PROBLEMS OF TRUST ADMINISTRATION IN NEW JERSEY*

SECTION V. DISTRIBUTION OF TRUST ASSETS

A. Instruction to Pay Specific Sums.

Having paid funeral expenses, debts and administrative expenses, the trustee is under a duty to distribute as directed by the instrument or by rules of law.[161] Legatees must be paid within one year of the decedent's death,[162] but if the corpus is insufficient to pay legacies they are subject to abatement and the trustee may recover excess already paid, in good faith and sound discretion.[163]

B. Effect of clauses giving trustee discretion as to application of principal to life beneficiary.

1. *Limitations effective to give trustee discretion.*[164]

The following language is typical of what has been deemed sufficient to clothe a trustee with discretion:

(a) "as much as cestui wants or requires for her support and the education of her children."[165]

(b) "should cestui become incapacitated because of serious illness or extraordinary circumstances, trustee may"[166]

(c) "whenever he shall deem it expedient, in view of the necessities, comfort, or welfare, to apply corpus."[167]

(d) "if cestui reaches forty (40) years of age and if she be not indebted, and competent to manage her affairs, of which executor is to be sole judge,[168] executor is to pay over corpus."[169]

2. *Consequences of discretion in trustees.*

(a) Trustee as a judge of whether the condition precedent to payment has occurred.

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[161] Hoboken Trust Co. v. Norton, 90 N.J.Eq. 314, 107 Atl. 67 (1919).
[162] O'Leary v. Smock, 95 N.J.Eq. 276, 119 Atl. 118 (1923).
[163] *In re* Liberty Title and Trust Co., 115 N.J.Eq. 506, 171 Atl. 531 (1934).
[164] Hicks v. Hicks, 84 N.J.Eq. 515, 94 Atl. 409 (1915).
[165] Coffin v. Watson, 78 N.J.Eq. 307, 83 Atl. 1118 (1911).
[166] Hudson County National Bank v. Flora, 114 N.J.Eq. 135, 168 Atl. 123 (1923).
[167] Martin v. Kimball, 85 N.J.Eq. 10, 95 Atl. 565 (1916).
[168] Turnure v. Turnure, 89 N.J.Eq. 197, 104 Atl. 293 (1918).
[169] Hudson County v. Flora. *supra* note 166.

Sometimes courts rule as a matter of law that the contingency has not happened. In such case, the trustee has no power to pay over. Thus where the trustee was authorized "to use the principal in the event that the son became incapacitated because of serious illness or other extraordinary circumstances," it was held that the permanent unemployment caused by the economic depression and indolence did not empower the trustee to use the corpus towards his support. Sometimes, it has been adjudged that certain conditions being present, the trustee cannot as a matter of law be compelled to exercise his discretionary power. This is best illustrated by the case of *Hudson Trust Co. v. Grant*[170] where the trustee was empowered to use the corpus for the benefit of testator's son in the event that he become incapable of earning his own support and the son, having lost two fingers, was shown to have other assets.

In other instances, courts have declined to interfere with the determination arrived at by the trustee, clothed with discretion, there being no taint of bad faith.[171]

(b) Trustee as a judge of the amount to be paid over.

In this group of cases, the trustee apparently is permitted to make any reasonable disbursement, though on a bill for instruction the court has referred to a master the question of the amount of income necessary to maintain and educate certain minor children.[172] The more usual rule was illustrated in *Martin v. Kimball*[173] where the trustee was authorized to expend $3,000, in a particular year, in excess of the income in order that cestuis be maintained in the higher social circles, in spite of evidence indicating such expenditures would exhaust the corpus within fifteen years if kept up in succeeding years.

C. Apportionment.

The division of the equitable interests under a trust into

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[170] 114 N.J.Eq. 130, 168 Atl. 283 (1933).

[171] Turnure v. Turnure, *supra* note 168 ("executors to be sole judge"); Strong v. Dunn, 90 N.J.Eq. 329, 108 Atl. 86 (1919) ("if trustee shall deem it proper to make such advances in his discretion").

[172] Adrain v. Koch, 83 N.J.Eq. 484, 91 Atl. 123; *aff'd.* 84 N.J.Eq. 195, 93 Atl. 1085 (1914) (discretion was here inferred from the instrument rather than from an express clause. This may serve to distinguish this case from the *Martin* case, *supra* note 167).

[173] 86 N.J.Eq. 10, 95 Atl. 565 (1916) (court intimated it would not approve such extra disbursement regularly).

successive periods of enjoyment raises the problem of harmonizing the conflict of interests between those presently entitled, and those whose interests are to follow. Typically, the problem of deciding out of whose pocket the expenses are to be paid and into whose pockets the income and accretions are to go, arise. The concept underlying apportionment takes root in a division of property held under and accruing to a trust, into "corpus" and "income". It follows that corpus belongs to the remainderman and income to the life tenant.[174] The discussion which follows will be concerned, therefore, with methods of apportionment of expenses and benefits as the courts of New Jersey have approached and decided these problems.

1. *Expenses and losses.*

Certain expenses, such as general administrative expenses,[175] expenses of sale and conversion,[176] counsel fees,[177] taxes levied before deceased's death,[178] fire insurance on nonproductive real estate,[179] insurance premium on the life of a third person,[180] foreclosure to realize on security for a loan,[181] have been charged to corpus. Other expenses, such as current operating costs,[182] (rent, clerical salaries, and agents' commissions), and executor's commissions[183] come out of income. The cost of maintaining an accounting organization,[184] and losses due to depreciation of security, or default and insufficiency of security have been apportioned.[185]

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[174] But where the life tenant and remainderman are the same person, that is, the period before which the corpus can be enjoyed being postponed, the cestui may in case of necessity anticipate the use of the corpus. *In re* Bloomfield Trust Co., 2 N.J.Misc. 309 (1923) (college education); *In re* Lucy, 98 N.J.Eq. 314, 119 Atl. 783 (1925) (support and education of minors).

