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Trust Administration - Apportionment and Other Remedies of an Income Beneficiary When the Trustee's Retention of Unproductive Property Causes a Loss or Termination of Income

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TRUST ADMINISTRATION — APPORTIONMENT AND OTHER REMEDIES OF AN INCOME BENEFICIARY WHEN THE TRUSTEE'S RETENTION OF UNPRODUCTIVE PROPERTY CAUSES A LOSS OR TERMINATION OF INCOME — When a trust is created for successive beneficiaries, the life tenant and remainderman each have interests in the trust estate. The former has the right to income[1] and to prevent the improper reduction of corpus during his life;[2] the latter is entitled to the corpus on the death of the former. During the time that any of the trust assets fail to yield an income, a life cestui is deprived of his interest in that trust. The purpose of this comment is to examine apportionment and other remedies of a beneficiary who has been deprived of his income by the retention of unproductive property,[3] and especially to examine the problems which arise when the trustee's retention of such assets constitutes a breach of trust.

I. REMEDIES AGAINST THE TRUSTEE

Courts will frequently permit a trustee temporarily to retain unproductive property which cannot be immediately sold at a fair price. Such a retention may be permitted either when the settlor

[1] It has even been held that the life tenant has the sole right to complain where the trustee either retained an unproductive asset, St. Louis Trust Co. v. Ohio, 240 Mo. App. 1033, 222 S.W. (2d) 556 (1949), or charged improper expenses against income, Estate of Walsh, 32 N.J. Super. 528, 108 A. (2d) 652 (1954).

[2] A reduction of corpus would in turn bring about a reduction of income. For a discussion of the rights of various beneficiaries to complain of injury to corpus and income, see 9 A.L.R. (2d) 10 (1950). See also 2 SCOTT, TRUSTS, 2d ed., §216.2 (1956), and note 3 to that section.

[3] Section 11 of the Uniform Principal and Income Act defines unproductive property as "realty or personalty which for more than a year and until disposed of as hereinafter stated has not produced an average net income of at least one per centum per annum of its fair inventory value or in default thereof its market value at the time the principal was established or of its cost where purchased later. . . ." TRUSTS RESTATEMENT SECOND §231 (1956) defines unproductive property as property "which produces no income or an income substantially less than the current rate of return on trust investments. . . ."

originally entrusted the property to the fiduciary in its unproductive state[4] or when the trustee acquires property which later ceases to produce income.[5] Under such circumstances, the trustee is not responsible for the resulting loss of income.[6] On the other hand, if the trustee violated his fiduciary duty in acquiring or retaining such property, then the life tenant has a cause of action against the trustee for damages,[7] usually measured by the rate of return on trust investments.[8] Under certain circumstances[9] the damages will be computed at the maximum legal rate of interest, or compound interest.[10]

Also, where there has been an improper retention of unproductive property, the life beneficiary usually has the power to compel a sale of the property,[11] to charge the trustee with the loss brought about by the improper investment[12] and have his compensation reduced[13] and to remove him if the beneficial interest will be best served by so doing.[14]

II. APPORTIONMENT OF THE SALE PROCEEDS OF UNPRODUCTIVE PROPERTY

Another remedy, and one which has given the courts much difficulty, is apportionment. When apportionment is granted, a life cestui of a trust which has retained unproductive property obtains a portion of the proceeds if this property is eventually sold,[15] thus reimbursing him for the loss of income during the holding period.[16]

4 Patterson v. Vivian, 63 Misc. 389, 117 N.Y.S. 504 (1909), mod. on other grounds 137 App. Div. 596, 122 N.Y.S. 347 (1910) (where the court refused to permit an apportionment of the sale proceeds of property which was acquired from the testator in its unproductive state).

5 Will of Des Forges, 243 Wis. 178, 9 N.W. (2d) 609 (1943); TRUSTS RESTATEMENT SECOND §231, comment *c* (1959).

6 This assumes that the trustee did not breach his duty by improperly delaying the sale.

7 TRUSTS RESTATEMENT SECOND §209 (1959); Moore, "A Rationalization of Trust Surcharge Cases," 96 UNIV. PA. L. REV. 647 (1948).

8 As a rule, neither the highest legal rate of interest nor compound interest is assessed against the trustee. See First and American Nat. Bank of Duluth v. Andrews, 219 Minn. 325, 17 N.W. (2d) 656 at 664 (1945). See, generally, 2 SCOTT, TRUSTS, 2d ed., 207 (1956); Wright, "The Measure of the Trustee's Liability for Improper Investments," 80 UNIV. PA. L. REV. 1105 (1932).

