

# The Right of the Beneficiary to Specific Items of the Trust Fund

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Where, under a settlement, a house and furniture are vested in trustees for *A* for life with remainder to *B*, the position at common law is simple. The trustees own the property jointly, and have the same rights in respect to it as other co-owners. But courts of equity compel them to use the property for the benefit of *A* and *B*. How far can the latter be said to own the house and furniture in equity?

When the Chancellor first enforced the use in the Middle Ages,<sup>1</sup> the answer was, "Not at all". The Chancellor merely proceeded against the trustee who did not fulfil his moral obligation, so as to purge his conscience; the accent was on the duty of the trustee, not on the correlative right of the beneficiary. Later, not only the trustee, but also people to whom he gave the property,<sup>2</sup> or who bought it knowing of the trust, would also be compelled to perform it. Since the only factual connection between the beneficiaries and such people was the common-law ownership by the latter of "property impressed with a trust", the juridical relationship must be based on this ownership, and to this extent the beneficiary's right may be said to be real,<sup>3</sup> based on the specific trust *res*. But, on the other hand, if the trustees sold the house and invested the proceeds, equity allowed the beneficiary to trace the trust fund into the property for which it had been exchanged,<sup>4</sup> even where the investment was unlawful. Here the beneficiary's right against the trustee is not

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<sup>1</sup> See A. W. Scott, *The Nature of the Rights of the Cestui que Trust* (1917), 17 Col L Rev. 269, at pp. 280 *et seq.*

<sup>2</sup> For a modern example of this, see *Re Diplock*, [1948] Ch. 465, at pp. 502-3 (C.A.). The H L. judgment proceeded on a somewhat different basis, though the C A reasoning was approved.

<sup>3</sup> For other meanings of the word see Hohfeld, *Fundamental Legal Conceptions* (1923) pp. 68 *et seq.*

<sup>4</sup> Keeton, *Trusts* (6th ed., 1954) pp. 368 *et seq.*

to the actual house, but to due administration of the fund which the house temporarily represented.<sup>5</sup>

This antinomy between the beneficiary's right to the house and furniture, on the one hand, and to due administration of the fund, on the other, lies at the basis of our problem: for some purposes it is important to know whether the trustee has sold the house and invested the proceeds in, say, consols: for others it is immaterial. In the absence of a trust for the sale or purchase of land, the character of the actual trust assets will determine whether *A* and *B*'s interests are realty or personalty; whether the rule in *Howe v. Lord Dartmouth* applies; whether the beneficiaries are legally liable for tax on income not received in the United Kingdom.<sup>6</sup> It has even been held that for some purposes the beneficiary under a trust for sale,<sup>7</sup> or even a discretionary<sup>8</sup> trust of land, has an interest in land. Despite the doctrine of conversion, this had unfortunately been extended to the conflict of laws distinction between movables and immovables.<sup>9</sup>

The purpose of this article is to consider some of the purposes for which the beneficiary is treated as having an interest in the actual house and furniture and to try to find any general principle underlying the apparently inconsistent cases. It will be submitted that the line should be drawn according to principles of justice and convenience; usually where the mechanical side of the trust is in issue, it is the beneficiary's right to due administration that prevails,<sup>10</sup> but that in economic problems one should ignore the technicalities and treat the beneficiary as owner of the trust funds. But the second half of this suggestion is more complicated where there are several beneficiaries, or some items of which the fund is composed have not been ascertained.

There are three main types of trust to be considered: firstly, the administration of a deceased's estate, where no residuary beneficiary can point to particular assets that will come to him, as the personal representative may appropriate any to his co-beneficiaries.

<sup>5</sup> The first person to emphasize the importance of the fund in the common-law concept of a trust was Lepaule, *Traité de Trusts en Droit Interne, en Droit Fiscal et en Droit International* (1st ed., 1931). He thinks of the trust not as a "personne morale" but as a "patrimoine affecté".

<sup>6</sup> *Baker v. Archer-Shee*, [1927] A.C. 844, footnote 77 *infra*.

<sup>7</sup> Cases cited in Glanville Williams, *Interests and Clogs* (1952), 30 Can. Bar Rev. 1004, also pp. 530 *et seq. infra*.

<sup>8</sup> *Att.-Gen. v. Heywood* (1887), 19 Q.B.D. 326; followed *dubitante* in *Att.-Gen. v. Farrel*, [1931] 1 K.B. 81 (C.A.); not followed in *Re Bibby & Sons Ltd.*, [1952] 2 All E.R. 483.

<sup>9</sup> Footnote 100 *infra*

<sup>10</sup> But see the tracing orders in *Re Hallet's Estate* (1879), 13 Ch D 696, and *Re Diplock*, *supra* footnote 2

Even the hopes of a specific legatee may be defeated by a sale for the benefit of creditors. In such a situation it is hard to see how the beneficiary can be treated as equitable owner of the particular assets for most purposes: he is merely entitled to due administration of the deceased's estate. The second type of trust occurs where beneficiaries are interested under a trust for sale. In this case, the beneficiary is more likely to enjoy the trust assets in specie, as the fund has been ascertained; the assets cannot normally be sold to pay the creditors of the settlor or be appropriated to satisfy the claim of another beneficiary. Often the settlor is far from intending that the funds should be sold, the trust for sale being mere machinery to facilitate distribution, either concurrently or successively. One might expect, then, that the beneficiary might be held to have an interest in the actual assets for rather more purposes than in the case of the administration of a deceased's estate. Where the trust is not one for sale or part of an administration of an estate, it can hardly be an abuse of language to call the beneficiary the equitable owner of the specific trust assets.<sup>11</sup> However, without calling for a transfer of the assets and determining the trust, he cannot direct the trustee how his discretions should be exercised.<sup>12</sup>

#### *The Situs of the Beneficiary's Interest*

No distinction is made between these three types of trust in determining the situs of the beneficiary's interest. There is a general principle of the conflict of laws that a chose in action is situated where the obligation can be enforced, usually the residence of the debtor.<sup>13</sup> But an interest in land can be enforced only where the land is. Should a trustee or personal representative resident in England hold as part of the estate of a settlor or testator domiciled outside England foreign land on trust for *A*, the question arises whether *A*'s interest is in the foreign land, situated there, or whether, since he has a right to due administration enforceable against the trustee, his interest is situate either where the principal administration is being carried on or where the trustee is resident or domiciled<sup>14</sup>—England. The problem has mainly arisen under various

<sup>11</sup> Each of these three cases can be sub-divided according to whether there is more than one tenant for life. Where there is not, the interest of the life beneficiary is more specific and indeed dividend mandates are often given in favour of such a beneficiary.

<sup>12</sup> *Re Brockbank*, [1948] Ch. 206.

<sup>13</sup> Falconbridge, *Essays on the Conflict of Laws* (1st ed., 1947) Chap. XX, pp. 421 *et seq.*

<sup>14</sup> But there is little to be said in favour of the trustee's domicile: a chose in action is situated where it can be enforced. A trustee would normally be sued where he resides.

statutes, especially the Finance Act, 1894, section 2(2), which renders property within the United Kingdom liable for death duties.

In *Sudeley v. A. G.*<sup>15</sup> the House of Lords decided that for this purpose the interest was situate in England. In that case, *H* died domiciled in England, leaving a share of his residuary estate, which included mortgages in New Zealand, to his widow absolutely. She died while the estate was still being administered and her personal representatives claimed that, as to a share of the value of the mortgages, her estate was not liable to probate duty, as being property situate outside the United Kingdom. But the House of Lords held otherwise. Lord Halsbury said<sup>16</sup> that, to see to what the widow was entitled, one must use strict language. Until the administration was complete, it was uncertain of what the trust fund would consist,

and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say 'I will have this or that part of the assets' . . . Until the thing has been ascertained, until the trust fund has been constituted, the thing of which the trustees are the trustees has not been ascertained.