[175] Commercial Trust v. Gould, 105 N.J.Eq. 727, 149 Atl. 590 (1930).

[176] *Ibid.*

[177] *Ibid.*

[178] *Ibid.*

[179] *Ibid;* see also Kearney v. Kearney, 17 N.J.Eq. 59, *aff'd.* 17 N.J.Eq. 504 (1866); Burton v. Mellis, 75 N.J.Eq. 10.

[180] Fidelity Union Trust Co. v. Fera, *supra* note 123.

[181] Equitable Trust Co. v. Swoboda, 113 N.J.Eq. 399, 167 Atl. 525 (1933)

[182] Marsh v. Marsh's Ex'rs, 73 N.J.Eq. 99, 67 Atl. 706 (1907).

[183] Commercial Trust v. Gould, *supra* note 175 at 728 (on his disbursements of current income).

[184] *Ibid.*

[185] Equitable Trust v. Swoboda, *supra* note 181; see also Burnett v. Witschief, 96 N.J.Eq. 71, 126 Atl. 23 (1924), and Skinner v. Boyd, 98 N.J.Eq. 55, 130 Atl.

2. *Enhanced value.*

It is well settled that appreciation in the value of the trust res is to be allocated to corpus. Thus, pre-emptive rights[186] in stock, proceeds of a life insurance policy on the life of a third person where trust paid the premiums,[187] and profits realized from the resale of property bought in at a foreclosure to protect the security of the trust estate[188] go to the remaindermen.

3. *Delayed income.*

Frequently, decedent directs the sale of property left by him which in its then state is not productive of income, and the trustee holds for a favorable opportunity to convert. In this situation courts have stated that, since the inference is that the estate gains, the life tenant should participate in the benefit. The courts treat the sale as having been made immediately on death of the decedent and give the life tenant interest from that date.[189] This rule has been applied where trustee forecloses and buys in property on which he holds a mortgage in order to protect a loan, and, after holding the property for seven years, resells at a profit.[190]

4. *Dividends.*

(a) Extraordinary cash dividends.

In dealing with the question of cash dividends the courts have not been entirely consistent. Since the rules as applied to ordinary dividends have been developed from the prior treatment of extra-ordinary dividends it would be well first to present the course of judicial opinion in its analysis of the latter.

The leading case on this subject is that of *Lang v. Lang's Ex'rs*[191] where the testator died in the middle of a dividend period and the extraordinary cash dividend was apportioned

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22, *aff'd.* 100 N.J.Eq. 355, 138 Atl. 919 (1925). To the effect that decedent's intent can well vary normally operative rule, see *In re* Leup, 108 N.J.Eq. 49, 153 Atl. 842 (1931).

[186] Ballentine v. Young, 79 N.J.Eq. 70, 81 Atl. 119 (1911); McCoy v. McCloskey, 94 N.J.Eq. 60, 115 Atl. 745 (1922); Plainfield Trust Co. v. Bowlby, 107 N.J.Eq. 68, 151 Atl. 545 (1930).

[187] Fidelity Union Trust v. Fera, *supra* note 123.

[188] Skinner v. Boyd, *supra* note 185; Burnett v. Witschief, *supra* note 185 (as to latter, see *infra* "Delayed Income").

[189] Gaede v. Carroll, 114 N.J.Eq. 524, 169 Atl. 172 (1933) (realty); Berger v. Burnett, 97 N.J.Eq. 169, 127 Atl. 160 (1924) (stock).

[190] Burnett v. Witschief, *supra* note 185 (interest at rate in mortgage).

[191] 57 N.J.Eq. 325, 41 Atl. 705 (1898).

according to the number of days in the dividend period before and after testator's death. The objection to the effect that this apportionment bore no true relation to the dividends as they had actually been earned was met by an answer that in absence of notice the trustee was justified in assuming that the earnings were made "de die per diem".[192] Similarly in *Hagedorn v. Arens,*[193] as between successive life tenants, the first of whom died in the middle of a dividend period, the court apportioned that part of the dividend which represented earnings. For purposes of convenience this type of apportionment will be called "temporal".

We now consider those cases in which extraordinary dividends, disregarding for the present the problem of temporal apportionment, have been declared in part out of surplus and in part out of earnings. The question first arose in two cases decided at about the same time. They were *Day v. Faulks*[194] and *Ballentine v. Young,*[195] whose reasoning and results were in accord. In the latter case, the dividend was partially declared out of surplus accumulated before the testator's death. The dividend was apportioned in the ratio that that portion of the dividend declared out of surplus at testator's death bore to the whole dividend. This method was followed in *McCracken v. Gulick,*[196] and in *Hagedorn v. Arens*[197] in which the additional problem of temporal apportionment was also present. The method of apportionment which we have been discussing we shall, for purposes of convenience, call "factual".

(b) Ordinary cash dividends.

As to this type of dividend, the rules have been developed out of dicta in the cases on extraordinary cash dividends. The *Lang* case had first spoken[198] broadly of cash dividends in terms which could easily include ordinary dividends, and apparently

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[192] Rule appears to be derived from method used in apportioning income from funded obligations. Lewis v. Towar, 45 Atl. 949 (1900).

[193] 106 N.J.Eq. 377, 150 Atl. 48 (1930).

[194] 79 N.J.Eq. 66, 81 Atl. 354 (1911), *aff'd.* in 81 N.J.Eq. 173, 88 Atl. 384 (1912).

[195] 79 N.J.Eq. 70, 81 Atl. 119 (1911).

[196] 92 N.J.Eq. 214, 112 Atl. 217 (1920).

[197] *Supra* note 193.

[198] Lang v. Lang's Ex'rs, *supra* note 191, at p. 329. See also Beattie v. Gedney, 99 N.J.Eq. 207, 210.