9 E.g., where the breach was willful.

10 Riggs v. Loweree, 189 Md. 437, 56 A. (2d) 152 (1947).

11 Willis v. Holcomb, 83 Ohio St. 254, 94 N.E. 486 (1911).

12 See 2 SCOTT, TRUSTS, 2d ed., §§209, 213.3 (1956).

13 See 4 BOGERT, TRUSTS §979 (1948).

14 See 4 BOGERT, TRUSTS §861 (1948). See 98 A.L.R. 1132 (1935).

15 See 3 SCOTT, TRUSTS, 2d ed., §241.6 (1956) for instances involving a sale of the un-

A. *Common Law*

Once it has been determined that the testator intended (or would have intended had he considered the matter) an apportionment, there would seem to be two theoretical bases upon which it may be granted. First, it may be argued that since the word "income" is far from clear, we must look to the intention of the testator to interpret this word and to determine whether the testator intended the word "income" to include a part of the sale proceeds of unproductive property. This result seems quite reasonable when the unproductive property was deliberately retained in order to obtain a better price, and when the property is in fact sold for more than could have been obtained when the duty to sell first arose. If income is that which is derived from capital (or labor, as the case may be) and if the only thing derived or intended to be derived from holding this capital was the increment in value, it would seem that this increment in value might properly be termed income. Another possible theoretical basis for apportionment is that this constitutes a proper deviation from the express terms of a trust, since it is necessary in order to carry out the purpose of the trust.[17] This is done whenever the court orders a *cy pres* administration of a trust.[18]

In attempting to ascertain the probable intention of the testator, the courts consider a number of factors. One of the most important indicia of this intent is the respective relationships of the life tenant and remainderman to the testator. It is more likely that an intention by the testator to have an apportionment of the sale proceeds will be found to exist if the income cestui was the

productive property after the termination of the life tenant's interest. See Uniform Principal and Income Act, §11, which states: "Where . . . the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, *but is made before the principal is finally distributed,* then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated." Emphasis added.

[16] See cases collected in 103 A.L.R. 1271 (1936); 115 A.L.R. 881 (1938); 116 A.L.R. 1354 (1938); 129 A.L.R. 1314 (1940); 142 A.L.R. 264 (1943).

[17] See Walker v. Thomas, (D.C. Cir. 1935) 75 F. (2d) 667 at 669, indicating that the court would reject the literal meaning of words in a trust instrument in order to carry out the testator's intention. See also Thurlow v. Berry, 249 Ala. 597, 32 S. (2d) 526 (1947), and Estate of Loring, 29 Cal. (2d) 423, 175 P. (2d) 524 (1946) to the effect that the doctrine of equitable deviation is applicable to private as well as charitable trusts. But see note, 30 MINN. L. REV. 553 (1946) stating that deviation will not often be permitted when the interest of another beneficiary will thereby be invaded without his consent.

[18] 4 SCOTT, TRUSTS, 2d ed., §399.3 (1956).

principal object of the testator's bounty,[19] and especially if this beneficiary was dependent upon the testator.[20]

The courts also consider the amount of unproductive property as compared to the size of the trust estate, so as to deny apportionment when the unproductive asset is small in comparison to the entire estate. Thus, in *Creed v. Connelly*,[21] where the unproductive property constituted approximately one seventh of the total value, the court denied apportionment. A similar result was reached in *In re Marshall's Estate*,[22] where such property comprised less than one twentieth of the total. Moreover, the courts may consider, in addition to the relative amounts of productive and unproductive property, other equitable factors such as the adequacy of the remaining trust income to support the life cestui.[23]

Still another factor which is often considered in determining whether to grant apportionment is whether the asset was received in its unproductive condition from the testator,[24] and if so, whether there was a mandatory direction to sell it.[25] Ordinarily, if the testator leaves unproductive property to the trustee, it is believed that since he knew it to be unproductive, he would not have intended the life tenant to receive an income until it could be sold at a reasonable price.[26] However, if the testator ordered that the property be sold and the proceeds invested, no such inference as to his intent will arise.[27] Mr. Shattuck severely criticizes this result, stating that there are many reasons for inserting or

19 In re Rowland's Estate, 273 N.Y. 100, 6 N.E. (2d) 393 (1937); Quinn v. First Nat. Bank, 168 Tenn. 30, 73 S.W. (2d) 692 (1934); Furniss v. Cruikshank, 230 N.Y. 495, 130 N.E. 625 (1921); Lawrence v. Littlefield, 215 N.Y. 561, 109 N.E. 611 (1915). See also comment, 40 YALE L.J. 275 (1930).

