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Some Aspects of Illinois Land Trusts

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ment of procedural rules adopted by the Department of State as a result of the failure of Congress to legislate specifically on the matter.[44]

[44] Legislation is also needed on the issue of requiring an affidavit as to Communist associations to be filed on the part of an applicant. As stated above, supra at footnote 3, this problem played an important role in the Kent and Briehl cases. The Appellate Court for the District of Columbia in Briehl v. Dulles, 248 F.2d 561 (App. D.C., 1957), decided such affidavit, the requirement of which would come prior to any actual allegations of Communist activities, and by which the applicant was not entitled to be confronted with witnesses and evidence sustaining the Secretary's suggestion of Communist affiliations, was not in violation of due process. The point was resolved on two bases: (1) Applying the rules of civil procedure, it is found that applicant must raise the issue of facts as to his Communist affiliations, in order to get an evidentiary hearing on the facts. (2) It is customary to require applicants to supply pertinent information under oath. There is no reason to treat a passport application differently. Chief Judge Edgerton, dissenting, pointed out the critical factual differences between this case, where the liberty to travel is made subject to restraints, and prior cases dealing, for example, with the retainment of State employment [as in Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951)].

The Supreme Court did not consider the issue, since it solved the Kent and Briehl cases, as it did the Dayton case, on the basis of lack of authority on the part of the Secretary of State to deny passports on the grounds of Communism. Thus, some definite statement, promulgated by Congress, or issued by the Secretary with power derived from Congress is necessary. Both will necessarily be subject to Constitutional interpretation by the Court.

SOME ASPECTS OF ILLINOIS LAND TRUSTS

INTRODUCTION

The last half-century has seen the development in Illinois of a rather curious type of trust; namely, the Illinois land trust. Based on a liberal application of fundamental common law principles, it offers many advantages in the holding of real property and estate planning.[1]

Under a typical Illinois land trust agreement, the beneficiary retains the right to possession and control over the real estate, including the full power of management. He collects and distributes the income, leases, insures, develops, finances and directs the sale of the property as he sees fit. He may terminate the trust when he desires or may add property to the trust when he wishes. The beneficiary has exclusive and full powers in these matters. The trustee may execute deeds and mortgages or otherwise deal with the real estate only upon the written direction of the beneficiary. The beneficial interest is assignable and transferrable with the same facility as a stock certificate. Since it is assignable, the beneficial interest can be

[1] An Illinois land trust may be created by anyone who desires it. It is generally known as an excellent procedure for holding real estate by syndicates, subdividers, builders, industrial concerns, partnerships, associations, professional groups, societies and corporations. For a thorough discussion of Illinois land trusts and their present popularity in Florida, see Caplan, The Law of Land Trusts (Central Bank & Trust Co., Florida, 1958).

pledged as collateral security. The identity of the beneficiary does not appear on public record, inasmuch as the tract books record only the identity of the holder of the legal title—the trustee. A court in a proper proceeding may, however, direct the trustee to disclose the names of the beneficiaries.

Many of the advantages of the Illinois land trust stem from the fact that the interest of the beneficiary is personal property, i.e., a beneficial interest in the rents, issues and proceeds of the land. As such, it may be assigned without the signature of the spouse. And, like all intestate personalty, it passes on the death of the beneficiary to his personal representative and not to his heirs at law, thereby dispensing with the tedious rigors of probate proceedings.

A more detailed analysis of the nature and practical merits of the Illinois land trust follows. Attention will be given to some of the differences between it and the more familiar common law land trust.

INTEREST OF THE CESTUI QUE TRUST

Most of us have come across words to the effect that when the corpus of a trust is real estate there is a "split of title," the trustee having legal title to the property and the cestui que trust equitable title. This is a good, though sometimes not an entirely accurate statement of the mechanics of a common law land trust.[2] The beneficiary's interest is an equitable one in the real property. In an Illinois land trust, however, the *full* title to the realty is vested in the trustee. The beneficiary is specifically designated to have no right, title or interest in the real estate, either legal or equitable. Under the trust agreement his interest consists solely of: (*a*) A power of direction to deal with the title to the property and to manage and control it, and (*b*) The right to receive the proceeds from rentals, mortgages, sales or other dispositions of the property. Such right in the avails of the property is stated to be personal property.

Although the Illinois land trust was apparently created in 1891,[3] the first Illinois case thereon was *Kerr v. Kotz*,[4] a 1920 appellate court abstract decision, which upheld the basic theory of such a land trust. Six years later in *Duncanson v. Lill*,[5] the Illinois Supreme Court for the first time held that the cestui's interest is personal property. In that case, the original beneficiary of an Illinois land trust assigned his interest to a creditor to

[2] Where the res itself is an equitable interest, neither the beneficiary nor the trustee has legal title. It is perhaps best to say that the trustee is the nominal, while the beneficiary is the beneficial owner of the property. See Snell's Principles of Equity (22nd Edition, 1939) at p. 68.

