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Recent Decisions

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by comparison of the signatures of the owner. Add to this the safety guaranteed by the assurance fund and the risk is much reduced. In regard to the rights of heirs, a real estate representative is usually created, who holds the property of the testator until final adjudication, then he signs it over to the heirs, on an order from the court. This system does not change old laws but provides a new means for carrying them out. Much has been said of its tendency to foster a disposition in the people to look toward the government, the state, as the source of title. Here the discussion might readily go off on a tangent, and directly toward an application of sociological principles. My own belief is that the argument is fatuous. I incline toward the standpoint that the buyer will regard the vendor, to whom the consideration runs, as the source of title, and the state as usual in its role of staunch protector of the people's rights. A final argument for the system of registration of title is that of ease and swiftness of transfer or encumbrance. It is quite conceivable at least to my mind, that the present financial condition, due in some measure to difficulties of bankers in allowing loans on real estate, might have been of less consequence had it been possible to pass title to real estate as quickly and easily as title to personal property is passed, or a loan as quickly and easily arranged on realty as on personal property. Perhaps this is too gross a supposition, still we may see a day when this system fitted as it is to a more complex civilization, will be in widespread use. Some localities find it adapted to their needs even now.

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RECENT DECISIONS

TRUSTS.—WHERE ONE HOLDS PROPERTY IN TRUST FOR AN UNDISCLOSED BENEFICIARY, WILL CREDITORS WHO HAVE GIVEN THE TRUSTEE CREDIT ON THE STRENGTH OF REPRESENTATIONS THAT TRUST PROPERTY WAS HIS OWN BE GIVEN RIGHTS PRIOR TO THOSE OF THE UNDISCLOSED BENEFICIARY?—The subject of this note, as presented in the recent case of *Hummel v. Willmow*, 179 N. E. 438 (Ill. 1932), raises a nice problem and leads us to inquire into the following: What are the rights of creditors of a trustee holding property under a secret trust when such creditors extended the credit on the representation of the trustee that the property, in fact the subject of a secret trust was his own? What are the rights of such creditors as against the trust beneficiary? What are the rights of such creditors if, after credit is given, the property is conveyed to the beneficiary? In the *Hummel* case the question was: Would creditors who issued credit to a husband on the strength of his representation that certain realty was his own, and to which he had been permitted to hold the title in his own name for 18 years, be permitted to set up their title in preference to that of

the undisclosed beneficiary for whom the property had actually been held in trust? The court *held* that the creditors would be given priority, for the beneficiary had allowed the title to remain in the hands of the husband for 18 years during which he, on his apparent ownership (in which the beneficiary by silence acquiesced), was extended credit which he now cannot satisfy.

Judge Learned Hand in the case of *Bryant v. Klatt,* 2 Fed. (2d) 167 (1924), a case involving very similar circumstances, says that he cannot see how a court will allow one's creditors to profit by that which was never truly the debtor's at all, but in that case allows a recovery for that portion of the debt which was contracted after the beneficiary had knowledge that the creditors were relying on the trust property as security. He was loath to do this but did it on the precedent of three cases cited and on the basis of an estoppel. However, it was his opinion that in cases where the beneficiary was innocent of any knowledge of reliance by the creditors of a trustee on the property the subject of a secret trust, that as between creditors and beneficiary there were equal equities and, following the rule of equity, the one prior in time should prevail thus giving the beneficiary priority.

The Supreme Court of Illinois, in deciding the *Hummel* case, does not seem to consider this proposition. It seems to be of the opinion that when the beneficiary of an undisclosed trust placed the trustee in a position where he might work fraud on his creditors or permitted the trustee to assume a position whereby he might work fraud on his creditors and by reason of such position he does work fraud on his creditors, that the beneficiary will be estopped to exclude the creditor from his claim and the instrument will be regarded as a conveyance for the purpose of defrauding creditors of their rights. Quoting from the decision in the principal case: "A married woman may have a resulting trust in real property, yet, if she represents to the world that the husband is the owner of the property, or if she permits him to act with respect to it in such a manner as to induce others to believe him to be the owner, third persons extending credit on the strength of such belief will be protected. The wife cannot, in such case, assert a resulting trust to defeat the claim or lien of one who extended credit to the husband on the faith of his apparent title and without notice of the wife's equity."

It might be well at this point to consider for a moment as to what, in general, are the rights of a creditor. He has only a general claim against a debtor; until the claim is sued on and reduced to a judgment the creditor has no specific lien against the property of the debtor. After judgment, it amounts to a lien against any property possessed by the debtor.

