HANDBOOK

OF THE

LAW OF TRUSTS

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To

EDWIN H. WOODRUFF

this book
is gratefully dedicated

PREFACE

THE object of this book is to give to practitioners and students a compact summary of the fundamental principles of the American law relating to trusteeships. It is hoped that lawyers will be able by the use of the book to obtain ready information on the large, outstanding problems in the field, and to gain starting points for research into the more recondite and complicated questions. The law student will, it is believed, find in the book sufficient material to furnish him that groundwork which is the maximum possible of attainment in his preliminary studies.

Space limitations have prevented detailed treatment of the English law and extended discussion of matters of principle. These must be reserved for a text-book which purports to be all-inclusive.

In the arrangement of topics the author has varied somewhat from the standard analysis. This change has been made partly with the purpose of facilitating the work of the reader in finding the law and partly because it has appealed to the author as logical. An effort has been made to classify the material under headings which represent the principal practical problems arising in the administration of trusts, as well as to develop the trust relation in sequence from beginning to end. The chapters on the trust purpose are illustrative of these departures from the customary outline. What may be the trust purpose is a frequently occurring question in practical affairs, and the trust purpose is one element of the trust relationship which logically deserves treatment.

Some statutory matters have been dealt with in considerable detail, as, for example, the Statute of Frauds. Effort has been made to set forth as far as possible the peculiarities existing in the states which have statutory trust systems, as, for instance, New York, Michigan, and California. The important distinction between the states which have modified and partially codified the law of trusts, and those jurisdictions which retain the English system almost wholly untouched by legislation, is not always appreciated. Certain rules of property

which sometimes intimately affect trusts have been discussed, although perhaps not usually treated in works on trusts. These are the rules regarding remoteness of vesting, suspension of the power of alienation, and accumulations.

References to articles in leading law periodicals have been inserted with an attempt at completeness. The value of these carefully prepared monographs on narrow points of law is increasingly apparent to bench, bar, and the law school world.

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CHAPTER I

INTRODUCTION AND HISTORY

DEFINITION OF FUNDAMENTAL TERMS

1. A trust is a relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another.[1]

The settlor of a trust is the person who intentionally causes the trust to come into existence.

The trustee is the person who holds the title for the benefit of another.

The trust property is the thing, real or personal, the title to which the trustee holds, subject to the rights of another.

The cestui que trust is the person for whose benefit the trust property is held or used by the trustee.

[1] Other definitions of a trust are the following:

"A trust, in the words applied to the use, may be said to be 'A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land and to the person touching the land, for which cestui que trust has no remedy but by subpœna in chancery.'" Lewin, Trusts (12th Ed.) 11, referring to Co. Litt., 272, b.

"A trust is an equitable obligation, either expressly undertaken, or constructively imposed by the court, under which the obligor (who is called

The trusts treated herein should not be confused with the monopolies or combinations called "trusts," or with the positions which are loosely called "places of trust." The monopolistic trusts were originally so called because the stock of the combining corporations was transferred to technical trustees to accomplish a centralization of control.[2] In common parlance, to be in a position of "trust" or to be a "trustee" often means merely to occupy a station where elements of confidence and responsibility exist.[3] The one trusted in this sense may be an agent, a servant, a partner, a guardian, or a trustee. He is not necessarily in the technical trust relation.

It is not intended that the definitions of the essential terms here given shall be final or exhaustive. The nature and incidents of the trust will be developed throughout the book, and

a trustee) is bound to deal with certain property over which he has control (and which is called the trust property), for the benefit of certain persons (who are called the beneficiaries or cestuis que trust), and of whom he may or may not himself be one." Underhill, Trusts (3d Ed.) 1, 2.

"A trust is an obligation imposed, either expressly or by implication of law, whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons, of whom he may himself be one, and any one of whom may enforce the obligation." Hart, What is a Trust? 15 Law Quart. Rev. 301.

"A trust, in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another." Bispham, Equity (5th Ed.) 77.

