Lee Brobst's

EYE OF THE EAGLE

NEWSLETTER

THY WILL BE DONE IN ASSOCIATION

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EXPRESS TRUSTS

Property which is held in trust for another is most conveniently described by the term "trust res," or "res". According to Black's Law Dictionary 5th Ed. *"Res is everything that may form an object of rights and includes an object, subject-matter or status. The term is particularly applied to an object, subject-matter, or status, considered as the defendant in an action, or as the object against which, directly, proceedings are taken. In admiralty-maritime the res is the captured vessel and proceedings of this character is said to be in rem."* Subject-matter or status is probably the most important to keep in mind as we proceed. Status puts you in a position of either absolute or relative rights. In place of trust-res we will use the term res. Suppose now that A holds property in trust for B. Upon A's death the title of the property, if the latter be real estate, will, as a matter of law, pass to his heir or heirs; if it be personal property, to his executor or administrator. It is a commonplace of the law of trusts today that in such a case the heir or heir or personal representative, as the case may be, holds the property in trust for the beneficiary, B. It should be noted, however, that in the early history of equity this was not true, it being at first doubted whether the chancellor could compel anyone except the original "feoffee to uses" to hold the property for the beneficiary. The reason for thinking that no one else could be bound in the same way that feoffee to uses was, that the latter was regarded as having entered into an obligation binding upon his conscience and so enforced in equity by decree of the chancellor. Now (it was argued in these early days), the heir (or personal representative, if the property were personal property) has not bound himself, so what is there to enforce? It is obvious, however, that further consideration, together with the development of higher ethical ideals, would soon compel recognition of the fact that it would not be fair for the heir or personal representative in the case supposed to keep the property for himself. Granted that he has, by operation of the common law, the legal

title, and that he never agreed to hold the same for another's benefit, still he gave nothing for it, and his ancestors had in the eyes of a court of equity no right to its beneficial use. This being so, it was inevitable that before long the chancellor should impose upon the heir or personal representative of a deceased trustee a duty to hold the res for the benefit of the same beneficiary. That equity might impose a conscientious obligation upon one against his will, as well as enforce those willingly assumed, was already being worked out at the same time in other fields of equity, and at least as early as the latter part of the fifteenth century the chancellor had reached the result as to the heir, indicated above.

The early chancellors had the same kind of difficulty in enforcing the trust-obligation against one to whom the trustee had transferred the res. Here again the legal title passed to the trustee, and in the earliest cases equity saw no basis for compelling the transferee to fore go his legal rights as owner of the property. For example, it was said in a case in 1453 that "if I enfeoff (pronounced n fef) a man to perform my last will (i.e. in trust to dispose of the property as directed in my will) and he enfeoffs another, I cannot have a subpoena (i.e. enforce the trust) against the second because he is a stranger, but I shall have a subpoena against my feoffee and recover in damages for the value of the land". But, in 1502, Frowike, C. J., in Anonymous, Zkeilwey, 46, 6, pl. 7 said: "But if the second feoffee has notice of the use, they in chancery will reform this by subpoena at this day". It has accordingly ever since been held that one who, with notice that the res is held in trust, accepts a transfer of the same from the trustee, will be compelled by equity, in spite of his legal ownership, to hold the property in trust for the beneficiary. Obviously, the basis for the result is the same as in the case of the heir: the transferee, who becomes such with notice that the res is held in trust, cannot conscientiously use for himself the legal rights he acquires by the transfer, and the chancellor accordingly compels him to discharge his duty by holding the res for the original beneficiary.

Following the same line of reasoning, one who receives a transfer of the res from the trustee by way of gift is compelled by equity to hold the same in trust for the beneficiary. If he accepted the transfer, with notice of the fact that he was receiving property held in trust, it is clear that in thus co-operating in a breach of trust he is acting unconscientious and should be compelled to make restitution to the beneficiary. On the other hand, if he received the gift innocently, i.e., without knowledge of the trust obligation under which his donor stood, it is clear that he commits no wrong, either at law or in equity, by his mere act of accepting the transfer. If, however, after acquiring title to the property, he learns of the trust, it would obviously be inequitable for him to keep the property for his own use, as he paid nothing for it, and so he is compelled by equity to hold it in trust for the beneficiary.

