Florida Law Review

Volume 13 | Issue 2 | Article 2

June 1960

The Illinois Land Trust in Florida

James H. McKillop II

Recommended Citation

James H. McKillop II, *The Illinois Land Trust in Florida*, 13 Fla. L. Rev. 173 (1960).
Available at: https://scholarship.law.ufl.edu/flr/vol13/iss2/2

THE ILLINOIS LAND TRUST IN FLORIDA

JAMES H. McKILLOP II*

The Illinois type land trust, hereinafter referred to as the Illinois trust or the land trust, was first held to be valid in 1921 in *Kerr v. Kotz.*[1] Since that time its use by owners of Illinois real estate for an ever-increasing number of purposes has flourished.

The primary function of the Illinois trust is to facilitate the transfer and financing of real estate holdings of relatively large value. The Illinois courts have held that the trust provisions convert the beneficial interest in trust real estate into personalty; hence the beneficial interest can be represented by trust certificates. These certificates can be assigned or pledged as collateral security with the facility of corporate stock. The trustee is capable of passing title to the trust real estate upon the written direction of the beneficiaries without their joinder or that of their wives. The trust offers an escape from certain corporate tax disadvantages, from dower, from public record of beneficial ownership, from partition among the beneficiaries, and from administration of estates in courts of the land's situs.[2]

With the advent of nation-wide speculation and investment in Florida real estate, the Illinois trust inevitably has found increasing acceptance in the state. The trust has been severely criticized as invalid under present Florida trust law by many attorneys as well as by the great bulk of reputable title insurers operating in the state.

This article attempts to shed some light upon the rationale of this hybrid trust and to analyze the positions of Illinois, Florida, and other jurisdictions, so that the reader may more readily evaluate the trust's present tenuous position under Florida law. Notwithstanding the criticisms lodged against the trust, Florida could be greatly benefited in the development of its bountiful real estate if such a trust vehicle were made available by legislative enactment. Without legislation, however, use of the land trust in Florida is a legally hazardous venture.

There are two basic documents involved in the Illinois land

---

*Graduate, Spring Semester 1960, College of Law, University of Florida.

The author gratefully acknowledges the assistance of Professor Kenneth L. Black, College of Law, University of Florida, in the preparation of this article.

[1]299 Ill. 465, 132 N.E. 625 (1921), *aff'g* 218 Ill. App. 654 (1919).

[2]See 2 BOGERT, TRUSTS AND TRUSTEES §250 (1953); CAPLAN, LAND TRUSTS 12-14 (2d ed. 1958).

trust, the deed in trust and the trust agreement. Under the deed in trust[3] a corporation is named trustee and the deed is recorded. The deed grants broad powers to the trustee to protect and conserve, to sell and convey, to mortgage, to lease, and generally to deal with the title as if he were the owner of the total estate. The deed also provides that persons dealing with the trustee are relieved of any obligation to require that the purchase money be applied in such a way that the terms of the trust are complied with, or to inquire into the authority or necessity of any act of the trustee. Third parties are not privileged to inquire as to the terms of the non-recorded auxiliary document, the trust agreement, and it is explicitly provided that the instruments out of the trustee shall be conclusive evidence in favor of third persons that the trustee acted within the terms of the agreement. The interest of every beneficiary under the trust is expressly declared to be only in the earnings and avails of the property; it is stated to be personal property that carries no legal or equitable title to the trust realty. The beneficiaries are not named in the deed in trust.

The form of the non-recorded land trust agreement used in Illinois is less verbose than the one used in Florida.[4] The components of each, however, are basically the same. The identity of the beneficiaries is disclosed, and the trustee's powers and duties are set forth. The trustee is empowered to deal with the title to trust property only upon the written direction of the specified beneficiaries.[5]

As in the deed of trust, the beneficial interest of the cestui under the trust agreement is declared to be in the avails and proceeds of the property and not in the real estate; and the interest is expressly designated as personal property.[6] The trust agreement, however, imposes a number of additional prohibitions and duties upon the trustee. Full and exclusive management and control of the handling of the trust property are reserved to the beneficiaries. The trustee is expressly precluded from insuring the trust property out of trust proceeds or paying taxes thereon or filing various tax reports.[7] As an

---

[3]See CAPLAN, LAND TRUSTS 24 (2d ed. 1958).