Vice-Chancellor Buchanan was also of the opinion that the rule of temporal apportionment included cases of ordinary cash dividends when he said, concerning apportionment between successive life tenants: "dividends whether regular or extraordinary should be divided and apportioned and . . . the life tenant . . . is entitled to receive so much of such dividend, no matter when declared, as represents in fact earnings made during his lifetime."[199] While the learned Vice-Chancellor spoke of temporal apportionment in terms of factual apportionment, *i.e.*, "as represents *in fact* earnings," he was in reality applying the "de die per diem" presumption.[200] The only case in fact applying the temporal rule to the cash dividend situation was *Graves v. Graves.*[201] Vice-Chancellor Buchanan, who had earlier[202] spoken of the "de die per diem" method as a presumption, now stated that it would be conclusively presumed that the dividends were earned day by day equally. Said the learned Vice-Chancellor: "It is concluded that . . . regular . . . dividends . . . are intended to be distributed to and among life tenants . . . as if they were interest on bonds."[203] And this holding was approved and followed in the recent and important case of *Bankers Trust Co. v. Lobdel.*[204] One Vice-Chancellor, apparently following the universal rule outside New Jersey, has refused to temporally apportion ordinary cash dividends.[205]

Similarly, the rules regarding the factual apportionment of ordinary dividends, where only part of the dividends are derived from earnings, have originated in dicta in cases treating the problem in connection with extraordinary dividends. So, in *Ballentine v. Young,*[206] and in *Day v. Faulks,*[207] the language used was broad enough to include both types of dividends,[208]

[199] Hagedorn v. Arens, *supra* note 193, at p. 380.
[200] See Lang v. Lang's Ex'rs, *supra* note 191.
[201] 115 N.J.Eq. 547, 171 Atl. 681 (April 1934).
[202] See Hagedorn v. Arens, *supra* note 193.
[203] *Ibid.*, p. 554. Same rule applies where decedent dies within a dividend period.
[204] 116 N.J.Eq. 363, 173 Atl. 918 (1934).
[205] National Newark and Essex Banking Co. v. Harris, 109 N.J.Eq. 468, 158 Atl. 109 (1932).
[206] *Supra* note 195 *passim.*
[207] *Supra* note 194. Accord: Brown v. Brown, 72 N.J.Eq. 667, 65 Atl. 739 (1907).
[208] And in the Union County Trust v. Gray, *infra* note 244, V.C. Backes said, "the tags 'regular' and 'extra' are presently of no significance."

though the reasoning in *McCracken v. Gulick*[209] is not entirely consistent with this point of view.

The cases involving actual adjudications of this question are confused. In *Hewitt v. Hewitt*[210] a large dividend accruing from stock in the Union Sulphur Company was declared. Part of this dividend was derived from a surplus accumulated until testator's death and amounting to $16,838,423 (although the capitalization until that time was only $200,000). The rule of opportionment applied was identical with that applied in *Ballentine v. Young.*[211] In *City Bank Farmers Trust Co. v. McCarter*[212] dividends from the same company were apportioned. The argument was here made that the presumption was that ordinary dividends were declared out of earnings.[213] The court held that, even if this were conceded, the decrease in the surplus after the declaration of the dividend was notice to the trustee that the contrary was true. The *Lang* case[214] was cited to support the presumption and the courts' conclusion. Although the opinion[215] in the *Gray* case is ambiguous the holding as to actual dividends disbursed seems in accord.

On the other hand, it has been widely argued that normal corporate dividends should not be apportioned *factually* at all. Justice Swayze in the *Gulick* case[216] reasoned that "normal corporate dividends should be presumed to be declared out of current earnings" and in the *Graves* case,[217] the Vice-Chancellor felt that this dictum was binding upon him. He held that the "de die per diem" presumption ought to be extended to this type of case, in the absence of a clearly expressed intent for apportionment on the part of the settlor. Finally, the *Lobdel* case[218] held that normal ordinary corporate dividends would be conclusively presumed to be declared out of earnings. The opinion of Vice-Chancellor Berry is interesting in its analysis of

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[209] *Supra* note 196. See especially p. 216.
[210] 113 N.J Eq. 199, 166 Atl. 578 (1933).
[211] *Supra* note 195.
[212] 111 N.J Eq. 315, 162 Atl. 274 (1932), *aff'd* 114 N.J Eq. 46, 168 Atl. 286 (1933).
[213] *Ibid* at p 320.
[214] *Supra* note 191.
[215] *Infra* note 244, see especially p 275.
[216] See *supra* note 196.
[217] *Supra* note 201.
[218] *Supra* note 204

the cases. He cites the *McCarter*[219] case and the *Hewitt*[220] case but does not distinguish them, and the *Gray*[221] case is mistakenly thought to be in accord with this court's opinion. Moreover, the *Lang*[222] case was thought to be modified by Justice Swayze's dictum in the *Gulick* case[223] since the same court decided both cases. This dictum and the holding in the *Graves* case[224] are the chief grounds for the decision here. The conclusion of the court was that ordinary dividends declared after testator's death would not be factually apportioned.

It will be noted that no mention is made of any of the other cases (except *Hagedorn v. Arens*[225]) factually apportioning extraordinary cash dividends even though the Court of Errors and Appeals had ruled on this point twice[226] before the *Gulick* case.[227] Moreover, the *Lang* case[228] is erroneously thought to be in some way inconsistent with the view of the court in the present case whereas the *Lang* case is merely a holding on temporal apportionment of extraordinary cash dividends, saying such should be made.

Summarizing, it may be said that extraordinary dividends are apportioned both temporally and factually. There is some confusion in the case of ordinary dividends. Probably, the *National Newark and Essex* case[229] is out of line, and the courts will at least apportion ordinary dividends temporally. The confusion in the factual situations cannot so easily be settled. While the *Hewitt*[230] and *McCarter*[231] cases follow respectable dicta, the inevitable difficulty of administration of their rules militates against their adoption in the future.