Under the American system of recording deeds of real estate, the recording of the deed has the same effect as actual notice (knowledge) of its contents. Accordingly, if the trust is disclosed on a deed which has been duly recorded, all persons subsequently acquiring title have what is called "constructive notice" of the trust, which, for the purposes of the rule as to innocent purchase for value, is equivalent to actual notice or knowledge.

Whether one who has obtained the title to the res by purchase from the trustee, paying value for the same and in ignorance that it is held in trust, is subject to the trust or not depends upon the answer to the question: Would it be against equity and good conscience for him to keep it for his own use? We have already noted that one who accepts title innocently, by way of gift, is not regarded by equity as committing any wrong in taking title, and that his only wrong consists in keeping the

property after he learned of the trust. That result is based upon the idea that as he has paid nothing for his legal ownership, he ought to be compelled to give up the benefits of it for the benefit of the beneficiary. The purchaser for value, however has paid for his legal title and is the owner of the property. How can it be inequitable for him to reap the benefits of his bargain, made innocently and in good faith? Accordingly, it is a fundamental principle of equity and the law of trusts that one who thus acquires the legal title innocently and for value, holds the title to the former res free from any trust obligation.

A third person who, with notice that the property was once trust property, purchases the same from an innocent purchaser for value, acquires the rights of the latter. The reason for this is, that as the property in the hands of the innocent purchaser for value is no longer trust property but is owned by the innocent purchaser absolutely free from any trust obligation, there can be nothing inequitable in permitting one who obtains it by transfer from its present absolute owner to succeed to those absolute rights. The mere fact that it was once trust property clearly cannot alter the situation.

From the very beginning of our discussion the fact that at law the trustee is the sole and exclusive owner of the res has appeared. Let us now examine some of the cases which demonstrate that this is true of the modern trust as well as of the old use. If our statement be correct, it follows that the trustee is entitled at any time in a court of law to eject the beneficiary from the trust property, if the latter happen to be in possession. The beneficiary, if entitled in equity to the possession of the property, is entitled to obtain from the chancellor an injunction ordering the trustee to refrain from proceeding to enforce his legal rights. In many states today, under the modern or code procedure, the same court enforces both legal and equitable rights, but, according to the view which prevails in most states having this new system of procedure, the right of the beneficiary to remain in possession must still be asserted as an equitable and not as a legal right; a thing has most important effects upon the manner in which the beneficiary pleads his right in order to defeat the trustee's action.

Since the title to the property is vested in the trustee, it follows that for all legal wrongs done to the property by third parties, the trustee is the one to bring suit. He is therefore the proper plaintiff in actions to recover possession of the property or damages for wrongful interference with it. For example, in the first of the cases just cited, the trustee succeeded in an action of trespass against third persons interfering with the property.

The beneficiary is often spoken of as "owning the property in equity," or as having the "equitable" title to the same as distinguished from the legal title or ownership. As a useful figure of speech this is all well enough, but it is likely to be misleading if accepted literally. If the ownership in equity be solely vested in the beneficiary, it would seem to follow that he ought to be permitted by equity to bring actions in equity directly against third persons wrongfully interfering with the res, but that is not the case. By filing a equity action against such wrong-doers, the beneficiary obtains no better treatment than by bringing an action at law.

Carrying out the idea that the ownership of the res, even in equity, is not vested in the beneficiary but in the trustee, the courts of equity, hold that even in equitable suits brought by the trustee against third persons for wrongs connected with the res, the beneficiary is not a necessary or indispensable party, through of course he may property be joined if the trustee so wishes. Take for example a case where the trustee who held certain promissory notes in trust for others had filed a federal equity action. The defendants objected to the action, on the ground that the persons

entitled to the equitable interest should have been made parties, but the objection was not allowed. The court said: "Where the suit is brought by the trustee to recover the trust property, or reduce it to possession, and in no way affects his relation to his beneficiary, it is unnecessary to make the latter parties.

