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## LAND TRUSTS: SOME PROBLEMS IN VIRGINIA

Land trusts of the type commonly found in Illinois are unique and somewhat controversial creatures. As creations of the legal imagination, they embody many standard principles,<sup>1</sup> the combination of which raises questions and difficulties unheard of in more normal circumstances. The essence of the device is a conveyance of subject real property to a trustee, vesting the trustee by a recorded deed in trust with all the powers of title over the property, but in an unrecorded trust agreement limiting the trustee's seemingly plenary powers to the point where the actual control of the land is vested in the trust beneficiaries. The result is a device for holding land which, when local law is benign, has some extremely advantageous characteristics.

How the Illinois Land Trust got its start is not really clear. It appears that the device was already popular when the first case mentioning it by name came to court.<sup>2</sup> In all of the early cases<sup>3</sup> there is no examination of the law upon which the device operates nor a questioning of the basic principles which afford it its unique characteristics. The opinions consist mainly of an examination of the trust agreement itself and faithful acceptance of its operative terms. Such bland judicial approval aided greatly in the establishment of the device in Illinois, and not until recent attempts in introducing the land trust into other jurisdictions<sup>4</sup> were made, were the principles upon which it is based seriously examined.<sup>5</sup>

The device is based on several common law principles. The statute of uses raises a problem because of the vesting of no more than ministerial duties in the trustee, thereby possibly rendering the trust involved capable of being classed as a dry or passive trust, subject to exe-

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1. Garrett, LAND TRUSTS (reprint from ILLINOIS LAW FORUM, Winter, 1955 pp. 655-680) second revision, 1963 at p. 3.

2. Kerr v. Kotz, 218 Ill. App. 654 (1920) (abst. dec.)

3. *Ibid.*; Whitaker v. Scherer, 313 Ill. 473, 145 N.E. 177 (1924). The court in *Whitaker* makes no mention or intimation of the land trust being a new device. The Illinois Supreme Court, in *Chicago Federal Savings and Loan Association v. Cacciatore*, 25 Ill. 2d 538, 185 N.E.2d 670 (1962), mentioned that the device had been in use in Illinois for eighty years.

4. Virginia and Florida. See: McKillop, *The Illinois Land Trust in Florida*, 13 FLA. L. REV. 173.

5. See: Resnick v. Goldman, 133 So.2d 770 (1961), where the District Court of Appeals of the Third District of Florida held that tender of the deed from the trustee without submission of the trust agreement was not tender of marketable title when the land was held under a land trust agreement.

cution by a strict application of the statute. The heart of the land trust, however, lies in the operation of the doctrine of equitable conversion, and it is here that the most serious questions arise concerning the features which most vitally affect its usefulness. The application of the doctrine must be left to the courts, and until decisions are forthcoming, much of the commentary on the point, other than in Illinois, must be speculative.

Other questions arising in consideration of the land trust are the use of incorporation by reference in relating the unrecorded trust agreement with the recorded deed in trust to the trustee, and questions of public policy which might arise in connection with consideration of this by the courts.

Why then, should land trusts, with all their possible legal problems, be worth all the trouble which has been put forth in attempting to introduce them to states other than Illinois? The answer is that, if successful, they have certain very desirable features which make them quite useful in allowing large groups to own and deal with land as an entity. The vehicle of a land trust enables one signature (that of the trustee) to convey title to the property even though the beneficial owners are scattered all over the country. If the law of the state is benign toward the device, as it is in Illinois, and equitable conversion considerations are correctly in line, chaos in the personal financial affairs of the beneficiaries, such as death, bankruptcy and judgments against them cannot encumber the title of the land in trust. Also, if a corporate trustee is used, there is generally no problem with judgments against it. Under such conditions the title to the property remains freely alienable. Privacy of ownership provided by a land trust is also often a convenient feature, allowing many parcels of land in the same area to be bought without revelation of a common buyer and a consequent possibility of a rise in price on the part of an informed landowner. Then, too, the beneficiaries might want to have the trustee deal with unruly tenants without involvement.