20 Matter of Jackson, 258 N.Y. 281, 179 N.E. 496 (1932). See also Jordan v. Jordan, 192 Mass. 337, 78 N.E. 459 (1906) which distinguished Edwards v. Edwards, 183 Mass. 581, 67 N.E. 658 (1903) on the basis of the beneficiary's need for funds.

21 272 Mass. 241, 172 N.E. 106 (1930).

22 43 Misc. 238, 88 N.Y.S. 550 (1904). But see Skilton, "The Rights of Successive Beneficiaries in Unproductive Trust Assets Not Bearing Interest," 15 TEMPLE L.Q. 241 at 259 (1941).

23 Lang v. Mississippi Valley Trust Co., 359 Mo. 688, 223 S.W. (2d) 404 (1949).

24 See Patterson v. Vivian, 63 Misc. 389, 117 N.Y.S. 504 (1909), mod. on other grounds 137 App. Div. 596, 122 N.Y.S. 347 (1910).

25 Even though the property was received from the testator in its unproductive state, if there was a mandatory direction to sell, there is a strong likelihood that apportionment will be granted. Edwards v. Edwards, 183 Mass. 581, 67 N.E. 658 (1903). However, apportionment was denied in an instance where there was not even an express power of sale. Creed v. Connelly, 272 Mass. 241, 172 N.E. 106 (1930).

26 See Creed v. Connelly, 272 Mass. 241, 172 N.E. 106 (1930). But see In re Rowland's Estate, 273 N.Y. 100, 6 N.E. (2d) 393 (1937).

27 See Edwards v. Edwards, 183 Mass. 581, 67 N.E. 658 (1903).

omitting a mandatory direction to sell other than those concerned with the computation of income.[28]

A few cases[29] and the Uniform Principal and Income Act[30] have granted apportionment only to the extent that the ultimate sale price of the unproductive property exceeded the cost or inventory value of such property, thus preserving the corpus of the trust intact. However, it would appear that most cases reject this distinction.[31]

Lastly, courts may arrive at different results in cases involving different types of property.[32] For example, where the asset sold was an interest-bearing obligation and where there was interest in arrears, courts quite properly tend to grant apportionment.[33] Indeed, dividing the sale proceeds of an interest-bearing note with interest in arrears is not truly an apportionment of corpus to the extent that the income cestui's right to interest was also "exchanged" for the property acquired in settlement of the debt. However, decisions denying apportionment of the sale proceeds of stock,[34] and other personalty,[35] under circumstances which may well have allowed an apportionment of the sale proceeds of realty, seem unjustifiable.

In conjunction with the remedy of apportionment, the common law also permitted the income beneficiary to shift the expenses of the unproductive asset to corpus. The ability of the life tenant to so charge corpus with the burden of maintaining unproductive property is usually determined by the same criteria that govern the availability of apportionment upon the ultimate sale of the property.[36] If expenses have been paid from income,

28 Shattuck, "Unproductive Trust Property in Massachusetts," 20 BOST. UNIV. L. REV. 447 at 452 (1940).

29 See, e.g., Willis v. Holcomb, 83 Ohio St. 254, 94 N.E. 486 (1911).

30 Uniform Principal and Income Act, §11, 9B Uniform Laws Annotated 365 (1957).

31 See Jordan v. Jordan, 192 Mass. 337, 78 N.E. 459 (1906).

32 See In re Clarke's Estate, 166 Misc. 807, 3 N.Y.S. (2d) 60 (1938), granting apportionment of the sale proceeds of personalty. Other courts have denied apportionment of personalty. See, generally, 3 SCOTT, TRUSTS, 2d ed., §241.1 (1956).

33 Compare In re Lander's Estate, 162 Misc. 201, 294 N.Y.S. 58 (1937), which denied apportionment of the sale proceeds of preferred stock, to the cases cited in 103 A.L.R. 1271 at 1286 (1936).

34 See Shattuck, "Unproductive Trust Property in Massachusetts," 20 BOST. UNIV. L. REV. 447 (1940).

35 In re Searle, [1900] 2 Ch. 829, distinguishing realty and personalty. Cf. In re Lander's Estate, 162 Misc. 201, 294 N.Y.S. 58 (1937).

