

CHAPTER III

NATURE OF CESTUI QUE TRUST'S INTEREST

CLAIM PURELY EQUITABLE, EXCEPT WHEN ACCOUNT WOULD LIE AT COMMON LAW

§ 48. **Cestui's Remedy Against the Trustee.** The subject of express trusts is a part of equity jurisdiction; the *cestui* may always bring a bill in equity against the trustee for an accounting, and need not proceed at common law even where he might do so. There is only one class of cases where he may proceed at common law for a breach of trust, viz, where, either by the terms of the trust, or by stating an account to the *cestui* the trustee's sole duty is to pay over money. In early times the proper common-law action in this class of cases was the action of account; but because of its clumsiness and costliness it has practically become obsolete in most jurisdictions and has been superceded by the action of debt—if the amount is certain—or by the action of *indebitatus assumpsit*.¹

In *Norton v. Ray*,² the *cestui* brought a common-law action against the trustee for the value of the trust property which the trustee had wrongfully conveyed to X. The court held that the *cestui* must proceed in equity. If it had been the duty of the trustee to sell and convey the property and hand over the proceeds to the *cestui*, then the latter could have maintained a common-law action for such proceeds after they had been received by the trustee-account or *indebitatus assumpsit*.

§ 49. **Liabilities of Trustee in Covenant and Special Assumpsit.** If the trustee should execute an instrument under seal promising to carry out the trust, the *cestui* may, if he prefers, sue the trustee in the common-law action of covenant, which is the appropriate action upon sealed instru-

¹ For nature of these actions see article on Common-Law Pleading.

² 139 Mass., 230.

ments. In such a case the *cestui que trust* has his choice of remedies and is not barred from suing in equity.

If the promise to perform the trust is not under seal, special *assumpsit* would logically be allowed against the trustee wherever there was consideration for the promise. But the jurisdiction of equity over express trusts was so well settled before the action of special *assumpsit* came into general use that the latter action was practically never brought.

§ 50. The Trustee May Recover Against the Cestui in Ejectment or in Trover. The legal title being in the trustee, he may recover at common law against the *cestui* in ejectment for the trust land or in trover for the trust chattels. The *cestui's* only remedy is by getting a decree in equity forbidding the trustee to continue with his action at common law. In some jurisdictions, however, by statute a *cestui que trust* has been allowed to plead his equitable interest in the common-law court and, therefore, does not need in those jurisdictions to resort to a bill in equity.

Conversely, a *cestui* can not succeed in ejectment or in trover against his trustee, but must resort to a bill in equity.

**CESTUI QUE TRUST IS CLAIMANT AGAINST TRUSTEE—
NOT OWNER OF THE TRUST RES**

§ 51. Cestui's Claim Enforcible Regardless of the Situs of the Trust Property. If a *cestui* wishes to sue his trustee it is not necessary that the court in which the suit is brought shall have jurisdiction of the trust property, or *trust res*, as it is usually called—a Latin term meaning thing or property. In the *Earl of Kildare v. Eustace*,³ the defendant was trustee for the plaintiff of some land in Ireland; and the defendant being in England, the plaintiff brought suit against him in an English court. It was held that the court had jurisdiction, since the decree of a court of equity was in the nature of a command to the defendant and only affected the trust property through the carrying out of such commands; hence, it was not necessary that the trust property be in England.

³ 1 Vern., 405.

§ 52. **Jurisdiction of the Property Alone not Sufficient for the Enforcement of Cestui's Claim.** Not only may the *cestui* sue the trustee wherever he can get jurisdiction of him but he must do so there if at all; jurisdiction of the property alone is not enough. This frequently works a hardship upon the *cestui* and, therefore, in some jurisdictions, for example, in Massachusetts, the legislature has vested in the court the power to confiscate in such cases the trustee's title to land lying within the State and invest it in a new trustee. In *Felch v. Hooper*,⁴ the court said:

“Upon the facts stated in this bill, the land in question is charged with an implied trust in plaintiff's favor and the court is not powerless to enforce that trust merely because the parties holding the legal title are beyond its reach. It is said that the courts of equity will not allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint by a statute which provides that when a person, seized of an estate upon a trust express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the object of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require.”

