California Law Review

Volume I MARCH, 1913 No. 3

Classification of the Law of Trusts

DOUBTLESS no branch of the law has given greater opportunity for theorizing than the subject of trusts. Since the days of the historic utterance as to the nimbleness of a use, students of the law have taken great delight in speculating,—and, in most cases, it has been no more than a speculation,—as to the difference between legal and equitable interests, the priority of the legal interest, the nature of a cestui's right, the doctrine of bona fide purchasers as applied to such right, and other questions of similar nature. It is quite unfortunate that, after so much discussion, legal writers are still undecided as to the place to be allotted to Trusts in our system of jurisprudence. Doubtless, the question is more academic than practical, but, in view of the increasing importance of the law of Trusts, and in view also of the almost universal tendency to abolish separate equity courts, the question becomes quite important. Then, too, from the standpoint of the teacher of law some classification is necessary.

In a recent article in the Law Quarterly Review,[1] Mr. Walter G. Hart advances the theory that the subject of Trusts properly belongs under the general heading of obligations rather than under the heading of property. His conclusion is based upon the theory that the right of the cestui is purely in personam, that his only remedy is to make the trustee perform his obligation, that he has no right in rem as indicated

[1] 28 Law Quarterly Review 290, July, 1912.

by the fact that whatever right he has is cut off by a sale to a bona fide purchaser, and that, therefore, the law on the subject should be considered as a branch of the law of obligations and in the same subdivision as the law concerning rights quasi ex contractu. At the conclusion of Mr. Hart's article, Sir Frederick Pollock, the editor of the Review, adds a note wherein he suggests that Trusts might be entitled to rank as a head sui generis. While we agree that the subject of Trusts as a branch of equity jurisdiction is entitled to separate consideration, we see no more occasion for giving the subject a separate place in our system than there was in the case of uses. It would seem hardly in keeping with the fitness of things that the modern Trust which was kept upstairs by the English legislators in the time of Henry VIII should now be forced to vacate the premises entirely and seek a new abode. Moreover, both from the standpoint of policy and legal theory, there seems no necessity for a classification which would lead to no better understanding of the subject, and which, we believe, would make for confusion rather than simplicity. We are quite ready to admit that the law of Trusts has much to do with the law of obligations, and, in framing an ideal code, it might be well to discuss the proper phases of the subject under the law of obligations as well as under the law of property. In fact, this is done in the civil codes of some States. It is, however, not the purpose of this article to frame such an ideal code, but merely to consider whether or not under the existing classification the law of obligations should prevail as to classification, or, what amounts to the same thing, whether the law of Trusts may not be more properly classified under the law of property.

Most writers on the subject have in defining Trust contented themselves with Coke's definition of a use: "An use is a trust or confidence reposed in some other, which is 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 had no remedy but by subpoena in chancery." It is submitted that to the modern legal mind this definition of a trust is far from satisfactory. We grant that the remedy of the cestui is through the trustee, but even this elementary rule has to some degree been infringed upon. We likewise agree that in strict legal theory it is proper

to say that the cestui is an owner of an obligation, and we, of course, subscribe to the fundamental principle of equity jurisdiction that equity acts in personam, emphasizes the duty of the defendant and decrees that he do or refrain from doing a certain thing. But is it not true that the cestui has something more than an obligation against the trustee? In the old days before the statute of uses, the court of chancery looked upon the interest of the cestui que use as an estate in the land, notwithstanding the fact that his interest was protected only by process against the trustee personally.[2] Equity takes the same position with reference to a modern trust, and that in the face of the fact that the cestui's interest may be cut off by wrongful transfer by the trustee to a bona fide purchaser.[3] The same idea is well expressed by Mr. Salmond, who is quoted in the article referred to at the beginning of this paper.[4] The citation of a few cases will suffice to show the same attitude in modern American decisions.[5] This equitable estate is, it is true, an indirect form of interest in property dependent upon an obligation owing from the legal owner to deal with the res for the cestui's benefit, but the trustee has in many cases no more than the dry legal title, and the extent of his legal estate is limited by the necessities of his office.

