THE MEASURE OF THE TRUSTEE'S LIABILITY FOR IMPROPER INVESTMENTS *

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Periods of financial and industrial depression and dislocation are invariably echoed by the revelation of the errors in judgment and the defects in character of those who in eras of huge dividends and enormous increases in market values are blindly followed and naively relied on. And true it is in the case of the trustee: particularly so in this age of the corporate trustee for whom the affection and friendship of the settlor and beneficiaries of the trust, present in the older personal trust relation and here wanting, hold no actuality or hope of a merciful attitude in the time of trouble. Declines in the capital value of the trust followed by a lessening of the income therefrom send the *cestuis que trust* scurrying to counsel with cries for vengeance not even slightly muffled by feelings of sentiment.

An indispensable background for any discussion of the liability of a trustee for losses resulting from investments improperly retained or purchased is a statement, here necessarily and designedly general, of the principles governing the investment¹ of the trust estate.

The basic principle is firmly established: a trustee is under a duty to retain or make only such investments as an intelligent, prudent man would make in investing his own property having in view primarily the preservation of the principal and the securing of a permanent and reasonable income.²

*The statement of problems and principles in this article will, in many instances, coincide with the terminology of the TRUSTS RESTATEMENT, Tentative Draft No. 3 (Am. L. Inst. 1932), in the preparation of which the writer has collaborated as Legal Assistant to the Reporter, Austin W. Scott. However, the discussion and conclusions are the writer's own.

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¹ Every trustee is under a duty to make the trust estate productive of income unless by the terms of the trust he is directed to retain unproductive property; and if he fails to do so, he is liable for interest either at the legal rate, or at the rate usually obtainable on trust investments under the circumstances, simple or compound as the case may be. *Howard v. Manning*, 65 Ark. 122, 44 S. W. 1126 (1898); *Jacoway v. Hall*, 67 Ark. 340, 55 S. W. 12 (1900); *Regents v. Wilson*, 73 Colo. 1, 213 Pac. 131 (1923); *Mades v. Miller*, 2 App. D. C. 455 (1894); *Elliott v. Baird*, 102 Kan. 317, 169 Pac. 1149 (1918); *Citizens' Nat. Bank v. Jefferson*, 88 Ky. 651, 11 S. W. 767 (1889); *Succession of Hawthorne*, 158 La. 637, 104 So. 481 (1923); *Estate of Wilson*, 97 Neb. 780, 151 N. W. 316 (1915); *Knowlton v. Bradley*, 17 N. H. 458 (1845); *Lent v. Howard*, 89 N. Y. 169 (1882); *Andrew v. Schmitt*, 64 Wis. 664, 26 N. W. 190 (1885); *Stafford v. Fiddon*, 23 Beav. 386 (Eng. 1857); *Re Jones*, *Jones v. Searle*, 49 L. T. (N. S.) 91 (1883); *Cann v. Cann*, 51 L. T. (N. S.) 770 (1884).

² *Foscue v. Lyon*, 55 Ala. 440 (1876); *Citizens Nat. Bank v. Jefferson*, 88 Ky. 651, 11 S. W. 767 (1889); *Mattocks v. Moulton*, 84 Me. 545, 24 Atl. 1004 (1892); *Harvard College v. Amory*, 26 Mass. 446, 9 Pick. 446 (1830); *Appeal of Dickinson*, 152 Mass. 184, 25 N. E. 99 (1890); *In re Buhl's Estate*, 211 Mich. 124, 171 N. W. 651 (1920); *Kimball v. Reding*, 31 N. H. 352 (1855); *King v. Talbot*, 40 N. Y. 76 (1869); *Coghill v. Boyd*, 77 Va. 450 (1883).

This principle is stated by Woodruff, J., in *King v. Talbot*, *supra* at 85, "the trustee is bound to employ such diligence and such prudence in the care and management, as

The preservation of the trust estate and not the risking of it in the hope of increasing its value, is the true policy. The trustee must exercise his own judgment and use such care and skill as he has in making the investments. This ordinarily involves investigation as to the safety of the investment and the probable income to be derived therefrom.³ He must prudently avoid placing "all his eggs in one basket" and is required so to diversify his investments as to minimize the risk of a considerable loss.⁴ In addition, the trustee must be constantly vigilant in his maintenance of the trust estate.⁵

The primary principle disclosing the scope of proper trust investment has in several states been crystalized either by statutory enactment⁶ or by judicial decision,⁷ so as to limit the trustee to securities of various approved types. In such jurisdictions the trustee is unsafe in making an investment outside the prescribed field, for he assumes the risk of any unfortunate result in treading the uncharted paths.⁸ Even within these designated limits, how-

in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs.

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and objects of the trust, and the consequences of a mistake in the selection of the investments to be made.

"It, therefore, does not follow, that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded."

³State v. Washburn, 67 Conn. 187, 34 Atl. 1034 (1896); *In re Buhl's Estate*, 211 Mich. 124, 171 N. W. 651 (1920); *Listman's Estate*, 57 Utah 471, 197 Pac. 596 (1921); *Burwell v. Burwell's Guardian*, 78 Va. 574 (1884). See *Scoville v. Brock*, 81 Vt. 405, 70 Atl. 1014 (1908).

⁴*Dickinson, App.*, 152 Mass. 184, 25 N. E. 99 (1890); *Davis, App.*, 183 Mass. 499, 67 N. E. 604 (1903).

For a modification of the rule of liability in case of an over loan on mortgage security, see the English Trustee Act, 15 Geo. V, c. 19, § 9(1) (1925).

⁶But it is unnecessary for the trustee to watch the security markets day by day unless there are indications of trouble elsewhere which would require such attention. *Beam v. Paterson Safe Deposit & Trust Co.*, 83 N. J. Eq. 628, 92 Atl. 351 (1914).

⁷Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin, Wyoming. See the statutes in each particular state as to what are authorized investments. States whose statutes provide only that a trustee shall invest in accordance with the general principles stated *supra*, have not been listed. For a digest of statutes and decisions in all the states see MCKINNEY, TRUST INVESTMENTS (2d ed. 1927).

⁸Indiana: *Tucker v. State*, 72 Ind. 242 (1880); *Indiana Trust Co. v. Griffith*, 176 Ind. 643, 95 N. E. 573 (1911).

Maryland by statute requires a guardian to secure the approval of the court before investing the ward's estate. MD. ANN. CODE (Bagby, 1924) art. 93, §§ 172-173, 178-179, 251; trust companies were later included by art. 11, § 48. An order was issued on September 17, 1923, by the Supreme Bench of Baltimore specifying the types of investments for trust funds.