From the foregoing, the real nature of the interest of the beneficiary in the res must be apparent. Although not the owner of the res, he is interested in it, and that interest is based upon the personal duty which the owner of the res owes the beneficiary to use the property for his benefit. In other words, a trust exists wherever one person, not the owner of a thing, has a personal claim against another person who does own it, that the latter shall use the thing in question for the benefit of the former. Starting with this conception, practically all the important rules in the law of trusts may be deduced by no very complex process of reasoning. We have seen that a person may be under a duty to use a thing which he owns for the benefit of another because he has so agreed. In that case we have what is called an express trust. In other cases we saw that equity imposed a duty, often against the owners will, to use the thing for the benefit of another, for example, where a purchaser of the res who took with notice, is held as trustee for the beneficiary. Trusts which arise in this manner are constructive trusts, the trust obligation being imposed or "constructed" by the chancellor upon the principles of natural equity and justice. Fundamentally, all trust obligations arise in one of these two ways, but of the details of the classification of trusts we shall deal later on. Bare in mind that in a public trust, trustee and beneficiary are one in the same, to become what is known today as a intermediary meaning 14th amendment citizens.

From the brief sketch of uses and trusts given above, it is apparent that the interest of the beneficiary is purely the creation of the court of equity as distinguished from the court of law. Not only is this true, but no action for damages for breach of trust agreement will lie in a common law court of justice against a delinquent trustee. This is true even in the case of the express trust, in many of which cases apparently all the elements of a simple contract are to be found, including promise, consideration, and intention to enter into binding obligations. This result is an illustration of the effect of historical development upon the logical symmetry of our legal system. At the time the feoffment to uses above described was first unsued, and indeed all during the time when uses as distinguished from trusts existed (i.e., before the statute of uses) no action for the enforcement of simple contracts had been devised. Before the action for the enforcement of simple contracts was finally developed under the name of special assumpsit, equity had occupied the field of trusts, so that when simple contracts were recognized by the common law, the contract idea was never applied to express trusts, but they were left in the hands of the chancellor. However, through the development of the action of general assumpsit and its extension into the really equitable field of quasi-contracts, it finally became possible for the beneficiary to bring an action at law against his trustee, when the only thing left for the trustee do so was to pay over to the beneficiary a definite sum of money.

Inasmuch as the right of the beneficiary with reference to the res is not based upon ownership of the property, but upon the personal claim which he has over against the trustee, it follows that if the chancellor has both beneficiary and trustee, 14th amendment citizen before him, he may proceed to enforce the trust, i.e., give effect to the equitable interest of the beneficiary, even though the res be itself beyond the jurisdiction of the court. Meaning the District of Columbia. Of course this result is simply an illustration of the fact that equity acts upon the person by ordering people to perform their duties, rather than in rem (upon the ownership of property). To this you are referred back to the November issue of this newsletter pages 4 and 5. On the other hand, in the absence of statutes, equity is powerless to administer adequate relief even though the res be within the jurisdiction, if the trustee, be absent therefrom. The legal title is in the trustee, and, so far as equity is concerned, there it must remain, until the trustee can be brought under the jurisdiction of the court.

This situation has, however been remedied in many perhaps most jurisdictions by statutes authorizing the court of equity to appoint a new trustee in such cases, the statute providing that upon his appointment the legal title shall pass to the new trustee. In pursuance of a statute of this kind, the court, where the defendant trustee had absented himself from the state, proceeded to appoint a person to carry out the trust. It should be carefully noted that in the absence of such statutes, the removal by equity of a delinquent trustee and the appointment of a new one in his place left the legal title outstanding in the old trustee, until in pursuance of an order of the court, the later conveyed the title to the court's appointee.

We have seen above that the beneficiary is not entitled to sue third parties who wrongfully interfere with the res, but that the trustee is the one to do this, both at law or in equity. This being so, what happens if the trustee refuses to bring the appropriate action? In such a case the remedy for the beneficiary if to file a equity action against the delinquent trustee, the object of which is to compel the later to perform his duty by suing the third person. This right of the beneficiary has been recognized from the very early times, but for many years this was all that the beneficiary could do. Today however, he may join the third party as defendant with the delinquent trustee. This is based upon the principle of avoiding a multiplicity of suits. Under the old system, the beneficiary first brought the equitable action against the trustee, and then the latter brought the other action, legal or equitable as the case may be, against the third person. To save the time and expense to all parties, the modern simple method was introduced, but the underlying principle remains unchanged. Two suits are consolidated into one, but the beneficiary has no rights directly against the third person under the new system any more than under the old.