"A trust may be defined as a property right held by one party for the use of another." Keplinger v. Keplinger, 185 Ind. 81, 113 N. E. 292, 293.

"A trust, in its simplest sense, is a confidence reposed in one person, called a trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter." Dowland v. Staley, 201 Ill. App. 6, 7.

For other definitions, see Teal v. Pleasant Grove Local Union, No. 204, 200 Ala. 23, 75 South. 335; Keeney v. Bank of Italy, 33 Cal. App. 515, 165 Pac. 735; Drudge v. Citizens' Bank of Akron, 64 Ind. App. 217, 113 N. E. 440; Frost v. Frost, 165 Mich. 591, 131 N. W. 60; Ward v. Buchanan, 22 N. M. 267, 160 Pac. 356; Templeton v. Bockler, 73 Or. 494, 144 Pac. 405.

These and many other definitions of the trust seem concerned rather with the duty or obligation of the trustee, or the right of the cestui, than with the trust. The trust in its modern sense is conceived to be the relationship or status in which are concerned certain property and persons, and incidental to which are certain rights and duties. The whole bundle of property, persons, rights, and duties makes up the trust. It is often said that a trustee holds the trust property "subject to a trust," but it would seem to be more accurate to state that he holds it subject to the duties of a trustee.

[2] Jenks, The Trust Problem, 111.

[3] See Thompson v. Thompson, 178 Iowa, 1289, 160 N. W. 922.

the meaning of the elementary terms more fully explained. But a certain rough, general description of the trust and its parts is necessary before one can proceed to trace the history of trusts and distinguish them from other similar relationships.

The Trust Property . .

It should first be noticed that specific property, real or personal, is always an element of the trust. In certain somewhat analogous relations men only, or men and any property, may be involved, as, for example, in agency, where A. may be the agent of B. for the performance of personal services, which have no connection with any property, or no connection with any particular property. But the trust presupposes fixed, ascertained property, to be handled or held by the trustee. What may be the trust property and how it may become such are matters to be dealt with later. The trust property is sometimes called the trust res, the corpus, the subject or subject-matter, of the trust.

It is sometimes said that the legal title to the trust property is always in the trustee. His title may be a legal or an equitable one, dependent on the nature of the title which the settlor, in express trusts, or the law in implied trusts, has seen fit to give him. Thus, if the settlor has a fee-simple estate in certain lands, and conveys his interest to A. to hold in trust for B., A., the trustee, will be seised of the legal estate; but, if the settlor has contracted to buy land for which he has paid the purchase price, but a deed of which he has not yet received, and the settlor transfers his interest in the land to A. in trust for B., A., the trustee, will hold merely the equitable title of the contract vendee of the land. It is because of this possibility of legal or equitable ownership that the definition given above merely states that the trustee is a title holder, without regard to the court in which his title will be recognized. In a great majority of trusts the trustee has the legal title to the trust property.

The Trust Parties

It is customary to think of three persons as connected with every trust, namely, the settlor, the trustee, and the cestui que trust. But since, where the settlor declares himself a trustee, settlor and trustee are one and the same person, a trust may exist with only two parties. Since a man cannot be under an obligation to himself, the same individual cannot be settlor, trustee, and cestui, and the trust persons can never be less than two.[4] But a

[4] In certain rare instances private trusts have been sustained, where there were no human cestuis que trust, as where the trust was for the benefit of specified dogs or horses. In re Dean, 41 Ch. Div. 552. In these cases,

sole trustee may be one of a number of cestuis que trust, and one of several joint trustees may be the sole cestui.[5] There are no limitations upon the maximum number of persons who may be connected with a trust, except the limitations of convenience.

In some trusts there is no settlor. These are the implied trusts created by the law, because it is presumed that the parties intended a trust to exist, or for the purpose of accomplishing justice.[6] In these implied trusts no individual intentionally brings a trust into being. The court gives life to the trust. But the acts of one or more persons have caused the court to decree the trust's existence. Such persons are not settlors. Their acts merely afford the reasons which the courts give for declaring the existence of the trust. Hence, in the definition of the word "settlor" given above the word "intentionally" is used, so that the doers of acts which unintentionally result in the declaration of a trust by a court may not be included within the class of settlors.

