THE

AMERICAN LAW REGISTER.

APRIL 1886.

INVESTMENT OF TRUST FUNDS.

THE LAW IN ENGLAND.—The strictness of the English law upon the question is well known. Lord COTTENHAM thus states the rule: "It will be found to be the result of all the best authorities upon the subject, that although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative, in funds or securities, not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such course may have been from any improper motive:" *Clough* v. *Bond*, 3 Mylne & Craig 490. Similar comments have been made by other English judges: "No rule is better established than that a trustee cannot lend on mere personal security, and it ought to be rung in the ears of every one who acted in the character of trustee." Lord KENYON in *Holmes* v. *Dring*, 2 Cox 1: "The court will always discourage lending trust moneys on private security, though large interest may be given. It becomes a species of gambling." Lord Commissioner NOTHAM, *Adye* v. *Feuilleteau*, 1 Cox 24; s. c. 3 Swanst. 84. The course of decision which has led up to this conclusion in England, is worthy of note. In *Trafford* v. *Boehm*, 3

Atk. 444, as early as 1746, Lord HARDWICKE decided that investing the trust funds in South Sea stock would not protect the trustee against personal liability for the loss; and the Lord Chancellor remarked that "Neither South Sea stock nor bank stock is considered a good security, because it depends on the management of the governors and directors, and is subject to losses." And in the same case he held that an investment "in South Sea or bank annuities, where the directors have nothing to do with the principal, and were only to pay the dividends and interest, until such time as the government pay off the capital, would be good security." In *Hancom* v. *Allen*, 2 Dickens 498, it was held in 1774, that if a trustee lay out trust money in a fund which the court does not adopt, and such fund afterwards sink in value, the court, though there was no *mala fides*, will throw the loss upon the trustee. Otherwise, if laid out in the fund which the court adopts: *Peat* v. *Crane*, 2 Dickens 498, note. In *Adye* v. *Feuilleteau*, 1 Cox 24; s. c. 3 Swanst. 84, decided in 1783, Lord LOUGHBOROUGH held that where an executor lends money of his testator, upon bond, he shall be personally answerable if the security prove defective, though the testator was in the habit of lending money on such security. Counsel attempted in this case to rely upon *Harden* v. *Parsons*, 1 Eden's Cas. 145, but that case was overruled by Lord ELDON in *Walker* v. *Symonds*, 3 Swanst. 62, and has never since been relied upon as an authority. In *Holmes* v. *Dring*, 2 Cox 1, decided in 1787, the executors had loaned the trust money of an infant on a bond with security. The obligors were in "ample circumstances" when the money was lent, but afterward became insolvent. The Master of the Rolls said that "it was never heard that a trustee could lend an infant's money on private security," and directed the executors to pay the money, and interest and costs. In *Wilkes* v. *Steward*, Cooper's Ch. Rep. 6, decided in 1801, the executors were empowered to lay out the legacy in the funds, "or in such other good security as they could procure and think safe." It was none the less held, that they could not lend it on personal security. In *Powell* v. *Evans* (1801), it was held that executors who neglected to call in money lent by the testator on a bond, should be charged with the loss that might be sustained by the subsequent failure of the obligors.

In *Ackerman* v. *Emott*, 4 Barb. (N. Y.) 636, it is said to be the well-settled rule of the English Court of Chancery, that the trustee can only protect himself against risk, by investing the trust fund in real or government securities. He must either take security on real estate, or invest in a fund approved by the court; and no other fund is there approved by the court, except the public funds: *Vigrass* v. *Binfield*, 3 Mad. 62; *Walker* v. *Symonds*, 3 Swanst. 1; *Howe* v. *Earl of Dartmouth*, 7 Ves. 150; *Holland* v. *Hughes*, 16 Id. 111; *Tebbs* v. *Carpenter*, 1 Madd. 290; *Clough* v. *Bond*, 3 Mylne & Craig 490; *Darke* v. *Martyn*, 1 Beav. 525; *Keble* v. *Thompson*, 3 Cro. Ch. 112; *Wilkes* v. *Steward*, George Coop. 6; *Pocock* v. *Reddington*. 5 Ves. 799; *Collis* v. *Collis*, 2 Sim. 365; *Blackwood* v. *Borrowes*, 2 Conn. & Laws 477; *Watts* v. *Girdlestone*, 6 Beav. 188; *Geaves* v. *Strahan*, 8 DeG., M. & G. 291; *Fowler* v. *Reynal*, 3 Mac. & G. 500.