We must guard ourselves very closely against one error. Although as we have seen, the beneficiary as such is not the owner of the property, it may happen that in a given case he is in possession of the property. In fact this is often the only way in which the objects of the trust can properly be carried out. Now the common law attaches very important results to the possession of property. It is often said that possession is prima face evidence of title, but even that is not strong enough. It may fairly be said that, as against the world but the rightful owner, the one in possession of property is, by the common law, the owner of it. By that is meant that if anyone interferes with it, the possessor may bring not only those common law actions intended specifically for the redress of injuries to mere possession, but also all the actions based upon ownership. Whatever action an absolute owner could bring under like circumstances, the possessor of property can bring. This being so, there is no reason why the beneficiary of the trust in possession may not rely upon this doctrine. Even so, it must be remembered that he sues not as beneficiary of the trust but as possessor, and so owner against all but the rightful owner, who in this case is the trustee. As we have seen, his only remedy against the trustee is by equity, if in the given case he is, by the terms of trust entitled to remain in possession.

From the fact that the trustee and not the beneficiary is the one to sue third persons in all matters relating to the res, it follows that if the statute of limitations has run against the trustee, upon any claim of any kind, whether legal or equitable, the beneficiary be an infant, a married woman, or an adult. Conversely, if the trustee be an infant, irrespective of whether the latter is a adult or not. In other words, the only owner of the claim is the trustee, and so the time of the running of the statute is computed on that basis.

In determining the validity of assessments for taxes, if they depend upon the resident of the one owning the property subject to taxation, as is usually the case in taxes upon personal property, it is the residence of the trustee, in a public trust, trustee and beneficiary are one and the same meaning 14th amendment citizens of the District of Columbia and not of the beneficiary which settles the matter. This is of course, because the trustee and not the beneficiary owns the res. Similarly, actions for damages for nuisances created upon the

J.1-10

trust property, where it is real estate, are properly brought against the trustee and not against the beneficiary. The action brought against the trustee for injuries done to the plaintiff by the escape of water from a leader upon the house held by the defendant as trustee for others. In deciding that the action lay against the trustee, the court said: There is no force in the objection that he cannot be made liable as trustee. He owns as trustee, and owes the duty as owner to keep his pipes and drains from injuring his neighbor by reason of faulty construction or from suffered to get in bad repair. The common law trust liability is based upon the duty of the occupier of land or buildings to do certain things to protect other persons from being injured by the unsafe conditions of the premises.

MEANING OF EXPRESS TRUSTS

An express trust is one which comes into being because a person having the power to create it expresses an intent to have the trust arise and goes through the requisite formalities.

In considering the origin of trusts two classes are usually defined. Those trusts which come into being because the parties concerned have formed the actual intent that they shall arise, have expressed that intent in written or spoken words of otherwise, and have made or procured the requisite property transfers, are called express trusts. Thus, if A executes a writing whereby he declares himself trustee of certain of A's lands for B, using the words "trustee" and "beneficiary", and describing the particular land as the subject of the trust, there is an express trust.

But there are certain trusts which do not involve any written intent. These latter trusts are usually called implied, and are divided into two classes, namely, resulting and constructive. Resulting trusts arise where the courts presume or infer from certain acts that the parties intended a trust to exist, although they expressed no trust intent directly by word or writing. Thus if A pays the purchase price of property to its owner, B, and directs B to convey it to C, and this is done, it is inferred that A desired a trust for his benefit, in the usual case, and this trust is called resulting. On the other hand, constructive trusts are imposed by chancery on the owners of property as a means of accomplishing justice and preventing unjust enrichment. Constructive trusts are not based on the intent of the parties, either actual or presumed. They are often called involuntary trusts, or trusts ex maleficio. Thus, is A when occupying a fiduciary relation to B, fraudulently obtains B's property, B may have A declared a constructive trustee of the property. Further definition of implied trusts is left to later sections, where their origin is considered. The steps leading to the creation of express trusts will first be described.

In order to create an express trusts the settlor must own or have a power over the property which is to become the trust property, or must have the power to create such property.

Legal disabilities of a settlor may render his attempt at trust creation void or voidable. If a settlor is illegally induced to create a trust, his act may be void or voidable.