The land trust also offers the highly desirable feature of limited liability to the beneficiaries. In Illinois, at least, the purchase of land to be held in trust may be accomplished on mortgage loans for which the sole security is the land, with no personal liability required on the part of the lender. In addition, it is also possible for a beneficiary holding a certificate of interest in a land trust, to pledge the certificate as collateral for a personal loan (upon notification of the trustee) without disturbing

title to the land.<sup>6</sup> In such circumstances, the trust agreements generally provide that such a pledgee, while he may receive the rents, profits and other avails from the property does not receive the right to manage or command its sale.<sup>7</sup> The problem of deaths of out-of-state owners is also simplified under the land trust, since, because their interests are considered personalty, there is no necessity for troublesome double probate proceedings and, as in any trust, devolution of beneficial interest may be specified in the agreement. In addition, the land trust device also necessitates the presence of a responsible local representative in the person of the trustee.<sup>8</sup>

Many of the foregoing characteristics, of course, are not peculiar to the land trust. Nor are they all of the possibilities which might be exploited should imaginative legal minds turn their efforts to the task. Something must be said for their simplicity and ease of establishment, however, and there is little question but they would be a desirable alternative to have available.

#### THE STATUTE OF USES

The first problem which arises in the technical considerations of the applicability of the local law on the possibility of the use of land trusts deals with the operation of the statute of uses. If the ministerial duties given the trustee<sup>9</sup> are not considered by the local courts to be sufficient under that jurisdiction's statute of uses to keep the trust from being a dry or passive one the trust is executed and, with equitable title of the land thereby vested in the beneficiaries, the land trust is destroyed. In Virginia, the problem was not considered a particularly serious one even before legislation was passed,<sup>10</sup> but now, with the advent of a

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6. *Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E. 2d 94 (1957); *Seno v. Frank*, 169 N.E.2d 335 (1961); *Duncanson v. Lill*, 322 Ill. 528, 153 N.E. 618 (1962).

7. *Seno v. Frank*, *supra*, note 6.

8. *Garrett, Land Trusts, supra*, note 1; *LAND TRUSTS: A NEW CONCEPT FOR HOLDING LAND IN VIRGINIA*, published by the Central National Bank of Richmond, Virginia (1962).

9. Duties such as conveying the land on the order of the beneficiaries, and selling the corpus at the end of the twenty-year period are normal provisions in land trust agreements.

10. Section 55-17 of the 1950 CODE OF VIRGINIA (repl. vol. 1959). See: *Blake v. O'Neal*, 63 W.Va. 583, 61 S.E. 410 (1908), where a copy of the Virginia Statute of Uses was closely examined and found to apply only to three situations: deeds of bargain and sale, deeds of lease and re-lease, and covenants to stand seized for the use of another, at p. 413.

new Virginia statute,<sup>11</sup> the problem of the statute of uses has been laid to rest.

It was generally considered that the Virginia Statute of Uses<sup>12</sup> did not apply to instruments by which real property was conveyed by a settlor to a trustee, since the Statute seems to apply mainly to a situation in which a property owner declares himself trustee for another in passive trust.<sup>13</sup> But there was some worry that a Virginia court, under its general equity power,<sup>14</sup> might declare the property to be vested in the beneficiaries under a deed of trust. The Virginia court made such a declaration, however, under a situation in which the trustee had no duties at all, whereas under the terms of a land trust the trustee, in addition to certain current ministerial duties, is also required to sell the land at the end of twenty years.

When the Illinois Supreme Court was faced with interpretation of this problem,<sup>15</sup> it held that the duties imposed on the trustee of having the real property subdivided and platted, and the powers given it to control, improve, use, sell, lease and mortgage the land made the trust active and, therefore, not executed by the Illinois Statute of Uses.