[4]*Id.* at 20.

[5]*Id.* §3: "The trustee assumes and agrees to perform the following active and affirmative duties hereunder: (a) To execute instruments: When and as directed so to do by the following named person or persons: . . . ."

[6]CAPLAN, LAND TRUSTS 24 (2d ed. 1958).

[7]*Id.* at 22, §5: "BENEFICIARIES MANAGE AND OPERATE TRUST PROPERTY: The beneficiaries shall in their own right, have full and exclusive control

"active and affirmative duty," the trustee is expressly instructed to sell any remaining trust property twenty years from the date of execution of the trust, after giving reasonable notice to the beneficiaries.[8] The Florida form is reinforced by the imposition of various other duties upon the corporate trustee, however.[9]

Is the Typical Illinois Land Trust Active or Passive?

There does not appear to be any standard definition of an active or a passive trust, but most of them run along the same lines. Pomeroy gives a characteristic definition:[10]

> "An express private *passive* trust exists where land is conveyed to or held by A in trust for B, without any power expressly or impliedly given to A to take the actual possession of the land, or to exercise acts of ownership over it, except by the direction of B. The naked legal title only is vested in A, while the equitable estate of the *cestui que* trust is to all intents the beneficial ownership virtually equivalent in equity to the corresponding legal estate. Express private *active* . . . trusts are those in which . . . the trustees are charged with the performance of active and substantial duties in respect to the management of and dealing with the trust property for the benefit of the *cestui que trustent* . . . ."

This definition, like those laid down by the Florida courts, is not sufficiently detailed. The courts state generally the characteristics of an active or a passive trust, but they are reticent about specifying in which category a particular "duty" falls.

One of the arguments often raised against the Illinois land trust is that it is a passive trust of realty and executed by the statute of

over the management and operation of the trust property and control of the selling, renting and other handling and disposition thereof, and each beneficiary, or his or her agent, shall collect and otherwise handle his or her share of the rents and avails thereof and the proceeds of any sale or other disposition thereof, and the trustee shall have no duty respecting the payment of taxes, insurance premiums or other costs or charges against or concerning the trust property."

[8] Caplan, Land Trusts 21, §3 (b) (1) (2d ed. 1958).

[9] *Id.* §§3 (c)-(k).

[10] 1 Pomeroy, Equity Jurisprudence §153 (5th ed. 1941), cited in Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940).

uses.[11] The problem is apparent when one reads the broad powers granted to the corporate trustees in the deed in trust[12] and compares these powers with the restrictions imposed upon the trustee's activities under the trust agreement.[13]

The duties of the trustee fall into the following categories: (1) the duty to sell property remaining in trust twenty years from the date of execution; (2) the duty to convey title to trust property upon direction of the beneficiary; and (3) administrative duties, such as the duty to pay over all income and proceeds, to pay ad valorem taxes with funds from sources other than the trust, and other ministerial duties. Duties (1) and (2) are consistent in their appearance in both the Illinois and Florida forms of land trust. The third category appears to be a Florida innovation inserted in an attempt to make this type of trust acceptable under Florida law.

Duty to Sell Property

There is little authority on whether the duty to sell twenty years from date is an active or a passive provision. In Illinois the courts have been reasonably consistent in holding that this duty is active.[14] In *Masters v. Smythe*,[15] however, it was held that the duty to sell property remaining in trust twenty years was insufficient to make the trust active. Although the *Masters* case has not been reversed, there are some features that distinguish it from the other Illinois cases that uphold this type of trust.[16] The party seeking partition was the settlor of the trust, who had power to effectuate the same result by other means. In the other cases partition could be accomplished only through the courts. The trustee was expressly prohibited from exercising any control over the property aside from selling it twenty years after date, while in the other cases the courts found that the trustees had certain "managerial" or "active" duties to perform. The trust did not expressly provide that the interest of the beneficiary would be

[11]See, *e.g.*, Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932); Masters v. Smythe, 342 Ill. App. 185, 95 N.E.2d 719 (1950); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

[12]See CAPLAN, LAND TRUSTS 24 (2d ed. 1958).

[13]*Id.* at 20.

[14]*E.g.*, Breen v. Breen, 411 Ill. 206, 103 N.E.2d 625 (1952); Crow v. Crow, *supra* note 11; Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, *supra* note 11.

