

EQUITY AND THE ORIGIN OF TRUSTS

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THE main object of this paper is to give an idea of Trusts in English Law; to do so, however, it is essential to introduce the subject by giving a short history of the developments of Equity. In dealing with any subject of English Law the principles can be understood and their logic appreciated only if we go back to 1066 and in many cases even further back. No satisfactory definition has been given of Trust but it has perhaps been best described by Underhill as "an equitable obligation binding a person to deal with property over which he has no control for the benefit of persons (who are called the beneficiaries or *cestui que* trusts) of whom he himself may be one and any one of whom may-enforce the obligation. The essential word in this definition is the word "equitable". It is imperative therefore to understand what we mean by Equity in English Law. Equity is not a conception but a definite source of law; it is a completely different thing from *aequitas* in Roman Law. In certain passages of the Digest *aequitas* is equivalent to *ratio*, the correspondence between a legal rule or institution and the spirit of civil or natural law; in other passages *aequitas* denotes (a) the agreement between rules of positive law and the natural sense of right or (b) the decision of a legal question with special reference to the circumstances of the case or (c) the mitigation of strict law in accordance with a higher sense of justice.

English equity is a system of established rules supplementary to the Common Law; it has been described by Dr. Brierley as consisting of a number of afterthoughts, not logically related to one another but each of them only intelligible when read in relation to some rule of the common law. Equity owes its origin to the difficulty or impossibility in which a person found himself in the old days of the common law of obtaining relief under the system then prevailing. These difficulties will be appreciated if it were to be pointed out that from the very beginning it was not the office of the King's Own Courts to provide a remedy for every wrong. In common Law there was no right unless there was a remedy. The remedy consisted in the form of a writ which was issued on application by the Chancellor from Chancery which was the Secretarial Department of the Crown ; it is by these Writs that actions are begun in a Court of Law. At Common Law a person could only obtain relief if there was a writ, a form of action applicable to his case. These forms of action were originally few and limited in their application. The consequence was that an unfortunate suitor who could not bring his complaint within the four corners of an official writ had no redress. The evil was so grave as to cry aloud for a remedy, and accordingly was dealt with by a clause of the Statute of Westminster II of 1285. This clause laid down "Whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case, under like law and requiring like remedy , is found none the Clerks of Chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree; and let them refer themselves until the next Parliament, that by consent of men learned in the law a writ shall be made, lest it might happen after that the Courts should long time fail to minister justice unto

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complainants." From this time arose actions on the case, so called because the writs were framed *in consimili casu*. If the Common Law Courts had taken full advantage of the powers given them by enactment, there would probably have been no need for the Court of Chancery ; but they did not seize the opportunity and more than once refused to allow the validity of new writs. But the King is fountain of all justice and when a subject could not for some reason or other obtain redress for a wrong in the ordinary Courts he could address a petition to the King which would be considered by the King in Council. The Council was not bounded by law and used to "give redress to all men according to their deserts." In the petition the petitioner complains that he cannot get a remedy in the ordinary Courts of Justice; the reason may be that he is poor or sick or old or that his adversary is rich and powerful and will bribe or will intimidate the jurors or has by some trick or some accident acquired an advantage of which the Ordinary Courts with their formal procedure will not deprive him. The King is asked to find a remedy "for the love of God and in the way of Charity." In the course of the XIV Century the petitions gradually began to go straight to the Chancellor. The Chancellor was a very influential member of the Council. He was not then, as he is now, a judge; he was at the head of Chancery, Secretarial Department, he was we may say the King's Secretary of State for all Departments; he kept the King's Great Seal and the great mass of writing that had to be done in the King's name had to be done under his supervision ; he was usually a bishop and, what is very important in connection with the growth at equity, he was the King's Chaplain and as such the Keeper of his conscience.