11. Section 55-17.1 of the 1950 CODE OF VIRGINIA, passed by the General Assembly April 16, 1962, which reads as follows:

§ 55-17.1. No trust relating to real estate shall fail, nor shall any use relating to real property be defeated because no beneficiaries are specified by name in the recorded deed of conveyance to the trustee or because no duties are imposed upon the trustee. The power conferred by any such instrument on a trustee to sell, lease, encumber or otherwise dispose of property therein described shall be effective and no person dealing with such a trustee shall be required to make further inquiry as to the right of such trustee to act nor shall he be required to inquire as to the disposition of any proceeds.

Nothing in this section shall be construed (1) to affect any right which a creditor may otherwise have against a trustee or beneficiary, (2) to enlarge upon the power of a corporation to act as Trustee under § 6-9 or (3) affect the rule against perpetuities.

12. *Supra*, note 10.

13. *Ibid.*

14. *Sims v. Sims*, 94 Va. 580, 27 S.E. 436 (1897), where a will leaving one-third of the testator's estate in trust for his incompetent son for life, with no terms for directions for administration, was held by the court to be executed as a passive trust, and the son's committee entitled to possession of the property. *See also: Jones v. Tatum*, 19 Gratt. (60 Va.) 720 (1870), where the court held that the sole duty of the trustee to convey land to the children kept the trust from being a dry or passive one. (citing *Bass v. Scott*, 2 Leigh (29 Va.) 356 (1830)).

15. *Hart v. Seymour*, 35 N.E. 246 (1893). Although the property in this case was not held under a land trust, the proposition was never seriously questioned in cases actually involving them. *See also: Chicago Title and Trust Co. v. Mercantile Trust and Savings Bank*, 300 Ill. App. 329, 20 N.E.2d 992, (1939).

### THE DOCTRINE OF EQUITABLE CONVERSION

The very heart of the trust lies in the doctrine of equitable conversion, for it is upon this principle that the beneficiaries' interests are made personalty, removing them from the application of dower and curtesy, allowing the possibility of avoidance of double probate proceedings, making them unable to encumber title to the land with their personal debts and prescribing the devolution of the beneficiaries' interest upon his death.

Professor Bogert states:

while the right of (sic) cestui que trust was originally in personam against the trustee, it has become increasingly a right in rem and is now substantially equivalent to equitable ownership in the trust res.<sup>16</sup>

In view of this statement, if the corpus of the trust should be realty, the beneficiary has a real property interest which is subject to the rules governing such property. However, as a matter of intention rather than law, a deed to one person for the use of another may separate the legal from the equitable title and vest the former in the trustee and the latter in the the cestui que trust, dictating that each descend accordingly.<sup>17</sup> If, then, the interests of the trustee and the beneficiary are subject to the will of the settlor, it is possible that the expression of such intent may be sufficient to vest the desired title in each party. In addition to and further substantiating this view, the Illinois Supreme Court<sup>18</sup> quoted with approval from Powell's *The Law of Real Property*, as follows:

Interests of beneficiaries of private express trusts run the gamut from valuable substantialities to evanescent hopes. Such a beneficiary may have any one of almost infinite variety of the possible aggregate of rights, privileges, powers and immunities.<sup>19</sup>

Note that this is an expression of trust law, not the operation of equitable conversion. In *Gordon v. Gordon*<sup>20</sup> the Supreme Court of Illinois found that the interest of a beneficiary of a trust, the corpus of which was land, was an interest in real property. It held that the nature of the

16. BOGERT, TRUSTS, sec. 37 at p. 162 (3rd. ed., 1952).

17. *Blake v. O'Neal*, *supra*, note 10; *Grove v. Long*, 89 W. Va. 652, 109 S.E. 817.

18. See: *Farkas v. Williams*, 5 Ill. 2d 417, 125 N.E. 2d 697 (1955), also *Garrett*, *supra*, note 1 at p. 5.

19. 4 POWELL, REAL PROPERTY 87 (1952), also *Garrett*, *supra*, note 1 at p. 5.