[3] Garrett, Land Trusts (Chicago Title & Trust Co., 1957). The trustee was Cook County Abstract & Trust Co., one of the predecessors of the Chicago Title & Trust Co.

[4] 218 Ill. App. 654 (1920).

[5] 322 Ill. 528, 153 N.E. 618 (1926).

satisfy a debt. By separate agreement, such assignee was given authority to sell the beneficial interest and, if sold within two years, was to receive half the proceeds as compensation. Eighteen months later the assignee contracted to sell the interest to a third person, but later refused to perform. The original beneficiary filed a bill for specific performance in the Superior Court of Cook County. Unsuccessful, he appealed directly to the Supreme Court of Illinois, on the theory that a freehold was involved.[6] In denying jurisdiction and transferring the appeal to the appellate court, the court said:

> By the deed of trust the entire legal and equitable title to the property was expressly vested in the trustee, and the interest of each and every beneficiary, and of all persons claiming under them, was declared to be personal property.... The assignees merely took the place of the assignors as beneficiaries under the trust agreement and the trust continued to exist. The acquisition of those rights by the assignees effected no change or transfer of the title to the real estate. . . . If the decree sought were entered appellants would not gain and appellees would not lose a freehold. . . . Hence a freehold is not here involved and this court is without jurisdiction. . . .[7]

This statement shows the great difference between a common law trust and the Illinois land trust.

In *Gordon v. Gordon*,[8] the beneficiary of a land trust deserted his wife and moved to California. His wife was successful in obtaining a decree of separate maintenance with alimony. On the theory that the husband had an attachable interest in the trust real estate located in Illinois, the lower court ordered it sequestered to enforce payment of the alimony. When the trustee refused to allow court appointed commissioners to obtain control of the property, the court ordered the trustee to convey the land to the commissioners. The trustee appealed from this order, arguing that the beneficiary's interest was personal property, though not so specified in the trust agreement, and as such was outside the territorial jurisdiction of the Illinois courts. In affirming the lower court, it was stated:

> The nature of a beneficiary's interest is dependent upon the terms of the trust agreement. In the absence of an express provision to the contrary, the beneficiary is ordinarily the owner of the trust *res*. If the corpus of the trust is real property, the interest of the beneficiary is also real property.[9]

From this statement of the court, it is apparent that in order for the interest of the cestui to be personal property it must be expressly so provided by appropriate language in the trust agreement. Language commonly in use to achieve such purpose is: *The interest of any beneficiary hereunder*

[6] Ill. Rev. Stat. (1957) c. 110, § 75: "... Appeals shall be taken directly to the Supreme Court . . . in all cases in which a . . . freehold . . . is involved. . . ."

[7] 322 Ill. 528, 533, 153 N.E. 618, 620 (1926).

[8] 6 Ill.2d 572, 129 N.E.2d 706 (1955).

[9] Ibid., at 575, 708.

shall consist solely of a power of direction to deal with the title to said property and to manage and control it as hereinafter provided, and that such right in the avails of said property shall be deemed personal property, and may be assigned and transferred as such. Without such specific terms, the common law rule that the cestui que trust has an equitable interest in the res itself will apply, as in the *Gordon* case.

THE STATUTE OF USES

The modern day trust evolved from the common law use, a device originated in England whereby legal title was held by one for the use or benefit of another. Because the use was designed to circumvent such established rules as primogeniture and feudal duties owing to the King, Parliament adopted the Statute of Uses in 1536 in an effort, to curtail among other things, the widespread popularity of uses.[10] By the Statute of Uses, the holder of the use became holder of the legal estate of the same character as the equitable or use estate which he formerly owned. Thus, if A enfeoffed to B and his heirs for the use of C and his heirs, the Statute would operate to execute the use in C, giving him a legal estate in fee simple and leaving B with nothing. However, in 1545 the English courts decided that the Statute of Uses did not apply to an active use or trust.[11] The Statute of Uses, in practically verbatim form, was made part of the law of Illinois.[12]

A trust is active when the trustee has duties to perform. The majority of American courts hold that a trust is active where the only duty of the trustee is to eventually convey title.[13]