Though he was not a judge, the Chancellor by himself or his subordinates had a great deal of work which brought him into a close connexion with the administration of justice. The issuing of writs by which actions in court could be started, though not judicial business brought him in close contact with that business. Some of them were writs of course (*brevia de cursu*) which one obtained by asking for them of the clerks—called Cursitors—and paying the proper fees; but the writs in *consimili casu* meant that the Chancellor had to consider whether the case was one in which some new writ or some specially worded writ should be framed. But in cases where the Chancellor was satisfied that no remedy could be given in the ordinary courts—and this happened very often when the courts of law were given to quashing writs which differed in material points from those already in use—the Chancellor could, after considering the petition, order the adversary to come before him and answer the complaints; the writ whereby he does this is called a *subpoena*—because it orders the man to appear upon pain of forfeiting a sum of money, e.g. *subpoena centum librarum*. The writ tells the defendant what is the cause of action against him and he is to answer it. He appears before the Chancellor and answers on oath and sentence by sentence the petition of the plaintiff. This procedure is rather like that of the Ecclesiastical Courts and the Canon Law rather than like that of the old English Courts of Law; it was in fact borrowed from the summary procedure of the Ecclesiastical Courts for the suppression of heresy. The Chancellor decided questions of fact as well as of law. It does not seem that the Chancellors considered that they had to apply a body of rules different from the ordinary law of the land; they were administering that law in cases which escape the meshes of the ordinary Courts; but they were not bound by precedent; their jurisdiction was exercised on the ground of conscience and this; as Selden pointed out in his Table Talk, was likely to vary with each Chancellor even as his foot.

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The Law Courts did not like this exercise of jurisdiction, nor did Parliament, chiefly because of the interference of the King's Council in criminal matters. The Chancellor was in fact, in the fourteenth century, warned not to hear cases which might go to the Ordinary Courts, but then it was also becoming plain that the Chancellor was doing some convenient and useful work that could not be easily done by the Courts of common law. He had in tact taken to enforcing *uses* of land, later known as trusts. Uses were popular, and the Chancellor was, in virtue of the procedure above referred to, a very appropriate person to enforce uses. Uses were fiduciary relationships and, if we recall that according to the procedure of the common law which never compelled or even allowed the defendant to give evidence, and where all questions of fact were sent to the jury, it will be appreciated that that system was not competent to deal adequately with such relationships. It may here also be pointed out that the Ecclesiastical Courts (and the Chancellor was an ecclesiastic) had for a long time been punishing breaches of trust by spiritual censures, by penance and excommunication. The Chancellor exercised jurisdiction over conscience and on this ground the Chancellor continued to exercise jurisdiction notwithstanding the opposition of the Common Law Courts. As a result of this jurisdiction, new rights were in force, such as the uses or trusts; new remedies, unknown to the Common Law, were developed, such as the specific performance of a contract, an injunction to restraint or stay the repetition of an injury the appointment of a receiver to prevent a defendant from destroying or parting with property during the interval between the institution of proceedings and the trial of the action. It will be noticed that all these remedies were directed against the person; the Chancellor never claimed to interfere with the decisions given by the Courts; the Court of Chancery did not alter the common law, but it could prevent a person from exercising his common law rights where it was inequitable that he should do so. If a judgment was given for the plaintiff in a case of a breach of contract or of injury as a result of nuisance, payment of damages (the only remedy known to the common law) would not be sufficient; so the Chancellor, acting against the person, would, in appropriate cases, direct the defendant to perform the contract or issue against him an injunction.

In the course of the sixteenth century the jurisdiction of the Chancellor becomes more stabilised; he administers "rules of equity and good conscience." To show the nature of these rules, a few of the twelve basic maxims of equity may here be quoted.

1. Equity will not suffer a wrong to be without a remedy;
2. He who comes into equity must come with clean hands.
3. Equity looks to the intent rather than to the form.
4. Equity looks on that as done which ought to have been done.
5. Equity imputes an intention to fulfil an obligation.
6. Equity acts in personam.

During that century, Chancellors begin to follow precedents, and in 1557 cases in the Court of Chancery begin to be reported. The Court of Chancery, however, only dealt with what we may call equity cases, so that if a person wanted to get the performance of a contract rather than damages for breach of the contract, he had to present his case before the Court of Chancery; to approach the Common Law Courts would be fatal. This continued to be so until

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the passing of the Judicature Act, 1875, which amalgamated all the superior Courts in one Supreme Court of Judicature, which for the more convenient despatch of business is divided into three divisions, that is, the King's Bench, Chancery and Probate Divorce and Admiralty.

