory or Special Proceedings

If there is some support in the record for the trial court's determination regarding an award of attorney's fees, the Supreme Court will affirm it.

1 Cases that cite this headnote

[12] Costs

American rule;necessity of contractual or statutory authorization or grounds in equity

New Hampshire generally follows the "American Rule"; that is, absent statutorily or judicially created exceptions, parties pay their own attorney's fees.

4 Cases that cite this headnote

[13] **Appeal and Error**

Cases Triable in Appellate Court

The Supreme Court interprets statutes on a de novo basis.

Cases that cite this headnote

[14] **Trusts**

Costs

Trial court had statutory authority pursuant to the Uniform Trust Code to assess legal fees against trustee in her personal capacity in dispute, in which trustee's role was limited to her official capacity, with investment directors concerning handling of trust assets; the use of the word "any" in the Uniform Trust Code provision governing awards of attorney's fees conveyed broad authority upon the trial court to award attorney's fees to any party to be paid by another party as justice and equity required. RSA 564–B:10–1004.

Cases that cite this headnote

[15] **Costs**

Duties and proceedings of taxing officer

Before an award of attorney's fees is made, the trial court must provide a reason, grounded in equity, as to why such an award should be made.

Cases that cite this headnote

[16] **Trusts**

Costs

When acting in the proper exercise of her official duties, a trustee should not generally be held personally liable under the Uniform Trust Code for attorney's fees incurred by any party. West's Wyo.Stat.Ann. § 4–10–1004.

Cases that cite this headnote

[17] **Trusts**

Costs

While the Uniform Trust Code does not provide specific criteria for an award of attorney's fees, it gives the trial court flexibility to determine what is fair on a case by case basis. West's Wyo.Stat.Ann. § 4–10–1004.

Cases that cite this headnote

[18] **Trusts**

Costs

Beneficiaries of irrevocable trust, who intervened in dispute between trustee and investment directors regarding handling of trust assets, were entitled to award of attorney's fee pursuant to Uniform Trust Code due to trustee's bad faith conduct in initiating litigation; trial court made extensive findings and rulings that its fee award was based on trustee's initiation and prosecution of the litigation, and justice and equity required that trustee, rather than the innocent beneficiaries of the trust, bore the burden of paying fees to the parties based upon her own bad faith. West's Wyo.Stat.Ann. § 4–10–1004.

1 Cases that cite this headnote

[19] **Trusts**

Mismanagement or misconduct in execution of trust

Trustee's initiation and prosecution of litigation against investment directors of irrevocable trust concerning handing of trust assets constituted a violation of trustee's duties as trustee, and therefore warranted removal of trustee by the trial court, where trustee reluctantly agreed to serve as trustee only after beneficiary was unable to procure an institutional trustee, trustee was a party to the litigation and colluded with beneficiary

in creating controversy with the investment directors, trustee participated with beneficiary in interviewing and hiring litigation counsel to bring lawsuit which resulted in millions of dollars in litigation expenses and fees, trustee did not conduct appropriate cost-benefit analysis prior to bringing litigation, trustee did not request a transfer of the trust assets until six weeks after she was named trustee, and litigation costs were so massive that there were insufficient funds in trust to provide for beneficiary's three children. RSA 564–B:7–706(b).

1 Cases that cite this headnote

[20] **Courts**
Review and vacation of proceedings

The Supreme Court will uphold the findings of fact of a judge of probate unless they are so plainly erroneous that they could not be reasonably made.

Cases that cite this headnote

[21] **Appeal and Error**
Allowance of remedy and matters of procedure in general

The Supreme Court reviews a trial court's removal of a trustee under the Court's sustainable exercise of discretion standard.

Cases that cite this headnote

[22] **Infants**
Course of Proceedings
Mental Health
Powers, duties, and liabilities
Protection of Endangered Persons
Guardian ad litem or next friend

The recommendations of a guardian ad litem do not carry any greater presumptive weight than the other evidence in a case.

Cases that cite this headnote

Attorneys and Law Firms

****744** Choate, Hall & Stewart LLP, of Boston, Massachusetts (Robert S. Frank, Jr. and Robert M. Buchanan, Jr. on the brief, and Mr. Frank orally), for petitioner Julie Shelton.

Robert A. Stein, of Concord, on the brief, Ransmeier & Spellman, P.C., of Concord (Frank E. Kenison on the brief and orally), McDermott Will and Emery LLP, of Boston, Massachusetts (Michael Kendall on the brief and orally), and Barradale, O'Connell, Newkirk & Dwyer, of Bedford (Pamela J. Newkirk on the brief), for the respondents.

Opinion

PER CURIAM.

***492** Petitioner Julie Shelton, trustee of the Elizabeth M. Tamposi Trusts (the EMT trusts), appeals a lengthy and detailed order of the Hillsborough County Probate Court (*Cassavechia,* J.) that dismissed the complaint filed by: (1) Shelton, in her capacity as trustee of the EMT Trusts; and (2) Elizabeth M. Tamposi. Shelton argues that the trial court erred in: (1) construing the governing trust instrument; (2) ruling that, by filing the complaint, Elizabeth Tamposi violated the in terrorem clause; (3) ordering Shelton to pay the attorneys' fees "of both the Respondents and the voluntary Intervenors"; and (4) removing Shelton from her position as trustee. We affirm in part and remand.

***493** The following facts are found in the trial court's order or are supported by the record before us. Samuel Tamposi, Sr. (Sam, Sr.) had six children: Samuel, Jr. (Sam, Jr.), Michael, Elizabeth (Betty), Nicholas (Nick), Celina (Sally) and Stephen (Steve).[1] In 1992, Sam, Sr. established the Samuel A. Tamposi, Sr. 1992 Trust, which was designed to benefit him during his lifetime and, after his death, his six children and their issue. It was amended four times by Sam, Sr. prior to his death. In its final form, it specified that after his death, the trust corpus was to be divided into twelve separate trusts for each of his children and their issue (sibling trusts); six trusts contained assets exempt from the federal generation skipping transfer tax and six contained non-exempt assets. It also provided that Sam, Jr. and Steve would serve as investment directors of the twelve trusts and that a trustee would also be appointed. The trial court found that the third amendment

to the trust "confer[red] certain fiduciary responsibilities on the investment directors that are more commonly vested in a trustee."

Sam, Sr. also subsequently established the Samuel A. Tamposi Sr. 1994 Irrevocable Trust; he named David Tulley as his successor trustee for this trust. The 1992 and 1994 trusts were eventually consolidated pursuant to a settlement agreement of the parties; we refer to them collectively ****745** for purposes of our analysis as the SAT Sr. Trust.

Sam, Sr. died in 1995. At the time of his death, in accordance with the provisions of the amended 1992 trust, Sam, Jr. and Steve became the investment directors of the twelve sibling subtrusts. Gerald Prunier succeeded the original trustee, David Tulley. In 2000, Sam, Jr. and Steve, as investment directors, and Prunier filed a petition for declaratory judgment in which they sought a ruling that the trustee was required to act in accordance with the written directions of the investment directors, and that, in doing so, the trustee would incur no liability. The petition "alleged that Betty and Nick had expressed interest in a possible 'buy-out' or separation of their beneficial interests in the trust property."

Later that year, Nick and Betty and their children filed their own petition for declaratory judgment, seeking a ruling that they could participate in the action initiated by Sam, Jr. and Steve without triggering the in terrorem clause contained in the 1992 trust. The probate court ruled that as long as they did not attempt to challenge the validity of the trust or authenticity of documents, but sought only to uphold fiduciary standards under the trust and New Hampshire law, the in terrorem clause would not be triggered. Both petitions were dismissed by agreement in November 2000.

***494** The trial court also found that in September 2001, Betty and Nick filed suit against "Sam, Jr. and Steve, individually and as investment directors; Gerald Prunier, individually and as trustee; and David Tulley, individually and as trustee for the Samuel A. Tamposi, Sr. 1994 Irrevocable Trust; this time for breach of fiduciary duties." Betty and Nick took a voluntary non-suit approximately two months later.

Between 2001 and 2006, disagreements between Betty and Nick and their siblings continued. Following mediation, a settlement agreement was reached which provided that: (1) the SAT Sr. 1994 Trust for the benefit of each child would be merged into his or her respective non-exempt sibling sub-trust; (2) Nick and Betty could appoint his or her own trustee; and (3) Sam, Jr. and Steve would resign as investment directors over all but ten assets in Betty's and Nick's subtrusts pending their liquidation. Changes made to the SAT Sr. Trust as a result of the settlement agreement were approved by the court on February 22, 2007. Betty appointed Shelton as her trustee in August 2007.