As demonstrated in *Chicago Title & Trust Company v. Mercantile Trust & Savings Bank*,[14] the Illinois courts hold the Statute of Uses inapplicable to land trusts for two reasons. Under the trust agreement in this case the trustee was to sell any property that might be remaining in the trust estate after twenty years, and distribute the proceeds among the beneficiaries. Plaintiff was awarded a personal judgment against the beneficiary. Shortly thereafter the beneficiary directed the trustee to manage the land, as he was empowered to do under the trust agreement. When the mortgagee brought suit to foreclose on the land, plaintiff consolidated in the action, claiming a prior lien. He contended that the trust was passive and therefore executed by the Statute of Uses, leaving the beneficiary with a legal estate in land subject to a judgment lien. Plaintiff appealed from an adverse judgment. The appellate court affirmed and held that

[10] 27 Hen. VIII, c. 10 (1536).

[11] 1 American Law of Property § 1.29 (1952). The case citation is unavailable, although Brooke's Abridgement, "Feffementes al uses," refers to a case to that effect, dated 1545.

[12] Ill. Rev. Stat. (1957) c. 30, § 3.

[13] Rest., Trusts § 69 (1935); Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932).

[14] 300 Ill. App. 329, 20 N.E.2d 992 (1939).

the Statute of Uses did not apply because (1) the trust was not passive inasmuch as the trustee had the duty to make conveyances during the life of the trust upon direction from the cestui que trust, and to sell and convey any remaining realty after twenty years; and (2) the Statute of Uses does not operate upon personal property, but only upon real property. The court remarked to the effect that it made no difference that the beneficiary had the power to direct the trustee to convey the realty to himself, for, until such reconversion, his interest remained personal property.

This liberal interpretation of the Statute of Uses by the Illinois courts with respect to the duties of the trustee is undoubtedly the life-blood of the Illinois land trust. As pointed out in a publication of the Chicago Title & Trust Company:

> The Illinois courts have considered and approved of land trusts in a number of decisions, but they have set out no new principles. They have applied settled law. But there are legal hurdles which must be passed before land trusts can be safely utilized. For example, a decision that would apply the Statute of Uses too strictly would sink the land trust without a trace.[15]

THE PARTITION CASES

Partition will not lie with respect to property held in an Illinois land trust. In *Aronson v. Olsen*,[16] the deed of trust placed the entire legal and equitable title in the trustee, and the interest of each beneficiary was declared to be personal property. It was expressly stipulated that no beneficiary should have any right, title or interest in any portion of the real estate.[17] The Supreme Court denied the beneficiaries' complaint for partition on the ground that they had no such interest in the land, legal or equitable, as would authorize them to partition the premises.

When the trustee did not sell trust property remaining after twenty years as directed in the trust agreement, the beneficiaries brought suit for partition in *Breen v. Breen*.[18] The court held that the trustee had a reasonable time to sell the property and that until that time the trust did not expire so as to vest legal and equitable titles in the beneficiaries sufficient to entitle them to a partition.

LIABILITY FOR NEGLIGENCE

If Mr. X, exercising all due care and caution for his own safety, is injured due to the negligent maintenance of property held in an Illinois land trust, against whom may he enforce an action for negligence? This ques-

[15] Garrett, Land Trusts (Chicago Title & Trust Co., 1957).

[16] 348 Ill. 26, 180 N.E. 565 (1932).

[17] The deed in trust stated: ". . . [The] interest of any beneficiary hereunder shall consist solely of the right to receive the proceeds from rentals or from sales of said premises, and that such right in the avails of said property shall be deemed to be personal property. . . ."

[18] 411 Ill. 206, 103 N.E.2d 625 (1952).

tion is not easily answered. But the following may be helpful in determining his rights against the trustee.

The only fully reported case shedding some light on the Illinois land trust situation relative to liability for negligence is the 1935 Appellate Court decision of *Brazowski v. Chicago Title & Trust Co.*[19] In that case the trustee's only duty was to hold title and deal with it in accordance with the dictates of the beneficiaries. The beneficiaries by the trust agreement were expressly given the right to "management and control of said property and the selling, renting and handling thereof." Upon the direction of the beneficiaries, the trustee leased the premises to a tenant. While the premises were so occupied plaintiff was injured on a broken fence. The appellate court reversed a judgment in negligence against the trustee, and held that in order to hold the trustee liable for such torts he must not only have legal title, but also a right or duty with respect to control, management or possession of the premises. The court said:

> [W]e therefore conclude that *the trustee, at the time of the accident, had neither the right to, nor the actual possession or control of the premises,* upon which the injury occurred. It is a fundamental rule that the liability to pay damages for negligence arises out of the existence of a duty and a breach thereof. . . . The duty in the case at bar would, of necessity, arise out of the fact of possession and control, and can be attributed only to the person who has the possession and control.[20]