[15]342 Ill. App. 185, 95 N.E.2d 719 (1950).

[16]*E.g.*, cases cited note 14 *supra*; see CAPLAN, LAND TRUSTS 50 (2d ed. 1958).

considered personalty, whereas each of the other cases did so provide.

The Illinois courts do not give a reason for finding the duty to sell to be active. But in the *Masters* case the court held the trust to be passive because it was completely subject to the control of the beneficiary with the exception of the single ministerial act of selling the trust res if any should exist after twenty years. The Illinois court apparently frowned upon retention by the beneficiary of every vestige of control and ownership, and felt that there was no equitable reason for the division of legal and equitable title.

There is even less authority in other jurisdictions. A Wisconsin case involving a similar instrument has held that when the *only* duty imposed upon the trustee is to sell the trust res after twenty years, the trust is passive.[17]

The Florida courts have not had occasion to decide this point, so the courts' attitude in construing trusts in general must be relied on. In *Elvins v. Seestedt*,[18] the Supreme Court quotes Pomeroy to the effect that a passive trust is one in which naked legal title is placed in the trustee and equitable title in the beneficiary, without any power given to the trustee to take actual possession of the land or to exercise acts of ownership over it except by direction of the beneficiary.[19] Pomeroy concludes that the beneficiary has all the incidents of ownership "virtually equivalent in equity to the corresponding legal estate." The Court also cites Pomeroy for the proposition that the passive use under the common law imposed three duties upon the trustees: (1) The trustee must allow the beneficiary to receive the profits; (2) the trustee must, upon the request of the beneficiary, convey the estate to the beneficiary or his heirs or to any other person upon the beneficiary's direction; (3) the trustee must protect the beneficiary's right to possession. These passive duties are inserted in express terms in the land trust. Mere explicit stipulation of these duties should not make the trust active. The *Elvins* case is an indication of how the "duty to sell" clause will be treated in Florida, but it does not settle the question whether the Illinois land trust is active or passive.

There have been two opinions rendered by the Attorney General of Florida as to the nature of the cestui que trust's interest under a typical Illinois land trust. In considering whether the cestui's in-

---

[17]Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952); see 1A BOGERT, TRUSTS AND TRUSTEES 283-84 (1951).

[18]141 Fla. 266, 193 So. 54 (1940).

[19]*Id.* at 272, 193 So. at 57.

terest is in real or personal property,[20] the Attorney General cited the *Masters* case.[21] He concluded that since the Florida form was adapted from one used in Illinois, the construction by the Illinois court is entitled to great weight in this state. Less than two years later, in determining whether the res of the land trust was realty or personalty, he stated:[22]

> "We . . . feel that the Florida court would follow like or similar rules as those announced in such cases. We are inclined to think that the Florida courts would hold the interest of the beneficiary in trust instruments like, or similar to, those handed us . . . where the beneficiary is or was not residing on the property and making same his or her permanent home with the bank exercising no active duties in connection with the trust estate, to be personal property in accordance with the above Illinois cases."

It appears that the Attorney General feels that the Florida Court will follow the Illinois view. If this is the case, not only the duty to sell at the termination date of the trust but also most of the other duties imposed on the trustee will be held to be active and the land trust will be valid in Florida. The Illinois view, however, seems to be out of character wtih Florida's traditional application of trust concepts. A provision to sell the res of a trust that would otherwise be passive should not make the trust active when the purpose of the provision is to avoid violation of the rule against perpetuities by providing a definite termination date. If the trustee is to perform no active duty in the interim, the trust should be held passive.[23]

Duty to Convey upon Direction

There is more authority construing the duty to convey upon direction of the beneficiary than on the duty to sell property remaining in trust twenty years from the date of execution, but again it is

---

[20]Op. Att'y Gen. Fla. 055-18 (Jan. 28, 1955).

[21]Masters v. Smythe, 342 Ill. App. 185, 95 N.E.2d 719 (1950). This case held the trust to be passive; *accord*, Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952).

[22]Op. Att'y Gen. Fla. 056-271 (Aug. 31, 1956).