All the widow had was a right to sue the executors in England for due administration. The obligation of the trustees was a debt situate in England and probate duty was therefore exigible on all the property coming to the widow from her husband's estate. Their Lordships, in a decision binding on all courts, held that until the administration of the estate of a decedent is complete, the beneficiary has no right to specific assets, but only to due administration. And, what is as important in the present connection, Lords Herschell and Halsbury<sup>17</sup> suggested, obiter, that the same principle might apply where the estate had been administered and the trusts under the will were in operation.

The principle has been extended by the courts to interests under trusts for sale.<sup>18</sup> But recently these cases seem to have been ignored in cases where the court had to decide whether an interest under a trust for sale was in movable or immovable property. This depends on the *lex situs*. In *Re Cutcliffe*<sup>19</sup> Morton J. was careful not to decide by what criterion the situs was to be found, in considering succession to the proceeds of settled land, when the only non-English element was the deceased's domicile.

<sup>15</sup> [1897] A.C. 11.

<sup>16</sup> At pp 15 & 16

<sup>17</sup> At pp. 18 and 15 respectively

<sup>18</sup> *A G v Johnson*, [1907] 2 K.B. 885 (estate duty); *Re Smythe*, [1898] 1 Ch. 89 (probate duty)

<sup>19</sup> [1940] Ch 565, at p 571.

It seems to me clear that this investment, being debenture stock of a British company, and being capital moneys held by the trustees, resident in England, of a settlement of land in England made by the will of an English testatrix, must be regarded as being situate in England for the purpose of

deciding whether the interest there is in movable or immovable property.

It is submitted that the law creating the trust could have little to do with the situation of the interests given thereunder,<sup>20</sup> save in so far as it would be insular to apply the domestic concept of conversion where the proper law of the trust recognized no such doctrine. Presumably its application is one of the characteristics of the trust, which must be defined by the law under which it is created. But that leaves us with the choice between the residence of the trustees and the situation of the actual trust assets, as it is submitted that no case can be made out for the *lex situs* of the land which was sold, for the beneficiary certainly has no interest in that.<sup>21</sup>

*Re Mackenzie*,<sup>22</sup> however, seems at first glance to give the lie to this, for some purposes. There a lady, domiciled in the state of Victoria, came to England and was there certified as of unsound mind and a receiver was appointed to her property. Under an order of the English court, the receiver sold some of her land in New South Wales and invested the proceeds, which were remitted to England, in consols. Under the English Lunacy Act, 1890, section 123(1), the lunatic and her successors "shall have the same interests in money arising from any sale . . . under the powers of this Act . . . as he or they would have had in the property sold . . . if no sale . . . had been made". It had been held in an earlier unreported case that the consols devolved on the New South Wales heir,<sup>23</sup> but Morton J. held that the lunatic's interest was situate within the

<sup>20</sup> See Lord Greene M.R. in *Re Middleton's Settlement*, [1947] 1 Ch. 583, at p. 592, where he says that conversion under the Settled Land Act has nothing to do with location, but merely prevents a sale from affecting beneficial interests. As regards succession, however, it is submitted that his argument is fallacious, the situation of the beneficial interest would affect succession if the Irish and English rules differed on the matter and this might prevent the trustees from selling the land, or investing the proceeds outside Ireland. Cp. footnote 91 *infra*.

<sup>21</sup> In *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461, *Beaumont v. Oliveira* (1869), L.R. 4 Ch. 309, and *Rea v. Rea*, [1902] 1 Ir. R. 451, the land was not sold until the beneficiary's interest had accrued. But Rand J., in *M.N.R. v. Fitzgerald*, [1949] S.C.R. 453, at p. 461, footnote 37 *infra*, allowed the converse doctrine of conversion to affect the situs for tax purposes.

<sup>22</sup> [1941] Ch. 69.

<sup>23</sup> *Ibid.*, at p. 71. I shall read much into this first case, with only the facts and decision to work on. But it is submitted that there is a unique solution compatible with all that is known.

United Kingdom within the Finance Act, 1894. The first case seems to show that, as regards succession, the Lunacy Act does alter the situation of the beneficial interest. But this may be reconciled with what has been submitted already with the aid of the doctrine of *renvoi*. England was undoubtedly the situs of the interest enforceable against a receiver resident there to property there. But the *lex situs* included the Lunacy Act, which treats the consols as land and redefines the connecting factor,<sup>24</sup> and sends the court to New Zealand for the purpose of succession, but not for taxation purposes.<sup>25</sup> It is submitted that, despite first appearances, these cases are not inconsistent with *Sudeley's* case: in *Re Cutcliffe* it was not necessary to decide what element determined the situs, and in *Re Mackenzie* the different situs for different purposes is consistent only with the application of the Lunacy Act, which presupposes that the situs was England.

But as regards trusts not for sale, the position is not so clear. It appears from the unreported case of *Re Duff's Settlement Trusts*<sup>26</sup> that *Sudeley's* case does apply where there is a duty to convert an unauthorized investment. In *Favorke v. Steinkopff*<sup>27</sup> where English trustees held funds invested in Germany on the trusts of an English will, the beneficial interests were held to be "property, rights and interests" in the United Kingdom within the Treaty of Peace Order, 1919. In the earlier Australian case of *Re Graham Hood and Cussen JJ.*<sup>28</sup> ruled, in an alternative ground for their decision, that, the beneficiary's right being only to due administration of the trust, the situs of the specific funds did not affect the situs of her interest, which was in Victoria where the trustees resided.<sup>29</sup>

But on the other side of the line is the decision in *Re Haig*.<sup>30</sup> *T* died domiciled in America,<sup>31</sup> leaving her jewelry and the like to trustees, with power to sell, on trust to divide it into two parts, to be enjoyed by her daughters for life, and then by their respective children. When the administration was complete the trustees,

<sup>24</sup> But for one purpose only. The consols had already been characterized as land. New Zealand law was left merely to provide domestic rules of succession.

<sup>25</sup> Cp. Lord Greene M.R. in *Re Middleton*, [1947] Ch. 583, at p. 592, affirmed [1949] A.C. 418.

<sup>26</sup> (1935) in the Chancery Division

<sup>27</sup> [1922] 1 Ch. 174. See also *Watt's* case (1926), 38 C.L.R. 12, at pp. 35 and 36.

<sup>28</sup> [1918] V.L.R. 595, at pp. 605 and 606.

<sup>29</sup> The trust was also governed by Victorian law, but I fail to see why that should be relevant. The interest is Victorian because it is in that state that the trustees may be sued. See footnote 13 *supra*.

<sup>30</sup> (1922), 17 Annotated Tax Cases for 1938, p. 635 (C.A.)

<sup>31</sup> At p. 642, but Russell J. says at p. 635 that she was domiciled in England

who resided in New York, under a clause of the will allowed the daughters to enjoy the jewelry in specie, and on the death of one it was claimed that estate duty was not payable, as her interest in the jewelry (which was in fact in England) was situate outside the United Kingdom. But the Court of Appeal held that the duty was exigible. Russell J. pointed out, in the court of first instance, that the Finance Act was not concerned with the nature of the interest in property which passed on death, but the value of the property in which the interest was enjoyed.