20. 6 Ill. 2d 572, 129 N.E. 2d 706 (1955).

interest depended on the trust agreement, and in the absence of a provision to the contrary, the general rule that the beneficiary is the equitable owner of the trust corpus applied. The Court went on to state that the doctrine of equitable conversion is an exception to the general rule, but found that the doctrine did not apply in that case. There is no way of knowing from a reading of the case whether or not the trust was an ordinary land trust, but the holding would seem to indicate that it should be specified in each land trust agreement that the interest of the beneficiaries in the trust is to be personal property.<sup>21</sup> It is possible that the manner in which the Illinois Court disposed of the equitable conversion issue would not bar its argument in later cases, and that equitable conversion alone, without an expressed provision in the trust agreement, might be capable of converting the interests of the beneficiaries of a land trust into personalty. There is ample authority for this proposition in other jurisdictions:

“Equitable conversion” is that change in the nature of property by which for certain purposes real estate is considered as personalty or personal estate as real and transmissible and descendable as such. . .<sup>22</sup>

In a land trust, the transfer of land by the settlor to the beneficiary with directions to sell, even though the directions state that the sale is not to be made for twenty years, transfers the interest of the beneficiary of the trust into personalty immediately by equitable conversion. Professor Scott states:

The cases are numerous in which it is held that a mandatory direction to trustees to sell land which they hold in trust causes an equitable conversion. And that the interest of the beneficiaries is to be treated not as real estate but as personal property, even though the trustees have not yet sold the land.<sup>23</sup>

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21. Garrett, *supra*, note 1 at p. 9.

22. Richardson v. McCloskey, 261 S.W. 801, 812 (Tex. 1924); In Re Dodge's Estate, 223 N.W. 106 (Iowa 1929).

23. 2 SCOTT, TRUSTS sec. 31 at pp. 976-77 (2d ed., 1956). Cited as authority there is Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926), an Illinois trust case where appeal by beneficiaries was denied by the Illinois Supreme Court on the basis that a freehold interest was not held by them. See also: BOGERT, TRUSTS sec. 37 at p. 163 (2d ed., 1952); Johnson v. Tracey, 326 Mass. 628, 96 N.E. 2d 157 (1951); Sweesy v. Hoy, 324 Ill. 319, 155 N.E. 323 (1927); Chicago, North Shore and Milwaukee RR. Co. v. Chicago Title and Trust Co. 328 Ill. 610, 160 N.E. 226 (1928); Knight v. Gregory, 333 Ill. 643, 165 N.E. 208 (1928); Goben v. Johnson, 335 Ill. 395, 167 N.E. 94 (1929); Ahrens v. Ahrens, 345 Ill. 269, 178 N.E. 104 (1931); Aronson v. Olson 348 Ill. 26, 180 N.E. 104 (1931); Union Guardian Trust Company v. Nichols, 311 Mich. 107, 18 N.W.2d 383 (1945).

and further:

There is equitable conversion where the trustee is directed to sell the land, even though it is not his duty to sell it immediately. It is sufficient that there is imposed upon him by the trust instrument an absolute duty to sell at some time.<sup>24</sup>

The doctrine of equitable conversion is recognized in Virginia,<sup>25</sup> and the Supreme Court of Appeals has held that real property conveyed to a trustee with directions that the property should be sold without qualification is immediately transformed into personalty.<sup>26</sup>

Doubts have been interposed concerning the possibilities of a different conclusion based on the requirement that a land trust agreement gives the trustee no discretion to sell the property during the initial twenty-year period except pursuant to the order of the beneficiaries.<sup>27</sup> The general rule is that if the land is transferred to the trustee to be sold contingent on an event which might not happen, then equitable conversion does not take place until the event happens, but if the order is not contingent, then the conversion takes place immediately.<sup>28</sup> The

24. 2 SCOTT, TRUSTS, sec. 131 at p. 977 (2d ed., 1956); Chicago Title and Trust Co. v. Mercantile Trust and Savings Bank, *supra*, note 15; Liberty National Bank of Chicago v. Kosterlitz, 329 Ill. App. 244, 67 N.E.2d 876 (1946).