The settlor of a trust has previously been defined to be the person who intentionally causes the trust to come into existence.

Who may be the settlor of a trust? What qualifications must the settlor posses in order that equity will recognize and enforce the trust which he has attempted to create?

It appears that those methods involve either (1) making a conveyance of property or procuring another to make a conveyance, or (2) making a contract or procuring another to make a contract. It is obvious that if method (1) is used, the settlor must own a transferable property interest or have a power of disposition over such property interest, or he must have the means of contracting with an owner or holder of such a power; and that if method (2) is used the settlor must be able to make a contract, or

has the means of inducing a second party to make a contract in favor or a trustee.

The law of persons with respect to disabilities applies to a settlor as it does to all others who attempt to enter into legal relations. Bankruptcy, lack of mental capacity, infancy, and similar situations may either make it impossible for one to create a trust or render his attempt voidable by him.

In general, every person competent to make a will, enter into a contract, or hold the legal title to and manage property, may dispose of it as he chooses, and sui juris, meaning under the power of another, has the power to create a trust, and dispose of his property in that way. If one may legally convey his property absolutely, he may convey it upon trust, or declare that he holds it upon trust for another.

A person capable of making a contract may create a trust by contracting to pay money to a trustee for a third person.

So too the beneficiary of a trust may settle his equitable interest in trust in the same way that the owner of the legal title may create a trust. Thus there may be a trust in a trust.

One Common way of creating a trust is to leave property by will to another in trust for a third person. Thus, a property owner may make a will by which he leaves all his property to B, to hold it in trust for the testator's family. On the death of the testor, with the will un-revoked, title passes to the trustee and the trust begins.

A trust created by inter vivos arrangements are called "living trusts", and instruments creating them are called "trust agreements".

THE PRINCIPAL METHODS OF TRUST CREATION ARE

(a) A declaration by a property owner that he holds the property in trust for another, or procuring such a declaration by another;

(b) A transfer by the power of property (or the holder of a power of appointment over the property) of that by deed or will of another to hold in trust;

(c) Making, or procuring to be made, a contract to pay money or deliver property to another which the payee or transferee is to hold in trust for a third person.

In order to create an express trust the settlor's intent must be expressed and not merely formed in his own mind. Although it may be expressed (subject to formality requirements later stated) by conduct of the settlor, the use of written or spoken words is the method almost universally employed.

The trust property and the beneficiaries must be described with certainty.

No particular words or phrases need be used, and words of trusteeship are not necessarily conclusive.

The intent to have a trust must not only be formed in the mind of the settlor but must also be expressed by reducing his intent to writing or by communicating it to another. Trusts do not arise out of secret thoughts or drafts of contemplated trust declarations or transfers.

Expressions of vague benevolent or donative intents are not enough, nor are statements of an intent to give a property interest to another by some method other than trust creation, or to convey in trust at some time in the future.

If the words used convey the intent to establish a trust, they will have that effect. No formal or technical expressions are required. For example, it is not necessary that the settlor use the words "trust" or "trustee," and the designation of one as a "trustee" does not conclusively show the creation of a trust. The language used may be sufficient, although the person actually intended to be a trustee is called an "executor," an "attorney," an "agent,"

or a "guardian." If the duties required of the appointed representative are those of a trustee, the party nominated will be held to be a trustee regardless of terminology. A statement of the motive or purpose of a gift normally does not show an intent to have the donee be a trustee, as where a gift is made to a daughter "so that she can support her children".

Acts of trust creation are subject to generally prevailing rules about certainty as a prerequisite to enforceability. Uncertainty and ambiguity in the description of the trust elements may tend to show that no trust was intended; or, even if the intent to create a trust is assumed, it cannot be effective unless certain essential trust elements are properly described, namely, the subject-matter, the trust purpose, and the beneficiaries.

Thus if the property to be administered by the trustee is indefinite and incapable of indentification, no trust can arise. The residue of the testator's property after the payment of debts, expenses, and legacies is a sufficiently definite subject-matter for a trust, since that is certain which is capable of being made certain. It is not required that the settlor expressly give the trust property to the trustee. If the trust is fully described, the gift of the property to the trustee will be implied. So too if the description of the beneficiaries is vague the trust will be ineffective. The same result occurs if there is uncertainty as to the purposes of the trust or the size of the interests of the beneficiaries. Vagueness or inadequacy in the description of the trustee in not important, if other trust elements are present, since the court will supply a trustee.