Oregon: *Boehmer v. Silverstone*, 95 Ore. 154, 171, 186 Pac. 26, 30 (1920).

Utah, apparently, requires a fiduciary to secure an order of court for investment of trust funds to avoid liability for loss. UTAH COMP. LAWS (1917) §§ 7723, 7731, 7841-7842: as to trust companies, § 1207.

W. VA. CODE (1923) c. 87, § 23. The court may order trust funds to be loaned or invested.

⁹*Clark v. Clark*, 167 Ga. 1, 144 S. E. 787, 791 (1928); *Woodard v. Bird*, 105 Tenn. 671, 59 S. W. 143 (1900).

ever, the principle is applicable: the trustee must act intelligently and prudently.⁹

The settlor by provision in the trust instrument may specify the limits of the powers of the trustee in making or retaining investments. They may be broader or narrower than that prescribed by statute or decision; but in the absence of a direction requiring a particular investment of the trust estate, or perhaps authorizing speculation in specific words, the trustee is still subject to the primary principles governing the investment of the trust estate.¹⁰ This may be true despite the inclusion of an exculpatory clause in the trust instrument relieving the trustee of liability for any losses occurring from improper investments.¹¹

The failure of the trustee to act consistently with the principles enunciated above or those principles as rigidified by statutes and decisions or modified by the terms of the trust, is a breach of trust bringing in its train personal liability for resultant losses, or perhaps in the case where there is an exculpatory provision relieving the trustee of liability, the deprivation or lessening of his remuneration.

This liability of the trustee may arise from his breach of trust in:

- (1) selling trust property which he was under a duty to retain;¹²
- (2) failing to sell trust property which he was under a duty to sell;¹³
- (3) purchasing property which he was under a duty not to purchase;¹⁴
- (4) failing to purchase property which he was under a duty to purchase;¹⁵

or, may arise from a combination of any of these breaches of trust by his:

- (5) selling trust property which he was under a duty to retain and with the proceeds purchasing property which he was under a duty not to purchase;¹⁶

- (6) purchasing property he was under a duty not to purchase and failing to purchase property he was under a duty to purchase;¹⁷

⁹ *Gee v. Wornack*, 203 Ky. 718, 263 S. W. 6 (1924); *Gouldsey's Estate*, 201 Pa. 491, 51 Atl. 315 (1902).

¹⁰ *Mattocks v. Moulton*, *supra* note 2; *Davis*, App., *supra* note 4; *Matter of Clark*, 257 N. Y. 132, 177 N. E. 397 (1931); *Matter of U. S. Trust Co.*, 189 App. Div. 75, 178 N. Y. Supp. 125 (1919); *Cridland's Estate*, 132 Pa. 479, 19 Atl. 362 (1890); *Bartol's Estate*, 182 Pa. 407, 38 Atl. 527 (1897); *In re Allis' Estate*, 123 Wis. 223, 101 N. W. 365 (1904).

¹¹ In the following cases the court decreased the trustees' compensation because of a breach of trust in making improper investments despite the fact that an exculpatory clause in the trust instrument saved them from liability for the ensuing losses. *Warren v. Pazolt*, 203 Mass. 328, 89 N. E. 381 (1909); *In re Chamberlain*, 9 N. J. Misc. 809 (1931).

¹² TRUSTS RESTATEMENT, Tentative Draft No. 3 (Am. L. Inst. 1932) § 199.

¹³ *Ibid.* § 200.

¹⁴ *Ibid.* § 201.

¹⁵ *Ibid.* § 202.

¹⁶ *Ibid.* § 203 (1).

¹⁷ *Ibid.* § 203 (2).

(7) failing to sell property which he was under a duty to sell and failing to purchase property he was under a duty to purchase with the proceeds of such a sale.¹⁸

For convenience the first four will be considered by themselves. The decisions indicate clearly that where there is a single breach falling within one of these four classes the courts seek to restore the trust fund to the value it had prior to the commission of the breach, or to place the trust estate in the same position at the time of the decree that it would have been in had no breach been committed. Specifically: (1) Where the breach consists of selling trust property which the trustee is under a duty to retain,¹⁹ the trustee may be (a) charged with the value of the property at the time of the sale with interest thereon,²⁰ or (b) charged with its value at the time of the decree with the income which would have accrued thereon if he had not sold it²¹ or required to make specific reparation if this is reasonable under the circumstances,²² or (c) required to account for the proceeds of the sale.²³ (2) Where the breach consists of failing to sell trust property which the trustee is under a duty to sell, the trustee may be charged with the amount which he would have received if he had properly sold the property with interest thereon.²⁴ (3) Where the breach consists of purchasing property which he was under a duty not to purchase,²⁵ the trustee may be (a) charged with the amount of the trust fund expended in such purchase with interest thereon,²⁶ or (b) required to account for the property so purchased and in-

¹⁸ *Ibid.* § 203 (3).

¹⁹ *Ibid.* § 199.

²⁰ *Davis v. Dickerson*, 137 Ark. 14, 207 S. W. 436 (1918); *Weisel v. Cobb*, 118 N. C. 11, 24 S. E. 782 (1896); *Feld v. Kantrowitz*, 102 N. J. Eq. 307, 140 Atl. 426 (1928); *Bate v. Scales*, 12 Ves. Jr. 402 (1806).

²¹ *McKim v. Hibbard*, 142 Mass. 422, 8 N. E. 152 (1886); *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 117 (N. Y. 1815); *Re Walker*, 62 L. T. (N. S.) 449 (1890); *Re Massingberd's Settlement*, 63 L. T. (N. S.) 206, *aff'd* 60 L. T. (N. S.) 620 (1889).

²² *Draper v. Stone*, 71 Me. 175 (1880); *Phillipson v. Gatty*, 7 Hare 516 (1848); *Mansell v. Mansell*, 2 P. Wms. 678, 686 (1732); *Powlett v. Herbert*, 1 Ves. Jr. 296 (1791). See *Oliver v. Piatt*, 3 How. 333, 401 (U. S. 1845); *Hart v. Ten Eyck*, *supra* note 21; *Rife v. Geyer*, 59 Pa. 393 (1868); *Norman's Exrs. v. Cunningham*, 5 Gratt. 63, 72 (Va. 1848).

²³ *Davis v. Dickerson*, *supra* note 20; *In re Oatway* [1903] 2 Ch. 356 (but only if the proceeds can be traced); *United States v. Carter*, 217 U. S. 286, 30 Sup. Ct. 515 (1909); *United States v. Dunn*, 268 U. S. 121, 45 Sup. Ct. 451 (1925); *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582 (1910); *Fur & Wool Trading Co. v. Fox*, 245 N. Y. 215, 156 N. E. 670 (1927).