36 See 103 A.L.R. 1271 at 1273 (1936); 167 A.L.R. 1431 (1947). But see Hite v. Hite, 93 Ky. 257, 20 S.W. 778 (1892) following a more liberal rule for reallocation of expenses than for apportionment.

and if apportionment is later granted, the prevailing view is that expenses are to be repaid to income from the gross sale proceeds, and then the balance—the net proceeds—are apportioned.[37]

B. *Restatement of Trusts*

The *Restatement of Trusts* dispenses with these tests of intention and states that in the absence of a contrary direction in the trust instrument, there shall be an apportionment whenever an asset produces substantially less than the current rate of income on trust investments.[38] However, even courts purporting to follow this position will deny apportionment if the equities sufficiently favor the remainderman.[39] Such deviations from the *Restatement* position are not surprising, since the *Restatement* extended the application of apportionment considerably beyond what appears to be the position of the case law. Nevertheless, if a court desires to obtain one of the primary advantages of the *Restatement* position — the avoidance of the case-to-case determination of the testator's intention — it would seem wise to limit such deviation to the unusual case so that litigation will seldom appear profitable to the remainderman.

The *Restatement* permits the shifting to corpus of expenses on unproductive property whenever apportionment would be available.[40] Section 241, after providing that the net proceeds of the sale shall be apportioned in the absence of a contrary direction in the trust instrument, states:

> "The net proceeds are determined by adding to the net sale price the net income received, or deducting therefrom the net loss incurred, in carrying the property prior to the sale."

Comment *d* to this section provides:

> ". . . if carrying charges have been paid out of income, the amount so paid will be added to the amount which the life beneficiary would otherwise receive on the sale."

[37] See TRUSTS RESTATEMENT SECOND §241, comment *l* (1959); 4 BOGERT, TRUSTS §827, notes 82, 83 (1948).

[38] TRUSTS RESTATEMENT SECOND §241 (1959). This section also requires apportionment if the trustee delays selling "wasting" property or property producing an income substantially more than the current rate of return on trust investments.

[39] Lang v. Mississippi Valley Trust Co., 359 Mo. 688, 223 S.W. 404 (1949).

[40] TRUSTS RESTATEMENT SECOND §241 (1959) provides that there shall be an apportionment in the absence of a contrary direction by the trustee.

C. *Uniform Principal and Income Act*

Section 11 of the Uniform Principal and Income Act also makes provision for apportionment without looking to the unexpressed intention of the testator in each instance. Apportionment is proper under this act whenever the net income from an asset falls below a mechanically determined level.[41] However, unlike the *Restatement* and the common law, the uniform act provides that ". . . in no event shall such income [i.e., the income to be created by an apportionment] be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later." This is a very significant restriction. It permits apportionment only in the case where unproductive property is eventually sold at a profit. It offers no assistance to the life beneficiary in the frequent case where the unproductive investment causes a loss both to income and to corpus. This does not seem to be an apportionment of corpus, but merely an allocation of capital gains to income in an instance where there is little or no ordinary income.

The Uniform Principal and Income Act also permits a shifting of expenses from income to corpus, but the result reached under this act is not always identical with that attained by the application of the common-law rule. This act provides that expenses on the unproductive property shall be charged to principal, but that they shall be deducted from the gross proceeds of the property when sold, the balance—the net proceeds—being apportioned. However, because of the provision in this act which limits the apportionment to the amount by which the net proceeds exceed cost or inventory value of the property, a frequent result of reimbursing the life tenant for these expenses will be to reduce by an equal amount[42] the apportionment to be given him when the property is sold.[43]

41 Uniform Principal and Income Act §11 (1957), and see note 3 supra.

42 Under the uniform act the benefits of the provision shifting the expense of holding unproductive property to corpus are frequently illusory. This can be demonstrated by the following hypothetical. A trust for successive beneficiaries has sold for $100,000 a parcel of unproductive property which cost $80,000. This property had been retained in its unproductive state for five years during which time expenses were paid from income in the amount of $10,000.