25. See: Clay v. Landreth, 187 Va. 169, 45 S.E.2d 875 (1948).

26. McClanachan v. Siter, Price and Co., 2 Gratt. (43 Va.) 280 (1845). In that case, the Supreme Court of Appeals of Virginia held that a deed to trustee specifying that land which was the corpus of the trust be sold for the benefit of the grantors immediately converted the interest of the grantors to personalty by equitable conversion, and as such the remainder interest went to the husband on the death of the wife. The Court said at pp. 294-95: "It is well settled that land directed or agreed to be sold and turned into money, (upon the principle that what is agreed or ought to be done is considered as done) shall be treated as immediately assuming the quality of personalty, and as continuing impressed with that character, until some person entitled to the proceedings shall elect to take the subject in its original character as land." (Although the last words in the quotation might be at first thought to raise doubt seemingly laid to rest, it should be remembered that all land trust agreements specifically negate the capability of the beneficiaries to claim interest in the land itself, and Illinois courts, at least, have been religious in giving strict effect to the terms of the trust agreement.) See: Hart v. Seymour, 35 N.E. 246 (Ill. 1893); Whitaker v. Scherer, 313 Ill. 473, 145 N.E. 177 (1924); Martin v. Martin, 170 Ill. 634; Chicago, N. S. & M. R. R. Co. v. Chicago Title and Trust Co., 328 Ill. 610, 160 N.E. 226 (1928).

27. See: SCOTT, *supra* note 24 and quoted material in the body of text. See also: Mellon v. Reed, 123 Pa.St. 1, 15 Atl. 906 (1888); also: 124 A.L.R. 448 (1940). In the Mellon case it was held that when the sale of land was not capable of being defeated by a personal representative, but only delayed during her lifetime, that the order to sell was absolute, and equitable conversion of the beneficiary's interest took place immediately.

28. Harcum's Adm'r v. Hudnall, 14 Gratt. (55 Va.) 369 (1858).

Virginia Supreme Court of Appeals, however, has declared by way of dicta that equitable conversion might not take place until the happening of a contingent event though the direction to sell the land at some time was absolute.<sup>29</sup>

The real area of doubt, however, appears to be that in all cases other than those concerning land trusts decided in Illinois,<sup>30</sup> the operation of equitable conversion is an incidental rather than a preplanned and relied-upon effect. On this basis, it may well be that a misguided court, relying on considerations of public policy, could fail to give the desired effect to the doctrine.<sup>31</sup> Despite this possibility, it would seem that a court would be hard pressed to defeat both the argument that the nature of the beneficiaries' interest is explicitly stated in the trust agreement, and that the doctrine of equitable conversion applies.

#### TORT LIABILITY FOR ACCIDENTS ON THE PROPERTY

The general rule in situations where land is held under a trust is that liability for torts occurring on the property falls upon the trustee if the rights of control and possession are vested in it.<sup>32</sup> If, on the other hand, the trustee does not have the right to possession and control, he has been held not liable for such torts.<sup>33</sup> Such a rule has been applied to a land trust in Illinois, and, although a Virginia case holds that a trustee with right to possession and control of the property is liable,<sup>34</sup> this is not contradictory to similar statements in Illinois,<sup>35</sup> so it is probable that the general rule would be applied in Virginia.

#### RELATIONSHIP AMONG THE BENEFICIARIES

The Supreme Court of Appeals of West Virginia has held that the beneficiaries of a business trust were liable as partners in a tort arising from the negligent operation of the trust property on the ground that they formed an association of shareholders and retained the right to

29. Harcum, *supra*, note 28, might be distinguishable from the typical land trust case in the ground that in that case there was an absolute prohibition against the sale of the land until the contingent event, where in a land trust there is not, but rather a prohibition to sell except at the direction of the beneficiaries.