§ 53. **Remedies of the Cestui. Common-Law Remedies of the Cestui Against Third Person.** As has been already pointed out, the legal title to the trust property is in the trustee, if it is property of which you can predicate legal title. Where the property has been wrongfully interfered with by a third person, the trustee, therefore, and not the *cestui* is the proper party to sue the third person for such wrongful interference. Thus if the trust property, being chattels, is wrongfully taken and converted by X, the trustee and not the *cestui* is the proper party to bring the action of trespass, trover, or replevin. If the trust property is land and X wrongfully withholds possession, the trustee and not the *cestui* is the proper party to bring ejectment.⁵

⁴ 119 Mass., 52.

⁵ *Rice v. Brown*, 77 Ill. 549.

In *Bailey v. New England Mutual Life Insurance Co.*,⁶ the defendants in their policy had agreed to pay the amount of the insurance to the insured's executor for the benefit of the widow. It was held that the executor and not the widow was the proper party to sue on the policy, the court saying:

“The principle is that in policies of this kind the executor becomes a trustee under an express trust, and the legal title being in him, he can maintain an action in his own name against the company. It, therefore, necessarily follows that the *cestuis que trust* cannot maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts and renders the practice simple and uniform. To allow *cestuis que trust* to maintain actions in their own name might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to resort to a bill of interpleader to ascertain the equitable rights of the parties.”

§ 54. Remedies Against Third Person in Equity. Meaning of Equitable Title. If the wrong done to the trust property by X is of such a nature that the proper remedy against him is in equity, here also the trustee and not the *cestui* is the proper party to sue. Thus, if X should induce the trustee by fraud to convey trust land to him, the trustee and not the *cestui* would be the proper party to bring a bill in equity for reconveyance.

It is frequently said that the *cestui* has the “equitable title” to the trust property. This does not mean, as we have just seen, that he may sue third persons in equity for wrongs to the trust property; it means merely that it is the duty of the trustee, in equity, to manage the trust property for the benefit of the *cestui*. For this reason it is better to use the phrase “equitable interest” than “equitable title”. Strictly speaking there is no such thing as “equitable title”.

§ 55. Remedy of Cestui Que Trust If the Trustee Refuses to Sue the Third Person. Since the trustee is the proper

⁶ 114 Mass. 177.

party to sue for wrongs to the trust property, it is obviously his duty to do so. If he should refuse or fail to perform this duty, the *cestui's* remedy is to bring suit against the trustee and get a decree from a court of equity compelling him to bring the appropriate action in law or suit in equity against such third person. If the third person is within the jurisdiction of the court where the *cestui* brings his bill against the trustee, the *cestui* may have the third person joined with the trustee as a codefendant and thus both suits will be settled in one. This principle of thus avoiding multiplicity of suits is a fundamental one in equity jurisprudence. The *cestui* can not, however, sue the third person without joining the trustee, unless the latter should be beyond the jurisdiction of the court. In *Morgan v. Kansas Pacific Railway Co.*,⁷ the courts said:

“Lewis, being the trustee, is the proper party plaintiff in a suit of this character, and some good reason must appear of record why he does not sue as plaintiff; and, in such case, he must be made defendant. . . . The averment as to the request to Lewis to bring suit is controverted, but it is not proved on the part of the plaintiff. It would be necessary to prove it even though Lewis were served with process or appeared. It is not alleged in the bill that he is beyond the jurisdiction of the court, nor is that fact proved.”

