The Unincorportated Body

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Of the Taff Vale Case(1*) we are likely to hear a good deal for some time to come. The trade unions are not content; there will be agitation; perhaps there will be legislation.(2*) To one reader of English history and of English law it seems that certain broad principles of justice and jurisprudence are involved in and may be evolved from the debate: certain broad principles which extend far beyond the special interests of masters and workmen. Will he be able to persuade others that this is so? Can he assign to this Taff Vale Case its place in a long story?

Of late years under American teaching we have learned to couple together the two terms "corporations" and "trusts". In the light of history we may see this as a most instructive conjunction. And yet an apprentice of English law might well ask what the law of trusts has to do with the law of corporations. Could two topics stand farther apart from each other in an hypothetical code? Could two law-books have less in common than Grant on Corporations and Lewin on Trusts?

To such questions English history replies that, none the less, a branch of the law of trusts became a supplement for the law of corporations, and some day when English history is adequately written, one of the most interesting and curious tales that it will have to tell will be that which brings trust and corporation into intimate connexion with each other.(3*)

A few words about the general law of trusts may not be impertinent even though they say nothing that is new. The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.

"I do not understand your trust". These words have been seen in a letter written by a very learned German historian familiar with law of all sorts and kinds.

Where lies the difficulty? In the terms of a so-called "general jurisprudence" it seems to lie here: A right which in ultimate analysis appears to be ius in personam (the benefit of an obligation) has been so treated that for practical purposes it has become equivalent to ius in rem and is habitually thought of as a kind of ownership, "equitable ownership". Or put it thus: If we are to arrange English law as German law is arranged in the new code we must present to our law of trust a dilemma: it must place itself under one of two rubrics; it must belong to the Law of Obligations or to the Law of Things. In sight of this dilemma it reluctates and recalcitrates. It was made by men who had no Roman law as explained by medieval commentators in the innermost fibres of their minds.

To say much of the old feoffment to uses would be needless. Only we will note that for a long time the only, and for a longer time the typical, subject-matter of a trust is a piece of land or some incorporeal thing, such as an advowson, which is likened to

a piece of land. For trusts of movable goods there was no great need. The common law about bailments was sufficient. We may indeed see these two legal concepts deriving from one source: the source that is indicated in Latin by ad opus, in old French by al oes, in English by "to the use". In the one case however a channel is cut by the Courts of Common Law and the somewhat vague al oes explicates itself in a law of bailments and agency, while in the other the destined channel must be cut, if at all, by a new court since the law of rights in land has already attained a relatively high stage of development and finds its expression in an elaborate scheme of writs and formal actions. For the purposes of comparative jurisprudence it is of some importance to observe that though for a long time past our trust idea -- the idea of a trust strictly and technically so called -- has been extended to things of all sorts and kinds, still were it not for trusts of land we should hardly have come by trusts of other things. The ideas of bailment, agency, guardianship, might have shown themselves capable of performing all that was reasonably necessary. Foreigners manage to live without trusts. They must.

In the fourteenth century when feoffments to uses were becoming common, the most common of all instances seems to have been the feoffment to the feoffor's own use. The landowner enfeoffed some of his friends as joint tenants hoping for one thing that by keeping the legal ownership in joint tenants and placing new feoffees in vacant gaps no demand could ever be made by the feudal lord for wardship or marriage, relief or escheat, and hoping for another thing that the feoffees would observe his last will and that so in effect he might acquire that testamentary power which the law denied him and which the eternal interest of his sinful soul made an object of keen desire.

Now between feoffor and feoffee in such a case there is agreement. We have only to say that there is contract and then the highly peculiar character of our trust will soon display itself. For let us suppose that we treat this relationship as a contract and ask what will follow.