The case giving rise to this appeal began in October 2007, when Shelton and Betty filed a pleading entitled "Complaint" against Sam, Jr. and Steve, "Individually and as Investment Directors of Elizabeth M. Tamposi GST Trust and the Elizabeth M. Tamposi Trust both created under the Samuel A. Tamposi, Sr. 1992 Trust and the Elizabeth M. Tamposi Trust created under Samuel A. Tamposi, Sr. 1994 Irrevocable Trust, and as Directors of the Tamposi Companies." They filed an amended complaint in March 2009.[2] In their amended complaint, Shelton and Betty requested that the trial court: (1) order the "decoupling" of the EMT Trust assets from the other subtrusts created by the 1992 Trust Instrument and from the control of the respondents; (2) order the removal of Sam, Jr. and Steve as investment directors of the EMT Trusts and as directors of "the Tamposi Companies"; (3) surcharge the respondents "for all losses to the EMT Trusts and the Gifted Assets caused by ****746** Respondents' breaches of their fiduciary duties to Petitioners"; and (4) award them "their attorneys' fees and costs in this action, and any other costs caused by the actions of Respondents." They also sought "a declaration that it is the role of Petitioner Trustee Julie Shelton to determine what amounts need to be made available to the EMT Trusts so that the Trustee can fulfill her fiduciary obligations to make the appropriate distributions to the beneficiaries of the EMT Trusts to provide for their education and maintenance in health and reasonable comfort and it is the role of the Respondents Investment Directors Samuel A. Tamposi, Jr. and Stephen A. Tamposi to manage the assets of the EMT Trusts so that ***495** the needs are met." The trial court summarized this as a request for a ruling that Shelton as trustee had "sole responsibility and authority to determine appropriate distributions from the EMT Trusts; and that the investment directors' responsibility is to provide funds when and in the amount requested by the trustee."

In January 2008, counsel for trustee Prunier filed an appearance. In August 2008, the trial court granted without objection the motion to join filed by Michael Tamposi and Celina Tamposi Griffin. The trial court found that at the time this litigation began, the SAT Sr. Trust was comprised of the original trust instrument, the first, third and fourth amendments executed by Sam, Sr., certain provisions of the 2006 settlement agreement, and a 2007 court order.

After a trial of more than five weeks, the probate court dismissed the petitioners' complaint and amended complaint, and granted several motions filed by the respondents. The court also found that the in terrorem clause of the trust had been violated and, accordingly, Betty "forfeited her right, title and interest in the trust." In its order, the trial court indicated that it intended to award attorneys' fees and costs to the respondents and intervenors following receipt of further filings. Both Shelton and Betty filed appeals with this court. We subsequently granted with prejudice Betty's motion to withdraw her appeal.

We note that the trial court has not yet determined the amount of fees and costs to be awarded to the respondents and the intervenors. Accordingly, this appeal would appear to be interlocutory. *See Van Der Stok v. Van Voorhees,* 151 N.H. 679, 681, 866 A.2d 972 (2005). To the extent that it may have been interlocutory when we accepted the appeal, we waive the requirements of Supreme Court Rule 8, *see Sup. Ct. R.* 1, and now consider the appeal on its merits.

[1] **[2]** **[3]** Shelton first argues that the trial court erred in construing the governing trust instrument. As she concedes, when we construe a trust instrument, "the intention of a settlor is paramount, and we determine that intent, whenever possible, from the express terms of the trust itself." *Appeal of Lowy,* 156 N.H. 57, 61, 931 A.2d 552 (2007). The rules of construction that apply to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property. RSA 564–B:1–112 (2007) (amended 2011); *see* RSA 564–B:11–1104 (a)(1) (Uniform Trust Code applies to all trusts created before, on, or after its effective date). We reject any construction of trust language that would defeat the clear and expressed intention of the settlor. ***496** *Lowy,* 156 N.H. at 61, 931 A.2d 552. The settlor's intent is a question of fact to be determined by competent evidence and not by rules of law. *King v. Onthank,* 152 N.H. 16, 18, 871 A.2d 14 (2005).

****747** **[4]** Although Shelton concedes that the trust instrument contemplates an equal initial distribution of assets to the individual trusts, she argues that it "does not empower the Investment Directors to make decisions on whether to make 'distributions to the trustees.' " She contends that "all of the trust assets are owned by the Trustees. The role of the Investment Directors is only to direct them in making suitable investments." In essence, she argues that the trust documents give her the authority to determine not only what is distributed from the EMT Trusts to the beneficiaries but also the amount and timing of distributions that are to be made from the SAT Sr. Trust to the individual EMT sub-trusts. The respondents argue that Shelton's construction fails to give appropriate weight to Article Tenth–B of the Third Amendment of the trust.

We briefly examine the language at issue. Shelton relies upon Articles Fifth and Sixth, which authorize the trustee to "pay to or for the benefit of the child ... such amounts from the net income and principal of the trust and in such proportions among them as the trustee considers necessary for their education and maintenance in health and reasonable comfort." Article Tenth–B is also applicable to the administration of the trust. It provides, *inter alia:*

> (c) The trustee shall make purchases, pledges, sales or other dispositions of securities, real estate interests and other operating entities only as the investment directors from time to time may direct in writing.
>
> (d) The trustee shall entrust to the investment directors the management, control, handling, financing, refinancing and structuring of any and all real estate interests and other operating entities from time to time included in the trust property. In no event shall the trustee assume any responsibility in connection with the management, control and handling of such real estate interests or other operating entities.
>
> (e) The investment directors shall have full power and authority to direct the retention or sale of all other assets from time to time included in the trust property and to direct the purchase of property with any principal cash included in the trust property. The trustee shall have no responsibility for any loss that may occur by reason of

acting without question upon any such direction by the investment directors.

***497** After reviewing all the applicable documents, the probate court found that Sam, Sr. "conferred on Sam, Jr. and Steve unequivocal authority to make investment decisions and rendered their decisions neither reviewable nor reversible by the trustee." In construing the documents, the trial court found that the Third Amendment set up two classes of fiduciaries, a trustee and two investment directors, for the 12 sibling sub-trusts, and that certain fiduciary responsibilities given to the investment directors were more commonly vested in a trustee. The trial court found that the investment directors "are given authority and have the responsibility for the investment and management of the trust assets, while the trustee is tasked with determining the needs of the beneficiaries and distributing appropriate funds to them in accordance with the applicable ascertainable standard." Citing Article Tenth–B (d) and (e), the trial court also found that the investment directors have the authority "to control, finance, and structure all real estate assets and operating entities; full authority to direct the retention or sale of all trust assets; and to direct the purchase of property with cash principal." The trial court further found that, under this article, ****748** "[t]he trustee is expressly *prohibited* from making any decisions about the investment or sale of trust assets, and in the parlance of RSA 564–B:7–711, the trustee is an 'excluded fiduciary' with respect to investment and management of trust assets." *See* RSA 564–B:1–103 (24). In so ruling, the trial court also recognized that "the trustee retains the authority and discretion to determine the amount and timing of distributions to the beneficiaries, and the investment directors are 'excluded fiduciaries' regarding distributions to beneficiaries."

In each of the three provisions cited by the trial court, the authority of the trustee is subordinate to that of the investment directors. The trustee has authority to make dispositions of trust property *only* as directed in writing by the investment directors. The trustee is specifically prohibited from assuming any responsibility for the management, control and handling of the trust assets. The full power and authority to direct the retention or sale of assets and to direct the purchase of property with any principal cash reserves is reserved exclusively to the investment directors.

Shelton argues that the trial court's interpretation is in conflict with the authority given to the trustee under Articles Fifth and Sixth of the trust. We disagree. Contrary to her assertion that the trial court's interpretation "vitiated" the effect of Articles Fifth and Sixth, the trial court's construction melded all provisions of the trust, rather than reading any one provision in isolation. *See, e.g., In re Estate of Donovan,* 162 N.H. 1, 4, 20 A.3d 989 (2011) (clauses in will not read in isolation; rather their meaning is determined from language of will as a whole). Articles Fifth and Sixth ***498** control the distributions to be made from the trust; they do not address distributions to the trust. To interpret the language of the trust in any other manner would fail to give effect to its specific language that provides the investment directors discretion in determining whether distributions should be made to the subtrusts and the timing and source of the distributions.

[5] Shelton also cites as error the trial court's reliance upon extrinsic evidence of Sam, Sr.'s intent. Even if we assume without deciding that such reliance was in error, it did not alter the trial court's initial interpretation of the trust documents. Accordingly, to the extent that there was error, it was harmless. *See Appeal of Ann Miles Builder,* 150 N.H. 315, 320, 837 A.2d 335 (2003) (where it appears error did not affect outcome below, or where court can conclude from entire record that no injury has been done, judgment will not be disturbed).