As mentioned above, a typical Illinois land trust agreement gives the beneficiary full and exclusive rights to occupy, manage and control the trust property. The trustee is a mere repository of the legal and equitable title, pledged to deal with it upon direction of the beneficiaries. Thus, except where a special statute such as the Dram Shop Act might control,[21] the result in *Brazowski* would seem to obtain in all such Illinois land trust cases. That is, a third person injured due to the negligent operation of the trust premises cannot recover in an action against the trustee. The trustee would justifiably rely on this twenty-four year old "sleeper case" to free itself from liability. The obvious question therefore is: Who *is* liable? Often the beneficiary is not in actual possession of the property; he may be living in another state and managing the property through an agent. Can the third person recover against such beneficiary, or must he look to a tenant in possession? Is a clause in a lease of the trust property relative to the duty to repair or keep in a safe condition controlling? These questions

[19] 280 Ill. App. 293 (1935); noted in 13 Chi.-Kent L.R. (1935).

[20] Ibid., at 305 (emphasis supplied).

[21] Under § 135 of the Dram Shop Act, Ill. Rev. Stat. (1957) c. 43, which makes the "owner" of the premises liable for injuries where such owner knowingly permits intoxicating liquor to be sold thereon, it appears that the trustee, as legal owner, can be held answerable, so long as he is sued individually and not in his representative capacity. See: O'Conner v. Rathje, 298 Ill. App. 489 (1939).

cannot now be answered due to the absolute dearth of case law in Illinois.[22] Perhaps the only equitable solution can come from legislative enactment.

When we compare the holding of the *Brazowski* case with the common law land trust cases, we find no real difference in rules, but only in the factual makeups of the two types of trusts. *Schmidt v. Kellner*,[23] involved a common law land trust whereby the trustee had the right to possession and control of the premises. The trustees leased the premises and, during such lease, a roof water tank crashed through the ceiling and killed an employee of the lessee. Her estate brought suit in negligence against the trustees. It was held that the trustees were personally liable in negligence. The supreme court stated:

> In a court of law a trustee having the legal title to real estate, *together with the right of possession*, is regarded as the owner of the property, having all the rights and subject to all the liabilities of ownership. . . . The duties of the trustee as owner make him personally liable for torts committed by him or by his agents or servants in his employ.[24]

This is a sound statement of the common law rule. That is, the trustee of a common law land trust is liable in tort to third persons injured by the negligent operation of the premises.[25]

The *Schmidt* and *Brazowski* decisions are distinguishable solely on the basis of the trust instruments involved in each case. In *Schmidt*, the ordinary common law forms were used; duties of management and control and the right to possession were in the trustee. In *Brazowski*, under the peculiar Illinois land trust agreement, these duties and rights were reserved to the beneficiary; the trustee had no such rights or duties.

We must not take *Brazowski* to mean that the trustee in an Illinois land trust is *never* liable in negligence. There can be an Illinois land trust agreement whereunder the trustee is given some active duties with respect to the management, possession and control of the res. In such case there would be a *duty* in the trustee, the breach of which would render him liable. In short, liability pivots on possession.

OTHER CHARACTERISTICS

Dower.—The Illinois Statute on dower reads:

> A surviving spouse, whether husband or wife, may become endowed of a third part of all real estate of which the decedent was seized of an estate of inheritance at any time during the marriage. . . .[26]

[22] Whittaker v. Central Trust Co., 270 Ill., App. 614 (1933), is an abstract decision involving facts similar to those of Brazowski and which also held the trustee not liable in negligence.

[23] 307 Ill. 331, 138 N.E. 604 (1923).

[24] Ibid., at 336, 606 (emphasis supplied).

[25] Everett v. Foley, 132 Ill. App. 438 (1907).

[26] Ill. Rev. Stat. (1957) c. 3, § 170.

In adherence to this statute and the common law, the Illinois Supreme Court has held that dower does not attach to personal property,[27] but only to real estate of which the decedent was seized of some legal or equitable title.[28] Although there are presently no decisions stating that the surviving spouse of a beneficiary of an Illinois land trust has no dower, the result follows logically from the fact that the cestui's interest has been held to be personal property.[29] This is, of course, contrary to the common law land trust where the surviving spouse has statutory equitable dower in the beneficiary's interest.[30]

Homestead.—Homestead rights in Illinois are controlled by statute.[31] Such rights are given to anyone rightfully possessed of lands by lease or otherwise. The beneficiary in an Illinois land trust retains sole and exclusive right to possession of the property. Therefore, a beneficiary occupying the land as a residence is entitled to his homestead because he satisfies the possessory requirement of the Homestead Act.[32] His position is further strengthened by the fact that any holder of a possessory interest in land may invoke the aid of the statute, without regard to the extent of his title.[33]