Whether or not this was at any time a perfectly accurate statement of the English law governing the investment of trust funds, it is certain that later statutes and decisions have made important and significant changes. By Lord St. Leonards' Act, 22 & 23 Vict. c. 65, sect. 32, trustees, executors and administrators, where not expressly forbidden by the instrument creating the trust, are authorized to invest trust funds in the stock of the Bank of England, or Ireland, or in East India stock; but the act does not apply where a particular fund is settled specifically, and there is no power of varying securities. By 23 & 24 Vict. c. 38, sect. 12, the original act was made retrospective, and the Court of Chancery was authorized to issue general orders pointing out certain securities which met with the court's approval. In pursuance of the authority thus granted a general order was issued in 1861 and modified in 1883 as follows: "Cash under the control of, or subject to the order of, the court may be invested in Bank stock, East India stock, Exchequer bills, and 2*l.* 10*s.* per cent. annuities, and upon mortgage of freehold and copyhold estates, respectively in England and Wales, as well as on consolidated, reduced and new 3*l.* per cent. annuities." By the combined operation of sects. 21 and 32, of the Settled Land Act 1882, all moneys in court which are liable to be laid out in the purchase of land to be made subject to a settlement may be "invested in government securities, or on other securities on which the trustees of the settlement, are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or

Ireland, incorporated by special Act of Parliament, and having for ten years next before the date of investment, paid a dividend on its ordinary stock or shares." It is said in *Brown* v. *Brown*, 4 K. & J. 704, that "in order to come within the description 'government or parliamentary stock or funds,' a fund ought to be either managed by Parliament, or paid out of the resources of the British Government, or at least guaranteed by that government." It is enacted by 30 & 31 Vict. c. 132, sect. 2, that "it shall be lawful for any trustee, executor, or administrator to invest any trust fund in his possession or under his control in any securities, the interest of which is or shall be guaranteed by Parliament." By 34 & 35 Vict. c. 47, sect. 13, a trustee, executor or other person empowered to invest money in public stocks or funds, or other government securities, may, unless forbidden by the will or other instrument under which he acts, whether prior in date to the act or not, invest the same in consolidated stock created by the Metropolitan Board of Works.

Prior to these statutes, while the question was in some doubt, loans upon mortgages were not permitted, or were certainly not encouraged: *Ex parte Cathorpe*, 1 Cox 182; *Ex parte Ellice*, Jacob 234; *Norbury* v. *Norbury*, 4 Mad. 191; *Widdowson* v. *Duck*, 2 Mer. 494; *Ex parte Fust*, 1 C. P. Cooper, T. Cott. 157, note (*e*); *Ex parte Franklin*, 1 De G. & Sm. 531; *Barry* v. *Marriott*, 2 Id. 491; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgway*, 1 Hag. 309; Lewin on Trusts (8th ed.) 312; Perry on Trusts, § 457. But see *Brown* v. *Litton*, 1 P. Wms. 141; *Lyse* v. *Kingdon*, 1 Coll. 188; *Knight* v. *Plymouth*, 1 Dick. 126; *Bocock* v. *Reddington*, 5 Ves. 800. Justification was found for this rule in *Barry* v. *Marriott*, 2 De G. & Sm. 491, as follows: That even where an express power existed to lend on real security, the court would refuse to exercise it by sanctioning a loan on mortgage, on the ground that in ninety-nine cases out of a hundred, the expense of the mortgage more than counterbalanced the increase of income. Now, however, by Lord St. Leonards' Act, "when a trustee, executor or administrator shall not by some instrument creating his trust be expressly forbidden to invest any trust fund in real securities in any part of the United Kingdom," he is at liberty to make such investment, provided it be in other respects reasonable and proper: Lewin on Trusts (8th ed.) 313; Perry on Trusts, § 457.