[6] Shelton next argues that the trial court erred in concluding that the filing of the petition violated the in terrorem clause. In response to the respondents' contention that she does not have standing to contest this ruling, she argues that she has standing "for at least three reasons": (1) as trustee, she has a fiduciary duty to defend the settlor's intent; (2) the trial court's attorneys' fee award against her "is inextricably linked to the Court's decision on the *in terrorem* clause issue"; and (3) the *in terrorem* ruling is the basis for a surcharge motion that is pending in the trial court.

After this case was argued, we remanded it to the trial court to clarify the basis for its award of fees against Shelton. In its order following remand, the trial court stated: "Although the award of fees against Shelton and Elizabeth Tamposi ("Betty") was included in the section of the Order captioned '*In terrorem* Clause,' the court did not intend to suggest that they flowed as a consequence

of violating the **749 clause but for their actions and conduct in relation to their endeavor to sever Betty and her [progeny's] beneficial interests from those of her siblings and their issue in contradiction of what her father envisioned and implemented for them."

The specific issue of whether a trustee has standing to contest a trial court's ruling that litigation brought both by her in her official capacity and by a beneficiary violates an in terrorem clause of the trust instrument is an issue of first impression for this court.

RSA 567–A:1 (2007) governs appeals to the supreme court from the probate court. It provides: "A person who is aggrieved by a decree, order, appointment, grant or denial of a judge of probate which may conclude that person's interest in a matter before the court may appeal therefrom to the supreme court on questions of law in accordance with rules of the supreme court."

*499 To determine whether Shelton has standing to appeal the trial court's finding that the litigation violated the in terrorem clause of the trust requires that we interpret RSA 567–A:1. We note that the trial court was not required to address the issue of standing because Betty, a beneficiary of the EMT Trusts, participated as a petitioner in that court.

[7] [8] Our principles of statutory construction are well-established. Generally, when construing statutes we first examine the language used, and, where possible, we ascribe the plain and ordinary meanings to the words used. *Ocasio v. Fed. Express Corp.,* 162 N.H. 436, 450, 33 A.3d 1139 (2011). We interpret statutes in the context of the overall statutory scheme and not in isolation. *Id.* By doing so, we are better able to discern the legislature's intent and therefore better able to understand the statutory language in light of the policy sought to be advanced by the entire statutory scheme. *Id.*

Although RSA 567–A:1 was first enacted in 1975, its predecessor statute established the same requirements for appeal. The 1975 amendment limited appeals to questions of law and directed that they be brought in the supreme court. Because the 1975 amendment did not change the parameters of the appealable interests, our previous case law provides some guidance on the issue before us.

We have held that "[g]enerally, it may be said that one cannot be aggrieved by a decision unless he has some private right which is affected thereby." *Hutchins v. Brown,* 77 N.H. 105, 106, 88 A. 706 (1913). We recently construed the term "aggrieved" as used in RSA 567–A:1 in *In re Guardianship of Williams,* 159 N.H. 318, 986 A.2d 559 (2009). We find its analysis instructive in this case.

In *Williams,* 159 N.H. at 324, 986 A.2d 559, we observed that the pertinent plain and ordinary meaning of the term "aggrieved" is "having a grievance; specif[ically]; suffering from an infringement or denial of legal rights." *Webster's Third New International Dictionary* 41 (unabridged ed. 2002). To determine whether the appellant in *Williams,* a guardianship case, had standing to appeal an order of the trial court establishing a guardianship over her brother, we examined the purpose of the underlying statute and concluded that because its protections were clearly focused upon the proposed ward and not the appellant, the appellant lacked standing to appeal.

We conclude that, in this case, Shelton does not have standing to challenge the ruling that the in terrorem clause was violated. The Uniform Trust Code provides that "[u]pon acceptance of a trusteeship, the trustee shall administer, invest and manage the trust and distribute the **750 trust property in good faith, in accordance with its terms and purposes and the *500 interests of the beneficiaries, and in accordance with this chapter." RSA 564–B:8–801 (2007). Specifically, a "trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust[;] ... the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust." *Restatement (Third) of Trusts* § 79(1)(a)(2007). While we have held that "an executor named in a will has an interest in his representative capacity sufficient to maintain an appeal from a decree disallowing the will," *Hutchins,* 77 N.H. at 107, 88 A. 706, this is not an analogous case. The in terrorem ruling affects only one of several beneficiaries under the EMT Trusts. *See, e.g., Northern Trust Co. v. Heuer,* 202 Ill.App.3d 1066, 148 Ill.Dec. 364, 560 N.E.2d 961, 964 (1990) (unless terms of trust document provide otherwise, trustee's fiduciary duty to each beneficiary precludes her from favoring one beneficiary over another). Indeed, it may be argued that by pursuing this appeal, Shelton's interests are adverse to all beneficiaries other than Betty.

Moreover, there is no need to authorize Shelton to appeal the in terrorem clause ruling as a representative of the affected beneficiary. The beneficiary herself had a personal interest sufficient to enable her to appeal such a ruling, and she was fully capable of protecting her own interests by doing so. *Cf. Williams,* 159 N.H. at 326–27, 986 A.2d 559. Accordingly, we conclude that Shelton does not have standing as the trustee of the EMT Trusts to contest on appeal the trial court's ruling on the in terrorem clause.

Nor can Shelton base her claim of standing on the trial court's award of fees given the trial court's ruling that the award was based on her overall conduct as trustee rather than any violation of the in terrorem clause. That her conduct may have contributed to its violation does not establish standing given that she did not suffer the loss of any legal right as a result of the in terrorem ruling.

Finally, although Shelton argues that she has standing because the in terrorem ruling "is the basis for a surcharge motion currently pending in the probate court," no ruling has been made on that motion. In the absence of a ruling, we cannot determine what relief, if any, the trial court will grant and whether Shelton's legal rights will be affected. Accordingly, the issue of whether the surcharge motion would convey standing upon Shelton to appeal the in terrorem clause ruling is not ripe for our review. *See, e.g., Appeal of Tancrede,* 135 N.H. 602, 604, 608 A.2d 1308 (1992).

Shelton next argues that the trial court erred in ordering her to pay the attorney's fees "of both the Respondents and the voluntary Intervenors." The trial court found that the petitioners had acted in bad faith by bringing and prosecuting the litigation giving rise to this appeal. The court denied the petitioners' request for attorney's fees and costs and ordered them to ***501** pay the reasonable attorney's fees and costs incurred by the respondents and the intervenors in defending this action. In its summary of the relief to be granted, the trial court ruled: "After receipt of further filings, the court will make a determination of attorneys' fees and costs of the respondents and intervenors chargeable to and payable by the petitioners."

Shelton argues that the trial court erred in finding that she conducted the litigation in bad faith. She also argues that there is no precedent to support an award of attorney's fees against her in her individual capacity when she was a party to the litigation only in her official capacity as trustee of the EMT trusts.

****751** **[9]** **[10]** **[11]** **[12]** We review a trial court's award of attorney's fees under our unsustainable exercise of discretion standard, giving deference to the trial court's decision. *LaMontagne Builders v. Brooks,* 154 N.H. 252, 259, 910 A.2d 1162 (2006). To be reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. *Id.* If there is some support in the record for the trial court's determination, we will affirm it. *Id.* New Hampshire generally follows the American Rule; that is, absent statutorily or judicially created exceptions, parties pay their own attorney's fees. *Board of Water Comm'rs, Laconia Water Works v. Mooney,* 139 N.H. 621, 628, 660 A.2d 1121 (1995).

[13] The parties agree that the probate court's authority to order payment of attorney's fees in this case is governed by RSA 564–B:10–1004 (2007), which provides: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." We have not yet construed the specific language of RSA 564–B:10–1004. Moreover, we note that this appeal was filed prior to any specific ruling by the trial court on the period of time that the award covers or the actual factors that it will consider in determining the amount. However, because we interpret statutes on a *de novo* basis, *see, e.g., In re Guardianship of Eaton,* 163 N.H. 386, 389, 42 A.3d 799 (2012), we conclude that the interests of judicial economy support our decision to decide this issue that has been briefed by the parties. *Cf. J.E.D. Assoc.'s, Inc. v. Town of Atkinson,* 121 N.H. 581, 584, 432 A.2d 12 (1981), *overruled on other grounds by Town of Auburn v. McEvoy,* 131 N.H. 383, 553 A.2d 317 (1988). We limit our review to the legal issues of whether the probate court has the authority to assess legal fees against a trustee in her personal capacity when her role in the litigation was limited to her official capacity as trustee, and, if so, whether the probate court is authorized to award fees to the intervenors, where as Shelton contends, they were voluntary parties.