§ 56. Suits by Third Persons Against Trustee. Suits whether at law or in equity brought by a third person with respect to the trust property are properly brought against the trustees only. There is, however, one exception to this rule in some jurisdictions on the ground of policy. If a suit is brought to foreclose a mortgage on the trust property, the *cestui* is required to be joined with the trustee as party defendant so that he may be assured an opportunity to raise the money to prevent foreclosure.⁸

§ 57. Burdens of Ownership Fall upon Trustee. Unless the taxing statute provides otherwise, the trustee and not the *cestui* is personally liable for the taxes on the trust

⁷ 15 Federal Reporter, 55.

⁸ *Francis v. Harrison*, 43 Chancery Division, 183.

property, and in case of personal property it is usually taxable at the residence of the trustee. In *Latrobe v. Mayor and City Council of Baltimore*,⁹ the court said:

“That taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title we do not doubt, for at law the legal estate in the hands of a trustee has the legal incidents and obligation of an absolute title, subject only to the claims in equity of the *cestui que trust*.”

The trustee is also liable for a nuisance on trust land. In *Schwab v. Cleveland*,¹⁰ the plaintiff, an adjoining land owner, brought an action against the defendant for injuries done to plaintiff's premises by the escape of water from a leader upon the house, the legal title of which was in the defendant. The courts said:

“There is no force in the objection, that the defendant can not 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 being suffered to get in bad repair. Whether as between himself and beneficiary he can collect the damage from the trust estate is a question not now before us.”

This question as to the right of the trustee over against the trust estate for reimbursement in case he is compelled to pay will be discussed in a later chapter.

§ 58. Remedy of Cestui Que Trust Who Is in Possession of the Trust Res. Although the *cestui* as such has no direct remedy against the third person, yet if he is in possession of the trust property, he may bring whatever remedies are proper for the violation of such possession. Thus, a *cestui* in possession of land may maintain trespass for an unlawful entrance by a third person.¹¹ A *cestui* in possession of the personal property of the trust estate may maintain trespass, trover, or replevin against a wrongful taker.¹²

§ 59. Remedy of Trustee against a Joint Wrongdoer. In *Wetmore v. Porter*,¹³ the plaintiff trustee had wrongfully conveyed the trust property to the defendant with

⁹ 19 Md. 13.

¹⁰ 28 Hun. 458.

¹¹ *Cox v. Walker*, 26 Me. 504.

¹² 28 Ga. 469.

¹³ 92 New York, 76.

intent to defraud the *cestui*. To an action brought to get back the trust property so conveyed, the defendant set up the defense that the trustee was himself a wrongdoer and, therefore, not entitled to maintain the action. The court refused to sustain this defense, saying:

“We see no reason why a trustee who has been guilty of even an intentional default is not entitled to his *locus penitentiae* (place of repentance) and an opportunity to repair the wrong which he may have committed.”

The trustee's right to get back the trust property in such a case would, however, be lost if before bringing suit against his confederate the *cestui* should sue him for his breach of trust or should sue the confederate himself. As will be seen later, the *cestui* may in such a case sue the confederate directly and have him declared a constructive trustee of the property, since the confederate received the property from the trustee with notice of the trust.

§ 60. Cestui Barred by Laches of Trustee. Since the trustee is the proper party to sue the third person with respect to wrongs committed on the trust property, it follows that if the trustee is barred by delay in bringing suit therefor, the *cestui* will also be barred. In *Wych v. East India Company*,¹⁴ *A* had a claim against the defendant, and died leaving the plaintiff, at the time an infant of tender years, as his heir. *B* was appointed trustee for the plaintiff, but failed to bring suit on the claim before the Statute of Limitations had run. The plaintiff, after reaching majority, brought suit; but it was held that since *B*, the trustee, was barred, the plaintiff was also barred and could not take advantage of the exception in the Statute of Limitations in respect to suits brought by infants. A converse proposition would be found in a case in which, if the trustee were under disability—such as infancy, coverture or insanity—the exception in the statute would apply and thus the *cestui* would ultimately reap the benefit thereof even though he himself were not under any disability.

