

mation is gratuitously given.¹⁵ The right of jury trial supplies an additional safeguard. The defense of contributory negligence is also available, though limitation by statute seems desirable¹⁶ in view of increasing specialization and necessity for relying on experts' statements. A possible additional restriction, adopted in some cases,¹⁷ and urged by Jeremiah Smith,¹⁸ is the limitation of liability to cases where it appears that there was knowledge that the statement was to be used to induce reliance of third parties, and that it was "likely to produce substantial pecuniary loss if the statement proved false."¹⁹ Such a restriction in cases of negligent statements by accountants would result in an extension of liability consistent with the responsibilities of accountants to business.²⁰

Trusts—Apportionment of Proceeds of Sale of Unproductive Land—Taxes—[Illinois].—One of the provisions of a will setting up a trust which included a large amount of unproductive land was, "I hereby authorize and direct" trustees "in their judgment and discretion" to sell "any or all of my vacant real estate. I prefer that the tract of land known as 'the pasture' be sold last." Trustees held the vacant land for many years, deducting taxes and carrying charges from the income due the life tenants from other trust property. Upon the sale of the land at a greatly enhanced value, the life tenants sought apportionment of the sale price between principal and income and restitution of the amount deducted from their income for taxes and carrying charges. *Held*, that under the circumstances of the case the power was discretionary and that, therefore, the rule of apportionment which depends on an imperative power of sale is inapplicable. Furthermore, the taxes and carrying charges were properly paid out of income, inasmuch as the will directed payment of net income. *Love v. Engelke*.¹

This decision forces Illinois trustees in each case to interpret correctly at their peril whether a will establishes a discretionary or mandatory power of sale, and to look for an "intention" as to the extent of the powers of the trustee where in most instances settlors will have entertained no thoughts in regard thereto, a result which cannot help but increase litigation.

Because of the general duty of a trustee to obtain the highest income commensurate with the preservation of the principal of the trust,² the law imposes a duty on trustees to convert unproductive property.³ In order to avoid a sacrifice sale or to

¹⁵ *Carpenter, op. cit. supra* note 13, at 757; *Bohlen, Misrepresentations as Deceit, Negligence or Warranty*, 42 *Harv. L. Rev.* 733, 741 (1929); *Rosenberg v. Cyrowski*, 227 *Mich.* 508, 198 *N.W.* 905 (1924).

¹⁶ *Cf. New Brunswick Rev. Stat. (1927) c. 143, § 2; Nova Scotia Stat. (1926) c. 3, § 2; 35 Stat. 66 (1908), 45 U.S.C.A. § 53 (1926).*

¹⁷ *International Products Co. v. Erie Railroad*, 244 *N.Y.* 331, 155 *N.E.* 662 (1927); abstractor cases: *Brown v. Sims*, 22 *Ind. App.* 317, 53 *N.E.* 779 (1899); *Anderson v. Spriesterbach*, 69 *Wash.* 393, 125 *Pac.* 166 (1912); *Shine v. Nash Abstract & Invest. Co.*, 217 *Ala.* 498, 117 *So.* 47 (1928).

¹⁸ *Smith, Liability for Negligent Language*, 14 *Harv. L. Rev.* 184, 195 (1900).

¹⁹ *Ibid.* ²⁰ *Note 5 supra.*

¹ 368 *Ill.* 342, 14 *N.E. (2d)* 228 (1938).

² *Rest. Trusts* §§ 176, 181 (1935).

³ 4 *Bogert, Trusts and Trustees* § 825 (1935); *Loring, A Trustee's Handbook* 127-128 (4th ed. 1928).

benefit the trust as a whole because of appreciation of land values, the trustee is given the privilege to hold unproductive land in seeming violation of his duty to provide income for the life tenant.⁴ Such discretion, protecting the remainderman's interest, cannot be used to injure the life tenant because the trustee has a duty of impartiality as between successive beneficiaries.⁵ The rule of apportionment⁶ has been developed to allocate to the life tenant from the sale of unproductive property in the *res*, the income of which he had been deprived during the unproductive period.

But if the intention of the testator is manifest that the trustees are under no duty to sell the unproductive land and that thus the life tenant is not entitled to any income while the land is unproductive, apportionment will not be granted upon sale of the land.⁷ If, however, a power of sale is "discretionary" merely in the sense of leaving to the trustee discretion as to the time of the sale, apportionment is the proper solution.

An interpretation of the power of sale as discretionary in the sense that trustees might decide never to sell at all makes the interest of the life tenants as to a substantial part of the trust an illusory one dependent on the whims of the trustees. Such a power is so abnormal that it should never be held to be given to the trustee unless the settlor has clearly expressed such an intention. The New York court went as far as to hold⁸ that "all powers herein given are intended to be discretionary, and to be exercised or not as the said executors shall think proper" granted "discretion as to the time of sale" only.⁹

The Illinois court, influenced by evidence that the testatrix had little faith in her children and great solicitude for her grandchildren, the remaindermen, interpreted her intention as giving to the trustees the unusual degree of discretion which permitted them either to sell the vacant land or to retain it for the duration of the trust, free from any duty to the life tenants with respect to the land. As such an interpretation rests upon the peculiar circumstances of the instant case, the decision is a narrow precedent. It will, it is hoped, develop no trend in this jurisdiction toward denying apportionment to life tenants in the ordinary case.