It would seem that the interest of the cestui at least possesses this characteristic, that it refers to a specific res held by the trustee. While the cestui may not point to the res and say that it is his in a strict legal sense, may he not properly say that he has an interest in that specific property which is something more than a mere right against its legal owner? Are we not over-emphasizing the importance of procedure if we determine the nature of an equitable right wholly by the method of its enforcement? Procedure in personam is often used to protect and enforce rights in rem, and it would seem

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[2] 1 Sanders, Uses 64.

[3] Lewin on Trusts, pp. 7, 674.

[4] Salmond, Jurisprudence 2d ed., p. 230, cited 28 Law Quarterly Review, p. 293.

[5] Sims v. Morrison (1904), 92 Minn. 341, 100 N. W. 88; Hospes v. Northwestern Co. (1892), 48 Minn. 174, 50 N. W. 1117; Goodwin v. McMinn (1899), 193 Pa. 646, 44 Atl. 1094 Knowlton v. Atkins (1892), 134 N. Y. 313, 31 N. E. 914; Badgett v. Keating (1876), 31 Ark. 400; Bayer v. Crockerill (1865), 3 Kan. 276; Bowen v. Chase (1876), 94 U. S. 812, 24 L. Ed. 184.

that the nature of an equitable right or of equitable ownership is not necessarily different from the corresponding legal right or ownership simply because a different means is provided for its enforcement, or a different remedy offered for its violation.

It is submitted that although the cestui's remedy is through the trustee he has an interest in the res,—an equitable property right, if you will. This right or interest may exist even before any trustee has been appointed. The doctrine that equity will not allow a Trust to fail for want of a trustee is too well established for argument.[6] If that doctrine is sound, who is the obligor of the obligation which the cestui owns before any trustee is appointed, and, if there is no such obligation, what is the nature of the cestui's right at that time?

Again, it is a significant fact that where a trustee conveys to one not a bona fide purchaser, the cestui is frequently allowed to sue the transferee directly. Is that simply a short cut in procedure and if not, what is the basis of the cestui's direct right? We venture to express the belief that, in cases where the trustee commits a conscious breach of trust by selling the res to a vendee who knows of the breach, the cestui should be given a direct right against the vendee, notwithstanding the fact that he might have his remedy through the trustee under the doctrine of Wetmore v. Porter.[7] This result is justified not only upon grounds of policy but for the reason that the confederating third party has committed tort against the cestui, and the latter should be allowed to go directly after the res by way of specific reparation. If this conclusion is correct, it is a further evidence of the diminishing sanctity of the legal ownership. That the law is tending toward the view just expressed is indicated by the cases refusing to bar the cestui's right where the statute has run.[8]

In view of the foregoing considerations, it is submitted that the cestui has in fact something more than a right in personam, that such right might be more properly described as a right in personam ad rem, or, possibly, a right in rem per personam.

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[6] Fatjo v. Swasey (1896), 111 Cal. 628, 44 Pac. 225; Hurlbut v. Penny (1889), 76 Mich. 471, 43 N. W. 649; French v. Northern Trust Co. (1902), 98 Ill. App. 410, 197 Ill. 30, 64 N. E. 105.

[7] (1883) 92 N. Y. 76.

[8] See Miles v. Thorne (1869), 38 Cal. 335, 99 Am. Dec. 384; Neal v. Bleckley (1898), 51 S. C. 506, 29 S. E. 249.

We are met by the argument that the cestui's right cannot be a right in rem, or even ad rem, for if so, then the right would prevail against a bona fide purchaser, but if one will delve into the law regulating trade secrets he will find that even that old principle has not escaped attack.[9]

Whatever the true theory as to the nature of the cestui's interest may be, it is evident that the importance of such interest has been constantly growing in the law, until now, at least, such interest has come to be considered by the courts as very closely akin to ownership. That the tendency has been to pay more regard to the comparative dignity of equitable rights is evidenced in many ways. The equity of redemption is an excellent example of how nearly equitable interests have come to attaining the dignity of legal proprietary rights. Though in form merely a personal right, the equity of redemption is considered an estate in the land which may be granted, or devised, or treated, in general, like a legal estate. The growth of the lien doctrine is strong evidence of the modern tendency. Reference should also be made to the treatment by the courts of the interests of vendees under contracts for the sale of land. The case of Hyde v. Mangan,[10] contributes to the argument advanced in this paper in that it holds that when an action of ejectment is brought by the holder of the legal title, "a mere equitable title to the land, if it is of such a character as entitles the holder to possession in equity," is a good defense. A similar tendency in the law of trusts is indicated in recent statutory enactments, notably in New York, providing for powers in trust which serve to avoid the rigidity of the old system ,and also containing provisions protecting the cestui against the wrongful acts of the trustee.