²⁴ TRUSTS RESTATEMENT § 200; *Babbitt v. Fidelity Trust Co.*, 72 N. J. Eq. 745, 66 Atl. 1076 (1907); *Villard v. Villard*, 219 N. Y. 482, 114 N. E. 789 (1916); *Matter of Garvin*, 256 N. Y. 518 (1931); *In re Hammersley's Estate*, 180 N. Y. Supp. 887 (1920); *Matter of Lyall*, 212 N. Y. App. Div. 417 (1926).

²⁵ TRUSTS RESTATEMENT § 201.

²⁶ *Adamson v. Adamson*, 266 Fed. 949 (E. D. Pa., 1920); *Martin v. Raborn*, Adm'x, 42 Ala. 648 (1868); *State v. Washburn*, 67 Conn. 187, 34 Atl. 1034 (1896); *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560 (1889); *semble* *McLean v. Ladd*, 66 Hun 341, 348 (N. Y. 1892); *Norris' Appeal*, 71 Pa. 106 (1872); *Murphy-Bolanz Land & Loan Co. v. McKibben*, 236 S. W. 78 (Tex. Comm. App. 1922).

The purchase may be a proper one except for the fact that the trustee purchased it from himself individually. In this case, the trustee is liable, in the event of subsequent loss, to replace the fund expended with interest thereon less whatever income has been received. *In re Long Island Loan & Trust Co. (In re Garretson)*, 92 App. Div. 1, *aff'd* 179 N. Y. 520, 71 N. E. 1133 (1904) and *re-argument denied*; *semble* *Smith v. Howlett*, 29

come received.²⁷ In all of these three situations, as security for the claim against the trustee, there is given to the person entitled to the appropriate remedy an equitable lien either upon the proceeds of the improper sale or upon the property improperly retained or improperly purchased.²⁸ (4) Where the breach consists of failing to purchase property which the trustee was under a duty to purchase, the trustee may be (a) charged with the value of such property at the time of the decree together with the income which would have accrued thereon if he had properly purchased it, or (b) required to purchase such property if it is reasonable in the circumstances and hold it in trust, paying therefor from the trust estate only so much as he would have paid had he properly purchased it and to pay to the person entitled to income any income which would have accrued thereon had he properly purchased it.²⁹

All of these cases are of comparative ease when the question is one of the measure of the trustee's liability. The problem becomes more difficult, however, in a consideration of the last three enumerated classes:

(5) Where the trustee in breach of trust sells trust property which he is directed to retain and with the proceeds purchases property which he was under a duty not to purchase,³⁰ he may be (a) charged with the value at the time of the sale of the property with interest thereon,³¹ or (b) charged with the value at the time of the decree of the property with the income which would have accrued thereon,³² or (c) charged with the amount of the proceeds of the sale with interest thereon, or (d) required to account for the

N. Y. App. Div. 182 (1898). See *Birmingham v. Wilcox*, 120 Cal. 467, 52 Pac. 822 (1898); *Ackerman v. Emott*, 4 Barb. 626, 649 (N. Y. 1848).

²⁷ *Boston & Colorado Smelting Co. v. Reed*, 23 Colo. 523, 48 Pac. 515 (1897); *Eisenlohr's Estate*, No. 1, 258 Pa. 431, 102 Atl. 115 (1917); *Russell's Executors v. Passmore*, 127 Va. 475, 506, 103 S. E. 652 (1920). If the beneficiary has not elected to affirm the improper purchase, the trustee may sell the property, being liable for any profit or any loss, but the trustee will not be liable for any profit which thereafter would have accrued if he had retained the property. *McLean v. Ladd*, *supra* note 26. See *In re Patten*, 52 L. J. Ch. 787 (1883); *In re Jenkins & H. E. Randall & Co.'s Contract* [1903] 2 Ch. 362; *Wright v. Morgan* [1926] A. C. 788. Should the beneficiary be under an incapacity and therefore unable to make an election, the court will enforce the remedy in its opinion most beneficial to the trust estate. *Morse v. Hill*, 136 Mass. 60 (1883); *Holcomb v. Holcomb's Executors*, 11 N. J. Eq. 281 (1857).

²⁸ TRUSTS RESTATEMENT §§ 199 (2), 200 (2), 201 (2). *Matter of Niles*, 113 N. Y. 547, 21 N. E. 687 (1889); *Matter of Maitland*, 81 App. Div. 633, *aff'd* 178 N. Y. 612 (1904); *Matter of Ryer*, 94 App. Div. 449, *aff'd* 180 N. Y. 532 (1905); *Matter of Lyall*, *supra* note 24; *Furniss v. Zimmerman*, 90 N. Y. Misc. 138 (1915); *Will of Mendel*, 164 Wis. 136, 159 N. W. 806 (1916). The beneficiary may reject the purchase, cause the property wrongfully purchased to be sold, and in case there is a deficiency hold the trustee liable therefor. *Ferris v. Van Vechten*, 73 N. Y. 113 (1878); *Murphy-Bolanz Land & Loan Co. v. McKibben*, *supra*, note 26; *Will of Mendel*, *supra*.

²⁹ TRUSTS RESTATEMENT § 202. *Byrchall v. Bradford*, 6 Madd. 235 (1822); *Pride v. Fooks*, 2 Beav. 430 (1839); *Bate v. Hooper*, 5 DeG. M. & G. 338 (1855). Where the trustee is directed to purchase one of several designated securities, but fails to buy any of them, he is chargeable with the value of the least profitable one with its income or with the principal uninvested and interest. *Semble Shepherd v. Moulds*, 4 Hare 500, 503 (1845); *semble Robinson v. Robinson*, 1 DeG. M. & G. 247 (1851).

³⁰ TRUSTS RESTATEMENT § 203 (1).

³¹ *Martin v. Raborn*, Adm'x, 42 Ala. 648 (1868).

³² *Re Walker*, *supra* note 21.

property wrongfully purchased,³³ or (e) required to make specific reparation by repurchasing the property which he wrongfully sold if it is reasonable in the circumstances.³⁴

The trustee by the wrongful sale has affirmatively acted in an improper manner. The wrongful sale fixed the liability of the trustee at that time and although the property which he was under a duty to retain falls in value more than the property which he wrongfully purchased, he is chargeable with the value at the time when he sold it of the property which he improperly sold or with the amount of the proceeds of the sale, and it is no defense that if he had retained the original property there would have been a loss. The improper sale is a breach of trust separate and distinct from the subsequent wrongful purchase made with the proceeds thereof. The beneficiary is in the fortunate position of one playing the market with the ultimate facts known.