If the uniform act did not shift expenses to corpus, then the life tenant would receive no reimbursement for his previous outlay of $10,000 expenses, but he would receive an apportionment of $20,000 computed as follows:

III. APPORTIONMENT WHERE THE LOSS WAS CAUSED BY THE TRUSTEE'S BREACH OF DUTY

Where the unproductive property is retained without fault by the trustee, a refusal to grant apportionment would deprive the life cestui of both the income from the unproductive asset and also of other trust income to the extent that it is needed to pay the cost of maintaining that property. This sacrifice would be forced upon the life beneficiary in order to prevent an immediate sale for less than what is considered as the real value of the property. Since the retention is largely for the benefit of corpus, it is reasonable to suppose that the testator would have wanted a portion of the sale proceeds to be awarded to income as reparation for the loss sustained during the unproductive holding period. But compare the above situation to an instance where the trustee negligently delayed the sale of an unproductive asset. In the

$$\frac{\$100{,}000}{1+(.05\times 5\text{ yrs.})}=\$80{,}000$$ award to corpus, and the balance of the $100,000 or $20,000 to income. The limitation (that the amount given to income shall not be greater than the amount by which the net proceeds of sale exceed the cost of the property) will not reduce the $20,000 award, since that award is not greater than the $100,000 sale proceeds less the $80,000 cost.

Under the uniform act in its present form the net benefit to the life tenant would be no greater. The net proceeds will be $90,000 ($100,000-$10,000 expenses), and the life tenant will be reimbursed for the $10,000 of expenses which he incurred. The apportionment will then grant $10,000 of the remaining $90,000 to income, computed as follows:

$$\frac{\$90{,}000}{1+(.05\times 5\text{ yrs.})}=\$72{,}000$$ to corpus and $18,000 to income, *except* that the limitation states that the apportionment shall not be more than the amount by which the net proceeds ($90,000) exceed the cost of the property ($80,000), thereby reducing the award to $10,000.

Thus under the uniform act, despite its shifting expenses to corpus, the life tenant receives $10,000 of expenses and $10,000 of apportionment. In the absence of the shifting of expenses he received a $20,000 apportionment. The result is the same. Only where the property is sold for an amount sufficiently large to avoid the limitation will there be any benefit from the provision shifting expenses to corpus. Thus if the cost of the property in the above hypothetical were $70,000 instead of $80,000, then the life tenant would have received the $10,000 expenses and $18,000 of income, for the limitation would have been ineffective to reduce the life tenant's portion. Or if the cost had been $75,000, the limitation would not have completely eliminated the effect of shifting the expenses to corpus. The life tenant would have received the $10,000 expenses plus $15,000 apportionment ($18,000 but limited to $15,000 which is the amount by which the $90,000 net proceeds exceed the cost of $75,000).

[43] The uniform act not only causes the life cestui to pay the carrying charges if there are proceeds available from the apportionment; it also requires that interest be paid on the amount of these charges from the fund created by the apportionment. Charging the life beneficiary with interest is improper, since the remainderman would not have received the interest on the fund had it not been used to pay carrying charges. See Brandis, "Trust Administration: Apportionment of Proceeds of Sale of Unproductive Land and of Expenses," 9 N.C.L. REV. 127 at 137 (1930).

former situation the life tenant was compelled to sacrifice income for the intended benefit of corpus. In the latter case because the loss was caused by the breach of the trustee, it is probable that the life cestui could have compelled a sale of the improper asset.[44] The former situation is similar to a loan, where the life cestui was ordered to forego income temporarily in hope of avoiding a sacrifice sale of a trust asset; when the asset is later sold, he is repaid for his loss through apportionment. It would seem that the life tenant's equities *vis-à-vis* those of the remainderman are much weaker in the latter situation where the loss was caused by a negligent fiduciary. Indeed, it is often arguable that the life tenant should be estopped to claim an apportionment where the trustee was negligent, and the life tenant fails to call the matter to the attention of the remainderman by requesting that the charges be placed on corpus, or by instituting an action to compel a sale of the asset. This will be discussed in more detail later in the comment.[45]

The testator's probable intention in instances where a trustee's breach causes a loss of income or corpus furnishes little aid, for there is no compelling reason to believe that the grantor would have wanted this loss to be recouped by the life tenant against corpus rather than by proceeding against the fiduciary to whose judgment the testator entrusted his property.[46] Where the trustee is not negligent, apportionment is the only available remedy, and the intent of the grantor that this remedy should exist can be more readily assumed.