The Civil Code of California,[11] provides as follows: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation vests the whole estate in the trustee subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

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[9] See article by the author, 74 Central Law Journal 83.

[10] (1891) 88 Cal. 319, 26 Pac. 180.

[11] Sec. 863.

Notwithstanding the express language of the statute, there have been numerous holdings by the California courts which indicate that the cestui has something closely akin to a property right. In other cases, the courts have resorted to rather strained constructions in order to avoid the operation of the section. Thus, it has been held repeatedly that a cestui is not barred by the laches of the trustee or by the statute of limitations, where he was under a disability, or had no notice of trustee's fraud, laches or misconduct.[12] This certainly indicates that the trustee is not everything in the eyes of the law, notwithstanding the strong expression to the contrary in the section referred to. Again, it has been held that where a trust deed is given to secure a debt, while the legal title passes to the trustee, no incidents of ownership attach, and the cestui may even maintain an action to recover possession until the trust is executed.[13] Other cases where Section 863 of the Civil Code was held not to apply, are cited in the note.[14]

The tendency to give equitable interests a more prominent place is quite as noticeable in England as in this country. While the dissatisfaction in England may be directly attributed to the peculiar doctrine of "tacking," yet the tendency is quite sweeping in its character. It seems appropriate in this connection to refer to a little book published in 1912 by Mr. Willoughby, entitled "The Legal Estate." That author says, "well recognized proprietary interests should no longer be treated in relation to the proprietor of the legal title as no more than ground in equity or conscience to take it from him."[15] "The order of priority that prevails between legal interests themselves and equitable interests themselves should apply also as between legal and equitable interests, that is, the order of time of creation."[16]

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[12] See Hovey v. Bradbury (1896), 112 Cal. 620, 44 Pac. 107; Warren v. Adams (1894), 19 Colo. 515, 36 Pac. 604; Perry on Trusts, Par. 860, Note (a).

[13] Sacramento Bank v. Alcorn (1898), 121 Cal. 379, 53 Pac. 813; Tyler v. Granger (1874), 48 Cal. 259.

[14] Varni v. Devoto (1909), 10 Cal. A. 304, 101 Pac. 934; In re Spreckels' Estate (1912), 162 Cal. 559, 123 Pac. 371.

[15] Willoughby, The Legal Estate, p. 16.

[16] Id. p. 15.

From a practical viewpoint, the subject known as uses and trusts has been so long associated with, and wrapped up in, the subject of property that it seems inadvisable to divorce them at this late date. Uses and trusts have been treated as estates, lawyers have come to think of them as such, and no harm comes from such treatment. Admitting, arguendo, that the right of the cestui is purely in personam, we must also recognize that his right always has to do with some specific property and refers to and affects property more than any other sort of obligation known to the law. Again, the thing that usually confronts us as lawyers in dealing with the trust situation is the question of dealing with the res, tracing it into its products, etc. No one has ever suggested that the law of leasehold interests is not a part of property law, and yet that branch is more concerned with the law of obligations than is the law of trusts. Then, as a practical as well as a historical matter, does it not seem a fitter conclusion to say that we should classify the law of trusts as a part of the law of property rather than under the law of obligations, if we must choose between the two?

To summarize, we submit:

(1) That the cestui of a trust gets something more than a personal right,—that he gets an interest in the res, and that his right might be more fittingly described as a right in personam ad rem rather than simply as a right in personam.

(2) That the tendency of modern decisions is to increase the relative importance of equitable interests and to get away from the old sanctity of legal ownership.

(3) That admitting for the sake of argument the contention that the cestui has only a right in personam, yet considerations of policy and practice demand that the subject of trusts be considered a portion of the law of property.

(4) That in view of these considerations, while admitting that the subject in its different aspects might properly be treated under both heads, as between the two it is more properly classified under the heading of property.

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