Well (1) as between feoffor and feoffee how shall we enforce that contract? Shall we just give damages if and when the contract is broken or shall we decree specific performance on pain of imprisonment? Perhaps this difficulty was hardly felt, for it can, so I think, be amply shown that the idea of compelling a man specifically to perform a contract relating to land was old, and that what was new was the effectual pressure of threatened imprisonment. But (2) think of the relationship as contractual and how are we to conceive the right of the feoffor? It is the benefit of a contract. It is a chose in action at a time when a chose in action is inalienable. Also if we held tight by this conception there would be much to be said for holding that the use or trust is in all cases personal property. Then (3) there is great difficulty in holding that a contract can give rights to a third person. We in England feel that difficulty now-a-days. Foreign lawyers and legislatures are surmounting it. We should have had to surmount it, had it not been for our trust. But from an early time, we find that the action, or rather the suit, is given to the destinatory, the beneficiary, the cestui que use as we call him, and indeed if the trustor can enforce the trust this will only be so because in the particular case he is the destinatory. And then (4) arises the all important question as to the validity of the beneficiary's right against purchasers from the trustee and against the trustee's creditors. Think steady of that right as the benefit of a contract and you will find it hard to say why it should be enforced against one who was

no party to the contract.

We know what happened. No sooner has the Chancellor got to work than he seems bent on making these "equitable" rights as unlike mere iura in personam and as like iura in rem as he can possibly make them. The ideas that he employs for this purpose are not many; they are English; certainly they are not derived from any knowledge of Roman law with which we may think fit to equip him. On the one hand as regards what we might call the internal character of these rights, the analogies of the common law are to be strictly pursued. A few concessions may be made in favour of greater "flexibility" but on the whole there is to be a law of equitable estates in land which is a mere replica of the law of legal estates. There are to be estates in fee simple, estates in fee tail, terms of years, remainders, reversions and the rest of it: the equitable estate tail (this is a good example) is to be barred by an equitable recovery. Then as regards the external side of the matter, "good conscience" becomes the active principle; a conscience that can be opposed to strict law. The trust is to be enforced against all whose conscience is to be "affected" by it. Class after class of persons is brought within the range of this idea. The purchaser who for value obtains ownership from the trustee must himself become a trustee if at the time of the purchase he knew of the trust, for it is unconscionable to buy what you know to be another's "in equity". Then the purchaser who did not know of the trust must be bound by it if he ought to have known of it: that is to say, if he would have known of it had he made such investigation of his vendor's title as a prudent purchaser makes in his own interest. It remains to screw up this standard of diligence higher and higher, until the purchaser who has obtained a legal estate bona fide for value and without notice, express or implied, of the equitable right, is an extremely rare and extremely lucky person. And apparently he is now the only person who can hold the land and yet ignore the trust. It was not so always. The lord who came to the land by escheat came to it with a clear conscience. Also we read in our old books that a use cannot be enforced against a corporation because a corporation has no conscience. But in the one case a statute has come to the rescue and in the other we have rejected the logical consequence of a certain speculative theory of corporations to which we still do lip-service. The broad result is that we habitually think of the beneficiary's right as practically equivalent to full ownership, and the instances of rare occurrence in which a purchaser can ignore it seem almost anomalous. And in passing it may be noticed that such danger as there is falls to absolute zero in a class of cases of which we are to speak hereafter. No one will ever be heard to say that he has purchased without notice of a trust a budding that was vested in trustees but was fitted up as a club-house, a Jewish synagogue, a Roman catholic cathedral.

Even that is not quite all. Even when the Court of Equity could not give the cestui que trust the very thing that was the original subject-matter of the trust it has struggled hard to prevent its darling from falling into the ruck of unsecured creditors of a defaulting trustee. It has allowed him to pursue a "reified" trust-fund from investment to investment: in other words, to try to find some thing for which the original thing has been exchanged by means of a longer or shorter series of exchanges. That idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas

developed by modern English jurisprudence. How we have worked that metaphor! May not one have a vested interest in a fund that is vested in trustees who have invested it in railway shares? Even a Philosophy of Clothes stands aghast. However, the main point is that cestui que trust is magnificently protected.

Now I cannot but think that there is one large part of this long story of the trust that ordinarily goes untold. The student is expected to learn something about feoffments to uses and the objects that were gained thereby, something about the Chancellor's interposition, something about the ambitious statute that added three words to a conveyance; but no sooner is King Henry outwitted, no sooner is the Chancellor enforcing the secondary use, than the law of uses and trusts becomes a highly technical matter having for its focus the family settlement with its trustees to preserve contingent remainders, its name and arms clauses, its attendant terms and so forth. Very curious and excellent learning it all is, and in some sort still necessary to be known at least in outline. still we are free to say that some of the exploits that the trust performed in this quarter are not admirable in modern eyes, and at any rate it seems to me a misfortune that certain other and much less questionable exploits pass noticed by those books whence beginners obtain their first and their most permanent notions of legal history.