In the Court of Appeal, Lord Sterndale M.R., after citing Russell J.'s statement<sup>42</sup> that the daughter had a beneficial interest in the chattels, expressly decided that, since the factual rather than the "notional" position was relevant, the property was situated in England. But if this is so, why not look behind the trust for sale in *A. G. v. Johnson and Re Smyth*? There is no suggestion that the Inland Revenue are trying to get it both ways, by saying that duty will be levied if either the assets or the trustees are in the United Kingdom. *Hag's* case cannot be distinguished on the ground that there was a sole tenant for life; she could not have determined the trust, as there were remainders over. It is submitted that the case cannot be reconciled both with the authorities on the same section as regards trusts for sale and with those concerning other statutes as regards simple trusts. But neither line of cases appears to have been cited to the court.

It is submitted, then, that the situs of the beneficiary's interest, in even a simple trust, is the residence of the trustees.<sup>43</sup> But what if the trustees are scattered all over the world? The problem has not yet come before the courts. In a case of administration, Green<sup>44</sup> prefers the forum of the administration to the residence of the trustees. This at first sight seems attractive, as it fits in with the general conflicts rule that an obligation is situated where it can be enforced. But what if parts of the estate, going to the same person, are situated in different countries? Usually probate must be taken out in each country. So we have either to fall back on the principal administration,<sup>45</sup> and personal representatives there may not be the representatives at the place where other assets are, or else we must say that in the case of each asset we must look to the adminis-

<sup>42</sup> At p. 643, confirmed expressly by Warrington L.J. at p. 647 and impliedly by Scrutton L.J. at p. 649.

<sup>43</sup> Footnotes 13, 14 and 29 *supra*.

<sup>44</sup> G. M. Green, *Death Duties* (3rd ed., 1952) p. 400, and also, as to trusts, p. 401, footnote 5.

<sup>45</sup> Where the deceased was domiciled. See Kerwin J. in *M.N.R. v. Fitzgerald*, [1949] S C R 453, at p. 457, [1949] 3 D.L.R. 497, at p. 500.

tration governing that asset. But until that administration is complete, no one will usually have a right to any specific asset. Further, the rule does not help us in the case of the ordinary trust. There seems to be no perfect solution to the problem. Personally, though with no great confidence, I should be inclined to see where the bulk of the trust business is transacted and, if any trustee is amenable to the jurisdiction there, call it the situs.<sup>36</sup>

### *Three Main Types of Trust*

#### (a) *The administration of a deceased's estate*

*Sudley's* case, based on the impossibility of ascertaining any beneficiary's share, has been widely followed and extended in Canada and Australia as well as in England. The Supreme Court of Canada in *M. N. R. v. Fitzgerald*<sup>37</sup> was faced with an almost identical problem. Canadian succession duty is exigible on the death of a person domiciled outside Canada only on property<sup>38</sup> situated within Canada. The facts, in a simplified form, were that *A* died domiciled in British Columbia, leaving a legacy charged on land in that province to *B*. Before *A's* estate was completely administered, *B* died, domiciled in California, leaving all his estate to *C*, who died in 1944, also domiciled in California. Letters of administration to *C's* estate were granted in California. The Canadian land was sold in 1945. Of course, Canadian duty would have been exigible on *A's* death as the land was there and, it might be, on *B's*, as his right was either to land in Canada or against personal representatives resident and administering there, but, as both *A* and *B* died before the succession duty legislation came into force, the point with respect to *B's* estate was not argued. Duty was, however, claimed on *C's* death, as at that time the land on which the legacy was charged was in Canada.

Kerwin J., who delivered a joint judgment with Rinfret C.J., analyzed the situation immediately before *C's* death: *C* had a right that *B's* estate should be administered and, although probate of *B's* will had been taken out in British Columbia, limited to property there, the main administration was in California where *B* was domiciled.<sup>39</sup> The chose in action representing the right to due administration was therefore situated in California. True, "in a

<sup>36</sup> See my paper, *A Trust in the Conflict of Laws* (1953), 6 *Current Legal Problems* 176, at pp. 190-2, for a similar problem.

<sup>37</sup> [1949] 3 D.L.R. 497; [1949] S.C.R. 453.

<sup>38</sup> Defined to include "property, real and personal . . . and every estate and interest therein", section 2(k).

<sup>39</sup> S.C.R. at p. 457; D.L.R. at p. 500.

loose and general way of speaking" *C* had an interest in the Canadian land,

but what is referred to in [the statute] is not such a nebulous interest but a proprietary interest, either legal or such an equitable one that is recognized by our Courts, and that [*C*] did not have. <sup>40</sup>

He appears to recognize that, in deciding whether the beneficiary has an interest in land, one should consider the purpose for which it is to be determined, as he distinguishes *Re Berchtold*<sup>41</sup> on the ground that "it is dangerous and misleading to attempt to apply conflict of laws cases to those of taxation".<sup>42</sup> *Rand J.* adopted a somewhat different approach in applying the maxim that equity regards as done that which ought to be done. The Canadian property must therefore be considered as sold by *A*'s personal representatives, and to be part of *B*'s estate and so situated in California where it is not liable to Canadian succession duty. *Sudeley*'s case has also been followed and elaborated in Australia.<sup>43</sup>

One problem that has not been completely solved is the date at which, for the purposes of the rule already suggested, the administration is considered to be complete. In *Re Young*<sup>44</sup> it was held to be incomplete when the executor had paid the deceased's debts, but had still to divide the estate between the beneficiaries. Owing to the sparsity of decisions on this point, it is tempting to argue on the analogy of the cases decided on the distinction between matters of administration, governed by the *lex fori*, and matters of succession, governed by the *lex situs* or *lex domicilii*, as the case may be. In *Re Kehr*<sup>45</sup> it was held that, where a beneficiary was under age and unable to give a valid discharge to the personal representative, the administration was incomplete and trustees, who would have all the powers of English trustees, including those of maintenance and advancement, could be appointed under the Administration of Estates Act, section 42, to administer the funds

<sup>40</sup> S.C.R. at p. 460; D.L.R. at p. 502.

<sup>41</sup> [1923] 1 Ch. 192; footnote 100 *infra*.

<sup>42</sup> S.C.R. at p. 458, D.L.R. at p. 501.

<sup>43</sup> *Glenn v. Federal Commissioner of Land Tax* (1915), 20 C. L. R. 490. Cf. *Re Farrell*, [1930] L.R. 101, where it was held that the right of the deceased to a share in land on the death of a person whose estate was not shown to be fully administered was personalty descending to his next of kin. This was extended in *Re Young* (footnote 44 *infra*), where it was held that the rights to a deceased's estate, which included land, not proved to be fully administered, went to the beneficiary's successor by the law of her domicile, rather than to those entitled by the *lex situs*. But where some time has elapsed since the death, it will be assumed that the administration is complete, *Baker v. Archer-Shee*, [1927] A.C. 844, at pp. 856 and 862.

<sup>44</sup> [1942] V.L.R. 4 (Martin J.).

<sup>45</sup> [1952] Ch. 26 (Danckwerts J.)

during the minority. *Re Wilks*<sup>46</sup> shows that, for the same purpose, the administration continues until the personal representatives can obtain a valid discharge, under the *lex fori*, to postpone the realization of the assets. However, it is submitted that the analogy is not helpful, and we should not be confused by the use of the word "administration" in either case. *Re Wilks* was concerned with avoiding the inconvenience of an English executor having to administer according to a foreign and perhaps unknown law, not with the nature of the infant's interest.