(6) Where the trustee purchases property which he was under a duty not to purchase and fails to purchase property which he was under a duty to purchase,³⁵ he may be (a) charged with the amount of the trust fund expended in the purchase with interest thereon,³⁶ or (b) charged with the value at the time of the decree of the property purchased, or (c) required to purchase the property he was under a duty to purchase provided it is reasonable in the circumstances.³⁷ In this case the trustee is guilty of two breaches of trust each of which gives rise to its pertinent liability; and the fact that the value of the property which the trustee was directed to purchase has fallen below the value of the property he wrongfully purchased, in no wise affects the measure of his liability for wrongfully purchasing. The misapplication of the fund constituted a conversion and the trustee's liability as to it then became fixed. But the trustee has, at the same time, committed another distinct breach of trust in failing to purchase what he was directed to purchase and this raises a liability. The trustee has subjected himself to an election by the beneficiary of the remedy: he may be compelled to restore the trust estate, or to turn over any profit he has made, or to make up any profit foregone by his failure to purchase as directed. The beneficiary may "speculate" at the expense of the trustee with the result established in advance.

(7) Where the trustee fails to sell property which he was under a duty to sell and fails to purchase property which he was under a duty to purchase with the proceeds,³⁸ he may be (a) charged

³³ *Martin v. Raborn*, Adm'x, *supra* note 32.

³⁴ TRUSTS RESTATEMENT § 203 (b); *Phillipson v. Gatty*, *supra* note 22; *Re Massingherd's Settlement*, *supra* note 21.

³⁵ TRUSTS RESTATEMENT § 203 (2).

³⁶ *Matter of Irwin*, 6 Mills 438 (N. Y. 1908).

³⁷ TRUSTS RESTATEMENT § 203 (d) and (e). *Watts v. Girdlestone*, 6 Beav. 188 (1843). See *Robinson v. Robinson*, *supra* note 29, wherein the principle of *Watts v. Girdlestone* was approved, but the case overruled because the trustee had a choice of proper investments (consols or real securities) and it was impossible to determine which he would have made.

³⁸ TRUSTS RESTATEMENT § 203 (3).

with the amount which he would have received if he had properly sold the property with interest thereon,³⁰ or (b) charged with the value at the time of the decree of the property which he was under a duty to purchase together with any income which would have accrued thereon if he had properly purchased it,⁴⁰ or (c) required to purchase such property if it is reasonable in the circumstances and hold it in trust, paying therefor from the trust estate only so much as he would have paid had he properly purchased it and to pay to the one entitled to income any income which would have accrued thereon had he properly purchased it. In this situation there is a complete lack of action from which ensue two breaches of trust either of which alone brings upon the erring trustee certain liabilities. In each of the two cases immediately preceding there was affirmative action which constituted at least one of the breaches of trust involved. Two views as to the measure of the trustee's liability are possible: First, that the trustee is chargeable with the value at the time of the decree of the property which he should have purchased, but he is not chargeable with the amount which he would have received had he properly sold the property he was under a duty to sell if that exceeds the value at the time of the decree of the property which he should have purchased.⁴¹ Thus, if the property which the trustee was directed to purchase has risen in value more than or has fallen in value less than the property which he was directed to sell, the trustee is liable for the difference only. In the converse case, if the property which the trustee was directed to sell has risen in value more than or has fallen in value less than the property which he was directed to purchase the trustee is subject to no pecuniary liability, since no loss has resulted from his failure to comply with the terms of the trust, and no profit would have resulted from such compliance. This conclusion based merely upon the fact that the trustee has remained passive when under a duty to act rather than affirmatively acted in an improper manner, discards any suggestion of penalty, although it places the beneficiary of the trust in a position at least as good as that he would have been in had the trustee committed no breach of trust. It is questionable whether this change in policy can be justified on so slight a difference in the circumstances. A negligent or wilful failure to act when under a duty to do so, is not a wrong of sufficiently less degree than a negligent or wilful affirmative act of wrongful character, to justify the departure from consistency in the treatment of the trustee in these otherwise similar predicaments. Particularly is this so when improper investment is the common fault in each, for the fluctuation of the market can result in as serious an injury to the interests of the beneficiary in the trustee's

³⁰ *Shepherd v. Moulds*, *supra* note 29, at 504.

⁴⁰ TRUSTS RESTATEMENT § 203 (f), (g) and (h); *Hockley v. Bantock*, 1 Russ. 141 (1826).

⁴¹ TRUSTS RESTATEMENT § 203 (f) adopts this view.

improper failure to sell and buy as in the trustee's wrongful purchase and failure to purchase or in the trustee's wrongful sale and purchase.

Second, that there is a breach of trust when the trustee fails to sell the property he was under a duty to sell and if it is to the beneficiary's benefit to have the value of the property at the time of the breach he may have it. Any changes in value thereafter occurring are only additional factors which may be of advantage to him but can be of no avail in reducing the trustee's liability for this breach. They may, however, increase it for there has been a second breach in failing to buy property the value of which may rise to a point greater than the value at the time he should have sold it, of the property which it was his duty to sell but did not. This second view is apparently the accepted one,⁴² and is another illustration of a case where the beneficiary may gamble with loaded dice at the trustee's expense. The rule is based primarily upon a punitive and preventive theory of remedy for breach of trust. Its application is justified in the case of the inexcusably and negligently inactive trustee who employs no vigilance or business acumen in the management of the trust estate; but in the case of the mistaken though honest and diligent trustee, the results may well be so inequitable and impose such great hardship that the less severe rule will be adopted of permitting the beneficiary to affirm the whole situation by charging the trustee with the value at the time of the decree of the property improperly retained, or with the value of the property which he was under a duty to purchase and did not; thus saving the beneficiary from any possible loss and at the same time visiting no penalty upon the erring but honest trustee.

Thus far the situations which give rise to liabilities of the trustee, with only an incidental indication of the measure of the trustee's liability in the simple cases have been considered. As fully important a problem is the *measure of the trustee's liability*. For the purpose of the following discussion the cases will be divided into two classes:

(1) The trustee may with separate portions of the trust property commit separate and distinct breaches of trust: for example, he may improperly sell at different times various securities which he had been directed to retain, or conversely, improperly purchase with separate portions of the trust property, securities which he was under a duty not to purchase;

(2) The trustee may improperly sell trust property which he had been directed to retain and with the proceeds of the sale purchased property which he was under a duty not to purchase and so continue by successive dealings with the same property and its proceeds a series of improper transactions.