It has been pointed out earlier, that uses were very popular and that the Chancellor had the procedure best adapted for enforcing them. They were the forerunners of trusts. A use arose when A conveyed land to B to the use of or in trust for or in confidence for C, or even for A himself. The Common Law Courts would not consider the trust or the confidence, and B would *vis a vis* the Common Law Courts be the legal owner, and C or A would have the beneficial interest or the equitable interest, it being a right which in equity the Chancellor would enforce. It may here be pointed out that the word "use" is derived not from the Latin "usus" but from "opus". Maitland has shown us that before Doomsday it was a common practice for one man to do something "ad opus" on behalf of another, as for instance where the Sheriff seized lands "ad opus Domini Regis" or where a Knight about to go to the Crusades conveyed his property to a friend on behalf of his wife and children. The word "opus" became gradually transformed into "oes" then into "ues" thence into "use".

Now in such circumstances as those indicated, one person could deal with land on behalf of or to the use of another; the question that inevitably occurred to men was "why one person should not, in a general way, be allowed to hold land to the use of another." The advantages of doing this will be pointed out later. The practice did not spring into life all at once, and Maitland believed that 1230 was the earliest time at which one man was holding land permanently to the use of another. "In the second quarter of the thirteenth century", he says, "came hither the Franciscan Friars. The rule of their Order prescribes the most perfect poverty : they are not to have any wealth at all... still despite this high ideal, it becomes plain that they must have at least some dormitory to sleep in. They have come as missionaries to the towns. The device is adapted of having land conveyed to the borough community to the use of the friars". Maitland makes reference to a manuscript at Oxford where Ricardus de Mouliniere *contuult arem et domum comunitati villae Oxoniae ad opus fratrum*. By the fourteenth century, this curious method of land holding had become more extensive, and there is evidence that it was a common practice for a land holder to convey his land to a friend *ad opus suum*—to his own use.

Some of the advantages of putting lands in use may be mentioned :—

1. In the first place, lands became devisable. As a result of the English Land System of Tenure, land could not be given by will, and it is the natural desire that the power of testamentary disposition, which already applied to goods and chattels, should be extended to land which contributed more largely than any other factor to the rapid establishment of the use. The person to whose use land was conveyed, normally the same person who conveyed the land, could specify what the destination of the use should be after his death.

2. Secondly, by putting land in use, feudal burdens could be avoided. The most oppressive of the feudal burdens to which a tenant was liable at common law, were those which became

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exigible at his death, namely, wardships, marriage, reliefs and primer saisin. If a tenant upon putting his land into use were to have only one feoffee to use it, his position as regards the feudal incidents would scarcely be improved for the feoffee in his capacity as tenant at law was caught in the feudal net and his death would entitle the lord to exact such dues as might be demandable. The usual practice however was to convey land to several persons as joint tenants. Now the rule of joint tenancy several that the share of a tenant who dies does not pass to his heir but accrues to the surviving tenants. He leaves nothing for which his heir can be made to pay a relief. He leaves nobody over whom the lord can claim the right of wardship or of marriage. The one essential in this respect was to ensure that the numbers of feoffees never fell below two. The death of the person to whose use the land stood, could not be subject to any feudal dues.

3. Thirdly, mortmain statutes could be evaded. In Feudal England, land could not legally be conveyed to corporations, so that if A wished to grant lands, to a monastery, he could convey his land to B to the use of the monastery of X. B took the legal estate but the monastery became beneficially entitled. This system of putting land into use gave rise to a duality of ownership on the same land, one legal and the other equitable, or as they were technically called the legal estate and the equitable estate; the legal estate confers the bare technical ownership, while its equitable counterpart gives the *cestuique use* beneficial ownership, one is the nut the other the kernel ; broadly speaking we may say that the legal estate was right *in rem*, while the equitable estate was *a jus in personam*; the remedy in respect of the use, a confidence resting in privity of person and estate, was only in a Court of equity.

MISUSE OF POWER.

The tragedies of history are the tragedies of the misuse of power:: the decline of nations inevitably follows the possession of great power without the exercise of great leadership.—JOSEPH GREW.