It is obvious that the choice between the two rules involves a selection of values and decision of policy. It can be said with some justification that no equitable reason can be assigned for a distinction between extraordinary and ordinary dividends, in this regard, where the instrument is silent, leaving the settlor's

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[219] *Supra* note 212.
[220] *Supra* note 210.
[221] *Infra* note 244.
[222] *Supra* note 191.
[223] *Supra* note 196.
[224] *Supra* note 204.
[225] *Supra* note 193.
[226] *Supra* notes 194 and 195 (for the rationale of these cases clearly included the ordinary dividend situation).
[227] *Supra* note 196.
[228] *Supra* note 191.
[229] *Supra* note 204.
[230] *Supra* note 210.
[231] *Supra* note 212.

or testator's intent ambiguous. On the other hand, the rule of thumb symbolized by the phrase "de minimis non curat lex" is a necessary principle in a system wherein courts are burdened with much work.

It has not been shown to the authors that in fact an extraordinary amount of hardship results to remaindermen from administration of the rule of convenience, since in the long run, depleted surplus will be replaced. Moreover, the market value of a security seems but slightly affected by normal dividends out of surplus in periods of depression. While courts frequently support the doctrine of convenience by resorting to findings of implied intent that those presently entitled get some form of steady income, such inferences may well be disputed on obvious grounds.

(c) Stock dividends.

It seems clear that stock dividends are apportioned in New Jersey. Where the question centers around the death of a testator[232] or of a life tenant[233] within a dividend period at the end of which the stock dividend is declared, such stock or its proceeds is divided "temporally" according to how far into the dividend period decedent lived.

Leaving aside the question of *temporal* apportionment and turning to that type of division which we have labelled *"factual,"* we find that rules are less clearly stated. In *Ballentine v. Young,*[234] the court said that the apportionment would be based on the change in the capital and surplus items, and in *Koehler v. Koehler*[235] the court, using "book value" as a basis, said that the apportionment should be made in the ratio that the surplus at the time the stock was acquired bears to the surplus accumulated thereafter up to the time the dividend was declared. Par value was substituted for book value by the court in the more recent decision of *Plainfield Trust Co. v. Bowlby.*[236] In other words the apportionment is made as if the share of stock were so much cash as its "par"[237] or in the alternative, "book

[232] Lang v. Lang's Ex'rs, *supra* note 191.
[233] Hagedorn v. Arens, *supra* note 193.
[234] *Supra* note 92.
[235] 99 N.J.Eq. 142, 132 Atl. 751 (1925); 50 A.L.R. 378 (1925).
[236] 107 N.J.Eq. 268, 151 Atl. 545 (1930).
[237] *Ibid*

value."[238] Having determined the share which belongs to each contestant, the stock is awarded to corpus and the life tenant has a charge thereon to secure his share.

It is submitted that the court's use of par value is less desirable than its earlier use[239] of book value since it gives no effect to changes subsequent to the original incorporation and gives us little assistance where trustee is directed to retain stocks with no par value. While book value also fails to truly reflect the value of stock because such assets as "good will" and "patents" are carried at nominal figures, and while there are difficulties inherent in attempting to secure information regarding book value, it would seem that if we are going to apportion at all, it should be done as accurately as possible, resort to par value being limited to situations in which access to books is barred.

Where testator expressed the intent that all stock dividends be held for the benefit of the remaindermen,[240] such intent, of course, was said to govern.

5. *Wasting assets.*

(a) General rule.

Where we have a trust res whose assets consist of property whose value will be either extinguished or depleted at the end of a relatively definite period of time, courts have felt that not all of the annual yield should go to the life tenant where there are successive interests created. The first case involving this question was *Helme v. Strater*[241] in which stock which constituted part of the trust was by contract to go over at the end of a stipulated time to a third person. The dividends declared upon this stock were apportioned between the holders of successive interests. *Ballentine v. Young*[242] applied the rule to bonds bought at a premium by trustee after testator's death. Sufficient was deducted from the interest to amortize the premium at the maturity date of the bonds.[243] And in *Union County Trust*

[238] Koehler v. Koehler, *supra* note 235.

[239] *Ibid.*

[240] *In re* Fischer, 148 Atl. 193, 7 N.J.Misc. 1075 (1929) ("and said executor shall hold such stock and such additional shares as may thereafter be issued by said company" to receive dividends, etc.) see note, 72 A.L.R. 985, 990 (1931).

[241] 52 N.J.Eq. 591, 30 Atl. 333 (1894).

[242] 74 N.J.Eq. 572, 70 Atl. 668, *aff'd.* 76 N.J.Eq. 613, 75 Atl. 1100 (1909).

[243] The contrary rule was applied to bonds bought at premium by testator.

Co. v. Gray[244] the theory was applied in a case involving stock in a corporation whose assets constituted patent rights in oil processes. The court there stated that the life tenant was only entitled to interest on the value of the stock.[245] The rest of the dividend was given to the holders of the later interests. "Value" was defined as of the time of the death of testator, but the court said that if, as the years went by, the patents would become more widely used, allowance would be made year by year for this factor. The method of determination of "value" was, however, left unexplained. Presumably the book value might be used. A suggested method of apportioning is as follows: In any given year, take the dividend of that year—find the sum of money which if invested at the time of testator's death at the normal rate of interest would buy an annuity yielding the dividend for a period of time equal to the life of the asset. Interest on this sum belongs to the life tenant.

Not all dividends which affect capital assets are apportioned in this manner and where the corporation's sole means of earning profits are from enhancement of its capital assets (that is, where the corporation deals in capital assets) the life tenant gets the total annual profit.[246]

(b) Stock in mining corporations.

The common law rule that the yield of mines opened before testator's death belong to life tenant, and the yield of those opened afterwards to remainderman, which originated by reason of the theory of waste,[247] must have influenced the courts in their determination of the question of the allocation of dividends from stock in corporations operating mines.