⁴² In a recent conference with a judge of the New York Surrogates' Court the writer was informed that in trust accountings this was the theory proceeded upon there.

See UNDERHILL, *LAW OF TRUSTS AND TRUSTEES* (8th ed. 1926), art. 90, par. (1) (a), pp. 470-473.

For convenience the former will be termed the "horizontal", and the latter the "vertical", case.

In the horizontal case the problem both on the authorities and on principle is not difficult. If a profit has been realized as a result of each breach of trust, the trust estate is entitled to the aggregate profit. If a loss has been suffered as the result of each breach of trust, the trust estate is entitled to be reimbursed the aggregate loss with interest thereon. At once, however, there confronts us the possibility and the very real probability that from one breach there will result a profit and from another breach there will result a loss. The decided cases clearly and definitely indicate that the trustee's liability will be measured by the amount of the profit made on the one transaction plus the amount of the loss with interest, suffered on the other transaction: that there can be no set-off of loss against profit or profit against loss.⁴³ For example, *A* is trustee of \$50,000 for *B*. By statutory provision *A* is required to invest the money in bonds. *A* invests \$25,000 in shares of the *X* Company and \$25,000 in shares of the *Y* Company. The shares of the *X* Company double in value and *A* sells them for \$50,000, and the shares of the *Y* Company become valueless. *A* is not only liable for \$25,000 with interest, for the breach of trust in purchasing the *Y* Company shares, but is accountable for the \$50,000, the proceeds of the shares of the *X* Company.

The result is similar if the trustee improperly retains several securities which he originally received from the settlor as a part of the trust estate, and some of them appreciate and some depreciate in value: he is liable for the amount of the depreciation with interest thereon and must account for the amount of the appreciation. It can make no difference in any of these horizontal situations that the profitable transaction may not have been a breach of trust: *a fortiori* the losses from improper investments may not be reduced by the profits from proper ones.⁴⁴

The principle as applied to these and analogous circumstances is sound from a theoretical as well as a practical standpoint. It falls in readily with the accepted idea that the beneficiary has an election to affirm or reject the action of the trustee in case of a breach of trust:

"The rule is perfectly well settled, that a *cestui que trust* is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it at his option; and I perceive no reason for saying, that where the trustee has divided the funds into parts and made separate

⁴³ TRUSTS RESTATEMENT § 204 (a). *Creed v. McAleer*, 175 N. E. 761 (Mass. 1931); *Gillespie v. Brooks* 2 Redf. Surr. 349 (N. Y. 1876); *semble King v. Talbot*, *supra* note 2; *Cuylor's Estate*, 5 Pa. D. & C. 317 (1924); *Adye v. Feuilletau*, 3 Swanst. 84n, s. c. 1 Cox 24 (1783); *Ex parte Lewis*, 1 Gl. & J. 69 (1819); *Robinson v. Robinson*, 11 Beav. 371, *rev'd* on another point, 1 DeG. M. & G. 247 (1848); *Wiles v. Gresham*, 2 Drew. 258, *aff'd* on other grounds, 5 DeG. M. & G. 770 (1854); *In re Deare*, 11 T. L. R. 183 (1895); *In re Barker*, 77 L. T. (N. S.) 712 (1898).

⁴⁴ TRUSTS RESTATEMENT § 204 (b).

investments, the *cestui que trust* is not at liberty on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar it seems to me, he has an unqualified right to follow it, and claim the fruits of his investment, and that the trustee cannot deny it. The fact, that the trustee has made other investments of other parts of the fund, which the *cestui que trust* is not bound to approve, and disaffirms, cannot, I think, affect the power. For example, suppose, in the present case, the *cestui que trust*, on delivery to him of all the securities and bonds in which his legacy had appeared invested, had declared: although these investments are improperly made, not in accordance with the intent of the testator, nor in the due performance of your duty, I waive all objection on that account, except as to the stock of the Saratoga and Washington Railroad Company. That, I reject and return to you. Is it doubtful, that his position must be sustained?"⁴⁵

Practically the rule has a restraining influence on the trustee tempted to speculate in the hope of increasing the principal of the trust through improper investment since all the risk is thrown upon him in the case of loss from a particular investment regardless of any benefit which may accrue to the trust estate as a whole from his policy.⁴⁶ An incidental result of this rule in practice has been unfortunate. Where a trustee who has improperly purchased property though acting innocently and in good faith, discovers his error after a depreciation in the value of the property has occurred, there is no incentive to return to the paths of righteousness since should he rid himself of the improper investment and secure a proper one, his liability is fixed by the sale of the property which he had wrongfully purchased and any profit realized on the newly acquired property belongs to the trust estate and will not reduce his liability.

Thus far the horizontal case has been considered; but the principle denying a set-off of profits and losses is applicable alike to the vertical case.

⁴⁵ King v. Talbot, *supra* note 2, at 90.

⁴⁶ "... if any profits are made, he must account for them; if any loss happens, he must bear it; and it does not alter the case that the executor has improved the estate by loaning money on personal security; for the Court will not consider the whole account of his dealings together, but must consider every single transaction by itself." Adye v. Feuilletau, *supra* note 43, at 87n.

One case refuses to hold a trustee liable for a small loss, who pursued a general policy of retaining investments of the testator. Estate of Porter, 5 N. Y. Misc. 274 (1893). But the difficulty met in upholding this case on the theory that the trustee has (1) retained the shares received from the testator (2) which were of the same type (3) in pursuance of a general policy of investment (4) to the ultimate net gain of the trust estate, is that had the trustee acted properly with regard to all the securities and converted them all into legal investments but one, and suffered a loss on that alone while making a profit on the remainder, he would be liable for the loss on the wrongfully retained investment. In other words, the less evil he does the greater his liability. This is an unsound result.

It is believed that the true explanation of this case lies in the fact that the only objectant to the trustee's account was the special guardian of an infant and that that was only a technical one, since all adult parties with similar interests were silent.