[23]See Masters v. Smythe, *supra* note 21.

divided. Scott states that by the weight of authority the duty to convey on direction is sufficient in itself to make a trust active.[24] Pomeroy, however, feels that the passive trustee owes the cestui certain obligations, among which is included the duty to convey upon the request of the beneficiary.[25] If the Florida Court follows Pomeroy, as it did in the *Elvins* case, the inevitable conclusion will be that the duty to convey on direction is passive and that the mere expression of a passive duty will not activate an otherwise passive trust.

Illinois holds the duty to convey on direction to be active.[26] Aside from those cases dealing specifically with this duty, there are other Illinois trust cases containing the "duty to convey on direction" clause along with other ministerial duties that have been held to be active without specific discussion.[27]

It has been argued that Florida will follow the Illinois doctrine[28] on the basis of the following statement made by the Supreme Court in the *Elvins* case while discussing the efficacy of the Florida statute of uses: "It appears that our statute of uses . . . should be construed as having like application to a trust agreement of the sort which we have under consideration here as was applied by the Illinois court in the Newcomb case."[29] *Newcomb v. Masters*,[30] however, dealt with a passive testamentary trust which the Illinois court found to be executed by the statute of uses. Reference to this case by the Florida Court does not seem to carry a strong inference as to Florida's position.

Administrative Duties

The aforementioned duties are those most discussed in litigation concerning the Illinois land trust; but, in an effort to override ob-

[24]1 SCOTT, TRUSTS §69.1 (2d ed. 1956); see cases cited. See also RESTATEMENT, TRUSTS §69 (1935). *But see* 54 AM. JUR., *Trusts* §14 (1945) and cases cited.

[25]3 POMEROY, EQUITY JURISPRUDENCE 2125 (5th ed. 1941).

[26]*E.g.*, Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932); Emery v. Emery, 325 Ill. 212, 156 N.E. 364 (1927); Kurzawski v. Malaga, 338 Ill. App. 182, 86 N.E.2d 898 (1949); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939); see 1 SCOTT, TRUSTS §69.1 for other citations.

[27]*E.g.*, Breen v. Breen, 411 Ill. 206, 103 N.E.2d 625 (1952); Berning v. Berning, 320 Ill. App. 686, 51 N.E.2d 997 (1943). *But see* Masters v. Smythe, 342 Ill. App. 185, 95 N.E.2d 719 (1950), in which this particular duty was not enough in itself to render the trust active.

[28]This is the argument propounded by Caplan in LAND TRUSTS 45-46 (2d ed. 1958).

[29]Elvins v. Seestedt, 141 Fla. 266, 274, 193 So. 54, 58 (1940).

[30]287 Ill. 26, 122 N.E. 85 (1919).

jections to this trust in Florida, some miscellaneous "managerial" duties have been added.[31] It seems that the passive or active character of these duties should depend upon the necessity of the trustee's retention of the legal title in order to accomplish valid trust purposes.[32]

A popular Florida version of the Illinois land trust[33] states that the right to control of trust property and the right to collect and handle rents and avails are expressly reserved to the beneficiaries of the trust. A distinction must be drawn between a devise or deed to a person to collect and pay over rents and profits to another and a deed or devise in trust that permits another to enjoy the rents and profits.[34] The latter is usually deemed to be a dry trust and executed into a legal estate in the beneficiary.[35] The distinguishing factor between these two trusts is the trustee's active duty in the former to apply, distribute, and apportion the rents and profits in accordance with the directions of the trust.[36] Under the Illinois land trust the trustee is specifically precluded from handling any income derived from the beneficiaries' transactions in connection with the trust real estate. The Florida trustee, when required to make an outlay for taxes or insurance, is not permitted to make payment out of the trust res or income;[37] the beneficiaries are expressly required to furnish these funds. The trustee does not need to retain legal title for the performance of these duties. Under these circumstances the trust will probably be held to be passive and executed because of the absence of a duty upon the trustee to hold title for the purpose of collecting, applying, and distributing rents and profits.[38]

It has been suggested that the inclusion of a duty upon the corporate trustee to procure and pay all tax and special assessment bills and charges against real estate held by the trustee with funds pro-

---

[31]CAPLAN, LAND TRUSTS 21, §§3 (c)-(k) (2d ed. 1958).