[14] **[15]** ***502** We turn then to the specific language of RSA 564–B:10–1004, which authorizes the court, "as justice and equity may require," to award costs and

expenses, including attorney's fees "to *any* party, to be paid by another party or from the trust that is the subject of the controversy." (Emphasis added.) The language of this statute provides an exception to the American Rule that generally each party is responsible for his or her own fees. *See, e.g., In re Estate of King,* 455 Mass. 796, 920 N.E.2d 820, 827 (2010). We agree with the Supreme Judicial Court of Massachusetts that the words "as justice and equity may require ... establish a broad standard, one that certainly reaches beyond bad faith or wrongful conduct." Nevertheless, before an award of fees is made, the trial court must provide a reason, grounded in equity, as to why such an award should be made. *See id.*

[16] **[17]** We acknowledge at the outset that, when acting in the proper exercise of her official duties, a trustee should not generally be held personally liable under the Uniform Trust Code for attorney's fees incurred by any party. *See, e.g., Garwood v. Garwood,* 233 P.3d 977, 985 (Wyo.2010). We note, however, that the use of the word "any" conveys broad authority upon the trial court to award attorney's fees to *any* party "to be paid by another party" "as justice and equity may require." While the statute does not provide specific criteria ****752** for such an award, it gives the trial court flexibility to determine what is fair on a case by case basis. *See Atwood v. Atwood,* 25 P.3d 936, 947 (Okla.Civ.App.2001); *Shurtleff v. United Effort Plan Trust,* 289 P.3d 408, 415–16 (Utah 2012). Therefore, we conclude that the statute may, under certain circumstances, authorize the award of attorney's fees against a trustee personally.

[18] We are also not persuaded by Shelton's argument that the trial court lacked authority to award fees to the intervenors, who, she observes, "joined in this case voluntarily." As a preliminary matter, we note that "[i]n a suit by a trustee for construction or by one beneficiary to protect his interest, it is generally held that all beneficiaries (or the other beneficiaries) are necessary parties since a decree will or may benefit or prejudice them." G. Bogert, The *Law of Trusts and Trustees* § 871, at 179 (2d ed. rev.1995). As Bogert observes, "[their] interests may conflict and the trustee has an interest adverse to them and should not be allowed to represent them." *Id.* at 179–80.

Shelton cites *Clipper Affiliates v. Checovich,* 138 N.H. 271, 638 A.2d 791 (1994), in support of her argument that a party who is neither forced to litigate nor subjected to litigation should bear the burden of paying his or her own attorney's fees. *Clipper Affiliates* provides a helpful discussion of the exceptions to the general principle that each party to a lawsuit is responsible for payment of his or her own attorney's fees. It is, however, ***503** easily distinguished from this case. In *Clipper Affiliates,* the trial court awarded attorney's fees to a party who sought to intervene for the sole purpose of having her counsel present during her testimony. *Id.* at 277, 638 A.2d 791.

In this case, the probate court made extensive findings and rulings that its fee award was based on Shelton's and Betty's initiation and prosecution of the litigation giving rise to this appeal. These rulings included that the litigation constituted a breach of Shelton's fiduciary duties and constituted bad faith. Based upon the record before us, we conclude that the trial court sustainably exercised its discretion in concluding that justice and equity require that Shelton, rather than the innocent beneficiaries of the trust, bear the burden of paying fees to the parties based upon her own bad faith. *See LaMontagne Builders,* 154 N.H. at 259–60, 910 A.2d 1162; Bogert, *supra* § 871, at 179–80. Because the trial court has not yet determined the factors it will consider in its apportionment of fees, we express no opinion as to the propriety of a particular fee award in this case. We remand for proceedings consistent with this opinion.

[19] Shelton's final argument is that the trial court erred in removing her as trustee of the EMT trusts. Although the respondents filed a motion requesting Shelton's removal, the trial court found that they were neither settlors nor beneficiaries of the EMT Trusts and that they had "not been aggrieved by the distribution decisions of Trustee Shelton." The trial court also observed that both Betty and Shelton objected to the motion, and that Maggie Goodlander and Christina Goodlander, beneficiaries of the EMT Trusts, had testified at trial that they did not wish to have Shelton removed as trustee. The court ruled, however, that RSA 564–B:7–706 (2007) authorized it to remove a trustee on its own initiative.

RSA 564–B:7–706 (b) provides:

> (b) In addition to the power to remove a trustee pursuant to RSA 564:9, the court may remove a trustee if:
>
> (1) the trustee has committed a serious breach of trust;

**753 (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court *504 finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Shelton does not challenge the authority of the court to remove her as trustee; rather, she argues that the grounds for removal set forth in RSA 564–B:7–706 (b) were not present in this case. She also argues that the removal of a trustee is an extreme remedy and that the grounds cited by the trial court do not support its decision to remove her as trustee.

[20] We will uphold the findings of fact of the judge of probate unless they are so plainly erroneous that they could not be reasonably made. *King v. Onthank,* 152 N.H. at 17, 871 A.2d 14. We review questions of law de novo. *Id.*

RSA 564–B:8–801 (2007) provides: "Upon acceptance of a trusteeship, the trustee shall administer, invest and manage the trust and distribute the trust property in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this chapter." The trustee has a duty of loyalty, RSA 564–B:8–802 (2007), and where the trust has two or more beneficiaries, "the trustee shall act impartially in administering, investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." RSA 564–B:8–803. A trustee must also "administer, invest and manage the trust and distribute the trust property as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution." RSA 564–B:8–804.

In support of its decision, the trial court cited Shelton's testimony at trial "that she reluctantly agreed to serve as trustee because Betty was unable to procure an institutional trustee." The court also found that: (1) Shelton was a party to the litigation and "colluded with Betty in creating controversy with the investment directors"; (2) she participated with Betty in interviewing and hiring litigation counsel to bring this lawsuit which resulted in millions of dollars in litigation expenses and fees; (3) she did not conduct "an appropriate cost-benefit analysis prior to bringing this litigation, as suggested by her own expert, John Langbein"; (4) she did not request a transfer of the EMT trust assets until six weeks after she was named trustee; and (5) "litigation costs were so massive" that there were insufficient funds in the EMT Trusts to provide for Betty's three children. *Cf. Weldon Revocable Trust v. Weldon,* 231 S.W.3d 158, 179 (Mo.Ct.App.2007)(trustee may be removed where clear necessity to save trust property exists). After reviewing the record, we conclude that these findings are not so plainly erroneous that they could not be reasonably made. *See King v.* *505 *Onthank,* 152 N.H. at 17, 871 A.2d 14. We further note that Shelton herself testified at trial that she "would really like for the EMT Trusts to have an institutional trustee, a professional trustee."

Based on these findings, the court concluded that Shelton had violated her duties **754 as trustee. Accordingly, it ruled that Shelton's removal as trustee would best serve the interest of the beneficiaries.

[21] We have not previously addressed the standard of review applicable to a trial court's decision to remove a trustee under RSA 564–B:7–706(b). Shelton cites *Petition of Lovejoy,* 352 Mass. 660, 227 N.E.2d 497, 500 (1967), in support of her argument that the trial court erred in removing her as trustee; she specifically quotes the Massachusetts Supreme Judicial Court's holding that, in a case where all the beneficiaries were in agreement on the appointment of a qualified trustee, it was "arbitrary and capricious action and an abuse of discretion" for the court to appoint someone else. Because no party argues that a different standard of review should apply, we will review the trial court's ruling under our unsustainable exercise of discretion standard. *See State v. Lambert,* 147 N.H. 295, 296, 787 A.2d 175 (2001) (explaining unsustainable exercise of discretion standard); *see also Restatement (Third) of Trusts* § 37, comment (d) (1987) (trial court's decision to remove trustee if continued appointment would be detrimental to interests of beneficiary subject to review for abuse of discretion).

[22] Having reviewed the extensive record before us, we conclude that the trial court's decision to remove Shelton as trustee was sustainable. We need not restate the findings of the trial court that we have previously cited. These findings and other evidence support the trial court's conclusion that Shelton failed to satisfy her statutory duties of loyalty, impartiality and reasonable care of the trust property. We are not persuaded by Shelton's citation of the guardian ad litem's testimony as support for her argument that the trial court erred in concluding that she had committed a breach of trust. As we have previously held, the recommendations of a guardian ad litem do not carry any greater presumptive weight than the other evidence in a case. *In the Matter of Choy & Choy,* 154 N.H. 707, 714, 919 A.2d 801 (2007). Nor do we find *Petition of Lovejoy* applicable; in this case, the trial court found many deficiencies in Shelton's performance and, therefore, did not conclude that she was a "suitable person" for the position of trustee.

Accordingly, we affirm the trial court's order that dismissed the petitioners' complaint and that removed Shelton as trustee; we remand for further proceedings to allow the trial court to consider the issue of attorney's fees.

Affirmed in part; and remanded.