For example, *A* bequeaths \$10,000 to *B* in trust for *C*. In breach of trust *B* invests the money in the purchase of shares of stock. He sells the shares for \$15,000 and invests the proceeds in bonds which are a proper trust investment. Subsequently *B* sells these bonds for \$15,000 and with the proceeds and in breach of trust purchases shares of stock of a speculative type. Thereafter he sells out for \$12,000. *B* is liable for the loss of \$3000 and is accountable for the \$12,000. Similarly, no diminution of liability by way of a set-off is permitted if the trustee *B* in this illustration first suffers a loss through improper investment, then invests the proceeds properly and subsequently sells the proper trust investment and invests the proceeds in speculative stocks from which a profit is realized.⁴⁷

It becomes apparent from these illustrations of both the horizontal and vertical cases that the controlling factor in determining the measure of the trustee's liability is the commission by the trustee of *separate* and *distinct* breaches of trust. The general principle can thus be stated: *A trustee who has committed one breach of trust and is liable for a loss occasioned thereby cannot reduce the amount of his liability by deducting therefrom the amount of a gain which has accrued from a second and distinct breach of trust committed by him.*⁴⁸

The principle, simple enough in statement, raises the extremely difficult problem in application of determining whether or not there are separate and distinct breaches of trust in the particular case. A consideration of factual situations will be most helpful in separating the chaff from the wheat among the elements which determine the presence of separate and distinct breaches of trust:

A trustee, *A*, in breach of trust retained 100 shares of stock of the *X* Company worth \$100 per share and the shares rise in value to \$200 per share. *A* then sells as many of the shares as he is able, and succeeds in selling 80 shares at a large profit; but the 20 remaining shares he is unable to sell until the price has fallen to \$50 per share so that he incurs a loss as to these. On the one hand it is arguable that here there is a single breach as to the stock of the *X* Company from which there is a net profit determined by deducting the loss on the 20 shares from the profit on the 80 shares and that *A* is accountable only for this. On the other hand, had there been 80 shares of stock of the *X* Company and 20 shares of stock of the *Y*

⁴⁷ TRUSTS RESTATEMENT § 204 (c).

⁴⁸ *Ibid.* § 204.

The Master of the Rolls in *Robinson v. Robinson*, *supra* note 43, at 375, stated the rule as follows: "The question is, whether, where there are several distinct transactions, in some of which a loss has been incurred, for which the trustees are chargeable, and on others there has been a gain, which the trustee has no right to claim for his own benefit, the court will set off the one against the other. I could not enable a trustee thus to repay himself for the losses which he has sustained, without giving him the benefit acquired from a fortunate but improper investment of the trust fund. I have no authority to do that that I am aware of."

See also cases cited *supra* note 43.

Company, each share of stock of both companies worth \$100 per share originally, and the shares of the X Company had risen to \$200 and the shares of the Y Company fallen to \$50, A would have been accountable for the profit on one and the loss on the other. The fact that the shares are shares of stock in the same company is of slight moment in determining whether there is a breach or several distinct breaches in the retention thereof by the trustee. A share of stock is a unit with a unit value. It is for convenience only that the aggregate of the breaches as to the units uniformly handled is termed a breach.⁴⁹ This it seems is the important consideration: if the trustee in violation of his duty is dealing with fungible units, the fact that he deals with a group of them does not the less make it a breach as to each unit; and the resulting profit on some cannot be offset against the consequent loss on others.

The accidental factor that the trustee in breach of trust retained or purchased *at the same time* certain shares of stock should be of little importance in determining whether or not there are separate and distinct breaches. For example, should A in breach of trust have purchased 80 shares of the X Company stock on February 1, 1929, for \$100 per share and sold them on May 1, 1929, for \$200 per share; and then on June 30, 1929, again in breach of trust and with another portion of the trust property, purchased 20 shares of the same company for \$100 per share and on November 1, 1929, sold them for \$50 per share; there is little doubt that the general principle would apply and A would be accountable for the profit made on the 80 shares and the loss incurred on the 20 shares. To make the time element controlling in the determination of the amount for which the trustee is liable, is unconvincing.⁵⁰

A less difficult problem is presented by the following case: A is trustee of securities for B. A opens an account with a broker for the purpose of speculating for the benefit of the trust estate and in breach of trust deposits

⁴⁹ Nor is it mere sophistry so to reason. The same result can be reached on the basis of the individual share: each as a unit has been dealt with in breach of trust. This is true only in the case of fungible units and is not applicable to units which differ from one another in value or otherwise. The trustee may, however, commit a breach as to a unit which is the aggregate of parts differing from one another. For example: a trustee in breach of trust purchases a tract of land for \$5000. He sub-divides it into ten lots and sells four of the lots for \$600 each and the remaining six lots for \$400 each. Here there is one breach only for the trustee did not purchase a group of lots for a price equal to the sum total of the value of the individual lots; he purchased the tract for a price. As a result the trustee is liable for the net loss of \$200. It is impossible to determine any loss or profit as to a lot, but only as to the whole tract since its value at the time of purchase is the only standard to which reference can be made in fixing the amount of the trustee's liability. It would be otherwise had the trustee in breach of trust purchased a tract of land consisting of ten acres for \$500 per acre and thereafter sold four acres for \$600 each and the remaining six acres for \$400 each, assuming of course that the location of the particular acres did not influence the price but only fluctuations in the market value of land had occurred. In this case the trustee is liable for \$800, \$200 being the profit on the sale of the four acres and \$600 being the loss on the sale of the six acres.

⁵⁰ For other factors useful in determining whether or not breaches of trust are distinct see TRUSTS RESTATEMENT § 204 (e).

bonds worth \$100,000 with the broker as margin. *A* then purchases and sells through the broker various securities, one lot at a profit of \$5000 and another lot at a loss of \$5000. Ultimately, the original \$100,000 in bonds is returned intact to *A*. It may be argued that *A* has committed separate and distinct breaches of trust in these transactions and made a profit on one and suffered a loss on the other. The practical difficulty with this stand is that the trustee may well be subjected to enormous liability in a long series of transactions, out of all proportion to the risk of loss to the trust estate. On the other hand, it is more accurately said that the trustee has committed a single breach of trust resulting in two or more distinct sources of profit and loss; that the pledging of the bonds worth \$100,000 was the sole breach of trust; that jeopardizing their safety was the true concern of the trustee; that the trust estate was in no way involved in the fluctuations resulting from the varying purchases and sales but only in the ultimate liquidation of the account; that as a result the net profit or net loss of the account is the measure of the trustee's liability.⁵¹ The \$100,000 in bonds has been dealt with as a

⁵¹ *Ibid.* § 204 (1).