[32]See Elvins v. Seestedt, *supra* note 29, citing Kay v. Scates, 37 Pa. 31, 78 Am. Dec. 399 (1860); Jones v. Jones, 223 Mo. 424, 123 S.W. 29 (1909); People's Loan & Exch. Bank v. Garlington, 54 S.C. 413, 32 S.E. 513 (1899).

[33]CAPLAN, LAND TRUSTS 21, §§3 (c)-(k) (2d ed. 1958).

[34]Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762 (1853); 54 AM. JUR., *Trusts* §14 (1945).

[35]See 54 AM. JUR., *Trusts* §14 (1945), and cases cited n.13.

[36]Carpenter v. Cook, 132 Cal. 621, 64 Pac. 997 (1901); Eldred v. Meek, 183 Ill. 26, 55 N.E. 536 (1899); Barnett's Appeal, 46 Pa. St. 392, 86 Am. Dec. 502 (1864); see 26 R.C.L., *Trusts* 1177 (1920).

[37]See CAPLAN, LAND TRUSTS 21, §3 (k), 22, §5.

[38]See 26 R.C.L., *Trusts* 1175 and cases cited.

vided by the beneficiaries of the trust would make the trust active.[39] There is no necessity for the trustee to have legal title merely to pay taxes, however, since an agent or a stranger could do the same.[40] Hence, according to the prevailing view,[41] the trust would be considered passive.

The Florida modification of the Illinois form of land trust often contains the following miscellaneous managerial duties: (1) to furnish information concerning taxes and assessments, (2) to keep records of trust, (3) to prepare fiduciary reports, (4) to establish proof of heirship, and (5) to submit terminal accounting. As with the duty to pay taxes, these duties fall in the passive category by orthodox trust law, since they entail no necessity for retention of the legal title by the trustee in order to secure their performance.

Illinois, on the other hand, has taken a liberal approach to the active requirements for a subsisting trust — witness its rulings on the duty to sell on termination and the duty to convey on direction.[42] The Illinois courts hold that as long as "active" duties are imposed, regardless of their merely formal or ministerial nature, the trust is active and outside the operation of the statute of uses.[43] Thus in *Hart v. Seymour*[44] the Illinois Supreme Court stated that when, by the terms of the trust agreement, title to the land is vested in the trustee for management and distribution, the trust is active and not affected by the statute of uses even though the beneficiaries are authorized to direct and control the actions of the trustee and to remove the trustee and substitute another. Florida has a virtual vacuum with respect to the passive or active nature of these "duties," with the exception of *Elvins v. Seestedt,* discussed *supra* under "Duty to Convey upon Direction." It is submitted, however, that the *Elvins* case does not purport to indicate that Florida will follow Illinois in its liberal attitude toward *active* trust duties. The Florida Court's

---

[39]See CAPLAN, LAND TRUSTS 21, §3 (c), (d).

[40]26 R.C.L., *Trusts* 1174-75 (1920). See also Jones v. Jones, 223 Mo. 424, 123 S.W. 29 (1909).

[41]See 54 AM. JUR., *Trusts* §13 (1945), and cases cited n.16.

[42]Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932); Masters v. Mayers, 246 Ill. 506, 92 N.E. 945 (1910); Silverman v. Kirstufek, 162 Ill. 222, 44 N.E. 430 (1896); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

[43]Crow v. Crow, *supra* note 42; Oppenheim v. Scully, 337 Ill. App. 587, 86 N.E.2d 431 (1949); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, *supra* note 42.

[44]147 Ill. 598, 35 N.E. 246 (1893).

reference to the Illinois view was in the context of a clearly passive trust of realty that is executed by the statute of uses; not only Illinois but also the great bulk of American jurisdictions hold such trusts to be dry and executed by the statute.[45] It may be concluded that in the absence of a more positive indication that the Florida Court has changed its position, miscellaneous duties such as those discussed will not make a trust active.

Is a Passive Trust of Realty Executed?