***506** FAUVER, ARNOLD and FITZGERALD, JJ., retired superior court justices, specially assigned under RSA 490:3, concurred.

All Citations

164 N.H. 490, 62 A.3d 741

Footnotes

1 Because the trial court and parties refer to the Tamposi patriarch and his six children by their nicknames, we also do so to allow ease of reference to the record before us.

2 Shelton and Betty filed a complaint and amended complaint. The trial court order refers to Shelton and Betty as petitioners. For ease of reference, we do so also.

1 Fost. 9
Superior Court of Judicature of New Hampshire.

SPARHAWK & a.
v.
ALLEN & a.

July Term, 1850.

**1 *9 A person holding a fiduciary position cannot deal with property intrusted to him, for his own benefit; but the profit of any contract he may make concerning it belongs to the owner of the property.

A guardian cannot retain for his own use the benefit of any contract he may make affecting the property of his wards, but such benefit belongs to them.

If however they adopt the contract thus made they must take it *cum onere.*

A guardian can make no legal contract relating to the property of his wards by which he injures them and benefits himself.

The defendant, Allen, was guardian of the orators, who were minors. He was also the executor of a will by which the testator devised certain property to his wife, less in value than that to which she would be entitled as her distributive share under the statute, and made the orators residuary legatees. After the death of the testator the defendant and the widow agreed, without the knowledge of the orators, that she should waive the provision made her by the will, and take her distributive share of the estate, and should then convey all the property to the defendant, in consideration of which he agreed to support her, and to pay a certain annuity to her brother, and conveyances were made in pursuance of this agreement. Upon a bill in equity by the wards against the guardian to set aside the conveyances, it was *held* that the purchase by the guardian could not be sustained for his own benefit, and to the injury of his wards, and that the profit of it belonged to them, but that if they adopted it they must take it subject to the consideration the guardian had agreed to pay.

As the consideration for the purchase was entire, and as the Court would not interfere with any purchase the guardian might lawfully make, the guardian was allowed sixty days in which to make his election whether he would hold *10 all the property conveyed to him, as trustee of his wards, accounting to them for the surplus income after making the proper deductions, or would convey to them all the property except such as the widow was entitled to under the will.

IN EQUITY. The orators are infants under the age of twenty-one years, and children of John B. Sparhawk, who died on the 2d day of April, 1846. On the 18th day of that month George Sparhawk, being possessed of real and personal estate, amounting to the sum of about nineteen thousand dollars, made his will by which he bequeathed to his wife, Mary Sparhawk, one of the defendants, one half of his personal estate. He also devised to her the use of one third part of his real estate, and all the residue of his property he devised to the orators, and made the defendant, Allen, his executor. The testator died on the 13th day of February, 1847, leaving no lineal descendants. On the 7th day of April, 1846, Allen was appointed administrator of the estate of John B. Sparhawk, and guardian of the orators. Mrs. Sparhawk was infirm, and about seventy-five years of age.

**2 The bill alleged that Allen, in violation of the trust reposed in him as guardian, and for the purpose of appropriating to himself a portion of the estate devised to the orators, without their knowledge or that of Mrs. Sparhawk, previous to the 18th day of February, 1847, caused certain instruments to be prepared purporting to be her acts, and by misrepresentations as to their effect induced her to execute them at a time when her mind was fully occupied by the then recent death of her husband; that by one of these instruments she waived the provisions of the will, and requested that dower might be assigned her; that she also executed a deed by which, in consideration of six thousand dollars, she conveyed to Allen all her interest in the estate of her late husband, including all her interest as devisee under his will, and also upon her waiver of the provisions of the will, which waiver she then made, all her right and claim of dower in the premises, and all her distributive share in the property, which deed also contained a covenant that she would make all further necessary conveyances, and that *11 she also made a bill of sale of the personal property to the defendant.

The bill then alleged that Allen paid no other consideration for the deed than a bond conditioned to support Mrs. Sparhawk during her life and to pay an annuity of fifty dollars to her brother for the same period, which consideration was grossly inadequate and was

secured to her merely for the purpose of giving Allen a colorable title to that portion of the estate belonging to the orators, which he attempted to secure to himself; that Allen, though the guardian of the orators, fraudulently concealed from them the knowledge of these transactions, and for a long time affirmed to them that none such had taken place, and that nothing had been done affecting their interest in the devises contained in the will, and so continued to affirm to them until after his removal from his office of guardian on the third Tuesday of March, 1847, and the appointment of George Huntington in his place.

It was also alleged that Mrs. Sparhawk's request that dower should be assigned her, though bearing date on the 2d day of March, 1847, was in fact prepared and signed on the 18th day of February previous; that it was presented to the Judge of Probate on the 2d day of March, and that the report of the committee assigning the dower was approved on the first Tuesday of May; that Allen went into possession of the land, and still retains it, claiming to hold it and all the property mentioned in the instruments by virtue of his deed from Mrs. Sparhawk; that although she knew the instruments were executed at the instance of Allen, and has admitted that she signed them without knowing their contents, and was satisfied with the provisions of the will, and had not, to her knowledge, waived them, nor assented to any thing whereby the share of the orators would be diminished, still permits him to keep possession of the land and of the instruments; and that the orators and Huntington, on the 10th day of June, 1847, requested her and the defendant to reconvey the estate to them, and to cancel all the conveyances affecting their title to the estate, which they have declined to do. The bill then charged a combination between ***12** the defendants to defraud the orators of a portion of the estate devised and bequeathed to them by the will, in violation of Allen's trust as guardian, and for his benefit, and prayed a discovery, and that the defendants be decreed to reconvey to the orators all that portion of the estate which belonged to them by the provisions of the will, and that all the instruments in any way affecting their title be cancelled, and for general relief.

****3** The answer of Allen stated that about three months before the death of the testator, Mrs. Sparhawk complained to him of ill treatment and neglect in the family, and proposed to him, he being her nephew and having always enjoyed the confidence of herself and her husband, that in case she should survive her husband, Allen should take what was to come to her out of her husband's estate, and see that she should be well taken care of during her life, which was the first time the subject was mentioned to or thought of by the defendant. Soon after the death of the testator, the defendant informed her what were the provisions of the will, and what her rights were if she should waive those provisions, and she then decided to waive them, and an agreement was made for her support and for the payment of the annuity, and it was also agreed that the defendant should cause proper instruments to be drawn up to carry the agreement into effect, which was accordingly done. When the agreement was made she requested him, for reasons personal to herself, not to inform the orators of it, which he did not do until about three weeks afterwards. All the papers were explained and read to her, and were fully understood by her before their execution. The answer denies that the papers were prepared without Mrs. Sparhawk's approbation and knowledge, or that any persuasions were used, or any misrepresentations made to her as to their effect.

The answer of Mrs. Sparhawk states that the papers were such as Allen procured to be drawn up without any agency of hers. Some of the papers were read in her hearing, and she looked at some of them, but did not examine them so as to understand their full effect. It was never her intention to waive the provisions of the will, and if her name is to any such paper ***13** she signed it without knowing what it was. She did not intend to do any thing the effect of which would be to take from the orators any part of the property they would be entitled to under the will. She supposed she conveyed to Allen only the interest she had in the property devised her, and intended to do only that, and desires that the writings should be altered so as to effect that intention.

West Headnotes (2)

[1] **Guardian and Ward**
Individual Interest in Transactions

Defendant was the guardian of certain wards, and was also the executor of a will, by which the testator devised certain property to his wife, which was less in value than that to which she would be entitled as her distributive share under the statute, and made the wards residuary legatees. After the death of the testator, the defendant and widow agreed, without the knowledge of the wards, that she

should waive the provision made her by the will, and take her distributive share of the estate, and should then convey all the property to the defendant, in consideration of which he agreed to support her and to pay a certain annuity to her brother, and conveyances were made in pursuance of this agreement. Held, that the purchase by the guardian could not be sustained for his own benefit and to the injury of his wards, and that the profit of it belonged to them, but that, if they adopted it, they must take it subject to the consideration that the guardian had agreed to pay.

9 Cases that cite this headnote

[2] **Wills**

Rights of Other Devisees and Legatees

A widow, provided for by the will of her husband, having been induced by the guardian of her husband's residuary legatees to waive the provision made for her by will and claim dower, and to convey to him the property set off to her as dower upon certain conditions, it was held that the guardian should elect either to hold such property, subject to such conditions, for the benefit of his wards, or to convey to them so much thereof as should exceed the amount to which the widow would have been entitled under the provisions of the will.

2 Cases that cite this headnote

Attorneys and Law Firms

Wheeler, for the orators.