In spite of the care exercised by the English courts to protect the interests of the ward, that purpose is not permitted to do injustice to the trustee. In *Knight* v. *Plymouth*, 1 Dick. 120; s. c. 3 Atk. 480, Lord HARDWICKE observed: "Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value, or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the *cestui que trust*, was there ever an instance of the trustees being made to answer the actual sum so placed out? I answer, No! If there is no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favor him; for, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." The point decided in this case was that a receiver who paid the amounts of rents of an estate in his charge to a Bristol tradesman of good credit, taking his bills therefor on London, was not responsible for the loss of the money by his becoming bankrupt. In other words, that when trustees act by other hands, according to the usage of business, they are not answerable for losses. *Ex parte Belchier*, 1 Amb. 218; s. c. 1 Ken. 38. This decision has been affirmed in a very late case, where a trustee invested trust funds, and employed a broker to procure securities authorized by the trust, and paid the purchase-money to the broker, it was held that, if such was the usual and regular course of business of persons acting with reasonable care and prudence on their own account, the trustee was not liable for the loss of the money by fraud of the broker. Sir GEORGE JESSEL, M. R., Lord Justice BOWEN, and Lord BLACKBURN affirmed the general rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinarily prudent man of business would conduct his own; Lord BLACKBURN adding the qualification that "a trustee must not choose investments other than those which the terms of his trust permit." *Speight* v. *Gaunt*, 22 Ch. Div. 729; 9 App. Cas. 1; *Lamar* v. *Micou*, 112 U. S. 452.

PENNSYLVANIA.—The Pennsylvania statutes upon the subject are the following:

The Act of 1832 provides in substance that, wherever an executor, administrator, guardian or trustee has in his hands any money, the principal or capital whereof is to remain for a time in his possession, under his control, and the interest, profits or income thereof is to be paid away, such trustee may present his petition to the Orphans' Court of the proper county, stating the circumstances of the case, and the amount or sum of money which he is desirous of investing: whereupon it shall be lawful for the court, upon hearing and due proof of the circumstances, to make an order directing the investment of the said money in the stock or debt of the United States, or in the debt of the Commonwealth of Pennsylvania, or in the debt of the city of Philadelphia, or in real security; and in case the money be invested in conformity with such direction, the trustee shall be exempted from all liability for loss on the same, in like manner as if the investment had been made in conformity with a similar direction in the wills or other instruments creating the trust. *Provided*, that nothing contained in the act should authorize the court to make an order contrary to the direction contained in any will or other instrument in regard to the investment of such moneys.

By the Act 8th May 1876, the provisions of this act were extended so as to include all bonds or certificates of debt now or hereafter to be created and issued according to law by any of the counties, cities, school-districts or municipal corporations of this Commonwealth; "which said bonds or certificates are hereby declared to be legal investments of moneys by executors, administrators, guardians or trustees."

By the Act 13th April 1854, it was declared lawful for any trustee, committee, guardian or other person acting in a fiduciary capacity, to invest trust moneys in ground-rents, or other real estate, by leave of the proper court, provided the court approved, and such investment made no change in the course of succession.

At one time, in the history of legislation in Pennsylvania, statutes authorizing investments in particular securities were quite common. Acts authorizing investments in the following securities were passed between the years 1851 and 1872: Bonds of the county of Allegheny, the city of Pittsburgh, and the city of Allegheny; bonds of the borough of Allentown; loan of the county of Chester; bonds of the Pennsylvania Railroad Company, secured by a certain mortgage; public debt of the city of Williamsport; mortgage bonds of Philadelphia and Reading Railroad Company, secured by a certain mortgage; loan of the county of Adams.

Some of such legislation is now, however, a thing of the past.

Article III. sect. 22, of the Pennsylvania Constitution of 1874, provides as follows: "No act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stock of any *private* corporation, and such acts now existing are avoided, saving investments heretofore made."