In a few states statutes contain statements as to the content of the settlor's expression which is necessary to trust creation. In other states legislation has been enacted as to the effect of a conveyance to one as trustee, without description of the beneficiaries or other terms of the trust.

The burden lies upon the party asserting the existence of a trust to show that the acts of the alleged settlor were sufficient to create a trust. It is frequently stated by courts that the evidence to establish the existence of a trust must be "clear," "convincing," "explicit," and "unequivocal."

On principle it would seem that no stronger evidence should be required to prove the creation of a trust than to prove any other fact in a civil action. However, in many cases the effort to prove a trust involves an attack on a title which by the records or otherwise seems absolute. The public interest in the security of titles is doubtless behind the statements of the courts about the character of evidence required for the proof of trusts. A rule requiring an extraordinarily high degree of proof has been applied rarely, except in cases where an attempt was made by oral proof to fasten a trust upon property which appeared to be owned absolutely.

BAILMENT

A bailment for the benefit of another than the bailee bears a slight, superficial resemblance to a trust but it differs from a trust in that-

(a) It was developed in the common law actions, whereas the trust was developed in chancery, so that the rights of the beneficiary of a bailment are now legal, while those of the trust beneficiary are equitable;

(b) Bailment is not a fiduciary relation;

(c) Bailment deals with personal property only, while a trust may involve any kind of property;

(d) The bailee has a special, limited property interest, and the bailor has general property, whereas the trustee usually has full ownership subject to the equitable interest of the beneficiary.

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Bailment and trust are in some cases superficially similar. In each the owner of property places it in the control of another, unually for a temporary purpose, and often for the benefit on one other than the transferee. A few definitions of bailment would seem to make it a form of trust.

Bailment is a common law institution. It was developed through the common law actions such as detinue, replevin, and trover. Relief for violation of the terms of a bailment is usually given in a court of law. As previously stated, the trust was first recognized by the court of chancery and is enforced almost entirely on equitable principles.

Bailment is a business relation in which the parties deal with each other at arm's length. Bailor and bailee may contract and convey freely with each other and are not in special relations of intimacy or confidence. The trust is a fiducairy relation involving the duty of unselfish loyalty and extreme good faith.

Bailment relates to delivery of personal property of one to another for a temporary purpose, for example, where the general owner of a typewritter delivers it to friend for safekeeping or use. There can be no bailment of realty. On the other hand the trust subject-matter may be any kind of property, real or personal.

It is sometimes said that the trust and bailment differ in that a bailee has no "title," whereas the trustee has "legal title." It is more accurate to state that the bailee usually has a special, legal property interest which entitles him to possession and use for a period which is generally relatively short. The larger and general property interest remains in the bailor. In trust the property interest of the trustee is usually legal in nature and much larger than that of the bailee. The trust beneficiary's interest is always equitable. Thus in the normal bailment the total property interest is divided into two types of legal interests, special and general. While in the normal trust full legal ownership is in the trustee, subject to equitable interests in the beneficiaries.

Occasionally it is doubtful whether bailment or trust was intended, but usually a trust intent will appear from the language used and from the formally and relatively long duration of the relationship. Bailments cannot be confused with trusts if they are for the sole benefit of the bailee, but there may be a slight chance of confusion if the transferor or a third person is to secure advantages from the property delivered.

RECEIVERSHIP

A receiver is not usually a trustee. He is a court officer appointed by the court of equity to manage property which it is seeking to conserve and administer. Neither the court nor the receiver has title to the property, although the court meaning legislative court has possession and powers of management and disposition over the res which it exercises through its agent (the receiver). The title remains in the person who is placed in receivership. If the court vests title in the receiver, as is sometimes done, the receiver becomes a court controlled trustee.

Receivers are like trustees in that they are fiduciaries, they manage property for others, and are subject to the jurisdiction of the court of chancery.

When the estate of an insolvent is brought before it, and in other cases, equity sometimes appoints a receiver of the property in order to conserve it for appropriate distribution. Receivers have occasionally been referred to as "trustees". They are undoubtedly fiduciaries governed by the same rules as to good faith and loyalty as trustees. They also resemble trustees in that they are subject to the jurisdiction of a court of equity, and because their function is the management of property for the benefit of others.