The nature of the beneficiary's right can be material in questions of construction of documents as well as of statutes. In *Vanneck v. Benham*<sup>47</sup> *H* had covenanted to transfer all after acquired property, other than furniture, to the trustees of his marriage settlement. On the death of his brother intestate, *H* became entitled to a share of his personalty, which included furniture. Younger J. had to decide whether *H* could arrange to take some of the furniture in specie and avoid the covenant. It was held that at the date of the brother's death, when the interest accrued, *H*'s right was only to due administration, so the whole of the share was caught by the covenant. The judge appears to have distinguished *Re Dickson*,<sup>48</sup> a case on trusts for sale, on the ground that in the earlier case there was a sole beneficiary.<sup>49</sup> However, it is the claims of creditors as well as those of co-beneficiaries that render the right non-specific. As the covenant was presumably concerned with beneficial ownership, rather than the technicalities of trust machinery, it is submitted that the decision was unfortunate. In 1917, however, inflation had not been so rapid as recently, and there was not the same tendency to prefer free to settled funds, to allow freer investment. Younger J. also distinguished *Cooper v. Cooper*<sup>50</sup> on the ground that, though such an interest might be sufficiently specific at the time it accrued to raise a question of election, it was not specific enough to allow a claim to any particular asset without agreement with the other people entitled.

In the line of cases which shows that several beneficiaries can elect whether to take the residue in specie, or to have it sold and the proceeds divided, the nature of the beneficiary's interest has been stated more than once. For instance, in *Re Holmes*<sup>51</sup> Barton J. said:

<sup>46</sup> [1935] Ch 645

<sup>47</sup> [1917] 1 Ch. 60.

<sup>48</sup> [1890] W.N. 10, 34 Sol. J. 181; footnote 72 *infra*.

<sup>49</sup> Contrast *Green, op. cit.*, p. 400, footnote 2; also footnote 87 *infra*.

<sup>50</sup> (1874), L.R. 7 H.L. 53; footnote 68 *infra*.

<sup>51</sup> [1917] 1 I.R. 165, at p. 167.

The interest of a next-of-kin in the unadministered estate of an intestate is a specific interest *sub modo*. It is sufficiently specific for some purposes, e.g., to be capable of being assigned or of being mortgaged, or of being made the subject of a binding agreement, or of raising a case of election.<sup>52</sup> But it is not sufficiently specific for all purposes

It is not sufficiently specific to prevent an administrator from realizing chattels real for the purposes of making a proper distribution.<sup>53</sup>

(b) *Trusts for sale*

The interest of a beneficiary under a trust for sale is one degree more specific, for though the assets may be sold to facilitate the holding or distribution of the property, there will be no liabilities, other than those for outgoing, and so no sale in favour of general creditors. Where all the beneficiaries agree, they will be able, if *sui juris*, to prevent a sale by determining the trust. And in the absence of special circumstances, those entitled absolutely can call for a transfer of an aliquot share of each asset, even though some shares remain settled—at any rate where substantially all the assets are invested in the same type of personalty.<sup>54</sup> Since the trust fund has been ascertained and segregated, the reasoning in *Sudeley v. A. G.* cannot apply, though the dicta of Lords Herschell and Halsbury in that case support its extension.<sup>55</sup> We might expect, then, that such an interest would be sufficiently specific for rather more purposes than that of the successor to the unadministered estate of a deceased. This is largely off-set, however, by the interest of the beneficiaries being, so to speak, once removed by the doctrine of conversion.

As regards liability to probate duty, *Sudeley's* case has been followed in *Re Smyth*.<sup>56</sup>

In *Gresham Life Assurance Society v. Crowther*<sup>57</sup> it was held that the mortgage of an interest under a trust for sale of land was not registrable under the Yorkshire Registries Act, 1884. Swinfen Eady L.J. said,<sup>58</sup>

In my opinion, the interest in question in this proceeding is not an interest in land within the meaning of the Act, nor is it within the mischief of the Act, and no entry on the registry could secure for it

<sup>52</sup> Or of coming within the Statute of Frauds, s. 4 (*Horton v. Jones* (1935), 53 C.L.R. 475).

<sup>53</sup> Per O'Connor M.R. in *Re Norwood and Blake's Contract*, [1917] 1 I.R. 472, at p. 483. See also *In the matter of the Land Act 1890*, [1911] V.L.R. 197; *Mitchell v. Hannell* (1885), 7 N.S.W. L.R. Eq. 53; *Kelly v. Toohey* (1900), 21 N.S.W. L.R. Eq. 53; *Blake v. Bayne*, [1908] A.C. 371, at pp. 383-4 (J.C. P.C. from H. Ct. Aust.).

<sup>54</sup> *Re Marshall*, [1914] 1 Ch. 192.

<sup>55</sup> Footnotes 15 and 16 *supra*.

<sup>56</sup> [1898] 1 Ch. 89, footnote 18 *supra*.

<sup>57</sup> [1915] 1 Ch. 214.

<sup>58</sup> At. p. 227.

any priority over a prior incumbrancer who had given notice to the trustees.

This decision, concerned as it was with conveyancing machinery, cannot be impugned, although the 1884 act was not confined to dealings with the legal estate.

A somewhat less fortunate decision was that in *Parker v. Rosenberg*,<sup>59</sup> where the Court of Appeal held that the sole tenant for life under a trust for sale was not a "person . . . who is or would but for this Rent Restriction Act be entitled to possession of the dwelling house" forming part of the trust property, within section 12(1) (g) of the 1920 act, and so she was unable to recover possession on the ground that her hardship was greater than the tenant's. This seems a hard case. It is well known that the rent acts were hastily drafted as a temporary measure, and so surely they should be interpreted liberally, with a constant eye on the mischief they were intended to diminish. The trustee was a party to the action, so between them the plaintiffs had the complete legal interest in the house.

It may be objected that this reasoning begs the question, in as much as the trustees own the legal estate in the land and the beneficiaries the equitable interest only in the proceeds of sale, the beneficial interest in the land being *in nubibus*. But this type of merely logical reasoning does not seem to have found favour in the courts. In *Pearson v. Lane*,<sup>60</sup> there was a conveyance to trustees to sell and purchase other estates. The person equitably entitled in fee to the estates to be purchased agreed to partition of the lands conveyed to the trustees. On an objection to the title, Sir William Grant M.R. said:<sup>61</sup>

It is true, in the estate to be sold, they had no interest legal or equitable, expressly limited to them: but the equitable interest in that estate must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *Cestui que trust*. . . The daughters . . . had in this trust estate an equitable interest, of the same extent with that which they would have had in the purchased estate, if a purchase had been made.

The contract amounted to election to take the land in specie and the contract to partition was specifically enforced.

It was admitted (in *Parker v. Rosenberg*) that possession could not be obtained on the ground of the trustee's hardship as he cannot benefit from the trust. So the effect of the decision is to nullify

<sup>59</sup> [1947] K.B. 371.

<sup>60</sup> (1809), 17 Ves. 101.

<sup>61</sup> At pp. 104-5

the provisions for obtaining possession on this ground, where there is a trust for sale. It is submitted that no such intention can be attributed to the legislature, which was dealing with a social not a conveyancing problem. On what ground of policy should the machinery of the trust for sale take away the original right of the settlor to possession on this ground? In construing social legislation, the *cestui* should be regarded as having the beneficial interest in the house.