The earlier Pennsylvania cases avoid passing upon the question as to whether, since the enactment of the statutes mentioned, a trustee, with general authority, would be justified in lending the trust fund on any other securities than those pointed out in the acts: *Nyce's Estate*, 5 W. & S. 254; *Morris* v. *Wallace*, 3 Penn. St. 319. See, also, *Pray's Appeal*, 34 Penn. St. 100. *Twaddell's Appeal*, 3 Penn. St. 319, is an interesting and well-considered case. There a guardian, under an ordinary power, invested in the loan of the Lehigh Navigation Company—a corporation owning coal lands and a canal—and the investment was sustained. Chief Justice GIBSON therein lays down some important and able views: The Act of 1832 was not passed for the purpose of restricting the investments of trustees to the securities therein pointed out, but to name a course free from risk. It would be inconvenient, burdensome and expensive to demand judicial sanction for every investment. The act was passed for the protection of the trustee. It is doubtful whether the English rule or any other unbending principle covers the necessities of the case. The investment in this case was not on personal security, but in the loans of a great and flourishing corporation, the value of whose landed capital, to say nothing of its works, vastly exceeded the amount of its debts. The income from its coal mines and its canal was appropriated to payment of interest on its loans in the first instance; and the investment was consequently made, in substance, though not in form, on real security. The investment in *Nyce's Appeal* was made in the stock of a bank; and the history of banking for thirty years shows that it was essentially a hazardous one. Had the money in the present case been invested in the stock of a company which cannot receive a dividend till the interest on its loans had been paid, or had its dividends then been suspended, the case might probably have presented a different aspect. See, also, *Rush's Estate*, 12 Penn. St. 375. In *Barton's Estate*, Pars. Select Eq. Cas. 24, in the Orphans' Court of Philadelphia, the trustees were invested with the "full and uncontrolled management of the said $16,000, so that the same might be invested in real or personal property, or in such other way as they may think best." Investments already made by the testatrix in stock of the Schuylkill Bank and in a loan of the Lehigh Navigation Company were retained and the trustee exonerated. In commenting upon the Act of 1832, KING, J., observes: "It was intended simply to indemnify any trustee having money in his hands, the principal of which was payable in future, and the income to be paid away or accumulated, if he invested such fund in one of certain designated securities under the direction of this court. It was not intended to divest him of any authority lawfully exercised under the terms of the instrument creating the trust. This is shown by the proviso of the act, which declares that "nothing contained in it should authorize the court to make an order contrary to the direction of any will or other instrument in regard to the investment of such moneys. It was intended specially to embrace a large class of cases in which no direction is given by the instrument creating the trust *how* the trust fund shall be invested; such as the general direction, so common in country wills, to 'put out money at interest.' This is also shown by the words of the law, in which it is said that a trustee so investing under the order of this court, 'shall be exempted from all liability for loss, in the same manner as if such investment had been made in pursuance of directions in the will or other instrument creating the trust.' The act was intended as a substitute for special directions as to investment in the trust instrument; not as a *supersedeas* of full and express authority given by a testator or grantor. It leaves trustees clothed with special powers in regard to the investment of trust funds as it found them, responsible only for defaults arising from acts inconsistent with the terms of their charter; acts done without due and proper caution, or in violation of good faith."

The drift of opinion, in Pennsylvania, while apparently conceding the correctness of this construction of the acts of assembly, is in a contrary direction. In *Worrell's Appeal*, 9 Penn. St. 508, there was an investment under a general power in the stock of a navigation company when in good credit, and paying large dividends, which it continued to do for some time. It was common for other trustees to invest in such stock, and for others to use it as a permanent and safe investment. The guardian had invested his own funds in the same manner. The stock continued to pay large dividends and to be in good credit for some years after the investment, and some of the wards who received the stock on attaining their majority, had realized a large profit on the investment of their share of the fund. Nevertheless the guardian was held liable for a depreciation. The references to the decision in *Twaddell's Appeal* in this case are not flattering. The same case came up again before the Pennsylvania Supreme Court—*Worrell's Appeal*, 23 Penn. St. 44—and there the court uses this language: "It may now be considered as settled law that in Pennsylvania an investment by a guardian or other trustee, unless authorized by the deed of trust, in the stock of an incorporated company, whether a bank, railroad, canal, manufacturing or mining corporation, cannot be made at the risk of a ward or other *cestui que trust*." See, also, *Stanley's Appeal*, 8 Penn. St. 431; *Hemphill's Appeal*, 18 Id. 303. In *Pray's Appeal*, 34 Penn. St. 100, the power given the trustee authorized an investment "in any property, real or personal, that he may see fit," and the investment was made in the stock of a manufacturing company, the works of which were unfinished, and the stock not paid up in cash. The investment was held unauthorized. The court remarks: "It is not necessary in this case to decide whether, where a discretion is left, the trustee should always adhere to the securities pointed out by the act of assembly; but we must say that we think it the safest and wisest course. In our own books we have no such gross violation of the rules governing investments by trustees as the present; the nearest being that of the *Estate of Esther Barton*, 1 Pars. Eq. Cas. 24, decided by Judge KING in 1842. There, at the time of the investment, the stock and loans were valuable paying securities; and even this case is much shaken by the later decisions of *Hemphill's Appeal*, 18 Penn. St. 303, and *Worrell's Appeal*, 23 Id. 44, if not substantially overruled." In *Ihmsen's Appeal*, 43 Penn. St. 431, the direction was by will to invest the fund "in some good, secure and profitable stocks or other securities, and if they cannot be procured at reasonable prices, then to invest the said sum of $15,000 in some other way, so that the same will be well secured." The investment chosen was in the stock of the Ohio and Pennsylvania Railroad Company. Although there was no fraud, and the trustee had invested his own property in the same stock, such an investment was held to be illegal; it should have been made in the stocks or securities prescribed by the acts of assembly. In *Pleasants's Appeal*, 77 Penn. St. 356, authority was given to invest "in some safe and productive stock, mortgage or other real security, either in Jamaica or the United States of America." The investment was made in July 1836, in the stock of the Bank of the United States, and the court refused to surcharge the trustees.