****4** 1. This is a case of constructive fraud originating in a breach of trust, and this court has power to grant the relief sought. R. S. ch. 171, § 6. Jeremy, after treating of the jurisdiction of courts of chancery in certain classes of cases where there has been a breach of trust says,--"And indeed, it may perhaps be laid down that the same principles apply wherever confidence is reposed, and one party has it in his power in a secret manner for his own advantage to sacrifice those interests which he is in conscience bound to support." Jer. Eq. Jur. 396. Mr. Justice *Story's* language on this point is,-- "The doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner for his own advantage, to sacrifice those interests which he is bound to protect, he shall not be permitted to hold any such advantage." 1 Story's Eq. Jur. ch. 7, § 322. *Griffiths v. Robins,* 3 Madd. 105, is the leading case upon this doctrine. The marginal note is, that "a deed of gift was ordered to be delivered up, as obtained by undue influence over the donor, who was eighty-four years old and nearly blind, and placed confidence in the donee." Mary Morris, the original plaintiff, had confided in the defendant, who married her niece, and was dependent upon him for assistance and kindness. The Vice-Chancellor says "they (the defendant and wife) stood therefore in a relation to her, which so much exposed her to their influence, that they can maintain no deed of gift from her, unless they can establish that it was the result of her own free-will, and effected by the intervention of some indifferent person…. I do not think it necessary, however, to enter into all the transactions stated to be attendant on the deed, and in the manner in which it was prepared. ***14** It is sufficient to say that the defendants have not made out that case which the policy of this court requires from persons standing in that relation to the donor in which they had placed themselves."

The transactions set forth in the bill were in fact a fraud on the part of Allen both upon the orators and on Mrs. Sparhawk.

2. Courts of Equity require the utmost good faith on the part of guardians towards their wards. They will not suffer the guardian, directly or indirectly, to enrich himself at the expense of his ward, or in any way to appropriate the ward's property to himself. And this watchfulness over the interests of wards extends even beyond the time when the guardianship ceases by law. 1 Story, Eq. 312, § 317. "The guardian's trust is one of obligation and duty and not of speculation and profits. … He cannot reap any benefit from the use of his ward's money." … "He cannot act for his own benefit in any contract or purchase or sale as to the subject of the trust." 2 Kent's Com. 229. "The relative situation of the parties imposes a general inability to deal with each other." 1 Story, Eq. 312. "If the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud."*Hatch v. Hatch,* 9 Vesey, 297.

**5 3. By the devise, the death of the testator, and the probate of the will, the estate in question vested in the orators; and it was devested by the wrongful acts of their guardian. There could not properly be a waiver of the provisions of the will, until after the probate; and the orators then took, by relation back, a vested estate from the time of the testator's death.

Handerson, for Mrs. Sparhawk.

J. Parker, for the defendant, *Allen.*

1. As against Mrs. Sparhawk, if she stood alone, there is no pretence for relief. She but exercised a legal right. Any declaration that she may have since made that she did not know it could affect the complainants, or any matter in her answer of that character, could not affect her. She intended to waive *15 the provisions of the will. That appears throughout. She had the right to do so, she did so, and the legal effect, whatever it may be, follows. Her title to the property could not be impeached, and of course, ordinarily, the title of any one holding under her must be good.

2. The defendant Allen holds under her and has her rights. He well maintains his defence upon her title and transfer, unless the case shows something which will charge him with a trust when the property comes into his hands which would not avail to charge her while it remained in her hands, or in those of her grantee. If he may be so charged, it is by reason of some peculiar duty and consequent liabilities resting on him, by reason of which he cannot claim to stand, as any one else might, in as good a situation as the party from whom he derived his title.

3. There is no duty or liability which should prevent him from availing himself of the right acquired by the transfer from her, arising from any contract on his part with the complainants to procure the property for them or to act as their agent in any negotiation for acquiring it either from her or from the testator. The case is not within that class where agents employed to make purchases or to do any acts in relation to property, violate the duty they have undertaken by such employment, by making purchases or contracts for their own benefit instead of acting for their employers.

4. The only duty which Allen owed to the orators was of a fiduciary character, arising out of the relation of guardian and ward, or as executor of the will of the testator, the complainants being legatees. If he can be made liable it is by some breach or violation of such duty. He owed them no duty in this particular as administrator of the estate of their father.

5. As executor of the will, he was bound to administer upon the estate according to the will and the rules of law, and to pay and deliver over to the orators whatever they were entitled to receive from him as executor. As guardian, he was bound to take the custody of any property which belonged to them, to take due care of it, and if he might, by reasonable diligence, to procure an income from it. He was perhaps bound also to *16 appropriate so much of the income and principal as was necessary for their support and education. His duty as guardian of their persons cannot come in question in this case.

**6 6. He was under no obligation, either as guardian or as executor, to endeavor to procure property for the orators by gift or otherwise except by way of income from the estate, which belonged to them. Nor was he bound in either capacity to abstain from advising persons not to give to them, or from otherwise preventing property other than the income from this estate, from coming to them by any act which would be lawful in third persons. As executor or guardian he owed them no duty in this respect, and his liability is only commensurate with his duty.

7. If the testator had intended to give them all his estate, and Allen had solicited him not to bequeath any thing to them, but to give the estate to him, in consequence of which they had been omitted, and he had been made sole legatee, there would have been no pretence for charging him either from his being executor or guardian, or from any other consideration.

8. It follows that he is not liable, from any suggestions to Mrs. Sparhawk, or solicitations even, that she would exercise her legal rights, take what the law gave her, and convey it to him, or by the exercise of those rights, and the transfer of the property to him, unless it had passed to him, so that he, as executor or guardian, was chargeable with the custody of it for their benefit. If he owed no duty except as to their property, and if he might have advised the testator to exercise his legal rights in order to obtain the property himself, he might equally well advise Mrs. Sparhawk to exercise her lawful power over the subject-matter for the same purpose, unless the state of things was changed so that the property by the will passed to them. In order to charge him, they must show title under the will. They are not heirs at law.

9. The property never passed to them so that he, as executor or guardian, could be charged with any duty in relation to it. They never had any title; the devise to them was, by operation of law, subject to her right to waive the provisions of the will, ***17** and take her distributive share. Having waived her rights under the will, the devise to her became void. Rev. St. 314. She took by descent, and nothing of what she thus took ever passed to them by the will. There was not, upon general principles, aside from the statute provisions above referred to, any thing ever vested in them.

10. But if the general proposition might be supposed to admit of argument, and if it might be held, where the waiver was not made until after the proof of the will, that the estate vested in the residuary devisees, subject to be devested by the waiver by Mrs. Sparhawk, and her claim of dower, and that in such case she would hold her distributive share by descent, on the principle of relation back, there having notwithstanding been an intervening estate in the devisees, in the mean time, that is not so here, because the waiver was before any thing could vest in the orators as residuary devisees under the will, which could not pass any estate to them or to any person until its probate. This is entirely clear under the provisions of Rev. St. 313. Upon the probate of the will, if nothing had intervened to prevent it, the estate would vest in them, and if they continue to hold it they might, by relation back, have been deemed seised from the decease of the testator. But long before the probate, the widow waived the provisions for her, and claimed her rights. This appears from the bill and from the answer. The waiver and claim for distribution, as in case of intestacy was filed in the probate office, and became complete and binding on the 19th day of February. The devise to her was then void as if it had never been made. She was then entitled under the Statute of Distributions. Her title had relation back to the decease of the testator, not to defeat any title which they had in the intermediate time, but to preserve the succession to the freehold unbroken. She took as if the will had never been made. There is no intervening estate between her and the testator, and never has been. When the will was proved and became operative, upon the 2d of March, the residuary devise did not and could not operate upon any thing that she had thus entitled herself to as part of her share in the ***18** estate. As to what she thus took, the will was to the residuary devisees as it was to her, entirely inoperative. There could, of course, be no relation back in their favor. And the case stands no better for them than it would if the testator had expressed a wish that they should have the property in question, and then died without making a will. They never had even a contingent interest. It cannot surely be said of the intended provision for her inserted in the will, that the title vested in her and was devested by her waiver of the provision before the probate of the will. As little can it be said of the provision for the orators so far as the provision operated upon it.

****7** 11. As executor, then, he not only owed them no duty, but he had no power to take any charge for their benefit, until the probate of the will. As guardian he could not enter upon the land, nor do any act about it, until after the probate of the will. Upon the probate, they had no right so far as this estate is concerned, and never had any. And this shows clearly that Allen has not failed to perform, nor violated any fiduciary duty. The utmost that can be said is that he may have had some influence in preventing the property from ever coming to them, by a bargain with Mrs. Sparhawk, which induced her to waive the provisions of the will and assert her legal rights. This he had a right to do. Most persons would not hesitate to do it, and what equity is there in favor of the orators?