Most jurisdictions have adopted the statute of uses in one form or another, by statutory adoption of the English common law and statutes, by decision, or by statutory revision.[46] Florida has adopted the English statutes and common law consistent with its form of government,[47] and also has a specific statute dealing with the execution of certain forms of deeds.[48] Illinois has a substantial re-enactment of that part of the English statute of uses that relates to conveyances.[49] There are a few jurisdictions that do not recognize the statute of uses,[50] but in most of them passive trusts have been abolished.[51] Generally, therefore, when a trust beneficiary obtains the whole beneficial use and management of an estate and the trustee has no active duty to perform, the trust will fail and full title will pass to the beneficiary by force of the statute of uses.[52]

Although the law seems to be well settled in Illinois that the land trust is active and hence not executed by the statute of uses, *Masters v. Smythe* recognizes the applicability of the statute when the trust is passive. Since the land trust is a relatively new trust device, there has been little case law on it in other jurisdictions. The Wisconsin Supreme Court, however, has considered the land trust. In a suit for

---

[45]See 54 Am. Jur., *Trusts* §12 (1945).

[46]See Annot., 16 L.R.A. 1148 (n.s.) (1908).

[47]Fla. Stat. §2.01 (1959).

[48]Fla. Stat. §689.01 (1959).

[49]Ill. Ann. Stat. ch. 30, §3 (Smith-Hurd 1935).

[50]*In re* Fair's Estate, 132 Cal. 523, 60 Pac. 442 (1900), *rev'd*, 132 Cal. 580, 64 Pac. 1000 (1901); Blake v. O'Neal, 63 W. Va. 483, 61 S.E. 410 (1908); see Note, 78 Am. Dec. 409 (1886).

[51]See 26 R.C.L., *Trusts* 1172, §7 (1920).

[52]*E.g.*, Gindrat v. Western Ry., 96 Ala. 162, 11 So. 372 (1891); Glover v. Condell, 163 Ill. 566, 45 N.E. 173 (1896); Snelling v. Lamar, 32 S.C. 72, 10 S.E. 825 (1890); Sims v. Sims, 94 Va. 580, 27 S.E. 436 (1897).

partition,[53] the cestui under an Illinois land trust argued that the trust was passive and that under the Wisconsin statutes[54] the trust was executed, with legal title vesting in him. The Wisconsin court held the trust to be passive and executed, and refused to allow a provision referring to the trust as one of personalty to affect the result.

Florida seems to follow the generally accepted view as to the applicability of the statute of uses to a passive trust.[55] Thus, if it is determined that under Florida law the Illinois land trust is a passive trust of realty, it will be executed and full legal title will be placed in the beneficiary.

REALTY OR PERSONALTY?

The problem of realty versus personalty is of key importance to the question of the validity of the Illinois land trust in Florida. If it is held to be a trust of personalty the majority view is that a passive trust of personalty is not affected by the statute of uses.[56] The subject of the applicability of the statute to personalty and analogies thereto will be discussed later. The present section will deal with the several theories used by the Illinois courts to convert realty to personalty, the national views on these theories, and what Florida law there is on the point.

The Illinois view is illustrated by *Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank,* in which an appellate court, after reciting the provisions of an Illinois land trust to the effect that the beneficial interest should be deemed personalty, held:[57]

> "The rule has been long and well established in this state that the form of deed of trust and trust agreement before us creates a valid and subsisting trust under which the interest of the beneficiary is personal property only and not real estate."

This "long and well established" rule is the result of several lines

[53] Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952).

[54] WIS. STAT. §§231.05,.14 (1957).

[55] McGriff v. McGill, 62 So.2d 28 (Fla. 1952); Elvins v. Seestedt, 141 Fla. 266, 193 So. 54 (1940).

[56] See 1 SCOTT, TRUSTS §70 (2d ed. 1956).

[57] 300 Ill. App. 329, 336, 20 N.E.2d 992, 995 (1939).

of Illinois cases dealing with the nature of a partner's interest in land transactions for profit only, the conversion of realty to personalty through the doctrine of equitable conversion, and the conversion of the beneficial interest under the land trust by force of agreement and intent of the parties to the trust.