The settlor is also sometimes called the creator of the trust, or the trustor. The phrase cestui que trust[7] is synonymous with beneficiary of the trust.

The Trust Rights and Duties

The trustee holds the property "for the benefit of" the cestui que trust. It is unnecessary now to consider how the cestui may obtain that benefit. The methods vary greatly, according to the terms of the particular trust. In one case the trustee may have no duty, except to hold the property, and the cestui que trust may take the profits directly. In another instance the trustee may be charged with the obligation of detailed management, and the cestui que trust may receive the benefits indirectly. The means of obtaining the benefits for the cestui are not at this point important. The fundamental principle is that somehow the benefit is his.

if the settlor and trustee were identical, the number of trust persons might be reduced to one. See post, § 59.

[5] Post, § 74.

[6] Post, § 28.

[7] Pronounced as if spelled "cestwe kuh trust." Anderson, Dict. of Law, 162. The words are Norman French. The plural is properly "cestuis que trust," although frequently spelled "cestui que trustent," "cestui que trusts," or "cestuis que trustent" by the courts. See City of Marquette v. Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 480. For a discussion of the origin, meaning, and proper form of "cestui que use" and "cestui que trust" see a note by Charles Sweet, Esq., in 26 Law Quart. Rev. 196, in which the views of Prof. Maitland are set forth. The author says: "'Cestui que usē,' therefore, means 'he for whose benefit,' and 'cestui que trust' means 'he upon trust for whom,' certain property is held."

The duty of the trustee is enforceable by the cestui que trust. This quality distinguishes the trust in some jurisdictions from certain possible contracts. Thus, if A. promises B., for a consideration running from B. to A., that he (A.) will hold certain property for the benefit of C., C. will in some jurisdictions have no right to enforce the performance of A.'s promise, because C. is a stranger to the promise.[8] But, if A. declares himself a trustee of property for C., C. may everywhere enforce the trust against A., regardless of privity. This quality of enforceability by the cestui que trust, notwithstanding a lack of privity, is a characteristic of the trust.

The trustee's obligation is said to be "equitable." Originally it was recognized only by the English Court of Chancery, which alone administered the rules and applied the principles of equity. Many definers of the trust make enforceability in a court of chancery or equity a part of their definition. But in the present state of the law it is deemed preferable to define the trustee's obligation as equitable, and to omit any reference to the court in which this obligation may be enforced. In England and in many American states the separate Court of Chancery has been abolished, and both legal and equitable obligations are enforced by the same court. On the other hand, in a few states the separate court of equity is maintained.[9] The trustee's obligation is based on equitable principles, whether enforced by a court having both legal and equitable jurisdiction, or by a court having solely equitable functions. It seems wiser to omit all reference to the forum of enforcement.

Whether the right which the cestui has is a property right in the subject-matter of the trust (a right in rem), or merely a personal right against the trustee (a right in personam), is a question much debated. The arguments pro and con are stated in a later section, dealing with the nature of the interest of the cestui que trust.[10]

[8] Wald's Pollock on Contracts (3d Ed.) 243 et seq.

[9] For a discussion of the effect of constitutional changes on the separate existence of the court of equity, see 1 Pomeroy's Eq. Juris. §§ 40–42. The conclusion there reached is that the separate chancery court existed then (1905) only in Alabama, Delaware, Mississippi, New Jersey, and Tennessee.

[10] Post, § 110.

ORIGIN OF USES AND TRUSTS

2. Trusts, in their early development in England, were divided into two classes, namely, special or active trusts, and general, simple, or passive trusts. The latter were generally called uses. Prior to 1535, uses constituted by far the more important class of trusts.

Uses were introduced into England shortly after the Norman Conquest (1066 A. D.).

They were patterned after the German treuhand or salman.