See, generally, *McCahan's Appeal*, 7 Penn. St. 56; *Angue's Estate*, 2 Phila. 137; *Seidler's Estate*, 5 Id. 85; *Gaw's Estate*, 34 Leg. Int. 66; s. c. 24 Pitts. L. J. 128; *Shields's Estate*, 14 Phila. 307; *Jack's Appeal*, 94 Penn. St. 367; *Pleasonton's Appeal*, 99 Id. 362; *Eysters Appeal*, 16 Penn. St. 372.

It may be well to observe, however, that the latest statement of the measure of a trustee's duty by the Pennsylvania Supreme Court is as follows: "The measure of diligence and care required of a trustee is precisely that which a man of ordinary prudence would practise in the care of his own estate. This rule has been so often laid down in our books that it seems unnecessary to refer to authorities on that point, a reasonable degree of vigilance and the exercise of good faith is the standard of the trustee's duty:" *Fahnestock's Appeal*, 104 Penn. St. 46.

NEW YORK.—There seems to be little doubt, and even little difference of opinion, as to what is the law upon the subject in New York. As early as the case of *Smith* v. *Smith*, 4 Johns. Ch. 281, Chancellor KENT remarked that he had no doubt that it was a wise and excellent general rule, that a trustee loaning money must require adequate real security, or resort to the public funds, though he adds, that he was not prepared to say whether there are any, and if so, what exceptions to this rule. The case of *King* v. *King*, 3 Johns. Ch. 552, lends additional support to this view. A case of great interest and one containing an able and exhaustive opinion, is that of *Ackerman* v. *Emott*, 4 Barb. 626. After a most elaborate review of the authorities, both English and American, the court observes: "On the whole I cannot doubt but the English rule is adopted here, and that a trustee cannot be protected against a loss in investing trust funds, unless he loans on real security, or invests in some fund approved by the court. Such a rule is easily defined and readily understood, and I repeat, it is as necessary to the safety of the trustee, as to the protection of the *cestuis que trust*." Another case of importance, affirming this general doctrine, is that of *King* v. *Talbot*, 40 N. Y. 76. Therein the court remarks: "My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations which alone induce men of suitable experience, capacity and responsibility to accept its usually thankless burden, is, that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs." In the late case of *Mills* v. *Hoffman*, 26 Hun (N. Y.) 594 (1882), this statement of the rule is reiterated in the following words: "From our examination of the authorities and the cases referred to, we have come to the con clusion that as a general rule it is the duty of trustees to invest funds held by them, in government or state securities, or in bonds and mortgages, on unincumbered real estate; that while this rule is not arbitrary and inflexible, so as to admit of no possible exceptions, it is the basis upon which trustees should usually act; that in any event the trustee is bound to employ such diligence, care and prudence in the management of the trust, as diligent, careful, prudent men of discretion and intelligence generally employ in their own like affairs, and that for a neglect to make use of such diligence, care and prudence, the trustee becomes liable." See, also, *Adair* v. *Brimmer*, 74 N. Y. 539; *Clark* v. *St. Louis, Alton, &c., Rd.*, 58 How. Pr. (N. Y.) 21; *In re Foster*, 15 Hun (N. Y.) 387; *Baker* v. *Disbrow*, 3 Redf. (N. Y.) 348; *Bates* v. *Underhill*, Id. 365; *Judd* v. *Warner*, 2 Demarest (N. Y.) 104; *Ormiston* v. *Olcott*, 22 Hun 270; s. c. (on app.) 84 N. Y. 339; *Goodwin* v. *Howe*, 62 How. Pr. (N. Y.) 134.