30. See: Gordon v. Gordon, 6 Ill. 2d 572, 129 N.E.2d 706 (1955).

31. See: Carr v. Branch, 85 Va. 597 (1889).

32. Butler v. Townsend, 31 N.Y.S. 1094 (Sup. Ct. 1895); Pena v. Stewart, 78 Ariz. 272, 278 P.2d 892 (1955); Richman v. Green, 143 Cal. App. 2d 470, 99 P.2d 890 (1956).

33. Richman v. Green, *supra*, note 32.

34. Belvin's Ex'rs v. French, 84 Va. 81 (1887).

35. Brazowski v. Chicago Title and Trust Co., 280 Ill. App. 293 (1935); Whitaker v Central Trust Co., 270 Ill. App. 614 (abst. dec. 1933).

conduct a business.<sup>36</sup> Since the retention by the beneficiaries of the right to control the property in a land trust is similar to a Massachusetts trust, the statement made in a general manner by various courts that have likened the Massachusetts trust beneficiaries in some respects to partners may apply to land trust beneficiaries. In the well known case of *State Street Trust Co. v. Hall*,<sup>37</sup> however, the court held that the terms of the Uniform Partnership Act did not apply to a Massachusetts trust because "it makes no mention of a partnership with transferable shares."<sup>38</sup>

A recent Illinois case<sup>39</sup> held that a court, upon finding a deadlock between two factions of beneficiaries, could declare a termination of the business arrangement and sale of the corpus property under its general equity power. The court refused, however, to decree the sale under the provisions of the Uniform Partnership Act. After stating that in other types of business arrangements (such as joint adventures and corporations) courts had been called upon to decree dissolution, the court stated:

In the Uniform Partnership Act many grounds are provided on which dissolution may be obtained, and an Illinois Court has decreed dissolution of a partnership where such embittered relations existed between partners as to render it impracticable for them to conduct the business beneficially (citations omitted).

Thus, for a wide variety of forms of business, courts have been empowered to decree dissolution where disagreement producing stalemate defeated the very objects of the business arrangement. We believe that the principle should be extended to a termination of the business arrangement in the instant case.<sup>40</sup>

It declared the partnership analogy imperfect in that in a land trust, the beneficiary can get out of the arrangement by selling his interest freely, with the buyer being entitled to all his rights,<sup>41</sup> while a partner cannot transfer his status, even though he may sell his interest in the partnership assets with the approval of the other partners.

The case carries many important implications beyond the aspect of the relationship of the beneficiaries. Not the least of these is the fact that the court, after thoroughly examining the issue,<sup>42</sup> allowed the dissenting

36. *Marchulonis v. Adams*, 97 W. Va. 517, 125 S.E. 340 (1924).

37. 311 Mass. 299, 41 N.E.2d 30 (1942).

38. *Id.*, 41 N.E.2d at 37.

39. *Regas v. Danigeles*, 54 Ill. App. 2d 271, 213 N.E.2d 730 (1964).

40. *Id.*, 203 N.E.2d 734 at 735.

41. *Ibid.* (court's footnote 7.).

42. *Supra*, note 40.

beneficiaries to do indirectly what they could not do directly, that is, achieve sale and thereby a partition of the corpus property. Prior to this case it had been the settled rule in Illinois that since the interest of land trust beneficiaries is personalty and not realty, they have no right of partition in the property itself.<sup>43</sup> The decision noted that the purpose of the rule was to prevent a beneficiary having only a small fraction of the interest from compelling partition, and stated that since here each faction owned fifty percent of the interest the possibility of partition would work no hardship, and could therefore be decreed. Even with this expressed qualification, it is impossible to tell how the holding affects the possibilities of partition being achieved by dissenting beneficiaries under other facts.

Since the duties and powers of the trustees and beneficiaries are expressed fully in the trust agreement, it is doubtful that a court would apply the terms of the Uniform Partnership Act in such a way as to adversely affect them.