12. If we apply the most general language of the books, without reference to its connection and the facts to which it has relation, the defendant cannot be watched with jealousy, until he is shown to be trustee in this matter--until the fiduciary relation exists. He is not shown to have availed himself of any information which he acquired while acting as executor or guardian, to their prejudice. There was no interest which he was bound to support and protect, and he had no duty to perform to them in relation to this property.

13. For the reasons now suggested, the orators cannot be regarded as having had an estate in the property by virtue of the will taking effect upon the death of the testator, and defeated ***19** subsequently by Mrs. Sparhawk's waiver. If they might be regarded as having such an estate, subject to be defeated by the exercise of her right, we should contend that the estate, being in its nature subject to be defeated, and being lawfully defeated by the exercise of her legal rights, must be treated for all purposes as if it had never existed, and could not now be set up as if it had existed, so as to charge Allen with any duty to them. But it is not necessary to go into that argument, because it seems so entirely clear that they never had even a defeasible title.

14. The same result will be attained by another and a much shorter view. The estate belonged to the testator. The law gave him power to devise, but made that power subordinate to the right of the widow to waive the provisions of the will and take her distributive share under the provisions relative to intestate estates. By the waiver, she takes by descent directly, a distributive share, and not by defeating any estate given by the will. It is precisely the same as if the statute had said that this power of devise should not take effect so far as relates to the distributive share of the widow if she shall elect to waive the provisions made for her, and take her distributive share.

Chamberlain, on the same side.

Opinion

GILCHRIST, C. J.

The estate of the testator, according to the Inventory was as follows:

Personal estate,.....	$4,341.23	
Deduct for debts, including Allen's claim of $1000.....	1,573.17	$2,768.06
Real estate,.....		15,152.84
		$17,920.90
There was devised to Mrs. Sparhawk, by the will, one half the personal estate,.....		$1,384.03
One third of the real estate during her life.....		5,050.94
		$6,434.97
By the statute she would be entitled, on waiving the provision made her by the will, R. S. ch. 165, §§ 8 & 9, as her husband left no lineal descendants, to one third of the land during her life, as dower,.....		$5,050.94
also to one third of the residue in fee, which would be.....	17,920.90-5,050.90=12,869.96	
one third of which =4,289.98		
Deducting from the sum she would have in fee by the statute.....		$4,289.98
the sum given her absolutely by the will.....		1,384.03
she would receive the sum of.....		$2,905.95

****8 *20** by the negotiation with Allen, more than the sum given her by the will, of which Allen would receive the benefit, and which must of course be deducted from the share of the orators, who are the residuary devisees.

For the purpose of determining the principles which should govern this case, it is necessary to examine the authorities at some length.

There is a certain benefit which a guardian may legitimately derive from his position in relation to his ward. He may receive a reasonable compensation for his

services. But even this rule, when considered in relation to trustees, is of comparatively recent origin. In *Robinson v. Pett,* 3 P. Wms. 250, Lord Chancellor *Talbot* said it was an established rule, that a trustee, executor, or administrator, should have no allowance for his care and trouble. This rule has been changed for another, proceeding on more liberal principles, but its existence shows the extreme caution which has always been exercised by the courts in omitting to put any temptation in the way of persons occupying a fiduciary relation. Lord *Hardwicke* said, in *Ayliffe v. Murray,* 2 Atk. 58, that chancery looked upon trusts as honorary, and a burden upon the honor and conscience of the trustee, and not undertaken upon mercenary motives. Although all persons occupying these positions are now allowed a reasonable compensation, still the feeling of the necessity of watchfulness which dictated the original rule exists in all its force, and can be perceived in the reasoning of the courts whenever an inquiry is made into the character of transactions affecting the trust property. The conduct which the court of chancery intends to require is such as ***21** would result from the moral sense of a conscientious man. It frowns upon what, in the language of Chancellor *Kent,* "is repugnant to a sense of refined and accurate justice." 5 Johns. Ch. Rep. 407. So far has this doctrine been carried, that where there were two joint devisees of land in possession but the title was imperfect, it was held that one of them could not buy up an adverse title and expel his co-tenant, but that the purchase would enure to their common benefit. *Van Horne v. Fonda,* 5 Johns. Ch. Rep. 388. Such conduct is said by Chancellor *Kent* "not to be consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject created." "It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim which the relationship of the parties, as joint devisees, created." "There was a mutual obligation to deal candidly and benevolently with each other and to cause no harm to their joint interest." We have given the language of this eminent lawyer, because it expresses the high standard by which the court tests the conduct of parties, and that too in a case where ordinarily no fiduciary relation is supposed to exist.

****9** The following is, as we understand it, the substance of the acute and ingenious argument on the part of the defendant.

The defendant's only duty arose from his position as guardian of the orators, or as executor of the will under which they were legatees.

He was not bound to endeavor to procure property for them, or to abstain from advising persons not to give to them, or from preventing property from coming to them, by any act which would be lawful in third persons.

He might have solicited the testator to give *him* his estate, and not the orators, and if successful, he would not have been chargeable.

Consequently, he is not liable on account of his suggestions and advice to Mrs. Sparhawk to exercise her legal rights, and convey the property to him, unless it had passed to them so that he was chargeable with its custody for their benefit, and in order to charge him they must show title under the will.

***22** The property never passed to them so that he could be charged with any duty in respect to it. The devise was subject to her right to waive the provision in the will. Having waived her rights the devise to her became void, and she took by descent.

The waiver was before any title vested in them under the will, for that passed nothing until the probate, and the waiver was before that.

By the waiver, the devise to her became void, and her title had relation back to the death of the testator, and she took under the Statute of Distributions.

Therefore he violated no fiduciary duty in relation to the estate which she took. All that can be said is, that he might have had some influence in preventing the property from coming to them, by a bargain with her which induced her to assert her legal rights. Most persons would not hesitate to do this, and why should the guardian? There was no interest which he was bound to protect, and he had no duty to perform in relation to the property.

It may be remarked that even in the absence of fraud, a person holding a fiduciary relation is precluded from doing certain things for his own benefit, which strangers might do for their benefit. If a guardian buy up the incumbrances on his ward's estate at an under value he must not charge the ward with more than he paid. 2 Ch. Cas. 245. But a stranger may do this, and the reason why a guardian may not is derived from considerations of

public policy. It is held in *Hatch v. Hatch,* 9 Vesey, 292, that such considerations should weigh in a case where a conveyance was made by the ward to the guardian, and upon considerations of public policy the conveyance was set aside after a great lapse of time. Lord *Eldon* said,--"If the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud." In *Whichcote v. Lawrence,* 5 Ves. 750, Lord *Loughborough* said,--"It is very plain in point of equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter, shall not in the same matter act for himself. He is not acting with that want of interest, that total absence of temptation, ***23** that duty imposed upon him, that he shall make no profit. In whatever shape that profit redounds to him, whether by management, which is the common case, or by superior good fortune, it is not fit that the benefit shall remain to him." So executors cannot for their own benefit buy the debts of the creditors, although the transaction may be morally right, because the policy of the law makes it impossible for them to do any thing for their own benefit. *Lacey, ex parte,* 6 Vesey, 628. A trustee in a renewable lease endeavored fairly and honestly to treat for a renewal on account of the *cestui que trust,* but the lessor positively refused to renew to him, and the trustee then took the lease for himself. But it was held to be so difficult to be certain that in such cases there was not management, that the trustee was not permitted to hold it, though, as Lord Chancellor *King* said, "it might seem hard that the trustee was the only person of all mankind who could not hold the lease." *Keech v. Sandford,* 3 Eq. Ca. Ab. 78. Speaking of this case Chancellor *Kent* says in *Davoue v. Fanning,* 2 Johns. Ch. Rep. 260, that the decision has never been questioned, and also says, "if we go through all the cases, I doubt whether we shall find the rule and the policy of it laid down with more clearness, strictness, and good sense." The case of *Keech v. Sandford,* is stated by Lord *Eldon* in *Ex parte James,* 8 Vesey, 345, and he says, that the doctrine as to purchases by persons having a confidential character stands much more upon general principle than upon the circumstances of any individual case. It would seem that after the refusal of the lessor to renew the lease, the trustee ceased to be such as to the lease, but that made no difference. In *Whelpdale v. Cookson,* 1 Ves. Sr. 9. Lord *Hardwicke* said that where a trustee has a prospect of advantage to himself, there is a great temptation to be negligent, and to act in such a manner as not quite to fix an imputation upon him. In *Davoue v. Fanning,* Chancellor *Kent,* says, in speaking of a purchase by a trustee from a *cestui que trust* "however innocent the purchase may be in the given case, it is poisonous in its consequences." In *Ex parte James,* a solicitor to the bankrupt commission was not permitted to purchase the property at auction, and this decision was expressly put, not ***24** on the ground of want of fairness, but on the general principle that the solicitor had a confidential character. In *Davoue v. Fanning,* Chancellor *Kent* says that the principle pervades the whole body of the cases, that the question is not whether there was or was not fraud in fact. The case of the *York Buildings Co. v. Mackenzie,* 8 Brown's Par. Cases, shows how far the principle has been carried. The estates of an insolvent company were sold by auction at a price fixed by the court, and called the upset price, founded upon information procured by a person called in the Scottish courts "the common agent." He bid the upset price, no one offering more, and the sale was confirmed by the court, and he expended, in the course of eleven years, large sums for buildings and improvements, and there was no question as to the fairness and integrity of the purchase. The reasons stated by the appellant were, that he who is intrusted with the interests of others, cannot make the business an object to himself, because from the frailty of nature, one who has power will be too readily seized with the inclination to serve his own interest at the expense of those for whom he is intrusted; that the danger of temptation, from the necessity of the case, works a disqualification, and that the wise policy of the law had therefore rendered the person who had the one part intrusted to him incapable of acting on the other side. All the principles above-stated are recognized in their fullest extent in the case of *Davoue v. Fanning,* where, after a very able analysis of the authorities, the Chancellor decided that if a trustee, or person acting for others, purchase the trust estate, the *cestui que trust* will be entitled to have the sale set aside as of course, however fair the transaction may have been. And in 1 Story, Eq. Jur. § 323, the same result is said to follow from the authorities.