*Re Donkin*<sup>62</sup> was concerned with a statutory trust for sale, under which *A*, a person of unsound mind, was entitled. It was held that, although the trust funds included land, *A* had no "beneficial interest in real estate" within the Administration of Estates Act, 1925, section 51(2): a sensible result because the purpose of the section seems to be to preserve the interest of the heir, always rather specially treated in English land law. It might be thought that the new rules for intestate succession are not so fundamentally different from the old ones relating to personalty, but that the substitution of several beneficiaries, as regards realty, differed so fundamentally from the succession by the sole heir as to make it unfair to impose such a change on one who might have refrained from making a will while still sane, because he approved of the intestate succession rules. This explanation is supported by Sir Raymond Evershed M.R. in *Re Bradshaw*.<sup>63 64</sup>

On the other hand, it has been held that for some other purposes the beneficiary under a trust for sale has an interest in the individual trust assets. We will postpone discussion of the conflict of laws problem as to the effect of conversion on the distinction between movables and immovables, as it is too long to form a mere example. But the judgment in *Re Berchtold*<sup>65</sup> is nonsense unless the beneficiary is regarded as having an interest in land. The cases on gifts of land to trustees for sale for the benefit of charities, or even of an interest under a trust for sale of land, have been held to be gifts of an interest in land within the mortmain acts.<sup>66</sup> But these

<sup>62</sup> [1947] 2 All E.R. 690.

<sup>63</sup> [1950] Ch. 582, at pp. 594-5.

<sup>64</sup> The problem of reconciling the cases on ademption has been excellently tackled by Professor Keeton in *An Introduction to Equity* (3rd ed., 1952) Chap. XI. It is submitted that the distinction between a "share" and an "interest" in land is too artificial for a canon of construction. Settlers are usually more concerned with the economic than the technical side of a trust.

<sup>65</sup> [1923] 1 Ch. 192; footnote 100 *infra*

<sup>66</sup> *A. G. v. Harley* (1821), 5 Madd. 321; *Brook v. Badley* (1868), L.R. 3 Ch. App. 672; *Ashworth v. Munn* (1880), 15 Ch. D. 363; *Re Watts* (1885), 29 Ch. D. 947. But the cases on trusts for sale have now been statutorily reversed by the Mortmain and Charitable Uses Act, 1891, s. 3, which

cases have been treated as being in a category of their own, so we will not discuss them at length. The analogy, although pointed out to the court, was not followed in deciding whether an alien, at that time prohibited from holding land, could take under a trust for sale of land.<sup>67</sup> It was pointed out that the reason for the prohibition was the difficulty of enforcing the tenurial obligations against an alien, that the policy was to prevent an alien from holding the land, not from enjoying its benefit. Lord Langdale M.R. admitted that the beneficiary had a species of interest in the land, but held that it was immaterial for the purpose he was considering.

In *Cooper v. Cooper*<sup>68</sup> it was held that an interest under a trust for sale was sufficiently specific to give rise to a case of election. There three children were equally entitled under a trust for sale, the assets including the estate of Pain's Hill. Their mother left Pain's Hill to one of them, and her own property to all three, and it was decided that the other two must elect.<sup>69</sup> Lord Cairns L.C. said:<sup>70</sup>

In point of form, no doubt, what he was entitled to by the appointment [the interest under the trust for sale] was one-third of the proceeds of the sale of *Pain's Hill*, and not one-third of *Pain's Hill* in specie; but that I think your Lordships will consider to be mere matter of form. In point of substance, and in truth, whether he took the land as land, or took it in the shape of money arising from the sale of the land, is utterly immaterial. In the eye of the Court of Equity he was, in substance, the owner of one-third of the *Pain's Hill* estate, and, as such, he was clearly bound to elect. . . .

He pointed out that the trust for sale was mere machinery to enable the creditors of the settlor to be paid, and the residue to be distributed equally among the different beneficiaries:

For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors<sup>71</sup>

The case was followed in *Re Dickson*.<sup>72</sup> *W* had convenanted, in her marriage settlement, to settle all her after acquired personalty, except furniture. Later *X* died, leaving the residue of his estate, which included furniture, on trust for sale for *W*. The furniture excludes from the operation of the acts a benefit "in the personal estate arising from the land".

<sup>67</sup> *Du Hourmeln v. Sheldon* (1839), 1 Beav. 79

<sup>68</sup> (1874), L.R. 7 H.L. 53.

<sup>69</sup> In fact the share of one deceased child was being claimed by his children, but this is immaterial for our purposes.

<sup>70</sup> At p. 64

<sup>71</sup> At p. 65

<sup>72</sup> [1890] W.N. 10; 34 Sol. J. 181.

had in fact been sold to pay debts, but the sale was said to be without prejudice to her rights to elect to take the property in specie. The report is short, but it appears that Stirling J. did not advert to the fact that, when her interest accrued, the estate must have been unadministered:<sup>73</sup>

She was substantial proprietor of the chattels subject only to the claims of the creditors, and upon payment by her of a proportionate part of the debts she could claim delivery of the chattels in specie.<sup>74</sup>

Following *Cooper v. Cooper*, he thought that the trust for conversion did not affect her substantial ownership, and held that she could elect to take the furniture in specie, despite the sale. Technically it may be difficult to support the decision, but, on substantial grounds no doubt, X intended her to be the equitable owner of the furniture.<sup>75</sup>

### (c) *Trusts not for sale*

The beneficiary's interest under a trust not for sale is obviously one degree more specific than that of a beneficiary under a trust for sale, as the barrier of the doctrine of conversion does not exist.

It was with this sort of trust that the House of Lords was concerned in *Baker v. Archer-Shee*.<sup>76</sup> Lady Archer-Shee was sole tenant for life of a trust fund consisting of American stocks, shares and other funds. Under a power in the settlement, she had appointed an American trust company as trustee, entitling it to a commission to be deducted from the income. It paid the balance into her account at an American bank, none of the funds being remitted to this country. Her husband was, however, assessed for income tax on the net amount of the income.<sup>77</sup> Under the Income Tax Act,

<sup>73</sup> See *supra*, *Vanneck v. Benham*, footnote 47.

<sup>74</sup> This cannot be reconciled with the *Glenn* case, *supra* footnote 43. The plurality of beneficiaries was immaterial on the statute there construed.

<sup>75</sup> See also: (a) *Re Fox*, [1913] 2 Ch. 75 (on the mortgagor's interest and the Real Property Limitation Act, 1833, section 1), *Re Witham*, [1922] 2 Ch. 413 (on the Real Property Limitation Act, 1874), (b) *Re Wood*, [1896] 2 Ch. 596 (on the Intestates Estates Act, 1884); (c) *Briggs v. Chamberlaine* (1853), 23 L. J. Ch. 635 (on the Fines and Recoveries Act, 1833), and *Miller v. Collins*, [1896] 1 Ch. 573 (on the mortgagor's interest); (d) *Re Thomas* (1886), 34 Ch. D. 166 (on the Dower Act, 1833).

<sup>76</sup> [1927] A. C. 844, a case which received much comment: e.g., D. Hughes Parry, Review (1932) *Journal of the Society of Public Teachers of Law*, at p. 50; A. L. Goodhart, Note (1928), 44 L. Q. Rev. 8; G. W. Keeton, *Trusts* (6th ed., 1954) chap. 16; Nathan, *Equity through the Cases* (2nd ed., by O. R. Marshall, 1951) pp. 9 *et seq.*; Hanbury, *Modern Equity* (6th ed., 1952) pp. 489-90, especially footnote 56; *Essays in Equity* (1934) pp. 16-22 and 89-9.