#### AGENCY BETWEEN TRUSTEE AND BENEFICIARIES

In considering the land trust concepts attention must be paid to its internal administration. There are apparently no cases concerning misconduct of a trustee with respect to the beneficiaries, but there is no reason why such might not become a problem from time to time should the land trust be put into wide use. For instance, what happens if the trustee sells part of the property on his own, or refuses to carry out a sale ordered by the beneficiaries? The use of a responsible corporate trustee would tend to minimize these problems, and a writ of mandamus or action for money would most likely be successful against a trustee who misconducts himself, but how is the title passing from the trustee to the unwary buyer affected?

This subject has been dealt with at some length<sup>44</sup> concerning the possibilities of the trustee being considered an agent for the beneficiaries and vice versa—reaching the conclusion that the question of agency depends on the trust agreement and facts involved, and not necessarily on the provisions of the land trust itself.<sup>45</sup> However, the problem of the

43. *Whitaker v. Scherer*, 313 Ill. 473, 145 N.E. 177 (1924); *Aronson v. Olson*, 348 Ill. 26, 180 N.E. 104 (1931).

44. *Garrett*, *supra*, note 1, at pp.12, 13, 14, and 15.

45. *See: Gallagher and Speck v. Chicago Title and Trust Co.*, 238 Ill. App. 39 (1929); *Brazowski v. Chicago Title and Trust Co.*, 280 Ill. App. 293 (1935); *Schneider v. Pioneer Trust and Savings Bank*, 26 Ill. App. 463, 168 N.E.2d 808 (1960); *Barkhausen v. Continental Illinois National Bank and Trust Co.*, 3 Ill.2d 254, 120 N.E.2d 649 (1954); *Robinson v. Chicago National Bank*, 32 Ill. App.2d 55, 176 N.E.2d 659 (1961); *Scott, Trusts* sec. 274 (1st ed., 1939); 2 *Scott, Trusts* sec. 225 at p. 1643 (2d ed., 1956).

nature of the title taken by the purchaser without knowledge of the lack of authority on the part of the trustee is important also. The Virginia enabling act<sup>46</sup> states that the buyer is not required to make inquiry into the authority of the trustee to sell the property, and therefore, clearly implies that the buyer would get good title, leaving the beneficiary with only a damage suit against the trustee. Otherwise, the buyer would be foolish to purchase property without a look at the trust instrument and an inquiry into the specific authority of the trustee.

#### THE ARGUMENT AGAINST LEGALITY

The problems surrounding the effect of the statute of uses have for the most part been resolved both by case law and by statute, but several other considerations have not met with the same fortunate fate. The extent and nature of the incorporation of the unrecorded trust agreement by reference made to it in the recorded deed of trust may still be questioned. The problem has resolved itself into whether or not a court would tend to give effect to the powers of the trustee and interest of the beneficiaries as they are specified in the recorded instrument without allowing the purchasers a look at the trust agreement. Although a Florida case<sup>47</sup> has held that title to land held under a land trust is unmarketable without accompanying tender of the trust agreement, the Virginia enabling act<sup>48</sup> appears to have offered sufficient solution by its provision that the buyer need not inquire into the powers of the trustee nor the application of the purchase money.

There is remaining a question of the nature of the beneficiary's interest. The Virginia Courts have not yet been asked whether or not the parties to a trust agreement can vary by their own acts rights which vest by operation of law, or, more specifically, whether or not both legal and equitable title can be vested in the trustee and whether the beneficiaries do in fact obtain only that part of the bundle of rights which the settlors wish them to have. Illinois courts have decided that the beneficial interest in a land trust is personalty<sup>49</sup> and not a freehold estate in land,<sup>50</sup> that beneficiaries have a right only to the rents and in-

46. See note 11, *supra*.

47. See *Resnick v. Goldman*, 133 So.2d 770 (1961).

48. See note 11, *supra*.

49. *Regas v. Danigeles*, 54 Ill. App.2d 271, 213 N.E.2d 730 (1964), *supra*, note 39; *Chicago, N. S. & M. R. R. Co. v. Chicago Title and Trust Co.*, 328 Ill. 610, 160 N.E. 226 (1928); *Chicago Federal Savings and Loan Association v. Cacciatore*, 25 Ill.2d 535, 185 N.E.2d 670 (1962).