New England and Southern States.—In forcible contrast to the decisions just cited from Pennsylvania and New York are those in New England and the South. In *Harvard College* v. *Amory*, 9 Pick. 446, the testator directed his trustees to lend the trust fund upon ample and sufficient security, "or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion, hereby enjoining on them particular care and attention in the choice of funds, and in the punctual collection of the dividends, interest and profits thereof, and authorizing them to sell out, reinvest and change the said loans and stocks from time to time, as the safety and interest of said trust fund may, in their judgment require." After stating that the English rule had never been recognised in Massachusetts, the court sustains an investment in stocks of manufacturing corporations or incorporated insurance companies, and lays down the following as the rule: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." For half a century this has been the law of Massachusetts, and is still adhered to, and has been applied in cases where the terms of the trust contained no special provisions upon the subject: *Lovell* v. *Minot*, 20 Pick. 116; *Kinmonth* v. *Brigham*, 5 Allen 270; *Clark* v. *Garfield*, 8 Id. 427; *Brown* v. *French*, 125 Mass. 410; *Bowker* v. *Pierce*, 130 Id. 262.

In VERMONT and NEW HAMPSHIRE, investments honestly and prudently made, in securities of any kind that produce income, appear to be allowed; *Lamar* v. *Micou*, 112 N. S. 452; *Barney* v. *Parsons*, 54 Vt. 623; *Knowlton* v. *Bradley*, 17 N. H. 458; *Kimball* v. *Reding*, 31 Id. 352; *French* v. *Currier*, 47 Id. 88.

In MAINE the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out: *Knowlton* v. *Brady*, 17 N. H. 458; Perry on Trusts, sect. 459.

In MARYLAND good bank stock, as well as government securities and mortgages on real estate, has always been considered a proper investment: *Hammond* v. *Hammond*, 2 Bland 306; *Gray* v. *Lynch*, 8 Gill 403; *Murray* v. *Feinour*, 2 Md. Ch. 418; *Lamar* v. *Micou*, 112 N. S. 452.

In MISSISSIPPI investment in bank stock is allowed; *Smyth* v. *Burns*, 25 Miss. 422. But in *Coffin* v. *Bramlitt*, 42 Id. 194, it was held that a guardian assuming to invest or loan out the money of his ward without the authority of the Probate Court takes the risk, and in the event of loss, is liable.

In GEORGIA and ALABAMA the matter is regulated by statute. That of Georgia, passed in 1845, authorized executors, administrators, guardians and trustees, holding any trust funds, to invest them in securities of the state. In 1863 this statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order, or else be at the risk of the trustees. The construction placed upon the first statute was that such investments were not compulsory upon trustees, and prior to the passage of the amendment thereto, it was held that those who lent the fund at interest, on what was at the time considered to be good security, were not liable for a loss without their fault: Cobb Dig. 333; Code 1861, sect. 2308; *Brown* v. *Wright*, 39 Ga. 96; *Moses* v. *Moses*, 50 Id. 9. The Alabama statute of 1852 authorized guardians and trustees to invest on bond and mortgage, or on good personal security, with no other limit than fidelity and prudence might require: Code 1852, sect. 2024; Code 1867, sect. 2426; *Foscue* v. *Lyon*, 55 Ala. 440; *Lamar* v. *Micou*, 112 U. S. 452.

In NEW JERSEY a statute authorized an investment to be made upon an application to the court, but does not establish any particular funds: Perry on Trusts, sect. 459. But it is also laid down as a rule, that investments must be made in government stocks, or in real security: *Gray* v. *Fox*, Saxton 259; *Lathrop* v. *Smalley*, 23 N. J. Eq. 192.

In MICHIGAN and MISSOURI the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out: *Gauble* v. *Gibson*, 59 Mo. 585; Perry on Trusts, sect. 459.

