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TRUSTS - VALIDITY - SUBJECT MATTER - PROFITS TO BE ACQUIRED IN THE FUTURE

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TRUSTS — VALIDITY — SUBJECT MATTER — PROFITS TO BE ACQUIRED IN THE FUTURE — The plaintiff contemplated trading in the stock market and in 1927 declared a trust of the proceeds of his stock trading for the year 1928 in favor of various members of his immediate family, agreeing to assume all losses personally and to distribute all profits equally among the beneficiaries after deducting a reasonable compensation for his services. At the expiration of the year 1928, plaintiff deducted \$10,000 as compensation, which he reported in his tax return for that year, and credited the named beneficiaries with the remainder on his books, these amount being reported in their respective tax returns for that year. Plaintiff was taxed, however, on the basis of the whole sum as a part of his gross income for the year, and he sued to recover. *Held*, that no trust was created at the time of the declaration because there was no res in existence. The profits when realized were not impressed with a trust and as a result were taxable to the plaintiff as gross income. *Brainard v. Commissioner of Internal Revenue*, (C. C. A. 7th, 1937) 91 F. (2d) 880.

The rule as ordinarily stated is that any property which can be voluntarily transferred by the owner can be held in trust, and, conversely, property which an owner cannot voluntarily transfer cannot be held in trust.¹ The proposition is that the policy which prevents transfer of an interest applies with equal force to prevent an equitable transfer of the interest through the medium of a trust. It is generally held that the expectancy of an heir apparent is not subject to present voluntary conveyance,² although in some jurisdictions provision may be made for future transfer by an executory contract with adequate consideration.³ The same rules apply to expectancies of future wages.⁴ It may be taken as fairly well settled that the expectancy of acquiring property by descent, devise, purchase or gift is not a good trust res.⁵ A chose in action may be held in trust;⁶ and in those jurisdictions where an executory contract for the transfer of an expectancy is specifically enforceable against the heir apparent,⁷ there would seem to be no objection on principle to a trust of the equitable chose in action so created, but in such cases the trust is impressed on the contract right and not on the expectancy. The extension of the trust conception to cover expectations of after-acquired property would in effect allow the equitable

¹ 1 TRUSTS RESTATEMENT, §§ 78, 79 (1935).

² Estate of Lennig, 182 Pa. St. 485, 38 A. 466 (1897).

³ Hale v. Holden, 90 Tex. 427, 39 S. W. 287 (1897); Richey v. Richey, 189 Iowa 1300, 179 N. W. 830 (1920). In some states the consent of the ancestor is required. Boynton v. Hubbard, 7 Mass. 112 (1810). Cf. In re Lind, [1915] 2 Ch. 345, where apparently such a contract passed an equitable present title to the expectancy. On the general subject of assignment of expectancies for value, see 1 WILLISTON, SALES, 2d ed., § 132 (1924).

⁴ Heller v. Lutz, 254 Mo. 704, 164 S. W. 123 (1913); In re Home Discount Co., (D. C. Ala. 1906) 147 F. 538.

⁵ In re Ellenborough, [1903] 1 Ch. 697; Matter of Gurlytz, 105 Misc. 30, 172 N. Y. S. 523 (1918), modified, 175 N. Y. S. 289 (1919).

⁶ Fletcher v. Fletcher, 4 Hare 67, 67 Eng. Rep. 564 (1844).

⁷ 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 1288 (1918); Philadelphia, etc., Ry. v. Woelpper, 64 Pa. St. 366 (1870).

alienation of something more in the nature of a personal right than a property right, for the settlor would thereafter exercise his personal right to acquire and hold property not for himself, but for the beneficiary; although this condition may prevail by virtue of a voluntary act, the law, as in many other fields, here deems it expedient to protect the improvident in spite of themselves.⁸ Another element which may enter into decisions on this general subject matter is that the res of the attempted trust may be so wholly nebulous and indefinite as to defy the efforts of equity either to enforce the trust on the application of the beneficiary, or to define and delineate the extent and scope thereof.⁹ Mere ideas or schemes, although subject to oral communication and transfer in the popular sense, have been held not to be sufficient subject matter to sustain a trust.¹⁰ The subject matter of a trust should be property in the sense that it is sufficiently definite to enable the courts to protect it and it should be transferable.

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⁸ A purely personal interest such as a peerage or an office cannot be held in trust. *Buckhurst Peerage*, 2 App. Cas. 1 at 27 (1876).

⁹ Cf. *Graves v. Graves*, 13 Ire. Ch. 182 (1862), where testator devised property in trust and declared it to be his earnest wish "that my said sister shall reside at Gravesend with my wife during her life." On a suit by the sister praying a declaration of her right to reside at Gravesend during her life, the Lord Chancellor observed that "if these ladies cannot agree to live together on friendly terms, I cannot compel them." An instruction or expressed desire may be created in trust when definite enough and when created as a charge on property in trust. *Hammel v. Barrett*, 79 N. J. Eq. 96, 81 A. 1106 (1911); *Lyon v. Lyon*, 65 N. Y. 339 (1875).

¹⁰ *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 A. 436 (1906); *Burnell v. Chown*, (C. C. Ohio, 1895) 69 F. 993. But a patent may be held in trust. *Re Russell's Patent*, 2 De. G. & J. 130, 44 Eng. Rep. 937 (1857). And so may a copyright. *Bisel v. Ladner*, (C. C. A. 3d, 1924) 1 F. (2d) 436. Presumably the legal procedure of patent defines, limits and confers a property status on the idea. An idea in the nature of a recipe for the preparation of an ointment has been held to be the subject of a good trust. *Green v. Folgham*, 1 Sim. & St. 398, 57 Eng. Rep. 159 (1823).