However, neither the *Restatement* nor the few cases on point have refused apportionment because of trustee negligence. Section 241 of the *Restatement of Trusts, Second,* comment *a,* provides that there shall be apportionment irrespective of negligence by the trustee in acquiring or retaining the unproductive property. The uniform act is not entirely clear on this point.[47]

[44] Willis v. Holcomb, 83 Ohio St. 254, 94 N.E. 486 (1911). However, if before the life tenant has a reasonable opportunity to compel a sale, a sale becomes impractical, the equities would be more evenly balanced between life tenant and remainderman.

[45] See text accompanying footnotes 62-65.

[46] In re Bothwell's Estate, 65 Cal. App. 598, 151 P. (2d) 298 (1944) contains dicta to the effect that apportionment *must* be used if available. No other case indicating this has been found.

[47] Section 11 of the Uniform Principal and Income Act provides for apportionment when ". . . the trustee is under a duty to change the form of the investment *as soon as it may be done without sacrifice of value* and such change is delayed. . . ." (Emphasis added.) Does this contemplate a situation when the trustee breached his duty by originally acquiring the asset? Or where the trustee is under a duty to sell immediately?

Of the few American cases[48] on point, the earliest is *Parsons v. Winslow*,[49] where the trustee improperly invested the trust corpus, losing not only the income, but also the greater part of the capital as well. The trustee was surcharged but his personal estate was insufficient to absorb the entire loss. The court ordered an apportionment of the recovery. This court showed no indication that it considered that the existence of negligence on the part of the trustee in any manner affected its determination to grant apportionment. Nor did the court show any indication that it would treat a claim for apportionment of the corpus itself any differently from a claim for an apportionment of the recovery from the trustee.[50]

The question arose more recently in Tennessee when a trustee bank which had misinvested trust funds became insolvent.[51] The bank was surcharged but the satisfaction was less than complete, and the issue presented was how the loss should be borne between the life tenant and remainderman. The court held that both the recovery from the trustee and the sale proceeds of the unproductive property should be apportioned between the two classes of beneficiaries,[52] but there was no discussion of the effect, if any, of the trustee's breach on the grant of apportionment.

An unusual approach was taken by the California Court of Appeals[53] in a case where the loss was caused by the improper

48 There are also a few English cases on point. In re Grabowski's Settlement, L.R. 6 Eq. 12 (1868) involved a life tenant's request for apportionment of the recovery from a trustee whose negligence caused loss to both income and corpus. The trustee's assets were insufficient to satisfy the claims of both beneficiaries, and the court awarded the entire amount to corpus. Since the award was granted for loss to income as well as to corpus, it would seem that the life tenant should have had an interest in the recovery irrespective of apportionment. Another case, In re Bird, [1901] 1 Ch. 916, involved a request for apportionment of the sale proceeds of the unproductive property (here also there was a loss both to income and corpus) and the court took note of the existence of a breach of trust, but permitted apportionment. However, there was no negligent delay by the life tenant in not compelling a sale, as neither beneficiary was aware of the existence of the improper investment.

49 16 Mass. 361 (1820).

50 The opinion did not state whether the apportionment only involved the recovery from the trustee, or whether the amount salvaged from that improper investment was also being apportioned. In the former instance, the apportionment is not very significant since it seems that the recovery represented both income and corpus, and thus both cestui should have had an interest in the recovery irrespective of apportionment.

51 Cate v. Hamilton Nat. Bank, 178 Tenn. 249, 156 S.W. (2d) 812 (1941); Quinn v. First Nat. Bank, 168 Tenn. 30, 70 S.W. (2d) 692 (1934).

52 See the argument of counsel in In re Grabowski's Settlement, L.R. 6 Eq. 12 (1868), contending that a distinction should be recognized between an apportionment of the recovery from the trustee and an apportionment of the sale proceeds of the unproductive property.

53 In re Bothwell's Estate, 65 Cal. App. (2d) 598, 151 P. (2d) 298 (1944).

holding of unproductive property. The court not only held that there could be an apportionment, but said in dicta that where apportionment was available the life tenant could not proceed against the trustee.[54] This dicta seems clearly unreasonable. There is no reason to immunize the trustee from suit by the life tenant or remainderman because apportionment was available to shift the incidence of the loss between the two classes of beneficiaries.

There are other instances where the question of apportionment arose[55] or was mentioned in dicta[56] when the trustee had been guilty of a breach of duty which caused the loss. However, none of these cases discussed the effect, if any, of the trustee's negligence upon their determination to grant or refuse apportionment. Nor did the cases distinguish between a grant of apportionment of the sale proceeds of the unproductive property, and a division of the recovery against the trustee in which both beneficiaries were interested.