But the ordinary receiver is not a trustee of the type herein discussed. He is a court officer and must secure authority from the court for every act he does. The "title" to

the property being administered is in the insolvent debtor or other individual who had it prior to the receivership. The creation of the receivership merely indicates that the court has taken the property into its possession in order to guard against wastage or improper usage, and has assumed powers of management and dispposition which it will exercise through an officer or agent, the receiver. A trustee is not usually an officer of the court, even though he may have been appointed by the court; his interests in the property he manages are greater than those of the usual receiver and are dignified by the name "title".

A receiver is more like an agent than a trustee. He does not contract or convey as a separate legal entity and is not ordinarily liable on contracts or conveyances. He cannot sue or be sued except with consent of the court. He is usually not held personally liable on his contracts or for torts involving personal fault. The powers of co-receivers are several and are not vested in them as a board or group, whereas co-trustees usually hold their powers jointly.

Sometimes equity appoints a receiver and vests him with title. Either by court decree, conveyance or statute, the receiver gets all the interests of the party whose estate is being managed, subject to a duty to manage them for the benefit of creditors, stockholders, or others. Here the receiver would seem to become a court-appointed trustee.

USURY QUASI-CONTRACTS

A usurious loan is one whose interest rates are determined to be in excess of those permitted by the usury laws. The usury laws as we will see, have a different meaning when dealing with a public trust and that is to protect one class of persons against another; for example when the IRS levies a fine and interest upon a tax payer for failing to report income. In other words, the IRS is compensating the public trust for you not contributing your share based upon unjust enrichment on your part based upon a quasi-contract.

In a case a plaintiff pawned a certain watch to a pawn shop and when the plaintiff sought to redeem the watch, the defendant demanded a much larger sum than he was entitled to , and the plaintiff finally, in order to get the watch, paid the amount demanded, recovered the watch and then brought a action for money had and received to recover the excess. The defendant argued that the plaintiff was not entitled to recover, as he had voluntarily paid the sum. The court however held that the that this was not a voluntary payment, but one made under such compulsion that an action based on quasi-contract would lie. In other words the court in this case established the principle that when the defendant has property belonging to the plaintiff in his possession and refuses to surrender the same until the plaintiff pays a sum not legally due, the plaintiff may in order to obtain the property without delay, pay the sum in order to obtain the property without delay, pay the sum thus illegally demanded and then recover the amount in a quasi-contractual action.

A case involving a similar principle is that in which a public official illegally seized certain goods of the plaintiff. To induce him to surrender the goods, the plaintiff paid the sum to the official and it was held that he could recover the amount thus paid in an action for money had and received. In another case the plaintiff was conducting his raft through a river, and when he came near the boom of the defendant, which was erected under a charter from the state, he was unable to pass through the passageway left for that purpose, and by force of the wind and current his raft was driven out of the passage and stopped by the defendants boom. The plaintiff and his assistants immediately endeavored to free the raft from the boom and conduct it through the passage, which he succeeded in doing in three hours. Later the defendant demanded

of the plaintiff a certain sum, being the amount of the regular boomage for the raft, which the plaintiff refused to pay. The defendant thereupon stopped the raft until the plaintiff paid the sum demanded. The action was brought by the plaintiff to recover the sum thus exacted by the defendant, and the court held that the plaintiff was entitled to recover.

In a case involving common carriers, the defendant carrier agreed to carry goods from Boston to St Louis for a certain sum. At St. Louis the carrier refused to deliver the goods to the plaintiff until he paid a much larger sum, which the plaintiff did in order to get the goods. This was also held to be, as to the excess, not a voluntary payment, and so the plaintiff was allowed to recover for the same.

In another case the defendant held a promissory note of the plaintiff, an delivery service, which however the defendant knew was no longer enforceable because of a discharge of the plaintiff in bankruptcy. The defendant however began a proceeding to enforce the note, which on its face appeared to be enforceable, and at two o'clock in Monday morning he attached five vehicles belonging thereto, which had just been loaded with goods ready to start to deliver the goods to customers. The defendant's attorney told the plaintiff that he could not start until the sum sought to be recovered on the note was paid. The plaintiff thereupon paid the sum demanded on order to be able to proceed to delivery of the goods. In an action for money had and received he was allowed to recover the amount paid.