Authorities upon the question involved are not numerous in the West and South. The following cases will be found to bear more or less, upon the matters under discussion: *Tucker* v. *State*, 72 Ind. 242; *Christy* v. *McBride*, 1 Scam. 75; *Field* v. *Colton*, 7 Brad. 379; *Williams* v. *Williams*, 55 Wis. 300; *Allen* v. *Graves*, 3 Bush (Ky.) 491; *Luxor* v. *Wilgus*, 7 Id. 206; *Dickinson* v. *Trout*, 8 Id. 442; *Clark* v. *Anderson*, 13 Id. 112; *Smith* v. *Lampton*, 8 Dana (Ky.) 73; *Wynne* v. *Warren*, 2 Heisk. (Tenn.) 476; *Collins* v. *Smith*, 1 Head (Tenn.) 251; *Thomas* v. *Scruggs*, 10 Yerger 400; *Coffin* v. *Bramlitt*, 42 Miss. 194; *Harrison* v. *Monk*, 10 Ala. 185; *Dejarnette* v. *Dejarnette*, 41 Id. 708; *Foscue* v. *Lyon*, 55 Id. 440; *Ex parte Calmes*, 1 Hill Ch. (So.C.) 112; *Rainsford* v. *Rainsford*, Rice's Eq. (So.C.) 343; *Boggs* v. *Adger*, 4 Rich. Eq. (So. C.) 408; *Barksdale* v. *Hall*, 13 Id. 180; *McClure* v. *Steele*, 14 Id. 105; *Snelling* v. *McCreary*, 14 Id. 291; *Nance* v. *Nance*, 1 So. C. 209; *Allen* v. *Gaillard*, 1 Id. 279; *Mayer* v. *Mordecai*, 1 Id. 383; *Womack* v. *Austin*, 1 Id. 421; *Sanders* v. *Rogers*, Id. 452; *Mathews* v. *Heyward*, 2 Id. 239; *Creighton* v. *Pringle*, 3 Id. 77; *Singleton* v. *Lowndes*, 9 Id. 465; *Davidson* v. *Moore*, 14 Id. 251.

It is very evident that there is no accepted rule of universal application. In England trustees are held to a stricter measure of liability as to investments than in any of the United States, although it is sometimes claimed that several of the latter have adopted the same principles. It is, perhaps, worthy of note that the English rule is said to have had its origin in the necessities of the government; that its purpose was less to secure the interests of the *cestuis que trustent* than to encourage investments in the public securities: *Brown* v. *Wright*, 39 Ga. 96; Story's Eq. 1269, 1275. This explanation, even if the correct one, may suggest a cause but does not alter the effect. The fact remains that there the investment of trust funds is hemmed in by very careful restrictions, judicial and statutory. By a long course of decision and by special statutes certain securities are pointed out to a trustee as those in which he may place his trust funds and be free from all risk of any personal liability. But should he go outside of these? All investments on mere personal security are very plainly interdicted, as are also, perhaps, those on real security not approved by the courts. Attention has been called to several cases which may be assumed to state the English law of to-day: *Knight* v. *Plymouth*, 1 Dick. 120; s. c. 3 Atk. 480; *Ex parte Belchier*, 1 Amb. 218; s. c. 1 Ken. 38; *Speight* v. *Gaunt*, 22 Ch. Div. 727; 9 App. Cas. 1. These cases, however liberal, do not go to the length of authorizing an investment outside of those approved. Practically the same test of what is the measure of care required in handling trust funds is applied in these decisions as in those in Pennsylvania, Massachusetts and New York. The English judges affirm the rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinarily prudent man of business would conduct his own. But it must be observed that this rule is applied after the investment has been made. Since there seems to be no positive prohibition in the English statutes of other investments, it need not necessarily follow that a trustee who goes outside of them *ipso facto* becomes liable for any loss. We have, however, in the cases cited, little to indicate that, in such case, a trustee might excuse himself by showing that he had conducted the business of investing his trust funds in the same manner that an ordinarily prudent man of business might do with his own property.