Three cases involving this problem have arisen within the last two years and their holdings are not at all consistent.

City Bank Farmers Trust Co. v. McCarter[248] refuses to apportion dividends from stock in a corporation owning oil wells. The corporation, there, had set up a reserve for depletion of the well. The court refused to consider this factor, stat-

[244] 110 N.J.Eq. 270, 159 Atl. 625 (1925).
[245] Accord: Helme v. Strater, *supra* note 241.
[246] Central Hanover Bank & Trust Co. v. Braman, 111 N.J.Eq. 191, 161 Atl. 674 (1932).
[247] Mulford v. Mulford, *supra* note 55.
[248] *Supra* note 212.

ing that this reserve was set up for income tax purposes.[249] The result was based upon the impossibility of determining when the wells would be depleted. As a matter of convenience therefore the court concluded that the life tenant takes the entire dividend so far as it represented earnings from date of testator's death.[250]

A consistent result was reached in *De Brabant v. Commercial Trust Co.*[251] but the case might be explained on its peculiar facts. The stock was of the United Verde Copper Co. The court began by stating the rule of convenience but went on to say that the circumstances were such that the intent of testator was manifestly against apportionment.[252] Two factors showed this. First, the testator, Senator Clark, was an old mining man, and when he used the term "income" (i.e., to define the interest of the equitable life tenants) so as to include rents, issues, interest, income and profits he must have known that there could only come such income which would result from the yield of the mines. Secondly, he gave to some of his children their shares outright and it would be, (said the court), discriminating against the others to apportion the dividends. This explanation may be plausible but is not entirely convincing because the terms used do not expressly exclude an intent that the interests of successors in interest be kept intact, and because the mere fact that some of the children received their shares outright might be evidence tending to show that the testator intended to prefer them over the others. It seems that the *DeBrabant* case[253] is not distinguishable from the *Hewitt*[254] case on that basis. As a matter of fact the decision in the latter case seems entirely inconsistent with those in the *McCarter*[255] and the *DeBrabant*[256] cases. The court in the *Hewitt* case found no direct precedent for its holding. It based its decision on *Helme v. Strater*[257] which as we have seen involves extinguishment of the capital assets at a stipulated time, and *Ballentine v.*

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[249] Such fund is a permissible deduction however.

[250] For discussion of the *factual* apportionment problem involved, see *supra* note 212 (ordinary cash dividend section).

[251] 113 N.J.Eq. 215, 166 Atl. 528 (1933).

[252] Note 212 (McCarter case).

[253] *Supra* note 251.

[254] Hewitt v. Hewitt, *supra* note 210.

[255] *Supra* note 212.

[256] *Supra* note 251.

[257] *Supra* note 241.

Young[258] in which the same thing is true. Moreover, it failed to dispose of the argument of convenience of the *McCarter* case.[259] Power of sale was present in all these cases so that an intent to preserve intact the interest of the remaindermen which sometimes is derived from the presence of such power, is not a distinguishing feature in any event. As a matter of policy the rule of the *DeBrabant*[260] case has the merit of convenience, and that of the *Hewitt*[261] case the merit of apportioning more justly the benefits of the res. In reality the argument of convenience seems to the writers a cogent one. Recalling that the apportionment rule applicable to wasting assets is that life tenant is entitled only to interest on the "value" of the asset, the difficulty of appraising the mine in the absence of data as to its probable time of duration is obvious, in view of the fact that any appraisal should have as its basis the value of the yield. It is conceivable that a rough and ready rule such as accepting the capitalized value of the mine could be used, though it has obvious defects.[262]

SECTION VI. ACCOUNTING.

A. *Duty to Account.*

While the word, "accounting," is popularly taken to imply a winding up of trust affairs, in fact such may not be the case at all. The Statutes provide that testamentary trustees or their executors or administrators may be required by the Orphan's Court to file an account yearly or as soon after the yearly term expires as the court convenes,[263] and surrogate must cite trustee if he delays account for two years.[264] Every trustee, testamentary or otherwise, *must* account to Orphan's Court once in three years.[265]

The duty to account exists, though the executor be a life tenant,[266] and the accounts exhibited must contain at least a

[258] *Supra* note 242.
[259] Accord: Union County Trust Co. v. Gray, *supra* note 244.
[260] *Supra* note 251.
[261] *Supra* note 210.
[262] Hewitt case states no definite rule of apportionment.
[263] C.S. (1910) Orph. Ct. Act. p. 3852, §114.
[264] *Idem.* p. 3854, §117 (limited to estates over $200 by *Idem.* §200b). Trustee may be removed for failure to obey such citation and must pay costs.
[265] *Idem.* p. 3853, §115.
[266] Sampson v. Sampson, 96 N.J.Eq. 198, 124 Atl. 708 (1924).

list of securities held by him for the estate and the changes made by him since the last accounting,[267] together with an itemized statement of the income and disbursements made since such accounting.[268] And such account must be accessible to all parties in interest at least twenty (20) days prior to presentation.[269] For failure to account, the trustee may be denied compensation,[270] and it has been held[271] that he is chargeable with losses resulting from depreciation of property held by him during the delay.

The duty to account implies a duty to keep accurate books, and to record all expenditures and disbursements, including vouchers therefor.[272] Where he fails to do this, all doubts as a result of the incompleteness of the records will be resolved against him.[273] In the absence of other evidence he will not be credited with an amount which he alleges to be the account stated between him and the cestui,[274] nor will he be credited with an alleged disbursement in the absence of vouchers or evidence confirming his testimony.[275] Of course he will be denied compensation where he fails to keep accurate records.[276]

B. Items in the account.

1. *Generally.*

Trustee is credited at the accounting with disbursements which by law he was required to make or which were reasonably necessary in performing his trust.