English v. McIntyre, 29 App. Div. 439, 51 N. Y. Supp. 697 (1898), is a case involving substantially the facts stated in the text. The court in discussing the question of the measure of the trustee's liability stated at page 447, 51 N. Y. Supp. at 703: "But the plaintiff insists that he is entitled to an accounting of each particular transaction made by the defendants upon the direction of Williamson, the trustee, that he may take the profits wherever it appears that a single transaction resulted in a profit, without any liability to share in the losses which may have accrued. Undoubtedly, as is said by Judge Woodruff in the case of *King v. Talbot* (40 N. Y. 76), where there has been a misappropriation of trust funds and several separate and distinct investments have been made, some of which have been profitable and others unprofitable, the *cestui que trust* is at liberty to ratify such investments as have been profitable and take profits which have accrued from them, and to reject the unprofitable ones, and as to them insist that he shall receive the money which has been invested in them, with interest. This rule is well established, and is founded in good sense. (Norris's Appeal, 71 Penn. St. 106; *Oliver v. Piatt*, 3 How. 333; *Robinson v. Robinson*, 11 Beav. 371.) But the facts of this case do not bring it within that rule. Here there was no setting apart of a particular portion of the trust fund and using it to make a particular investment which resulted in a profit and the setting apart of another portion of the fund for an investment which resulted in a loss. Whatever may be the theory, there was, as a matter of fact, no investment, in the true sense of the word, in any property whatever. The trustee might undoubtedly at any time have selected any particular alleged purchase of stock or grain, and required the title to that to be transferred to him, but to enable him to do so it was necessary that he should have paid the full purchase price of the particular property sought to be transferred, and until he did pay it the defendants were entitled to hold it in their own name in order to protect their lien upon it for the unpaid portion of the purchase price. That this was done in the case of any investment does not appear. . . . These investments were not separate and distinct investments, as we have said, but the whole transaction was simply a series of purchases and sales which, so far as the defendants were concerned, we must assume were actually made, and which, if they had resulted in a profit, would have operated to the benefit of the trustee; but which, so far as the trust estate was concerned, were mere shadowy transactions not at any time affecting its amount or its nature or the income to which it was entitled, but only rendering it liable to be depleted at any time if the transaction should result in a loss, or affording a possibility of an increase in the remote probability that the speculator should be able to make profits. The case is not within the rule laid down in the cases above cited, but it is more like a case where the trustee has engaged with the trust fund in an unauthorized business, in which case the rule is that the *cestui que trust* may ratify the transactions of the trustee and take the profits, if there are profits, or he may, at his election, take back the fund and the interest thereon, or the dividends which have accrued from the securities which constituted the fund, but he cannot take both. If he elects to ratify the action of the trustee, he must take it not only with the profits, but subject to the losses, but he cannot take the profits on one part of the transaction and interest on the other, and avoid the losses."

unit. At no time until the liquidation of the account could there be an increase or diminution in its value which remains intact and unaffected by the daily fluctuations in the worth of the securities bought and sold for the account.⁵²

Similarly if the trustee in breach of trust continues to operate a business which has been turned over to him by the settlor, there is but one breach of trust although it may involve two or more distinct sources of profit and loss. The breach consists of the jeopardizing of the capital invested in the business and not in the daily transactions incident to the operation of the business, some of which are concluded at a profit and others at a loss.

The amount of capital invested in the business is the unit. It is risked in breach of trust. As in the margin account with the broker the effect upon its value of daily transactions is unapparent. Only on the liquidation of the business or periodic accounting can its augmentation or diminution be determined. This is another illustration of a breach of trust pregnant with the possibility of profit or loss, but not of several breaches of trust. In such a case the trustee is not liable for the profit on one deal and for the loss on another; nor, indeed, is he charged with the net profit for one period, and for the principal of the trust employed in carrying on the business with interest, for another period in which a loss is suffered.⁵³ This is a sound result since the conduct of a business is usually seasonal and the fair standard for determining profit or loss is not the individual transaction or series thereof covering a short period.

A contrary view is possible. Where the trustee operates the business with trust moneys for a time which includes several periods customarily used as the basis for determining whether the business has been conducted at a profit or at a loss, he may be held liable not for the net profit or net loss but for the profit made in one of these periods and for the loss incurred in another.⁵⁴

⁵² This may be worked out on the basis of the individual bond: each as a unit in breach of trust is pledged as security for the margin account; the value of no bond is impaired by the transactional variations in the values of the securities in the account; only upon the liquidation of the account can the profit or loss on the improper dealing with the individual bond be determined. For convenience the aggregate of the breaches as to bonds uniformly dealt with is called a breach (see *supra* note 49).

⁵³ TRUSTS RESTATEMENT § 204 (j). *Small's Estate*, 144 Pa. 293, 22 Atl. 809 (1891); *Heathcote v. Hulme*, 1 J. & W. 122 (1819).

⁵⁴ This view was not adopted in *Small's Estate*, *supra* note 53, though the right was claimed. It seems it might well be taken, however, since it is the usual business practice to fix a definite period to determine the profitability or fruitlessness of a business. Tax laws are based upon the practice. The setting out upon each new period of speculation with the trust funds may well be considered a separate and distinct breach.

The force of the holding in *Small's Estate* is weakened somewhat by the questionable determination therein that money of the ward loaned by his guardian to a corporation of good credit and in which the guardian owned a large interest, although unnecessary to the success of the business and negligible in relation to its capital, was used as a part of the capital and therefore entitled the ward to elect to take the profits instead of interest.

In *Steen v. Hendy*, 103 Cal. 15, 36 Pac. 1021 (1894), the opposite result was reached. The court stated at 25, 36 Pac. at 1024: "Here the position of a trustee is very similar to a debtor who neglects paying his debts." *Contra*: *Smelting Co. v. Reed*, 23 Colo. 523, 48 Pac. 415 (1897).

Particularly may this election be given the beneficiary in the case where the trustee has accounted at regular intervals which correspond with such a period.