<sup>77</sup> P. 846. The appellant did not claim the gross amount, but there seems to be no necessity for the concession on a strict reading of the

1918, schedule D, "tax in respect of income arising from securities, stocks, shares or rents in any place out of the United Kingdom"<sup>78</sup> shall be computed on the full amount, but "tax in respect of income arising from possessions out of the United Kingdom other than stocks, shares or rents"<sup>79</sup> shall be computed on the amount received in the United Kingdom. It was contended that the income fell in the last class because she had no right to the specific shares in the trust fund, but only a claim for due administration, enforceable in New York, where the trustee resided, and situate there. Rowlatt J.<sup>80</sup> agreed that for most purposes she had no right to the specific dividends, but he held that, for taxation purposes, property had a wider meaning, and included beneficial interests, and so held that her husband had been rightly assessed. His decision was reversed by a unanimous Court of Appeal, on the ground that Lady Archer-Shee had no right to the specific trust funds and that the law of taxation was not peculiar in this respect. Rowlatt J.'s order, however, was confirmed by a majority of 3 to 2 in the House of Lords. All their Lordships expressly assumed that the law of New York was the same as English law. Lord Sumner (dissenting) said that it was clear that a trustee is not a bare agent of the beneficiary, who normally cannot control him or his changes of investments. The beneficiary's right is only to due administration. Lord Blanesburgh delivered a similar dissenting judgment. On the other hand, Lord Wrenbury thought she was entitled, not to the balance of income after disbursements were paid, but to the whole income, subject to certain charges. He concluded that her interest was therefore in the specific items of the trust fund and so her husband was liable for income tax on the balance.<sup>81</sup> Lord Atkinson agreed with this judgment,<sup>82</sup> but he also pointed out<sup>83</sup> that in the particular case before the House Lady Archer-Shee had considerably greater powers of controlling the trustee than has the normal beneficiary: she had the power to appoint trustees and discharge them at will and her consent was required for any change of investments. "I think it is not an unreasonable inference from these matters that the life interest given to her . . . had become vested in her, and that the trust company which she had appointed were merely her agents to

statute. It appears to be an example of *de facto* law-making by civil service practice.

<sup>78</sup> Case IV and Case V (1).

<sup>79</sup> Case V (2).

<sup>80</sup> [1927] 1 K B. 109.

<sup>81</sup> The case was sent back to the Commissioners to state which were "securities" within Case IV (1), which were "stocks", shares or rents within Case V (1), and which were other possessions within Case V (2), p. 868.

<sup>82</sup> At p. 863.

<sup>83</sup> At p. 859.

administer the fund for her and in her interest." He therefore held that the dividends and so on were vested in Lady Archer-Shee.

This paper does not deal with tax law as such, but it is submitted that the decision may have been correct on principles of convenience. Economically, Lady Archer-Shee was owner of the particular funds for her life-time, and tax should be imposed on economic grounds. But I hope that the decisions will not be extended to other branches of law without careful consideration of the expediency of the particular extension.<sup>84</sup> It may be that for many purposes the beneficiary should be treated as owner of the trust assets, but if he is so treated for all purposes, why set up the trust machinery in cases where it is possible to create corresponding legal interests?

The principle in the *Archer-Shee* case was extended in *Nelson v. Adamson*,<sup>85</sup> where the beneficiary's interest was subject to the payment of an annuity. Here it might be difficult to say that he could have insisted on the trustees giving him a dividend mandate, as the annuity was charged on the whole fund. Nevertheless it was held that he was taxable on dividends not received in this country, allowance being given for the annuity. It may be remembered that in *Sudeley's* case, Lord Shand expressly based his decision on the fact that there were several beneficiaries so that the share of each could be ascertained. Martin J. in *Re Young*,<sup>86</sup> after noting this, said:

I do not consider that any of the speeches delivered in *Baker v. Archer-Shee* warrant the deduction that, where there are a number of persons entitled to share in the residue of an estate, any one of them has an equitable interest in the actual assets forming part of the trust fund, even assuming that there has been full administration.<sup>87</sup>

But although the case may be difficult to reconcile with principle, it may be expedient to assess such a beneficiary on the ground that economically he is in much the same position as the owner, when allowance is made for the annuity.

On the other side of the line is *Schalit v. Nadler*.<sup>88</sup> Under the Law of Property Act, 1925, section 141, the rent reserved by a

<sup>84</sup> It should be noted that in *Archer-Shee v. Garland*, [1931] A.C. 212, where expert evidence, the accuracy of which has since been questioned (Scott, *Trusts* (1939) 130, at p. 690), was accepted that under New York law Lady Archer-Shee had no right to specific dividends, it was held that her husband was not assessable. This would appear to show that *Baker v. Archer-Shee* determines the rights of beneficiaries apart from revenue law.

<sup>85</sup> [1941] 2 K.B. 12.

<sup>86</sup> *Supra*, footnote 44.

<sup>87</sup> At p. 8. Contrast footnote 49 *supra*.

<sup>88</sup> [1933] 2 K.B. 79, noted by Professor Potter in (1933), 49 L. Q. Rev. 480.

lease "shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income . . . of the land leased". It was held that the beneficiary under a trust not for sale did not come within this definition. Goddard J. (now Lord Chief Justice), in delivering the judgment of the divisional court, said that the trustee was not a bare trustee, he had obligations towards the superior landlord for which he could recoup himself out of the rent from the sub-tenant. So the beneficiary was entitled only to a balance after deductions had been made. But he did not wish to decide the case on so narrow a ground, as it had been argued that in no circumstances could the beneficiary distrain for rent. He then considered the hardship on the sub-tenant if two distraints were levied, for no one denied that the trustee could enforce the covenant to pay rent. It is submitted that this case was correctly decided, although Professor Sir David Hughes Parry points out<sup>89</sup> that *Baker v. Archer-Shee* was not cited and suggests that it is inconsistent with that case. But why should a decision on the construction of the Income Tax Act be binding on the construction of the Law of Property Act: the former concerned the economic interest of the beneficiary, the latter the machinery for enforcing it? Is it surprising, then, that in the latter the technical position should be of more importance?

Goddard J. then cited *Allen v. I. R. C.*,<sup>90</sup> where Scrutton J. decided that a purchaser in possession of land before completion was a person "entitled in possession to the rents and profits of the land in virtue of any estate of freehold". He said that the valid contract actually changed the ownership of the estate in equity, but he expressly distinguished the case of a trustee. This seems to be reasonable, as in the normal course of events the contract price will be paid and the legal estate conveyed, while in the case of a trust, especially where there are several beneficiaries, none may see the actual trust assets at all.

So far, then, I have argued that where the economic situation is in issue the beneficiary's right to specific assets forming the trust fund may be relevant, but that, where the machinery for enforcing his right is in issue, then it is less likely to be recognized. We have also seen that, where there is a bare trust, the beneficiary's right is more specific than where there is a trust for sale, and still more so where the administration of a deceased's estate is incomplete.

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<sup>89</sup> (1934), 50 L. Q. Rev. 158.

<sup>90</sup> [1914] 1 K B. 327. Cp. *Re Burke*, [1928] 1 D.L.R. 318, footnote 109. *infra*.

*Conversion in the Conflict of Laws*

Does the equitable doctrine of conversion merely turn realty into personality and vice versa, or does it also turn land into money for other purposes? It is too well known to require authority that succession to movables is governed by the *lex domicilii* at death and to immovables by the *lex situs*. But in few of the cases which have been decided on this point has the matter been discussed on principle, so perhaps I may be forgiven for considering the reasons for the introduction of the doctrine of conversion. Until recently, land descended on intestacy to the heir, and money to the next of kin. So if land was left on trust for sale for X and he made no will, apart from the doctrine of conversion, any unsold land would go to his heir, and the proceeds of sale would go to the next of kin. Now, again but for the doctrine of conversion, if X had failed to make a will because he wished his heir to take the land, but he then became insane, the trustees might refrain from disposing of the land, so as not to defeat X's intentions, even though it might be economically desirable to sell. There is a fundamental principle of equity that the trustees should not affect beneficial interests when exercising administrative discretions.<sup>91</sup> Equity, therefore, applied the maxim that equity treats as done that which ought to be done, and treated the land as if it had been sold as soon as the trust for sale came into operation.