Let us now turn to look at the net effect of the rule permitting apportionment where the loss was caused by the trustee's breach. First, if trustee negligence can be proved and if the trustee is financially responsible, then the grant of apportionment will be of no significance since both parties will be made whole at the expense of the trustee[57] and the cost of suit, if not recovered from the trustee, will probably be apportioned between the two classes of cestui in proportion to their respective interests in the recovery.[58]

[54] Id. at 604-605.

[55] Plunkett v. Commissioner, (1st Cir. 1941) 118 F. (2d) 644 at 648.

[56] Matter of Jackson, 258 N.Y. 281 at 290, 179 N.E. 496 (1932).

[57] This assumes negligence can be proved. The risk of failure to prove trustee negligence will normally fall most heavily upon the remainderman. If the proceeds of sale are substantial and if the property has not been unproductive for more than a few years, the life tenant can recover most of his lost income via apportionment. If the jurisdiction grants apportionment irrespective of trustee neglect, then the remainderman will have to prove the trustee's breach in order to recoup from the trustee the loss caused to corpus by the apportionment. On the other hand, if apportionment is denied in instances where the trustee is negligent, the remainderman will still have the burden of proving the trustee's breach in defending against the apportionment claim by the life tenant. (If the burden of proving the trustee's freedom from negligence were placed upon the life tenant, he might well be in the position of being unable to prove negligence so as to obtain damages from the trustee, and unable to prove an absence of negligence so as to obtain an apportionment.) Only when apportionment would provide substantially less than the amount of the lost income would the life tenant have any real interest in proving the breach of duty by the trustee.

[58] If the trustee is found negligent, he may be surcharged for the amount of the objector's attorney fees. See Perry v. Perry, 343 Ill. App. 644, 99 N.E. (2d) 715 (1951); note, 16 GA. B.J. 93 (1953). But see Hardy v. Hardy, 217 Ark. 305, 230 S.W. (2d) 11 (1950). If the attorney fees are not charged to the trustee they may well be charged ratably

If, on the other hand, the trustee is totally without funds, then the effect of apportionment is the same as where there is no negligence at all—it shifts the incidence of the loss from income to corpus to the extent of the award. If apportionment were denied in such a case because of trustee neglect, then the loss would remain upon income. Denying apportionment seems entirely warranted where the life tenant had knowledge of the breach and ample opportunity to compel a sale of the property, and where he inexcusably delayed in so doing. This is especially true if the life tenant did not request that carrying charges be placed upon corpus thereby alerting the remainderman to the unproductivity of the asset. Without such notice, the remainderman may not be in a position to know that the asset is unproductive.

The third possibility is that the trustee has some funds, but not in sufficient amounts to make good the loss caused by his breach. If there was only a loss of income while the corpus of the trust remained intact, then to the extent that the apportionment exceeds the amount recovered from the trustee, the loss is shifted to corpus. When there has been a loss to both income and corpus as a result of this trustee's negligence, the problem is more complex. Let us assume a $1,000,000 trust res which has been reduced to $500,000 by the loss on an improper investment. In addition to the loss of corpus, there was also a $100,000 loss of income (five percent on one million dollars for two years) during the period the asset was retained. Of the $600,000 loss, assume $300,000 was recovered from the trustee. If apportionment is granted, the $300,000 recovery will be added to the $500,000 remaining from the investment, and the two apportioned together. Assuming a five percent yield on trust investments, the apportionment would, under the *Restatement*[59] formula, be made as follows:

$500,000.00	Salvaged investment
300,000.00	Recovery from trustee
$800,000.00	Total

$$\text{New corpus} = \frac{\$800{,}000.00}{1 + (.05 \times 2 \text{ yrs.})} = \$727{,}272$$

$$\text{Income} = 800{,}000.00 - 727{,}273 = \$72{,}727.00$$

to the various cestuis in accordance with their respective interests. See In re Rosenbaum's Estate, 115 N.Y.S. (2d) 450 (1948). See especially the comprehensive annotation in 9 A.L.R. (2d) 1132 (1950).

[59] TRUSTS RESTATEMENT SECOND §241 (1959).

Assuming that apportionment is denied, however, the life tenant should still share in the $300,000 recovery from the trustee which was partially in return for lost income. If a successor trustee brings suit, or if the two beneficiaries join and sue, the recovery should seemingly be apportioned according to their respective losses. This would give to income 1/6 of the recovery ($100,000 lost income as to $600,000 loss in toto) or $50,000 as compared to $72,727 when apportionment is permitted. Although some courts have awarded the entire recovery to corpus,[60] this seems improper and may encourage a separate action by the life tenant[61] to recover lost income where this is permitted.