Since the decision in the *Bryant* case, numerous cases have been decided holding that creditors who extend credit in reliance upon a trustee's apparent ownership will be protected upon the ground of an estoppel. See *Pierce v. Hower,* 142 Ind. 626 (1895); *Roy v. McPherson,* 11 Neb. 197, 7 N. W. 873 (1881); *Besson v. Eveland,* 26 N. J. Eq. 468 (1875); *Budd v. Atkinson,* 30 N. J. Eq. 530 (1879).

In cases however where a trustee under an oral or secret trust conveys to the beneficiary the conveyance cannot be set aside or impeached by the trustee's general creditors. See *Morgan v. Morgan,* 252 Fed. 719 (1918); *Smith v. Ellison,* 80 Ark. 447, 97 S. W. 666 (1906); *Fraser v. Churchman,* 43 Ind. App. 200 (1908); *McCormick Harvesting Mach. Co. v. Griffin,* 116 Iowa 397, 90 N. W. 84 (1902); *Bailey v. Wood,* 211 Mass. 37 (1912). This is on the theory that the courts will not prevent a man from doing what he is under a moral obligation to do. *Fraser v. Churchman, supra.* "While a parol trust made at the time of the delivery of a deed is within the Statute of Frauds, nevertheless it

supports a conveyance which would otherwise be open to attack as in fraud of creditors." See *Morgan v. Morgan, supra.* In these cases nothing is presented showing guilty knowledge on the part of the beneficiary or carlessness or that the beneficiary had been the one who placed the trustee in the position enabling him to work fraud. *Contra: Holmes v. Winchester,* 135 Mass. 299 (1883); *Bancroft v. Curtis,* 108 Mass. 47 (1871). See AMES, CASES ON TRUSTS, vol. I, p. 181.

The courts have even permitted the conveyance to stand although the conveyance was made after the creditor had reduced his claim to judgment and obtained a judgment lien upon the property. See *Hays v. Reger,* 102 Ind. 524 (1885); *Hurt v. Drew,* 122 Kan. 357; *Wilmer v. Dunn,* 133 Md. 354, 105 Atl. 319 (1918); *Siemon v. Shurck,* 29 N. Y. 598 (1864); *Kauffman v. Kauffman,* 266 Pa. 270, 109 Atl. 640 (1920). In cases, however, where fraud is shown or the trust beneficiary has permitted the trustee to appear of record as the apparent owner the conveyance will be impeached and set aside. It is not intent, so much as conduct, that determines the rights of the parties in such cases. *Cf. Galbraith v. Lunsford,* 87 Tenn. 89, 9 S. W. 365 (1888); *Lawrence v. Guarantee Investment Ins. Co.,* 51 Kan. 222, 32 Pac. 816 (1893); *McCormick Harvesting Mach. Co. v. Perkins,* 135 Iowa 64, 110 N. W. 15 (1906); *Warner v. Watson,* 35 Fla. 402, 17 So. 654 (1895); POMEROY'S EQ. JUR. (3d ed.) § 814.

The *Hummel* case presented yet another question. Where a beneficiary of a trust arrangement permits a trustee to hold property in such a way that he appears to be the ostensible owner thereof and as a result the trustee secures credit from creditors who place reliance on such ostensible ownership and the debtor trustee after receiving such credit conveys the property to the beneficiary, will the courts permit the impeachment of such conveyance? While the court held in that case that such a trust was not clearly and unequivocally established still, if it had been, the court would have impeached and set aside such conveyance. Quoting, "Even, assuming that the beneficiary had a resulting trust in the property, yet she knowingly permitted the title to remain in him of record for 18 years, during which period through his apparent ownership of the property, credit was extended to him, and he incurred obligations which remain unsatisfied. She cannot, by taking the title in herself place the property beyond the reach of her husband's creditors. The conveyance will be void and fraudulent." See *Frewin v. Stark,* 319 Ill. 35, 149 N. E. 588 (1925); *Smith v. Williard,* 174 Ill. 538, 51 N. E. 835 (1898); *Hauk v. Van Ingen,* 63 N. E. 705 (1902); *Hockett v. Bailey,* 86 Ill. 74 (1877).

While the decision and doctrine of *Hummel v. Villmow* and corresponding cases may seem at first blush to be harsh and unjust and while it is true, as Judge Learned Hand says in *Bryant v. Klatt,* that it would be giving the creditor a better title than the debtor trustee had, still where a beneficiary by his silence or otherwise permitted and enabled the fraud to be worked he has acquiesced and indirectly participated in the perpetration of the fraud and should not be allowed thereafter to save himself at the expense of the creditor. The action of the court is entirely just, equitable and justifiable.

Although "it is making one man's property answer for the debt of another," yet as between two parties equally innocent of actual guilty knowledge, it is entirely in accord with the principles of justice and equity that the one who has made the perpetration of the fraud possible should be made to suffer rather than the one who had neither an actual part in the fraud nor assisted in any way in making it possible.

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