In any event, of course, the trustee is liable at the option of the beneficiary for any loss resulting from the breach of trust in failing to dispose of the business and can be charged with the amount which he would have received if he had properly sold the business, with interest thereon.⁵⁵

A much clearer case of a single breach of trust in respect to property containing elements of profit and loss, is that of the trustee who improperly purchases shares of stock upon which the corporation thereafter declares a stock dividend. For example: *A*, the trustee, in breach of trust invests \$5000 in the purchase of fifty shares of stock at \$100 per share. Soon thereafter the corporation declares a stock dividend of one hundred per cent. *A* sells the fifty new shares at \$50 a share. He subsequently sells the original fifty shares at \$60 a share. *A* is liable only for the net profit of \$500. Obviously there is but one breach of trust: the purchase of the original fifty shares. Market fluctuations caused a loss as a result of this breach which was offset by a greater profit from the sale of the new shares declared as a dividend by the corporation. Both the loss and the profit are the product of the wrongful purchase of the original fifty shares.⁵⁶

One of the most perplexing problems in a discussion of the measure of a trustee's liability for breach of trust is raised in the case of successive dealings with a portion of the trust property and its proceeds. If property is improperly purchased by the trustee and is subsequently sold at a profit, and the proceeds are used in purchasing other property in breach of trust, which is thereafter sold at a loss, there are two tenable views as to the amount for which the trustee is liable: First, he is liable for the profit gained on the first improper purchase and sale since this was actually in his hands as trustee and was a part of the trust estate, and that thereafter he risked *trust* property in another separate and distinct breach by wrongfully purchasing property which later fell in value, thereby incurring a loss which perhaps not only reduced or equalled the profit on the former transaction but encroached on the principal with which the trustee originally set out upon his speculative course.⁵⁷ Second, he is liable only for the net profit or net loss occurring from the several transactions.⁵⁸ The trustee has converted a portion of the trust estate when he risks it in improperly purchasing property and thereafter his dealings with the property are of no consequence. His

⁵⁵ TRUSTS RESTATEMENT § 200 (1). *Heathcote v. Hulme*, *supra* note 53.

⁵⁶ TRUSTS RESTATEMENT § 204 (g). This result was reached in the case of issuance of rights on improperly held stock. *Matter of U. S. Trust Co.*, *supra* note 10.

⁵⁷ TRUSTS RESTATEMENT § 204 (c).

⁵⁸ *Baker v. Disbrow*, 3 Redf. Surr. 348, *aff'd* 18 Hun 29, *aff'd mem.* 79 N. Y. 631 (1880).

liability is fixed at the value of the misapplied trust property with interest thereon, except insofar as the principle of following the *res* will charge him with the profit he may have, on the property actually obtained. The difficulty with this latter view is that it fails to give proper weight to the circumstance that the trustee has in distinct transactions, each complete in itself, and carried on at different times, actually realized a profit and suffered a loss. The only relation between the separate transactions is that there flows through all some portion at least of the original trust property which was improperly expended, or its proceeds. There is no indefiniteness in measuring the trustee's liability in this situation for always there is a fixed basis for computing it on each sale of property improperly purchased, since each transaction is closed and the amount obtained on the sale can be measured against the amount expended in its wrongful purchase.⁵⁹

The converse case of successive dealings, where the first improper purchase and sale results in a loss and the reduced proceeds are again used in improperly purchasing property which rises in value, of course, lacks the argument that the trustee is risking not only what remains of the trust property originally loosed in the wrongful series of transactions, but is in addition, risking profits already made which belong to the trust. He is merely risking a portion of the original amount, supposedly in an attempt to regain his losses. If he is not permitted to offset any new profit, an incentive to repair his wrong is wanting. But this consideration is far outweighed, it is submitted, by the fact that in attempting to reimburse *himself* (since that is what it amounts to) he is speculating with property of the trust estate. This he has no right to do. He should be compelled to bear the loss sustained on the first purchase and sale regardless of the profit subsequently made. To admit otherwise, opens a door wide to much wrongful dealing with trust funds in an effort to reduct justly incurred liability.

The trustee, however, is not liable for the paper profit or loss indicated by the highest or lowest intermediate value between the time of the purchase and sale. Although the wrongful purchase necessarily involves a duty to sell immediately which is violated, the failure to sell is not a separate and distinct

⁵⁹ A third view has been suggested: if the trustee dishonestly intends to and does appropriate to his own use a portion of the trust estate, he is not acting on behalf of the trust estate. Therefore, it is impossible on any theory of trusts to hold him for more than the net profit or net loss resulting from the series of improper transactions, since in following the *res* only the ultimate profit could be obtained, and in compelling restoration of the trust estate only reimbursement for the net loss could be had. Furthermore, no wrong will justify a court of equity in punishing the trustee for his crime since that is cared for in the criminal courts.

This view implies and usually is a part of a scheme which includes the application, in the case of the honest, but mistaken, trustee, of the first view stated in the text. Hence, the greatest criticism is that it imposes a greater liability on the good than it does on the wicked, trustee. A court of conscience surely will not adopt such a result based as it is on such coldly legalistic reasoning. Rather would the principle denying any set off of losses against gains be employed.

breach of trust but arises from the same conduct in relation to the same unit.⁶⁰ The sale is necessary to fix the measure of his liability.

The case of an exchange of the property improperly purchased for other property which the trustee was under a duty not to buy is not as clear a case, at first glance, but it is submitted that the exchange is similar in effect to a sale in fixing the trustee's liability. The property improperly purchased has an ascertainable market value at the moment of exchange and the exchange is a definite termination of the trustee's dealing with the property. Hence, there is present the basis both as to value and time for an accurate determination of the amount for which the trustee is liable.

The problem of measuring the liability of a trustee for breaches of trust in the field of investment reduces itself to the problem of determining, in the myriad combinations of circumstance, what acts or omissions constitute *separate* and *distinct* breaches of trust. The prime factor to be sought diligently is the *unit*. Determine: (1) Is there more than one unit? (2) Are there units similar to, or different from, each other? (3) Are the units uniformly or differently dealt with? (4) Are the results alike or varied?

Where there is but *a* unit dealt with in breach of trust, within which are sources both of profit and of loss there is but one breach of trust, and the resultant liability of the trustee is for the net profit or loss determined by setting the one against the other.

Where there are *similar* units dealt with in breach of trust, there are as many separate and distinct breaches of trust as there are units, and if, because they are not handled uniformly, the results are varied, some being profit and some being loss, there can be no set-off. Where there are units *differing from one another*, whether dealt with uniformly or not, if the results are varied, some being profit and some being loss, there can be no set-off. If, in either case, the results of the dealing with all the units are similar, being all profit or all loss, of course, the answer is evident: the trustee must account for the whole profit and is liable for the whole loss.

Let it not be overlooked, however, in an attempt to correlate, classify and formulate, that trusts are children of Equity wherein the influence of many elements, however delicate, may tell in the result. The combination of factors which singly would not withhold liability, may well do so. The motive and intention of the trustee, be it evil or good, must always be of moment and may often be controlling.

⁶⁰ TRUSTS RESTATEMENT § 204 (k). But if the trustee is under a duty to sell the property improperly purchased by him, for a reason other than because it was improperly purchased, as for example where the property became highly speculative, the two breaches of trust in purchasing and in failing to sell arise from different conduct on his part and are separate and distinct so that he is liable not only for the original purchase price but for the value of the property at the time when he should have sold, at the election of the beneficiary.