a. Transactions for Profits Only

In Illinois it frequently has been held that an agreement creating an interest in the proceeds, avails, and profits of the sale of realty creates no lien upon or interest in the land itself.[58] In *Morrill v. Colehour*,[59] in which land was purchased by several persons for the purpose of sale and acquisition of profits only and not for permanent use, the Illinois Supreme Court held that the interest among the partners in the speculation was regarded in equity as personalty. Similarly, in *Roby v. Colehour*[60] the court held that when an owner of land declares himself to hold land in trust for the purpose of dividing net profits derived from the sale of the land, the beneficiaries take no interest in or title to the land itself but only an interest in the profits. The court reasoned that the relationship of the parties was in essence one of partnership and applied the rule of the *Morrill* case. It thus appears, according to the Illinois courts, that the key factor in determining whether the interest of the parties in the profit-sharing context is realty or personalty is the intent of the parties as determined by the terms of the contract.[61] Apparently the Illinois courts now apply this theory to the Illinois land trust as one rationale for finding a conversion of the trust res from realty to personalty.[62]

b. Personalty by Express Agreement

In the great bulk of the Illinois cases dealing with the land trust the courts fail to specify the theory upon which they found their de-

---

[58] *E.g.*, MacDonald v. Dexter, 234 Ill. 517, 85 N.E. 209 (1908); Roby v. Colehour, *infra* note 60; Morrill v. Colehour, *infra* note 59.

[59] 82 Ill. 618 (1876).

[60] 135 Ill. 300, 25 N.E. 777 (1890).

[61] *E.g.*, MacDonald v. Dexter, *supra* note 58; Ingraham v. Mariner, 194 Ill. 269, 62 N.E. 609 (1901); Van Housen v. Copeland, 180 Ill. 74, 54 N.E. 169 (1899); Boone v. Clarke, 129 Ill. 466, 21 N.E. 850 (1889).

[62] See Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

cision that the beneficial interest in the rents, proceeds, and avails of the trust property is personalty rather than realty. They usually recite the express trust agreement provision to the effect that the beneficial interest is personalty and then state that such a provision has been repeatedly held to be personalty.[63] They place great emphasis on the fact that the parties agree and stipulate that their interest shall be personalty. Here, as in the area of transactions for profits only, this expression of intent seems to be the basis for holding the beneficiaries' interest to be personalty. The question whether realty can be converted to personalty by mere agreement does not appear to have been discussed, but it can be inferred from reading a few cases that the Illinois courts are saying "it's personalty because the parties say it is personalty." For example, in the first case litigated on the Illinois land trust as it is known today,[64] the Illinois Supreme Court held that when the deed of trust expressly provides that it is the *intent* of the parties that both legal and equitable title to the land be vested in the trustee and that the beneficial interest be personalty, the beneficial interest is deemed to be personalty and therefore a judgment against the beneficiary is not a lien on the land in trust. Notwithstanding this liberal view, there is a great deal of doubt whether conversion can be accomplished by agreement alone if the courts refuse to apply the doctrine of equitable conversion.[65]

National Views

Although the Illinois courts have repeatedly held that an agreement creating an interest in profits or proceeds of the sale of real estate creates no interest in or lien upon the land itself, it should be observed that the courts were dealing with agreements that partook of the nature of partnerships and joint ventures. The legal nature and incidents of land purchased by a partnership with partnership funds is a subject on which there is a diversity of opinion in other jurisdictions. Under the English doctrine realty intended by partners to be part of the partnership property becomes converted into personalty ipso facto for all purposes.[66] The American view,

[63]*E.g.*, Horney v. Hayes, 11 Ill. 2d 178, 142 N.E.2d 94 (1957); Aronson v. Olson, 348 Ill. 26, 180 N.E. 565 (1932); Sweesy v. Hoy, 324 Ill. 319, 155 N.E. 323 (1927); Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926).

[64]Kerr v. Kotz, 299 Ill. 465, 132 N.E. 625 (1921), *aff'g* 218 Ill. App. 654 (1919).

[65]See 2 BOGERT, TRUSTS AND TRUSTEES §250 (1953).

[66]Lang's Heirs v. Haring, 25 Ala. 625, 60 Am. Dec. 533 (1854); Darrow v. Cal-

however, supports the rule that in the absence of any express or implied agreement between the partners to the contrary, partnership realty retains its character as realty, with all the incidents of that species of property, except that it is open for the payment of partnership debts. But if the partners agree that it is their intention to hold lands as partnership stock, or personalty, the land must be treated as such in all respects by courts of equity.[67]