Thus trustees have been credited with payments on bonds

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[267] *In re* Cooke, 96 N.J.Eq. 589, 125 Atl. 332 (1924), citing Orphan's Ct. Rule 21.

[268] *Ibid.* Rule 21.

[269] C.S. (1910), Orph. Ct. Act. p. 3855, §121.

[270] Welsh v. Brown, 50 N.J.Eq. 387 (1894). But where the failure to account is in good faith and is not due to gross neglect, indifference, or fraud, he may not be removed therefor. Heath v. Maddock, 81 N.J.Eq. 469, 86 Atl. 945 (1912), *aff'd.* 82 N.J.Eq. 366, 91 Atl. 1069 (1913).

[271] *In re* Eckert, 93 N.J.Eq. 598, 117 Atl. 40 (1921).

[272] Clark v. Clark, 87 N.J.Eq. 504, 101 Atl. 300 (1917); Dufford v. Smith, 46 N.J.Eq. 216, 18 Atl. 1052 (1889).

[273] Blauvelt v. Ackerman, 25 N.J.Eq. 495 (1873), *aff'd.* 25 N.J.Eq. 570; Dufford v. Smith, *supra* note 272.

[274] Blauvelt v. Ackerman, *supra* note 273; and *In re* Gaston Trust, 35 N.J.Eq. 60 (1882); *aff'd. sub nom* Veghte v. Steel *id.* 348.

[275] Willis v. Clymer, 66 N.J.Eq. 284, 57 Atl. 813 (1904).

[276] Clark v. Clark, *supra* note 269; Brewster v. Demarest, 48 N.J.Eq. 559, 23 Atl. 271 (1891); Blauvelt v. Ackerman, *supra* note 273.

and mortgages executed by decedent,[277] expenses of posting the required security[278] and of accounting;[279] current expenses including telephone,[280] caretaker,[281] and the employment of agents necessary to the proper management of trust business—such as real estate agents[282] and rent collectors.[283]

2. *Counsel fees.*

In general, trustee is allowed counsel fees, where the employment of counsel is reasonably necessary[284] to the execution of his functions or where he is called upon to act as counsel by extraordinary circumstances.[285] Thus a trustee is privileged to retain counsel to represent an infant or incompetent cestui in litigation.[286] Moreover, he is reimbursed for his costs in defending groundless attacks upon his accounts[287] and in the discretion of the courts will be made whole whether the attacks upon his account were groundless or not.[288] Under other circumstances also, counsel was recompensed. For example, where he pursued testator's cause of action, though he lost;[289] where trustee employed foreign attorneys;[290] and where he acted as counsel in the sale or redemption of trust property.[291]

On the other hand, he will not be allowed to employ counsel where such action is unnecessary[292] or he can reasonably do the job himself. Where trustee, therefore, petitioned for removal, not for statutory cause, but because of friction;[293] and where he defended a suit questioning testator's title though the

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[277] *In re* Ramsey's Est., *supra* note 13.
[278] C.S. (1910), Orph. Ct. Act. pp. 5051-5052, §2.
[279] McCloskey v. Bowman, 82 N.J.Eq. 410, 89 Atl. 528 (1913).
[280] *In re* Pettigrew, *supra* note 95.
[281] *Ibid.*
[282] Babbitt v. Fidelity Union Trust Co., *supra* note 90; *In re* Van Riper, 90 N.J.Eq. 217, 107 Atl. 55 (1919).
[283] *In re* Van Riper, *supra* note 282.
[284] *In re* Babcock, 112 N.J.Eq. 374, 164 Atl. 269 (1932).
[285] Willis v. Clymer, *supra* note 275.
[286] Warker v. Warker, 109 N.J.Eq. 106, 156 Atl. 547 (1931).
[287] *In re* Starr, *supra* note 21.
[288] Smith v. Monmouth Title and Guarantee Co., 115 N.J.Eq. 497, 171 Atl. 498 (1934).
[289] Wade v. Cox, 115 N.J.Eq. 608, 172 Atl. 215 (1934).
[290] *In re* Leup, *supra* note 185.
[291] Willis v. Clymer, *supra* note 275.
[292] *In re* Megorgee, 117 N.J.Eq. 347 (1934) (New York attorneys were retained though New Jersey counsel actually guided the executors in the administration).
[293] Walton v. Taylor, 78 N.J.Eq. 266 (1911).

title really was clearly in the testator,[294] trustee has been denied repayment. Again, he will not be allowed counsel to help him make up his accounts.[295]

It appears then that the whole matter is a question of the discretion of the trial court. Especially is this true of the amount of the fees. Usually they may not be paid by trustee in advance of hearing by the courts and the courts must determine the compensation prior to payment.[296] No set rule, therefore, governs the amount of the fees. It is said[297] that this depends upon the size of the estate, the risk involved, the work done, the judicial experience and skill of the attorneys, and the results attained. It is apparent that the predominant factor seems to be the size of the estate. Thus, where the estate was worth $15,000, fees of $300 were allowed in defense to an accounting;[298] where the estate was valued at $1,000,000 fees of $25,000 were approved;[299] and where the estate was $96,000, $2,500 in counsel fees were allowed.[300] The court in *Runkle v. Smith*[301] speaks of the character of the work in allowing $35,000 to counsel for the trustee for defending eleven actions and $10,000 to counsel for the residuary legatees for drawing the bill settling the estate. The value of the estate was close to two million dollars.

3. *Advances by trustees.*[302]

In order to protect the bona fide trustee and to preserve the corpus the courts have adopted the rule that for reasonable advances the trustee has a lien on the trust res. Such advances must either be expressly authorized[303] by the trust instrument,

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[294] *Ibid.*

[295] *In re* Steelman, 87 N.J.Eq. 270 (1917); *In re* Dreier's Estate, *supra* note 94; *In re* Ramsey's Estate, *supra* note 13.

[296] *In re* Turnbull, 1 N.J.Misc. 41 (1923).