50. *Duncanson v. Lill*, 322 Ill. 528, 153 N.E. 618 (1926); *Sweesy v. Hoy*, 324 Ill. 319, 155 N.E. 323 (1927); *Seno v. Frank*, 169 N.E.2d 335 (1961).

come from the property,<sup>51</sup> that they have neither legal nor equitable title,<sup>52</sup> that they have no right to partition of the trust property,<sup>53</sup> that they may be allowed to direct the trustee in dealing with the property without upsetting any of these principles,<sup>54</sup> that in forming the trust they may convey out or retain any part of the bundle of rights they choose,<sup>55</sup> and that any judgments against them personally do not attach to the land.<sup>56</sup> These issues in Virginia are yet to be decided, but previous decisions do not appear to have erected any permanent obstructions.

The most serious hurdle in the path of full acceptance of the land trust in Virginia as a full-blooded working entity was formulated, ironically, by the very statute<sup>57</sup> which removed many others. The statement contained therein, that nothing in the statute should be construed to affect the right of any creditor of the trustee or beneficiaries, may have implications far beyond the effects contemplated by the legislators. Such an indefinite statement may, if interpreted out of context, be twisted to imply that, although other problems are not affected, the relationships of creditors to trustees and beneficiaries with regard to land trusts would have to be determined without the aid of the provisions of the statute. Thus, with respect to the relationship of these parties, the statute of uses would have to be interpreted by case law, and the new code section would have no effect on the problem. It is difficult to see how this might happen, but court decisions or a revision of the statute appears to be the only practical remedy to possible doubts.

### CONCLUSION

From the foregoing discussions, one may see that most of the obstacles encountered in establishing the land trust in a new jurisdiction have been negotiated. The remaining problems, though not theoretically large when compared with those negotiated, still prevent the land trust from

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51. *Duncanson v. Lill*, *supra* note 50.

52. *Duncanson v. Lill*, *supra* note 50; *Aronson v. Olsen*, 398 Ill. 26, 180 N.E. 104 (1931); *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1957); *Crawford Realty and Development Corp. v. Woodlawn Trust and Savings Bank*, 382 Ill. 354, 47 N.E.2d 81 (1943).

53. *Whitaker v. Scherer*, 313 Ill. 473, 145 N.E. 177 (1924); *Breen v. Breen*, *supra*, note 52.

54. *Chicago Title and Trust Co. v. Mercantile Trust and Savings Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

55. *Schuman-Heink v. Folsom*, 328 Ill. 321, 159 N.E. 250 (1927); *Bellows v. Ziv*, 187 N.E.2d 265 (1962).

56. *Chicago Title and Trust Co. v. Mercantile Trust and Savings Bank*, *supra*, note 54; *Kerr v. Kotz*, 218 Ill. App. 654 (1920).

57. See note 11, *supra*.

taking its rightful place among devices which may be used for holding land in Virginia.

The questions raised by the final provision of the Virginia enabling act as mentioned above concerning the rights of creditors of beneficiaries have dictated that title examiners adverse all beneficiaries of the land trust for judgments and other liens against them. It may be easily seen that checking outstanding liens against two, three, four or even ten beneficiaries is the job required of title examiners every day. Should a land trust have fifty or a hundred beneficiaries, however, as well it might should the device become widely accepted, it is not hard to see why attorneys would just as soon use some other device, and title insurance companies bless them in their inclinations. It is also distressing to note that the requirement that the beneficiaries be adversely also nullifies one of the most attractive and controversial characteristics of the land trust, that is, the equitable conversion of the interests of the beneficiaries to personalty, so that judgments against them cannot become clouds on title to the land. Again, the only solution to the problem appears to lie in the courts.

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