The principal objects of their introduction were—

(a) To avoid the burdens of holding the legal title to land, such as the rights of the lord under feudal tenure, the rights of creditors, and the rights of dower and curtesy;

(b) To enable religious houses to obtain the profits of land, notwithstanding the mortmain acts;

(c) To secure greater freedom in conveying land inter vivos;

(d) To obtain power to dispose of real property by will.

The use was a trust in which the trustee had no active duties, but was merely a receptacle of the legal title for the cestui que trust.

The words "use" and "trust" are employed as synonyms frequently by writers and judges. However, there is a distinction in their meanings. Prior to the Statute of Uses (1535) there existed in England a relationship known as a trust. Trusts were of two classes, namely, active or special, and passive, simple, or general. In cases where a trustee held property for some temporary purpose and with active duties to perform, the trust was called active or special. Thus, if A. conveyed land to B. for ten years, to take the profits of the land and apply them to the use of C., B. was an active or special trustee. These trusts were comparatively rare prior to the Statute of Uses. But if the legal title was transferred to one as a permanent holder for the benefit of another, but with no positive duties of care or management, the trust was called general, simple, or passive, or a use. Thus, an enfeoffment of A. and his heirs to the use of B. and his heirs would create a use or general trust.[11] Uses were far more common than special trusts prior to the Statute of Uses. Indeed, by the time of Henry V (1413–1422) they were the rule rather than the exception in landholding.[12]

[11] Bacon, Uses, 8, 9; Sanders, Uses and Trusts, 3–7.

[12] Digby, History of Law of Real Property, 320.

Uses and trusts were introduced into England shortly after the Norman Conquest.[13] Recent scholars agree that they were modeled after the German treuhand or salman, rather than after the Roman fidei-commissum.[14] Under the Roman law it was not possible to give property by will to certain persons, as, for instance, persons not Roman citizens.[15] It became customary among the Romans to devise property to one capable of taking it, with a request that he deliver it to a desired devisee who was incompetent to take directly. This was the creation of a fidei-commissum. The obligation of the devisee to the desired beneficiary in this relationship was not at first legally enforceable, but later became so. This confidence was analogous in many ways to the English trust or use, but differed in that it arose by will only.

Trusts are not known to the modern civil law.[16]

"The feoffee to uses of the early English law corresponds point by point to the salman of the early German law, as described by Beseler fifty years ago. The salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions."[17]

It was said by an English lawyer many years ago that the parents of the trust were Fraud and Fear and the Court of Conscience was its nurse.[18] Certain it is that the reasons for the introduction of uses and trusts were not in all cases honorable. The common law of England attached to the holding of the legal title to land many burdens. As the feudal system prevailed when uses arose, the lord of the land was entitled to a "relief," or money payment, when the land descended to an heir of full age; to the rights of "wardship" and "marriage" when the heir was a minor; and to "aids" upon the marriage of a daughter of the lord, the knighting of his eldest son, or when the lord was held to ransom. These burdens, and others of a similar nature, fell upon the holder of

[13] Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 737, 741; Maitland, The Origin of Uses, 8 Harv. Law Rev. 127, 129; Development of Trusts, G. H. J. Hurst, 136 L. T. 76.

[14] Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 739, 740; Maitland, The Origin of Uses, 8 Harv. Law Rev. 127, 136. The earlier view was that the use was an evolution of the fidei-commissum. Story, Eq. Juris. §§ 966, 967; Pomeroy, Eq. Juris. §§ 976-978.

[15] Digby, History of Law of Real Property, 317.

[16] Thus in Louisiana, whose system is founded on the civil law, trusts were not recognized (Marks v. Loewenberg, 143 La. 196, 78 South. 444) until Act 107 of 1920 legalized them. Under this statute the trust term cannot exceed ten years after the death of the donor or the majority of a minor beneficiary.

[17] Holmes, Early English Equity, 2 Select Essays in Anglo-American Legal History, 705, 707.

[18] Attorney General v. Sands, Hard. 488, 491.