The striking similarity between the English statutory provisions and those of Pennsylvania, New Jersey and Georgia, and perhaps some other states, cannot be overlooked. The construction placed upon the Act of 1832, in Pennsylvania, for example, will then be of interest as determining the meaning of such statutes. The cases previously cited construe it with some care. Its main purpose was the protection of trustees. While in several states investments in national, state or municipal loans or in real securities are encouraged and recommended, it does not appear that they are obligatory upon trustees—such statutes operate rather as cities of refuge for trustees who prefer or require their protection. Trustees need no longer be subjected to the harassing and often unjust claims of *cestuis que trustent* who, had the investment proved successful, would have gladly accepted the increase and shown a different spirit. In the words of Chief Justice GIBSON, "It would be inconvenient, burdensome and expensive to demand judicial sanction for every investment:" *Twaddell's Appeal*, 5 Penn. St. 15. This opinion is confirmed by the case of *Barton's Estate*, 1 Pars. Eq. Cas. 24, and while in several particulars these cases have been criticised, there has been no attempt to place a different construction upon the Act of 1832. It is, perhaps, possible to draw a distinction between these two decisions. In the first no particular point is made of the terms of the instrument creating the trust. In the second the court observes: "It was not intended to divest him of any authority lawfully exercised under the terms of the instrument creating the trust. This is shown by the proviso of the act which declares that 'nothing contained in it should authorize the court to make an order contrary to the direction of any will or other instrument in regard to the investment of such moneys.' It was intended specially to embrace a large class of cases in which no direction is given by the instrument creating the trust *how* the trust fund shall be invested." While the first opinion is evidently of broader scope, the second may possibly warrant the inference that unless special directions are given, investments should be made with or without the sanction of the Orphans' Court only in the securities named in the acts. Nor is it to be denied that certain expressions in subsequent cases and statutes tend rather to confirm than to deny this construction. Such a view must however, leave unprovided for a large number of cases in which the terms of the trust instrument clearly contemplate a wider choice for the trustee than the statutory securities, and yet no specific investments are pointed out. If this view of the Pennsylvania statute is the correct one, and its terms are properly construed as certainly not mandatory, and probably not even directory, it follows that with the exception of certain insecurities which have been expressly frowned upon, there are many investments open to trustees outside of those specified; that where the trust instrument may fairly be construed to grant such authority, a trustee who exercises the diligence and care, and prudence of men of discretion and intelligence in their own like affairs in the investment, as well as the management of his trust funds, will only find in such statutes as that of 1832 a means of anticipating the protection which the court when called upon would subsequently extend.

The early New York case of *Ackerman* v. *Emott*, 4 Barb. 626, declared that the English rule was adopted there. The latest statement of the law in that state, it is true, contains nothing to the contrary, but it is not a complete affirmance of the English rule. In the case above cited, *Mills* v. *Hoffman*, 26 Hun (N. Y.) 594, after stating that, as "a general rule," investment should be made in authorized securities, the court continues: "That while this rule is not arbitrary and inflexible, so as to admit of no possible exceptions, it is the basis upon which trustees should usually act; that in any event the trustee is bound to employ such diligence, care and prudence in the management of the trust as diligent, careful, prudent men of discretion and intelligence generally employ in their own like affairs, and that for a neglect to make use of such diligence, care and prudence the trustee becomes liable." In Massachusetts the English rule is expressly repudiated, and yet the rule which has had the sanction of the courts of that state for half a century savors strongly of that quoted from New York: "All that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

This phrase, then, repeated in different words by courts whose opinions are supposed to differ widely, is apparently the nearest approach to a general rule that the authorities contain and courts would accept. Like most others of the sort, however, occasions will constantly arise in which it is wholly valueless, except as an indication of the *animus* of the court. The application of it to given facts will not determine, in many cases, whether or not a trustee's investment is open to criticism. What court could or would name the securities in which, and in which alone, diligent, careful and prudent men of discretion and intelligence might place their funds? What is the standard by which the diligence, care and prudence of discreet and intelligent business men are to be judged? It is not unlikely that in some localities courts may be authorized by statute to sanction investments of which they approve, although the act specifies no securities: *Coffin* v. *Bramlitt*, 42 Miss. 194. Or, such an impression might readily arise from a misconception of the statutes above cited and a supposed analogy to the English practice. In either case it may well be doubted whether a real advantage is thereby acquired. Neither a court nor a legislature can supply prudence, intelligence and judgment for trustees. Nor should their authorization affect the respective rights and responsibilities of *cestuis que trustent* and trustees. The approval of a court cannot make a bad investment good or a good investment better. So far as such statutes merely afford protection to trustees their wisdom will not be questioned. It is clear, however, that this object is fully accomplished when certain public and real securities, undoubtedly the safest and therefore the least remunerative investments, are named. A step beyond this must fail of its purpose in unnecessarily restricting a trustee in the exercise of his judgment; in embarrassing a *cestui que trust* who wishes to call him to account, if not, in many cases, in wholly preventing such a proceeding; and in placing before the creator of a trust the alternative of specifying securities other than the statutory—although to-day they may be valuable and to-morrow they may be cast into the fire—or else of making his grant of power to the trustee so liberal as to be manifestly dangerous.

The intention of the creator of the ordinary trust is not a doubtful one. He is usually providing for those incapable of properly managing their own affairs, looking to the support and maintenance of those dependent upon him after his death. Promising speculations have at such a time no attraction. Unquestionably, whatever suggests severity in the law as applied to trustees results from the common acceptation of these facts. On the other hand, few positions of equal responsibility are as poorly remunerated as that of a trustee, and this whether regard be had to pecuniary or to personal and private considerations. Proper performance of the duties of