To introduce a conflicts problem, suppose that English land is vested by an English deed on trust for sale, for the benefit of X and, further, that X had died domiciled in France. Does his interest under the trust devolve under the English law of the situs, or the French law of his domicile at death? This depends on whether it is an interest in a movable by the *lex situs*, here English law. It is submitted that this was just the sort of situation for which the doctrine of conversion is suited to deal, though this is not the view so far adopted by the courts. But where would the situs be if Scottish land were held under an English trust by English trustees? Undoubtedly the land is Scottish, but the situs of an interest under a trust has been held for many purposes to be where the trustees reside.<sup>92</sup> It is not the legal interest in the land which is in question — that remains in the trustees — but the equitable interest of the beneficiaries against the trustees. Is it not then arguable that whether the interest is movable should be decided by English law? This

<sup>91</sup> *Fordyce v. Bridges* (1848), 2 Ph 497; *Lechmere v. Carlisle* (1733), 3 P. Wms. 211, at p 215

<sup>92</sup> Pp. 522 *et seq.*, *supra*.

problem has not yet been considered by the courts.<sup>93</sup> But it may be that they will fail to notice the two seats of a trust, and say that the situs is where the land is, in Scotland. It may be that they would be justified in doing so by the principle of effectiveness, as only with the aid of Scots law can anyone inherit the interest. Though, subject to any prohibitions of Scots law, an English court could enforce a judgment *in personam* against the trustees.<sup>94</sup>

There are not very many cases on this branch of law. The first judgment I know of to advert to the problem is that of Strong V.-C. in the Ontario case of *Re Goodhue*,<sup>95</sup> where in considering a trust to sell land he said obiter, "the trust estate . . . , whether actually converted or not, is to be considered as money, movable property, or personalty from the date of the testator's death".

In *Grimwood v. Bartels*<sup>96</sup> a lunatic domiciled in Chile owned land in England, which was sold under the Partition Act, 1868, under which the proceeds of sale represent the property sold. A foreign guardian has rights to a lunatic's movables, but not to his immovables.<sup>97</sup> Without adverting, however, to the difference between realty and interests in immovables, Hall V.-C. said that the guardian had no rights to the realty of his ward. It is submitted that he was right in treating the proceeds of sale as an interest in immovables according to the English law of the situs, and not merely as realty, for the whole purpose of the conversion is to place everyone in substantially the same position, whether or not the sale has taken place.

In *Australian Mutual Provident Society v. Gregory*<sup>98</sup> a testator left land in Tasmania to trustees on trust to pay an annuity to *W* and, subject thereto, to pay the income to *X* and *Y* during *W*'s lifetime, and after her death to sell the land and divide the proceeds equally between them. While she was still alive, *X* went to Natal, where he was declared bankrupt. By Natal law, his trustee in bankruptcy automatically became entitled to *X*'s interest under the trust. *X* later returned to Tasmania and assigned his interest to *Z*, who

<sup>93</sup> But see the conversions of *Re Mackenzie*, footnote 22 *supra*.

<sup>94</sup> See G. W. Keeton, *Trusts in the Conflict of Laws* (1951), 4 *Current Legal Problems* 107, at p. 110.

<sup>95</sup> (1872), 19 Gr. 366, at p. 453.

<sup>96</sup> (1877), 46 L J Ch 788

<sup>97</sup> I know of no recent case on the point and, in the nineteenth century, the distinction between the categories of realty and interests in immovables was seldom adverted to; the judges consistently talked either of "land" or else of "realty": *Waite v. Bingley* (1882), 21 Ch. D. 674 (Hall V.-C.); *Re Hickson* (1927), 61 O.L.R. 180 (Middleton J.A. sitting in chambers); *Re William Crozier* (1887), 13 V.L.R. 362. In *Re Annand* (1891), 17 V.L.R. 108, the conflicts point was not argued.

<sup>98</sup> (1908), 5 C L R 615

claimed that by the *lex situs* the assignment to him was valid, and that that in Natal was not, as notice had not been given to the trustees as required by the law of Tasmania. It was held that the interest under the trust was in an immovable, as the land was still unsold. There is at least some discussion of principle: Isaacs J. said that the conversion operated for some purposes only,<sup>99</sup> citing several of the cases on mortmain aliens discussed already.

Probably the best known case on this branch of the law is *Re Berchtold*.<sup>100</sup> Count Nicholas was entitled, subject to a subsisting rent-charge, to a share under a trust for sale of English land. He died intestate, domiciled in Hungary, and the question to be decided was whether his interest should go to his next of kin by English law, or to those entitled by Hungarian law. It was agreed that the answer depended on whether his interest was in a movable, and that this was to be decided by the English law of the situs. (Since the land was in England, the trustees resided there and the trust was governed by English law, it was not necessary to decide where an interest under a trust for sale is situated.) Russell J. cited various cases to show, first, that some types of personal property, such as leaseholds and mortgages, were interests in immovables. He then went on to show that an interest under a trust for sale was an interest in land within the Mortmain Acts, the Real Property Limitation Act, 1833, and various other domestic statutes:

These authorities are only decisions that the property in question in each case fell within the wording of the relevant statute. but they certainly show that an interest in property such as I have to consider in the present case is aptly described as being 'an interest in land' or 'a sum of money payable out of land'. Subject to his mother's interest, Count Nicholas was entitled down to his death to the rents and profits of that immovable.<sup>101</sup>

This last statement might seem a little inaccurate, as presumably Count Nicholas would be entitled only to a balance of the rents and profits after outgoings and the annuity had been met. However, in the light of the later case of *Baker v. Archer-Shee*,<sup>102</sup> we cannot say that it was wrong, though it may be doubted whether it was expedient to hold that the interest was specific for this purpose. At this point of the judgment it seems that Russell J. had made up his

<sup>99</sup> However, since bankruptcy operates as a general involuntary assignment, each of the judges (Griffith C J at pp. 627-8; Barton J. at pp. 635 *et seq.*, and Isaacs J. from p. 644) said that their decision would have been the same had the interest been in a movable (Distinguish English domestic law on the last point — *Re Anderson*, [1911] 1 K B 896)

<sup>100</sup> [1923] 1 Ch. 192

<sup>101</sup> At p. 202.

<sup>102</sup> *Supra*, footnote 77.

mind that the interest was in an immovable. He then cited the Irish case of *Murray v. Champernowne*<sup>103</sup> as supporting his view, as also did the first edition of Dicey, and concluded that:

The doctrine of conversion is that real estate is treated as personal estate, or personal estate is treated as real estate; not that immovables are turned into movables, or movables into immovables.

This last statement is no more than a restatement of his decision; it could not be the ground for it, as it was the very thing he had to decide.

It is submitted that the decision was not the logically soluble problem that appears from the judgment. The theme of this paper has been that the interest of the beneficiary is in the specific trust funds for some purposes only. This Russell J. seems to accept in the passage quoted. It was virtually a case of first impression in England, *Grimwood v. Bartels*<sup>104</sup> was not cited, and was by no means conclusive.<sup>105</sup> It is submitted that the judge should have considered, from the point of view of policy, whether it was expedient to extend the doctrine of conversion to the distinction between movables and immovables. On any view England was the situs of the interest, so there is no theoretical obstacle there. As has been said earlier,<sup>106</sup> the doctrine is suited to deal with just this sort of situation, when it occurs in domestic cases, and the principle of effectiveness cannot be invoked to support the decision.<sup>107</sup> Personally I regret the conclusion, as it allows trustees to alter beneficial interests in the exercise of an administrative discretion, and it is at least unfortunate that the judge gave no reasons of policy for his decision.

