TRUSTS AND DUTIES OF TRUSTEES

CHAPTER I

ORIGIN AND HISTORY OF EXPRESSED TRUSTS

§ 1. Origin and History of Uses. It has always been the policy of our system of law that property should be freely transferable. In the twelfth century so much land had been given to religious corporations and thus taken from the land market, that Parliament in 1217 passed the Statute of Mortmain (dead hand) forbidding the holding of land by such bodies. To evade this statute, it became the custom to convey property to a friend of the religious body who allowed the corporation to use the property as if it were theirs absolutely. At first his obligation to do this was a merely moral one, but about 1450 courts of equity, whose chancellors were often ecclesiastics, gave a remedy against him if he did not carry out his obligation. The person holding the legal title in this way was called the *feoffee* (to use) and the beneficiary was called the *cestui que use,* an old French Latin term, meaning "the one for whom the use was held." Once established, uses were employed for other purposes. Since the law of forfeiture of property for treason applied only to the legal title and not to the equitable "use", it became common for the nobility of England, who were frequently engaged in civil wars, to convey the legal title of their land to some humble non-combatant, to hold for the use of their families, and thus avoid the loss of their property to their families, if they should be defeated in war and afterwards tried and convicted of treason.

§ 2. Statute of Uses and Its Effects. The employment

of uses became very common and led to many evils; e. g., the creditor of the *cestui que use* could not reach his interest to satisfy their claims; his widow got no dower; conveyances were frequently made for fraudulent purposes; and land titles became unsettled. Parliament again interfered in 1534 by passing a statute called the Statute of Uses, which was intended to put an end to these evils. It provided that whenever *A* should be seized to the use of *B*, the legal title should be adjudged to be in *B* and not in *A*. This was called "executing the use". The statute was effectual, at least for the time and as far as it went, in preventing the separation of the legal title and the equitable interest; but the chief importance of this statute was the unforeseen one that it was employed to make conveyances, that is, after the Statute of Uses was passed. To convey a legal title it was necessary merely to create a use in the person to whom it was wished to convey the estate. The Statute of Uses then operated to give him the legal title.

§ 3. Uses Not Affected by the Statute of Uses. The statute was construed as not affecting uses in personal property, uses for married women, and those uses where the *feoffee* to uses had active duties to perform; these active uses came to be called "trusts", to distinguish them from uses which were so important in the law of conveyancing. Several years later it was held that if land were conveyed to *A* to the use of *B* to the use of *C*, the Statute of Uses could operate only once, that is, in favor of *B;* then the legal title was in *B* to the use of *C*. The courts recognized this second use, calling it a passive trust to distinguish it from uses which were executed. As we shall see later these passive trusts in land have in some jurisdictions been abolished. The subject of express trusts thus covers active trusts in both real and personal property, and passive trusts in personal property which were unaffected by the Statute of Uses, and passive trusts in land which have originated since the Statute of Uses.

§ 4. Ways in Which Express Trusts May Be Created. Express trusts may be created in either of the following

ways: (1) *A* conveys property to *B* in trust for *A;* (2) *A* conveys property to *B* in trust for *C;* (3) *A* declares himself trustee of property for *C*.

The one who holds the legal title in trust is called the trustee; the beneficiary of the trust is usually called the *cestui que trust,* in order to distinguish him from other beneficiaries, such as beneficiaries of contracts and beneficiaries of bailments. The words "*cestui que trust*" mean "the one for whose benefit the trust exists."

§ 5. Express Trusts a Part of Equity Jurisdiction. The subject of express trusts is a part of equity jurisdiction, the *cestui que trust* always having the right to proceed in equity against his trustee for a breach of the latter's obligation. The topic is also closely related to the subject of property because there can properly be no trust unless there is trust property. The subject of express trusts bears a close analogy to contracts in that—with one exception to be noted later—a trust does not arise unless all the essentials of a contract are present.

§ 6. Advantages of Trusts at the Present Time. Where the parties who are entitled to the beneficial ownership of property are incompetent, by reason of infancy, insanity, etc., to manage it themselves, it is quite advantageous to have it managed for them by trustees. Even where the parties are competent, it is sometimes considered advantageous—especially in cases of large estates left by an ancestor to several heirs—to keep the property together as a unit by means of creating a trust. Public or charitable purposes such as hospitals, schools, universities, etc., could not be carried out except by means of a trust.

§ 7. Two Meanings of the Word "Trustee." The word "trustee" is sometimes used in a very broad sense, including other fiduciaries such as bailees, executors, and administrators, etc., but in this article it will be used in the narrower sense, and the term "fiduciary," meaning one in whom peculiar confidence is reposed, will be used when the broader meaning is intended.