****10** The gist of the defendant's argument is, that as the property never vested in the orators, he was not a trustee for them, and occupied no fiduciary position in relation to the property, and consequently was as free to make a bargain about it for his personal emolument as a stranger would be. If no broader view than this of the duties of a guardian can be taken, the position is correct. The authorities referred to, show the extreme jealousy ***25** with which the courts watch the proceedings of any one, who, being intrusted with the charge of the interest of others, attempts to make his charge a source

of personal profit. Nothing can be more pointed than the language of the eminent lawyers who have discussed the question. Some of the cases have a direct bearing upon the present one. In the *York Buildings Co. v. Mackenzie* the ""common agent" was not a trustee until, by making the business one of personal emolument, he made himself a trustee. He was merely appointed to look after the interests of the parties concerned. Was not Allen appointed to look after the interest of the orators, his wards? In the case of the renewal of the lease, *Keech v. Sandford,* the *cestui que trust* was not injured because the lessor refused to renew it for his benefit, and it would seem that then the trust ceased, but the general interests of justice were held to require, as Lord *Eldon* said, that such transactions should not exist. Here, the wards *were* injured and the guardian was benefited. Is there nothing here by which the interests of justice may be supposed to be perilled? In the case of the joint devisee who bought in the adverse title, *Van Horne v. Fonda,* the purchaser was not bound to look after the interests of his co-devisee, but he was not permitted to do any thing to injure them, and to benefit himself. Simply as a co-tenant he occupied no fiduciary position which did not exist much more decidedly in the present case.

But it is said that the orators had no vested interest in this property. Supposing this position to be sound, is this a safe criterion by which to judge of the propriety of the guardian's conduct? Is he not bound upon every principle to look after a contingent remainder, which may be of the last consequence to his wards? It is said, also, that he was under no obligation either as executor or as guardian to endeavor to procure property for the orators except by way of income from their estate. Let us suppose that he had been guardian only, that a stranger had been executor of the will, and that the executor had omitted to cause the will to be proved, in a case where the whole interest of his wards was of such a character that it might have been defeated by the exercise of the legal rights of a third person. ***26** Would there be no obligation in common fairness and fidelity resting upon the guardian to take some interest in the probate of that will; to exert himself somewhat that the affairs of his wards committed to his charge should be managed with, at least, that reasonable sagacity which is applied to the ordinary business of life? It is going sufficiently far to say, that he may fold his arms, and sit down and let the property go where it may without perplexing himself on the subject. It certainly is not requiring an unattainable degree of perfection, to ask that he shall at least be content with doing nothing, and that he shall not be the instrument by which the property is diverted from the channel in which, but for his interference, it might have flowed, and is made a source of profit to himself. It is said that this is not the case of an agent employed to make purchases who violates his duty by buying for himself. If he were not the agent for his wards, who was? The law prohibited them from managing this property themselves. Their contracts would be invalid. To whom, then, were they to look with confidence that their interests would be protected and their incapacity supplied, but to their guardian? If the law requires in a guardian neither self-denial, nor an integrity that will be above mercenary motives, nor a diligent attention, nor a single eye to the interest of his wards, why is he appointed? If any adult, of ordinary business capacity, had been in the situation of these devisees, he might, with perfect propriety and honesty, have advised Mrs. Sparhawk that, as she was comfortably provided for by the will, it would be fitting that she should pay some regard to the wishes of her deceased husband and permit his will to be executed according to his intentions. The guardian not only did not do this, but he did the very reverse of it. Is it asking too much of human nature to require that he should do this; or if it be, to demand of him that he should not aid in defeating the provisions of that instrument which he was doubly bound, as executor and as guardian, to enforce? Let us suppose that the precise course of conduct followed by the guardian could have been foreseen by the Judge of Probate when application was made to him for the appointment of Allen. Let us suppose that his conversations with Mrs. ***27** Sparhawk, the concoction of the bargain, the execution of the deeds, the omission to inform the orators of the matters in progress, and the effect of the whole upon their pecuniary interests, had been all anticipated by the Court of Probate. In the face of all these, would Allen have been appointed to this trust? Would any tribunal have fancied itself employed in the administration of justice by making such a decree? If, as we believe, such conduct would not then have been deemed justifiable, as little can it be considered proper now. A guardian is a person upon whom the law imposes the duty of looking after the pecuniary interest of his wards. In doing this duty he is bound to exercise at least that ordinary diligence which is applied to the common affairs of life. This, the defendant did not do, for knowing from his own account that Mrs. Sparhawk intended to take a step that would injure his ward, he did not oppose it, or advise against it, or even inform his wards of it, that they might, if they should choose, procure some person

who should manifest that interest in their affairs which their guardian did not seem to feel.

****11** The evidence tends to prove, and we do not understand it to be denied, that Allen took an important part in the transaction from the first suggestion of the purchase to the final result. Suppose, for the sake of the argument, that he used no influence over her, that he did not thrust the plan upon her, that he did not weary her with his solicitations. Still, admitting all this, he was the passive recipient of all her ideas upon the subject; he made use of no argument to dissuade her from her purpose; he did not remind her, as he might well enough have done, that the provision made her by the will was ample for all her wants; and he omitted for several weeks, as he says at her request, to inform the orators of the projects which he and Mrs. Sparhawk had been discussing. If such facts only had existed, and the result had been to his profit, the authorities seem to settle that he could not retain the benefit of the transaction. But he went farther than this; and to suppose that during all this period while the matter was yet incomplete, while he was preparing the various papers for her signature, it did not stimulate his exertions to reflect that all this was very much to his own personal profit, ***28** and did not induce him to use one argument in favor of her purpose, would be to put an unnatural construction upon his conduct, and to presume that he had a greater degree of self-denial than men in general possess. And if, in omitting to communicate the proposed purchase to the orators, he was actuated solely by a regard to her wishes and not to his own interest, he was remarkably free from selfishness. But it is enough that the whole was one transaction, in which, from the beginning to the end, he was concerned; that his interest as guardian was in opposition to the purchase, and his interest as an individual was in favor of it, and that the former gave way to the latter. He was, in the large sense of the word, an agent, intrusted with important interests, which, upon every consideration it, was his duty to guard. And we do not think that the limits of his duty are to be determined by the technical character of those interests, or that he was free to act as he chose, provided they could not be transferred by deed, or recovered in a writ of entry.

The judgment of the court is, that the purchase by the guardian was, under the circumstances, illegal, and he cannot derive any benefit from it. He must be regarded as having purchased the property of Mrs. Sparhawk for the benefit of his wards. We shall not, of course, interfere with any contract he might lawfully make with her. The consideration for Allen's contract was entire, and he should not be compelled to perform it if he is to lose any part of the consideration. If the orators adopt his contract they must take it *cum onere.* All the property he received from Mrs. Sparhawk is chargeable with the burden of his contract, and the surplus income, after performing the contract, belongs to the orators. Under the circumstances, he should have an election. He may, within sixty days, elect to hold the property as trustee for the orators, charging the income with the support of Mrs. Sparhawk, and with the annuity to her brother, and accounting to them for the surplus; or he may convey to them by a deed, with proper covenants against any incumbrances made by him, all the property he received from Mrs. Sparhawk, except so much as she would be entitled to under the will: and there must be a decree accordingly.

All Citations

1 Fost. 9, 21 N.H. 9, 1850 WL 4412