The case was followed with little discussion of principle by the Court of Appeal of British Columbia in *Alexander v. A. G. for B. C.*<sup>108</sup>

In *Re Burke*,<sup>109</sup> *V*, domiciled in Washington, agreed to sell land in Saskatchewan to *P*, but died before completion. Part of the land was actually conveyed after *V*'s death and his personal representative petitioned the court for advice whether the distribution of the land and proceeds of its sale should be governed by the law of the domicile or of the situs. Taylor J. said there was no case on this

<sup>103</sup> [1901] 2 I R. 232. The case was rightly decided as the exercise of the power of appointment was formally valid both by the law governing the instrument creating the power, and by the *lex situs*. But the alternative ground cited by Russell J. was not discussed on principle.

<sup>104</sup> (1872), 19 Gr. 366.

<sup>105</sup> The United States rule is different, *Planson v. Scott* (1927), 158 N.E. 588, at p 590 (Ohio Court of Appeals).

<sup>106</sup> Pp. 538 *et seq.*, *supra*.

<sup>107</sup> Footnote 94 *supra*.

<sup>108</sup> [1927] 1 D.L.R. 603 (B.C.C.A.).

<sup>109</sup> [1928] 1 D.L.R. 318 (K.B. Sask.).

point. But he could see no reason for applying the doctrine of conversion to private international law and it would be anomalous if the law of the domicile did not recognize the doctrine. (If the proper law of contract, but not the *lex domicilii*, recognized the doctrine, it is submitted that there would be no difficulty, as the characterization would be by the *lex situs*. The vendor's rights would be movable and the purchaser's immovable. The anomaly would arise only if the *lex situs* and the proper law of the contract differed.) Taylor J. decided therefore that the *lex situs* governed. It seems to me that the reasons for applying the doctrine to cases of contracts of sale are far less cogent than those which can be adduced for its application to trusts for sale. The whole of a person's proprietary rights are seldom considered as an integral whole in the same way as rights under a single trust fund, so why should not different parts be governed by different systems of law? Further, it is the beneficial owner himself who affects his rights by completion, and not a third party, as in the case of a trustee postponing sale. The case, then, may well have been rightly decided.

Another type of conversion, with which we have not yet dealt, is that under the Partnership Act, 1890, section 22:

Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), as personal or movable and not as real or heritable estate.

At first sight it might seem to turn immovables into movables for the conflict of laws. But we must remember that the act applies to Scotland, where the distinction between movables and heritable property is part of the domestic law, so the verbal argument may be discounted. In *Re Berchtold*<sup>110</sup> Russell J. considered that the conversion did not render the land movable, but only personal estate, though this may not have been strictly necessary to his decision on conversion arising under a trust for sale and not under the Partnership Act. But my remarks on trusts for sale apply with equal force to this type of conversion.

In *Re Cutcliffe's Will Trusts*,<sup>111</sup> English land was settled under the Settled Land Acts, 1882-1887. Later, part of the land was sold and the proceeds invested in English stock. The deceased, who was entitled subject to defeasance to a share in remainder, died intestate domiciled in Ontario. If his interest was in immovables, his heir would take it under English law, but if in movables, it would go to

<sup>110</sup> [1923] 1 Ch. 192, at pp. 206-7.

<sup>111</sup> [1940] Ch. 565.

his successor by Ontario law. It was admitted that the unsold lands went to the English heir, but Morton J. had to decide the effect of section 22(5) of the 1882 act, which enacted that:

Capital money . . . shall, for all purposes of . . . devolution, be considered as land, and the same shall be held for and go to the same persons . . . as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

Did it prevent the sale from changing *A*'s interest in immovables to one in movables? He first said that this depended on the *lex situs*, that is on English law. Looking at the section, he thought that the stock was rendered an interest in an immovable. His Lordship distinguished *Re Berchtold*, which was cited as pointing to a different conclusion, by showing that Russell J. based his decision on the fact that the equitable doctrine of conversion did not turn land into money for all purposes, whereas section 22 did turn stock into land for all purposes of devolution. But if the stock must be considered as land, it must be considered an interest in an immovable and descend as realty to the English heir. The case has been criticized<sup>112</sup> on the ground that conversion is a doctrine of English domestic law, merely determining the classification of interests as realty or personalty. But from what has been said already, it is submitted that this begs the question. Morton J. had to decide whether the statutory conversion turned the stock into land for this purpose as well. Dr. Falconbridge, in admitting that Parliament could have altered the conflicts rule if it wished, adds:<sup>113</sup>

The presumption seems to be strong that an amendment of the law of England with regard to the doctrine of conversion, a peculiar feature of the domestic law of England and other Anglo-American countries, should be construed merely as an amendment of the domestic law of England, and therefore should be applicable only to a case on which, on the general principles of the Conflict of Laws, the succession is governed by the domestic law of England

However, the decision has been approved<sup>114</sup> on the ground that:

The Settled Land Act was intended not to let the accident of the sale of a portion of the settled land cause the proceeds to devolve in a manner different from the rest of the land, regardless of where decedent was domiciled

I heartily endorse this view. The words of the section were certainly wide enough to cover the case; indeed, the decision of

<sup>112</sup> *E.g.*, Falconbridge, Note (1940), 18 Can. Bar Rev. pp. 568 *et seq.*; Essays, at p. 518. But contrast Cheshire, Private International Law (4th ed., 1952) pp. 424 and 425.

<sup>113</sup> Essays (1st ed.) p. 518

<sup>114</sup> Note (1940), 54 Harv. L. Rev. 134.

Morton J. was based on the verbal argument. And from the teleological viewpoint, also, it would seem to be correct, as I have argued. But while admitting that the verbal argument was strong, it is submitted that criticism might have been reduced had the judge also considered the reasons for enacting the section.<sup>115</sup>

### Conclusion

Technically the *cestui que trust* has no interest in specific items of the trust fund, but merely a right to its due administration, enforceable against the trustees and situated where they may be sued—their residence. Where, however, problems of social and economic importance are involved, the courts often attach the interest to specific trust assets. This is less easy in the case of trusts for sale, where the *cestui que trust* is separated from the assets by the doctrine of conversion and the possibility of a sale, and is still harder when the estate of a deceased person is not completely administered, when the actual assets may be sold to satisfy his creditors, as well as to facilitate distribution.

It seems that the equitable doctrine of conversion does not affect the distinction between movables and immovables, although perhaps it should, so as not to interfere with the exercise of the trustees' administrative discretion. The conversion caused by the Settled Land Act, however, does render capital moneys immovable.

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### Each Man, Undominated, to His Own Views

No reasonable man will deny Pascal's observation 'Le coeur a ses raisons, que la raison ne connaît pas'. It is both rational and reasonable to acknowledge a Power outside ourselves, whose ways are not man's ways. This requires no theological embellishment. 'It is a mystery, but so is the sunrise.' In matters of faith and opinion, therefore, the part of reason as well as courtesy is to allow others to retain their own views undisturbed. An idea which merely exists in a man's mind is not proof, after all, any more than a picture of a man is proof that he is now in the world. Nor is the vehemence or enthusiasm with which men hold their opinion any evidence whatever of the certainty or rightness of those opinions. 'The strength of our persuasions is no evidence at all of their own rectitude: crooked things may be as stiff and inflexible as straight: and men may be as positive and peremptory in error as in truth' (Eugene C. Gerhart, *American Liberty and "Natural Law"* (1953) p 121

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<sup>115</sup> See also *Re Crook*, [1936] S.R. (N.S.W.) 186, for a similar decision on the English statute, as part of the foreign *lex causae* to the New South Wales judge.