Money was paid to prevent illegal seizure of property for taxes then plaintiff sued the city to recover the sum of money paid to the city for taxes assessed against him when he was not liable for the same because he was a non-resident of the city. He paid the same under protest, in order to prevent a seizure of his person and property. Under Massachusets law it appeared that the tax officials had a right, in the case of a tax legally due, to seize summarily the person or property of the delinquent tax payer in order to collect the tax, and in this particular case the official had insisted that unless the plaintiff paid, he would proceed to act in pursuance of this law. The plaintiff was held entitled to recover the sum so paid. There is some discussion in these cases as to the necessity of protesting against the collection at the time payment is made in order to be able to recover in a suit against the official, but it seems clear that where the officer seizes the goods under color of process, as in the case just cited, no formal protest be necessary. The safe way however, in such a case, is to protest formally against the payment, stating to the officer that you do so only for the purpose of preventing the seizure of your goods, or of recovering the possession if they have already been seized, and not for the purpose of paying the tax, and further that you expect later to sue and recover the sum paid. In that case there can be no doubt of the recovery.

In all cases of this kind it must appear that the plaintiff made the payment under the threat and compulsion of the process. For example, a recovery was denied in a case which the plaintiff, having been arrested by the collector for not paying the tax, was released on agreeing to pay the same, and then at the end of the of the week did pay the amount alleged to be due. It was held that the compulsion of the imprisonment had ceased to act and that therefore the payment fell under the class of voluntary payments.

In a early New York case the plaintiff had hogs at a distillery and had failed to pay the rent when due, whereupon the landlord, in the exercise of his common-law right of distraint, seized the hogs belonging to the plaintiff as security for the payment of the rent due from the defendant. At common law the landlord had the right to make a seizure of this kind, that is, the landlord as security for the rent due, was entitled to seize and hold chattels on the land, even

though they were not the property of the tenant but of someone else. In order to secure the return of his property, the plaintiff paid the rent to the landlord, and in this action sues to recover the sum so paid on the ground that it was money paid by the plaintiff to the use of the defendant. Following a celebrated English case decided earlier, the court allowed the recovery.

The plaintiff a common carrier and by mistake delivered property to the defendant instead of to the consignee. The defendant thereupon appropriated the property to his own use by selling the same and receiving the money for it. The plaintiff, the carrier, admitting its mistake, paid the consignee the value of the property and brought a action against the defendant for money paid to the use of the defendant. It is needless to say that the plaintiff recovered, the court holding that the payment by the carrier to the consignee was not a voluntary payment, but one made in pursuance of a legal duty. In another case the plaintiff was also a common carrier, and the defendant refused to receive a horse which the plaintiff had carried for him unless they would let him have it without paying what was due them, which they of course refused to do. The plaintiff thereupon sent the horse to a livery stable and paid the livery stable keeper the charges for boarding the same. The plaintiff was allowed to recover the sum so paid, from the defendant, although it was clear that the defendant could not have been sued for the sum in question by the livery stable keeper.

In the next class of cases with which we will deal, it is assumed that no compulsion of law, or duress, legal or equitable exists. The first rule in connection with the subject of the present chapter is that one who voluntarily plays the part of intermeddler, "an officious intermeddler" as he is often called, gets nothing for his pains. Take the simplest case: If A owes B a sum of money and C voluntarily and without the request or knowledge of A, pays B this sum for A; while the effect of this is to discharge the obligation from A to B, C acquires no right of reimbursement from A. Another simple case is where one intending to make a gift transfers property to another. He cannot of course, subsequently change his mind and recover the value of the property in quasi-contract. An early case in 2 of English Chancery Reports 409 the plaintiff was paying attention to a young lady, hoping to marry her, and while doing so made her presents worth about 120 pounds. She married another man and the plaintiff sued to recover the value of the presents, but it was held that he could not.

This past article was not intended to give a throught run down on quasi-contracts but was intended to give you a little back ground on how the law has evolved into and help create the public trust. As we progress on with our insight, we will see that the single most important aspect of our Constitutional Republic was the separation of powers and that the public trust destroyed those separated powers.

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