First and last the trust has been a most powerful instrument of social experimentation. To name some well-known instances: It (in effect) enabled the landowner to devise his land by will until at length the legislature had to give way, though not until a rebellion had been caused and crushed. It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled men to form joint-stock companies with limited liability , until at length the legislature had to give way. The case of the married woman is specify instructive. We see a prolonged experiment. It is deemed a great success. And at last it becomes impossible to maintain (in effect) one law for the poor and another for the rich, since, at least in general estimation, the tried and well-known "separate use" has been working well. Then on the other hand let us observe how impossible it would have been for the most courageous Court of Common Law to make or to suffer any experimentation in this quarter.

Just to illustrate the potency of the trust in unexpected quarters we might mention an employment of it which at one time threatened radically to change the character of the national church. Why should not an advowson be vested in trustees upon trust to present such clerk as the parishioners shall choose? As a matter of fact this was done in a not inconsiderable number of cases and we may even see Queen Elizabeth herself taking part in such a transaction.(4*) Had a desire for ministers elected by their congregations become general among conformists, the law was perfectly ready to carry out their wishes. The fact that parishioners are no corporation raised no difficulty.

But there are two achievements of the trust which in social importance and juristic interest seem to eclipse all the rest. The trust has given us a liberal substitute for a law about personified institutions. The trust has given us a liberal supplement for a necessarily meagre law of corporations. The social importance of these movements will appear by and by. The juristic interest might perhaps escape us if we could not look abroad.

We in England say that persons are natural or artificial, and that artificial persons are corporations aggregate or

corporations sole. A foreign lawyer would probably tell us that such a classification of persons will hardly cover the whole ground that in these days has to be covered: at all events he would tell us this if he knew how little good we get out of our corporation sole -- a queer creature that is always turning out to be a mere mortal man just when we have need of an immortal person. We should be asked by a German friend where we kept our Anstalt or Stiftung, our Institution or Foundation. And then we should be told that, though in particular cases it may be difficult to draw the he between the corporation and the institute, we certainly in modern times require some second class of juristic persons. This necessity we should see if, abolishing in thought our law of trusts, we asked what was to become of our countless "charities". Unless some feat of personification can be performed they must perish. Let the "charitable" purpose of Mr Styles be, for example, the distribution of annual doles among the deserving poor of Pedlington, an incorporation of the deserving poor is obviously out of the question, and therefore we must either tell Mr Styles that he cannot do what he wants to do or else we must definitely admit "Styles's Charity" into the circle of "persons known to the law". In the latter case what will follow? What is likely to follow among men who have been taught the orthodox and cosmopolitan lore of the fictitious person? Surely this, that without the cooperation of the State no charitable institution can be created. And this doctrine is likely to endure even in days when the State is relaxing its hold over the making of corporations and learned men are doubting the fictitiousness of the corporations personality. Hear the new German Code: "Zur Entstehung einer rechtsfähigen Stiftung ist ausser dem Stiftungsgeschäfte die Genehmigung des Bundesstaats erforderlich, in dessen Gebiete die Stiftung ihren Sitz haben soll" (B.G.B. sec. 80).(5*) Translate that into English and suppose it to have been always law in England. How the face of England is changed!

Our way of escape was the trust. Vest the lands, vest the goods in some man or men. The demand for personality is satisfied. The lands, the goods, have an owner: an owner to defend them and recover them: an owner behind whom a Court of Common Law will never look. All else is mere equity.

Apparently we slid quite easily into our doctrine of charitable trusts. We may represent the process as gradual; we might call it the evanescence of cestui que trust. Observe the following series of directions given to trustees of land: (1) to sell and divide the proceeds among the twelve poorest women of the parish: (2) to sell and divide the proceeds among the twelve women of the parish who in the opinion of my trustees shall be the most deserving: (3) annually to divide the rents and profits among the twelve poorest for the time being: (4) annually to divide the rents and profits among the twelve who are most deserving in the opinion of the trustees. The bodily "owners in equity" who are apparent enough in the first of these cases seem to fade out of sight as small changes are made in the wording of the trust. When they disappear from view, what, let us ask, do they leave behind them?