[297] *Ibid.*

[298] *In re* Starr, *supra* note 21.

[299] Elfreth v. Allen, 106 N.J.Eq. 263, 150 Atl. 561 (1929) (divided court).

[300] *In re* Van Riper, *supra* note 282. Thus, fees seem to hover between 2% and 3% of the corpus.

[301] 90 N.J.Eq. 478, 106 Atl. 474 (1919).

[302] No cases have been found in which the estate has been subjected to liability for contracts executed for it by the trustee. It appears, reasoning from the cases on trustee liens and expense allowances, that the estate is liable if the contract be for the benefit of the estate and necessary to its existence.

[303] Villa Site Co. v. Copeland, 91 N.J.Eq. 503, 111 Atl. 39, 13 A.L.R. 356 (1920).

or be reasonable expenses in carrying out the direction of the trust,[304] or be essential to the preservation of the trust property.[305] Liens have been granted, in accord with these principles for advances, (a) to pay taxes, repairs and current expenses, (b) to pay dues to building and loan associations, (c) and to complete unfinished houses (by a trustee for the benefit of creditors),[307] (d) to pay the costs of foreclosure.[308]

4. *Interest.*

If the trustee fails seasonably to invest,[309] or collect,[310] or distribute funds,[311] coming into his hands, he is chargeable with interest for the period during which he is delinquent.[312] But the mere fact that he has funds of the estate does not subject him to this charge in absence of delinquency.[313]

Whether interest is to be simple or compounded is not clear. For failure to collect where the negligence was slight the court was unwilling to compound the interest,[314] and even where the breach was more serious, the trustee having failed for a period of time to invest, the court did not compound the interest but charged trustee with a sum intermediate between simple and compound interest.[315] It is clear therefore that in cases of slight breach simple interest only will be charged. But where the breach is very serious, interest will be compounded. Vice-Chancellor Lane in *Backes v. Crane*[316] states that bad faith is necessary for the application of the latter rule.[317]

C. Compensation.

1. Apparently, prior to statute, the old common law did not allow the trustee compensation,[318] but by 1831 New Jersey

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[304] Turton v. Grant, 86 N.J.Eq. 191, 96 Atl. 993, 100 Atl. 977 (1916).
[305] Equitable Trust v. Swoboda, *supra* note 181.
[306] Perrine v. Newell, 49 N.J.Eq. 58, 23 Atl. 492 (1891).
[307] Turton v. Grant, *supra* note 304.
[308] Equitable Trust Co. v. Swoboda, *supra* note 181.
[309] *In re* Walsh's Estate, 89 N.J.Eq. 569, 573-4 (1912); *supra* notes 64, 65, 114, 124.
[310] Backes v. Crane, *supra* note 11.
[311] See *supra* notes 161-163, incl.
[312] *In re* Jula, 3 N.J.Misc. 976, 130 Atl. 733 (1925).
[313] Johnson v. Eicke, 12 N.J.L. 316, 319 (1831).
[314] Voorhees v. Stoothoff, 11 N.J.L. 145 (1829).
[315] *Ibid.*
[316] *Supra* note 11.
[317] Accord: Jones v. Harris, 79 N.J.Eq. 110 (1911).
[318] Elizabeth State Bank v. Marsh, 1 N.J.Eq. 288 (1831).

courts[319] had held that a trustee was entitled to commissions. The rate allowed was between four[320] and six percent.[321]

2. Statutory provisions. These provide that, except where the estate is under $200.00,[322] the trustee is allowed compensation. Allowances are to be made with regard to trouble and risk and not with regard to quantum.[323] The maximum rates provide "for all sums coming into their hands" and are as follows:

7% on all sums not exceeding $1,000.00.
4% on the excess not exceeding $5,000.00.
3% on the excess not exceeding $10,000.00.
2% on the excess not exceeding $50,000.00.

If the estate is over $50,000.00, the rate of compensation is determined by the Orphans Court on the final accounting and is not to exceed 5%.[324]

Where property is to remain in the hands of trustee to pay over the income, the court, either on intermediate or on final accounting, shall allow commissions, taking into consideration risk and trouble,—though the commissions must not exceed five percent (5%).[325]

3. Judicial interpretation. The subject of commissions has been covered by the glittering generality that the award will be based upon trouble and pains,[326] and is a matter of judicial discretion.[327] Thus, a trustee cannot take his commission prior to award,[328] and it follows that the court will not award compensation for work to be done in the future.[329] The maximum rate provisions have been interpreted as covering the services of both executor and trustee where both are required.[330] But the award of compensation under Section 128 does not bar

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[319] *Ibid;* Johnson v. Eicke, *supra* note 313.
[320] Elizabeth State Bank v. Marsh, *supra* note 318.
[321] Johnson v. Eicke, *supra* note 313.
[322] Cum. Supp. (1925), p. 2623, §134a.
[323] C.S. (1910), p. 3860, §128.
[324] C.S. (1910), p. 3860, §129.
[325] C.S. (1910), p. 3860, §130.
[326] e.g. *In re* Steelman, *supra* note 295; *In re* Smith, 107 N.J.Eq. 607 (1931).
[327] Marsh v. Marsh, 82 N.J.Eq. 176, 87 Atl. 91 (1913).
[328] Titsworth v. Titsworth, 107 N.J.Eq. 436, 152 Atl. 869 (1931).
[329] *Ibid.*
[330] Lyon v. Bird, 79 Atl. 158, 80 Atl. 450 (1911).

commissions under Section 129,[331] since they provide for different types of service. The total commissions awarded, under Section 129 in intermediate accounting cannot exceed five per cent.[332].