Agency.—While under certain circumstances there might be a principal-agent relationship between the trustee and the beneficiary in an Illinois land trust, the status does not exist merely from the fact that there is a trust. In *Gallagher & Speck v. Chicago Title & Trust Co.*,[34] the beneficiary of an Illinois land trust had arranged to purchase a steam heating plant for an apartment building held in trust. When the bill was not paid, the contractor sued the trustee in assumpsit. The Appellate Court held the trustee not liable since there was no evidence to support the view that the beneficiary was the agent of the trustee for the purchase of anything. The following language of the court is important:

> [T]he recorded deeds, of which the public must take notice, provided that while the full legal and equitable title was conveyed to the defendant (trustee), such title should be held in trust under the provisions of an agreement which left the *cestui que trust* an interest in the "earnings, avails and proceeds arising from the disposition of the premises." This was constructive notice to the public that while the defendant held the *title* to the premises, someone else

[27] Clark v. Hanson, 320 Ill. 480, 151 N.E. 369 (1926).

[28] Nicoll v. Ogden, 29 Ill. 323 (1862).

[29] Breen v. Breen, 411 Ill. 206, 103 N.E.2d 625 (1952); Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926).

[30] Ill. Rev. Stat. (1957) c. 3, § 170: ". . . Equitable estates are subject to the right to elect to take dower. . . ." Nicoll v. Miller, 37 Ill. 387 (1865); Nicoll v. Ogden, 29 Ill. 387 (1865).

[31] Ill. Rev. Stat. (1957) c. 52, § 1.

[32] 39 Ill. L.Rev. 216 (1945).

[33] Watson v. Saxer, 102 Ill. 585 (1882).

[34] 238 Ill. App. 39 (1925).

named in the unrecorded trust agreement was the beneficial owner of all the rents and earnings of the property and the proceeds of any sale of the same.[35]

The issue before the Supreme Court in *Barkhausen v. Continental Illinois Nat'l Bank & Trust Company*[36] was whether or not the trustee was the agent of the beneficiaries of an Illinois land trust. The trust property, when conveyed to the trustee, was subject to a mortgage indenture containing a provision that on conveyance of the mortgaged property, the mortgage obligations were to be assumed by the grantee. When he acquired title, the trustee executed an assumption agreement whereunder as trustee, and not personally, he assumed all the covenants of the mortgagor under the mortgage indenture. The Supreme Court held that this assumption agreement exonerated the trustee from personal liability, but did not so relieve the beneficiaries in the absence of evidence showing that the trustee acted as agent of the beneficiaries in executing the assumption agreement. In short, *Barkhausen* stands for the proposition that the trustee in an Illinois land trust is not the agent of the beneficiary solely by virtue of acting on direction from the beneficiary.

CONCLUSION

This discussion by no means exhausts the myriad advantages available under the Illinois land trust. There are further benefits, such as those in the tax area which are outside the scope of this comment. Suffice it to say, in summary, that the Illinois land trust differs substantially from the more familiar common law land trust in the instances mentioned above.

[35] Ibid., at 43.

[36] 3 Ill.2d 254, 120 N.E.2d 649 (1954).

HISTORY AND CRITICISM OF JUROR HANDBOOKS AS A METHOD OF ORIENTATION

While the use of the jury system in criminal cases is widely approved as an important cornerstone of justice,[1] the inefficiencies and hazards present in its operation have been widely criticized in recent years.[2] One of the

[1] Knox, Jury Selection, 22 N.Y.U.L.Q. Rev. 433, 434 (1947) in which Judge Knox reports the views expressed by the Section of Judicial Administration of the American Bar Association at its meeting in July 1938. "Jury service . . . is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community." Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); Sherry, Juries in Criminal Cases, 11 Law Soc. J. 192 (1944); A.B.A. Committee Report, The Judge-Jury Relationship, 23 Ore. L. Rev. 3 (1943).

[2] Broeder, The Functions of the Jury, 21 U. Chi. L. Rev. 386 (1954); Coffin, Jury Trial Tragic But Not Entirely Hopeless, 25 J. Am. Jud. Soc. 13 (1941); Miner, The Jury Problem, 41 Ill. L. Rev. 183 (1946); Richardson, The Jury and Methods of Increasing Its Efficiency, 14 A.B.A.J. 410 (1928); Wicker, Jury Panels in Federal Courts, 22 Tenn. L. Rev. 203 (1952).