¹⁴ 3 Peere Williams, 309.

§ 61. Cestui Cannot Vote as Owner of the Trust Property. Where stocks in a corporation are held in trust, the right to vote as owner is in the trustee and not in the *cestui*, unless provided otherwise by statute or by-law of the corporation.¹⁵ It is, however, the trustee's duty to vote as the *cestui* directs—if the *cestui* is *sui juris*; and if irreparable damage would be likely to result from voting against the wishes of the *cestui*, the latter could enjoin his so voting.¹⁶

§ 62. Cestui Que Trust of an Obligation Can Not Discharge the Obligor. As pointed out in the preceding paragraph, obligations, that is, choses in action, may be held in trust; and the trustee and not the *cestui* is the proper party to sue the obligor thereon for the purpose of collection. Furthermore, the trustee and not the *cestui* can make a release of the obligation which will be valid at common law. Suppose *T* holds an obligation—*e.g.*, a note for \$1,000—against *O* in trust for *C*; *T* may make a release valid at common law, but if it were made wrongfully in fraud of the rights of *C*, *C* could compel *T* to sue *O* on the obligation and enjoin *O* from setting up the release, unless *O* had paid value for the release without knowing that the release was a breach of the trust.

On the other hand, if *O* has been released by *C*, it is no bar to an action at common law by *T* upon the obligation. If, however, *C* is *sui juris* (of full right) and, therefore, legally capable of making a release, *O* may get an injunction against *T*'s bringing or further pursuing the common-law action. This injunction is based upon what is called avoiding circuitry of action; that is, if *T* were allowed to recover against *O*, *T* would then be bound as trustee to pay the amount of recovery over to *C*, his *cestui que trust*, and *C*, having released *O*, would be bound to pay the amount so received to *O*; consequently the parties would be in the same position as when they started. Equity, to avoid this useless circuitry, will give an injunction and stop the first suit.

¹⁵ *Re Barker*, 6 Wendell, 509. ¹⁶ *McHenry v. Jewett*, 90 New York 58.

§ 63. Purchaser of Trust Property Not Bound to See to the Application of the Purchase Money. If a trustee has, by the instrument creating the trust or otherwise, the power to sell or convert the trust property into money, is the purchaser bound to see that the trustee properly applies the purchase money? It was formerly held that he was so bound, in equity, so that if the trustee misapplied the purchase money the *cestui que trust* could compel the purchaser to pay it over again. This doctrine was a very inconvenient one; and at the present time it has been changed by statute or decision practically everywhere, so the present rule is that the purchaser may safely pay the trustee unless he knows that the trustee may misapply the money.

§ 64. Set-Off between Obligor and Trustee. Equitable Set-Off. In the very early law, if *A* sued *B* on one cause of action and *B* had another cause of action against *A*, *B* could not use this in any way as a defense, but was compelled to bring a separate suit. During the past century and a half, however, statutes have been generally passed, allowing *B* in such a case to set off his claim against *A*'s claim (provided both claims are for liquidated or fixed amounts); and thus in many instances both causes of action can be settled in the one suit. Now suppose *T*, having an obligation for \$1,000 against *O* in trust for *C*, sues *O*; *O* has a personal claim against *T* for \$800. May *O* set off this \$800 claim and thus reduce the recovery to \$200? He may, at common law, because the statute of set-off has been construed to apply to the parties to the record. If, however, *O* knew of the trust at the time that he became bound to *T*, equity will, at the suit of *C*, enjoin *O*'s relying on his set-off.

Conversely, if *O*, instead of having a claim against *T*, had a claim of \$800 against *C*, he could not plead it by way of set-off at common law, because *C* is not a party to the record; that is, the action is brought in the name of *T* and not in the name of *C*. But equity, which looks to the real parties in interest, has allowed *O* to take advantage of the \$800 claim; this is called equitable set-off.