IV. SUBROGATION AND ESTOPPEL

One difficulty in applying apportionment arises when a life tenant, barred by laches[62] or estoppel[63] from commencing suit against the trustee, requests an apportionment of the same proceeds of the unproductive property. If the life tenant is not barred from seeking apportionment[64] should the remainderman be permitted to recoup the loss from the trustee, or only be subrogated to those rights which the life cestui possessed (which would be nil if action by the cestui has become barred by laches or estoppel)? To permit such an action by the remainderman allows the life tenant to ac-

60 In re Grabowski's Settlement, L.R. 6 Eq. 12 (1868).

61 Plunkett v. Lampert, 231 Minn. 484, 43 N.W. (2d) 489 (1950). See also Talbutt v. Security Trust Co., (E.D. Ky. 1938) 22 F. Supp. 241 and cases cited in 136 A.L.R. 693 (1942). These cases indicate that the life tenant may commence a separate action for lost income caused by the trustee's negligence. Even if the life tenant and remainderman join in an action against the trustee, it would seem that the court may grant separate damages for the injury to each interest and thus have a race of diligence determining which award will be satisfied.

62 Will of North, 235 Wis. 639, 294 N.W. 15 (1940). See 2 SCOTT, TRUSTS, 2d ed., §219 (1956).

63 See 2 SCOTT, TRUSTS, 2d ed., §177 (1956). But for the difficulty in successfully basing a defense on estoppel, see Liberty Title and Trust Co. v. Plews, 6 N.J. 28, 77 A. (2d) 219 (1950). Cf. Estate of O'Donnell, 8 Ill. App. (2d) 348, 132 N.E. (2d) 74 (1956). See also language in In re Bothwell's Estate, 65 Cal. App. (2d) 598 at 609-610, 151 P. (2d) 298 (1944).

64 See In re Bothwell's Estate, 65 Cal. App. (2d) 598, 151 P. (2d) 298 (1944); Delaware Trust Co. v. Bradford, 30 Del. Ch. 277, 59 A. (2d) 212 (1948). But see Spring v. Hollander, 261 Mass. 373, 158 N.E. 791 (1927); and the language in Green v. Crapo, 181 Mass. 55, 62 N.E. 956 (1902), indicating that the consent of a life tenant who individually held the unproductive property as a tenant in common with the trustee would bar her action against the trustee for negligence. A strong argument in favor of estopping the life tenant from obtaining apportionment is the unfairness of permitting him to remain silent while the property is retained and while the remainderman may be totally unaware that that property in question is unproductive, and then to claim a portion of the corpus. If the life tenant's failure to complain earlier was in any way responsible for the loss, it would seem only fair to prevent the life tenant from shifting this loss to the innocent remainderman.

complish by indirection much the same recovery which he was barred from obtaining directly,[65] although the amount of the recovery via apportionment might be smaller. On the other hand, it seems unjust to deny this remedy to the remainderman who may have had no earlier opportunity to compel a sale. These difficulties can be avoided and a more just result reached by estopping the life tenant from claiming apportionment under circumstances which would preclude his recovery against the trustee.

Conclusion

Although it is occasionally necessary to deny apportionment on equitable grounds, the application of this remedy usually produces a fair and desirable result. A rule which requires an apportionment without a determination of the testator's unexpressed intention avoids much costly litigation. Also, a trustee who knows that apportionment will ultimately be granted is able to determine whether to retain unproductive property without unduly favoring either class of beneficiary. Finally, when the retention is ordered to preserve the trust res for the benefit of all the cestui, apportionment distributes the burden of holding this property in a manner which seems equitable and in accord with the intention of the testator in most instances. It is therefore not surprising that, absent a contrary provision in the trust instrument, both the courts and state legislatures are tending toward the consistent application of the apportionment remedy.

Bruce M. Stiglitz, S. Ed.

[65] Nevertheless, the reasoning of cases allowing suit by the remainderman in the absence of apportionment would appear equally applicable where there had been an apportionment. See cases cited in 7 A.L.R. 1021 (1920), allowing recovery by the remainderman despite his acquiescence during the life of the life tenant, since the remainderman had then no right to enforce his claim to the fund.