Because of the difficulty in interpreting the intentions, if any, of settlors as to apportionment, it might be well to abandon the attempt to find by interpretation of the power of sale clause such intentions and grant apportionment as a matter of course in all cases except where the settlor has included an affirmative indication in the trust instrument itself¹⁰ as to what he wishes to be done about apportion-

⁴ Bogert, *op. cit. supra* note 3, at §§ 825, 826.

⁵ Rest., Trusts § 232 (1935).

⁶ Bogert, *op. cit. supra* note 3, at § 827; see 5 Univ. Chi. L. Rev. 122, 126 (1937).

⁷ Creed v. Connelly, 272 Mass. 241, 172 N.E. 106 (1930); Jordan v. Jordan, 192 Mass. 337, 78 N.E. 459 (1906); Green v. Crapo, 181 Mass. 55, 62 N.E. 956 (1902); Hite v. Hite, 93 Ky. 257, 20 S.W. 778 (1892); Outcalt v. Appleby, 36 N.J. Eq. 73 (1882).

⁸ The liberal extension of the apportionment rule may be traced in these cases: Lawrence v. Littlefield, 215 N.Y. 561, 109 N.E. 611 (1915); Furniss v. Cruikshank, 230 N.Y. 495, 130 N.E. 625 (1921); Matter of Jackson, 258 N.Y. 281, 179 N.E. 496 (1932); *In re Chapal's Estate*, 161 Misc. 67, 292 N.Y. Supp. 663 (1934); *In re Rowland's Estate*, 273 N.Y. 100, 6 N.E. (2d) 393 (1937).

⁹ Furniss v. Cruikshank, 230 N.Y. 495, 505, 130 N.E. 625, 628 (1921).

¹⁰ The Restatement *apparently* establishes this view in § 240 which provides "unless it is otherwise provided by the terms of the trust," trustees are under a duty to life tenants to sell unproductive property and apportion the proceeds. But consideration of § 4 which defines

ment.¹¹ The attitude of the New York courts favors this trend away from the ordinary search for "intention."¹²

The ruling on the taxes and carrying charges is hard to justify. Ordinarily, they are properly paid out of income. But an exception is made in the case of unproductive land,¹³ taxes and carrying charges being properly chargeable to principal.¹⁴ The taxes on urban vacant land rapidly appreciating in value, such as was involved in this case, might well have surpassed the total income from the productive property. It is hard to believe that a testatrix who went to the trouble of creating a trust for the life tenant would intend that the remaindermen "grow rich at the expense of the life tenant,"¹⁵ but so the Illinois court construed her intention.

Workmen's Compensation—Right of Employee's Illegitimate Children to Compensation—[Wyoming and Pennsylvania].—Non-resident, alien, illegitimate children of a workman, who was killed during and in the course of his employment, and for whose support the workman had made regular and substantial remittances to the mother, sought compensation under the Wyoming Workmen's Compensation Act,¹ according to which a non-resident alien child of a workman may under certain circumstances receive compensation. Upon appeal from an award to the plaintiffs, *held*, reversed. *In re Dragoni*.²

Workmen's compensation was sought by the illegitimate child of the wife of a workman, who was killed during and in the course of his employment. The child was living in the family of his mother's husband, and his claim for compensation was based on a provision of the Pennsylvania Workmen's Compensation Act,³ according to which compensation may be granted to a "step-child" of a workman. On appeal from a judgment for the plaintiff, *held*, affirmed. *Union Trust Company v. Union Collieries Co.*⁴

"terms of the trust" as the "manifestation of intention of the settlor" as indicated by written or spoken words or conduct of the settlor in the light of all the circumstances, seems to lead one back to the policy of seeking the intention of the settlor by examination of all sorts of evidence.

¹¹ For an interpretation of the Restatement as abandoning the intention test, see 35 Col. L. Rev. 306, 308 (1935); 40 Yale L. J. 275, 278 (1930).

¹² "The distinction between this case and cases where there is no imperative power of sale or equitable conversion; where the testator *directs* the trustees to sell *only* in their discretion and where it is, therefore, said that the only inference is that testator intended to benefit the principal of his estate . . . may not ultimately prevail," Pound, J., in Matter of Jackson, 258 N.Y. 281, 291, 179 N.E. 406, 500 (1932).

¹³ But see Matter of Satterwhite, 262 N.Y. 339, 186 N.E. 857 (1933) which seems to agree with the view of the instant case on taxes where there was no imperative direction to sell unproductive property in the will. The New York courts, however, would undoubtedly have construed this will as they did in Furniss v. Cruikshank, 230 N.Y. 495, 130 N.E. 625 (1921).

¹⁴ Patterson v. Johnson, 113 Ill. 559 (1885); Hite v. Hite, 93 Ky. 257, 20 S.W. 778 (1892); Bogert, *op. cit. supra* note 3, at § 804; 2 Perry, Trusts and Trustees § 554 (7th ed. 1929).

¹⁵ *In re Montgomery*, 99 Misc. 473, 474, 165 N.Y. Supp. 1069, 1070 (1917).

¹ Wyo. Rev. Stat. 1931, c. 124, §§ 106-7, k., as amended by Laws of 1935, c. 100, § 2.

² 79 P. (2d) 465 (Wyo. 1938).

³ Purdon's Pa. Stat. 1931, Title 77, § 562.

⁴ 200 Atl. 267 (Pa. Super. Ct. 1938).