Well, they leave "a charity" and perhaps no more need be said. If we must have a theory I do not think that any good will come of introducing the Crown or the Attorney-General, the State or the Public, for, although it be established in course of time that the Attorney-General is a necessary party to suits concerning the administration of the trust, still we do not think of Crown or Attorney-General, State or Public as "beneficial

owner" of the lands that are vested in the trustees of Nokes's charity, and trustees are not to be multiplied praeter necessitatem. Nor do I think that we personify the "charity": it cannot sue or be sued. Apparently our thought would be best expressed by saying that in these cases there is no "equitable owner" and that the accomplishment of a purpose has taken the place of cestui que trust. Our rule that the place of cestui que trust cannot be taken by a "non-charitable" purpose -- a rule that has not been always rigorously observed(6*) -- has not acted as a very serious restraint upon the desires of reasonable persons, so exceedingly wide from first to last Has been our idea of "charity".

Now no doubt our free foundation of charitable institutions has had its dark side, and no doubt we discovered that some supervision by the State of the administration of charitable trust-funds had become necessary, but let us observe that Englishmen in one generation after another have had open to them a field of social experimentation such as could not possibly have been theirs, had not the trustee met the law's imperious demand for a definite owner. Even if we held the extreme opinion that endowed charities have done more harm than good, it might well be said of us that we have learned this lesson in the only way it could be learnt.

And so we came by our English Anstalt or Stiftung without troubling the State to concede or deny the mysterious boon of personality. That was not an inconsiderable feat of jurisprudence. But a greater than that was performed. In truth and in deed we made corporations without troubling king or parliament though perhaps we said that we were doing nothing of the kind.

Probably as far back as we can trace in England any distinct theory of the corporation's personality or any assertion that this personality must needs have its origin in some act of sovereign power we might trace also the existence of an unincorporated group to whose use land is held by feoffees. At any rate a memorable and misunderstood statute tells us that this was a common case in 1532. "Where by reason of feoffments... and assurances made of trusts of manors... and hereditaments to the use of parish churches, chapels, church-wardens, guilds, fraternities, comminalties, companies or brotherhoods erected or made of devotion or by common assent of the people without any corporation... there groweth and issueth to the King our Sovereign Lord, and to other lords and subjects of this realm the same like losses and inconveniences, and is [sic] as much prejudicial to them as doth and is in case where lands be aliened into mortmain." Upon this recital follows a declaration that "all and every such uses, intents and purposes" that shall be declared or ordained after the 1st of March in 28 Henry VIII shall be utterly void in law if they extend beyond a term of twenty years. We know how Elizabethan lawyers construed this statute. They said that it struck at uses that were superstitious and not at such as were good and godly. We are better able than they are to trace the evolution of King Henry's abhorrence of superstition. In 1532 he was beginning to threaten the pope with a retention of mates, but he was no heretic and not even a schismatic; and indeed this very statute clearly contemplates the continued creation of obits provided that the trust does not exceed the limit of twenty years. The voice that speaks to us is not that of the Supreme Head upon earth of a purified church but that of a supreme landlord who is being done out of escheats and other commodities. I will not say but that there were some words in the Act which in

the eyes of good and godly lawyers might confine its effect within narrow limits, but I also think that good and godly lawyers belonging as they did to certain already ancient and honourable societies for which lands were held in trust must have felt that this statute had whistled very near their ears.

NOTES:

1. Taff Vale, R. Co. v. Amalgamated Society of Railway Servants (1901), A.C. 426.

2. [There was. Trade Disputes Act, 1906 (6 Edw. VII, c. 47); Trade Disputes and Trade Unions Act, 1927 (17 & 18 Geo. V. c. 22). See Slesser and Baker, Trade Union Law, ed. 3, (1931).]

3. [See Sir W.S. Holdsworth, History of English Law, vol. iv, pp. 477-480; vol. ix, pp. 47-48.]

4. In re St. Stephen, Coleman Street, (1888), 39 Ch. Div. 492.

5. [Translation: An endowed institution, having legal status, is created by the act of endowment together with its confirmation by that state of the confederation, within which the endowed institution is to be located. The Civil Code of the German Empire. Trs. Walter Loewy (1909).]

6. See In re Dean (1889), 41 Ch. Div. 552, 559: a trust for the comfortable maintenance of specific dogs and horses adjudged valid, though not charitable and not enforceable by any one. See however an article by J.C. Gray, 15 Harvard Law Review, p. 509 on "Gifts for a non-charitable purpose".

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