The awards under either section have seldom totaled the maximum, and when the maximum is granted it seems usually that the trustee has carried on a business for the cestuis.[333] If the compensation is to be divided between executor and trustee,[334] or between co-trustees, the maximum will be allowed under less unusual circumstances.[335] Moreover, under the maximum proviso of Section 128,[336] referring to all sums coming into the hands of trustee, the interpretation which courts have placed thereon has limited commissions to "net" income.[337] Rates allowed under both sections have varied between one and five percent.[338]

There follows a grouping in tabular form of cases on the subject of commissions according to the size of the corpus or income on which the commission was based, the character of the corpus and duties of the trustee, the rate used if given and the amount paid the trustee where it appears in the opinions.

Of course the parties to an inter-vivos agreement may fix the trustee's compensation, or the testator may fix the amount of compensation in the instrument. The trustee who is warned as to how much he is to get by the instrument and accepts the trust is bound by the stipulated rate.[339] Courts usually enforce such clauses strictly and trustee is limited to the stipulated rate although aid in the administration of trust affairs was promised and not forthcoming.[340] However, a clause providing that trustee shall serve without compensation is ineffective.[341].

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[331] e.g. Marsh v. Marsh, *supra* note 327; Lyon v. Bird, *supra* note 330; §128 and §129 are cited in *supra* notes 323, 324.
[332] *In re* Hibbler, 78 N.J.Eq. 217 (1910).
[333] *In re* Van Riper, *supra* note 282; *In re* Starr, 103 Atl. 392 (1918).
[334] Lyon v. Bird, *supra* note 330; *In re* Hibbler, *supra* note 332.
[335] *In re* N. J. Title and Guar. Trust Co., 76 N.J.Eq. 293, 75 Atl. 232 (1909).
[336] *Supra* note 324.
[337] *In re* Mullen, 35 L.J. 43 (1912).
[338] *In re* Thurston, 704 N.J.Eq. 395, 145 Atl. 110 (1905).
[339] Randall v. Gray, 80 N.J.Eq. 13 (1922).
[340] *Ibid.*
[341] Tichenor v. Mechanics Bank, 96 N.J.Eq. 560, 563 (1924).

Name and Citation	Am't of Corpus and/or Income	Character of Corpus and Duties of Trustee	Rate	Total in Dollars
Re Larrabee, 98 N.J. Eq. 655 (1926)	$5,000 net income	Business carried on for short time by executor.	2%	No am't given
Re Starr, 103 Atl. 392 (1918)	$15,912.60 net income	Business managed by trustee.	5%	No am't given
Re Steelman, 87 N.J. Eq. 270 (1917)	$29,397.59 corpus	Securing the res consisting of realty and personalty.	2½%	No am't given
Lyon v. Bird, 79 Atl. 158 (1911)	$81,629.48 corpus $9,211.86 income	Personalty — executor to divide.	1% corp. 2-2½% inc.	No am't given
In re Smith, 107 N.J. Eq. 607 (1931)	$132,115.27 corpus $8,217.00 income	Personalty—trustee to divide.	No rate	$2,000.00
Metcalf v. Wiles, 43 N.J.Eq. 128 (1888)	$150,000.00 corpus and income	Managing business of testator for one year.	4%	No am't given
In re Thurston, 104 N.J.Eq. 395, 145 Atl. 110 (1929)	$195,644.04 corpus and income	Trustee to hold and pay over income.	1%	$1,859.06
Elfreth v. Allen, 106 N.J.Eq. 263, 150 Atl. 561 (1929)	$634,000.00 corpus and income	Trustee to run business.	4%	No am't given
Marsh v. Marsh, 82 N.J.Eq. 176 (1913)	$900,000.00 corpus and income	Trustee to hold and pay income.	1¼%	No am't given
Weeks v. Selby, 61 N.J.Eq. 668 (1900)	$1,197,506.00	To divide and pay over personalty.	1%	No am't given
Marsh v. Marsh, *supra*	$5,000,000.00 gross income	Collections, dividends, conversions.	2½% on net inc.	No am't given

Delinquent trustees are usually denied commissions. Thus, where trustee failed to invest,[342] to distribute the funds to cestuis seasonably,[343] to render an accounting,[344] to keep accurate accounts,[345] mingled trust funds,[346] he was denied commission.

[342] Warbass v. Armstrong, 10 N.J.Eq. 263 (1854); *In re* Megorge, 117 N.J.Eq. 347, 351 (1934).
[343] *Ibid.*
[344] e.g. Blauvelt v. Ackerman, *supra* note 273.
[345] e.g. Dufford v. Smith, *supra* note 272.
[346] Clark v. Clark, *supra* note 272.

But a delinquent trustee may be compensated for special services rendered the estate, in spite of the denial of compensation.[347] So, where he manages a business earning profit for the estate, he is entitled to compensation although this conduct was unauthorized.[348]

CONCLUSION

Considering the amount of wealth tied up in trusts in New Jersey, it is striking that the amount of litigation, involving the multitudinous aspects of the trust relationship, is relatively small. The authors estimate that not more than five hundred (500) cases have reported litigation in this field and this may very conceivably include cases not taken before appellate tribunals. It would seem, therefore, that the trust form is adaptable to modification and sufficiently flexible to allow extension as the need arises. Of course, times marked by changes in the business cycle, or by changes in the economic approach to the problems continually arising, are characterized by corresponding difficulties in the execution and administration of trust affairs. Even though the courts have in the years since 1929 not been entirely consistent in their methods and attitudes, the situation is far from being muddled. Principles, rules, concepts and goal have not been overlooked and the experiences of the recent past can, if utilized as they are certain to be, serve their social purposes with increasing success in the future.

HAROLD S. OKIN,
HARRY BRANDCHAFT.

NEWARK, N. J.

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[347] Moore v. Zabriskie, 18 N.J.Eq. 51 (1866).

[348] *In re* Oliver, *supra* note 12. It will be noticed that had trustee been authorized to carry on the business, he would be entitled to no extra compensation. *In re* Larrabee, 98 N.J.Eq. 655, 130 Atl. 195 (1925).