The Illinois land trust agreement provides that the instrument shall not create or evidence a corporation, a partnership, or a joint venture, but rather that the agreement shall be deemed to create only a common law trust.[68] The Massachussetts courts have decided a few cases dealing with trusts in which partnership principles were applied.[69] In *Dana v. Treasurer,*[70] involving a trust in which a syndicate took over a factory, issued certificates of ownership, and provided that the beneficial interest was in the trust res and that the trust was to terminate twenty-one years from date, the Massachusetts Supreme Court held that the provisions created a partnership. Thus the provision for ultimate conversion at the end of twenty-one years was deemed to convert from the time of execution of the trust agreement. In view of the fact that a common law trust and a partnership are distinct legal entities, it might reasonably be concluded that Illinois has extracted partnership principles from their proper context and has applied them to trusts.

c. Personalty by Equitable Conversion

In the *Chicago Title & Trust Co.* case,[71] in discussing a judgment against a beneficiary of a typical Illinois land trust, the court observed that it frequently has been held in Illinois that when an equitable conversion is accomplished in a trust a judgment against the beneficiary is not a lien on the land but only a claim to the proceeds of

kins, 154 N.Y. 503, 49 N.E. 61 (1897); see 6 R.C.L., *Conversion and Reconversion* 1082 (1915); Annot., 37 L.R.A. (N.S.) 900 (1912).

67Bates v. Babcock, 95 Cal. 479, 30 Pac. 605 (1892); Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311 (1862); Buckley v. Doig, 188 N.Y. 238, 80 N.E. 913 (1907); see 6 R.C.L., *Converison and Reconversion* 1083 (1915).

68See CAPLAN, LAND TRUSTS 21, §4 (2d ed. 1958).

69Priestly v. Treasurer, 250 Mass. 452, 120 N.E. 100 (1918); Dana v. Treasurer, *infra* note 70.

70227 Mass. 562, 116 N.E. 941 (1917).

71Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

sale, because an equitable conversion transforms the cestui's equitable interest in land into an interest in personalty. The court relied upon the Illinois cases of *Lash v. Lash*[72] and *Moll v. Gardner*.[73] In the *Lash* case the Supreme Court held that when a will directs the sale of lands and division of the proceeds among designated persons after the termination of an intervening life estate, the will effects an equitable conversion of the land into money and the bequests of the proceeds of sale should be regarded as bequests of personal property. The court reasoned that the direction to sell the land was positive and absolute. The fact that the sale did not occur until death of the life tenant did not prevent a conversion. Both the *Lash* and the *Moll* cases, however, dealt with testamentary trusts that ordered the trustee to sell the lands and distribute the proceeds. Under this set of circumstances the conversion is deemed to take effect on the effective date of the devise, which is the date of the testator's death.[74]

In most of the cases dealing with the nature of the cestui's interest, the Illinois courts do not make direct reference to the doctrine of equitable conversion but merely state that, by the express provision and intent of the parties, the interest of the cestui is personalty.[75] There are a few cases, on the other hand, that do refer directly to the doctrine.[76] *Breen v. Breen*[77] involved a suit for partition by a beneficiary under a land trust in which the trust agreement provided that the beneficial interest was personalty and that the trustee was under a duty to sell any remaining trust property twenty years from date. The Illinois Supreme Court held that under the trust instrument there was an equitable conversion. The court probably felt that the duty to sell twenty years from the date of execution of the trust agreement was a sufficient reason for finding a conversion, although the rationale of the decision was not clearly expressed. The *Breen* case arose after the date of termination specified in the trust, however. Since the time for sale had arisen, the doctrine of equitable conversion should have applied, because the "ought" of the equity

---

[72]209 Ill. 595, 70 N.E. 1049 (1904).

[73]214 Ill. 248, 73 N.E. 442 (1905).

[74]See 3 Pomeroy, Equity Jurisprudence §1162 (5th ed. 1941).

[75]*E.g.*, Aronson v. Olson, 348 Ill. 26, 180 N.E. 565 (1932); Sweesy v. Hoy, 324 Ill. 319, 155 N.E. 323 (1927); Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926).

[76]*E.g.*, Breen v. Breen, 411 Ill. 206, 103 N.E.2d 625 (1952); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1917).

[77]411 Ill. 206, 103 N.E.2d 625 (1952).

maxim — equity treats that as done which ought to be done — was present.[78]

An Illinois case holding the beneficiary's interest to be personalty for the purpose of the sale and division of profits has been cited as an application of the doctrine of equitable conversion.[79] It has been held that, by the nature of the transaction, the declaration of trust creates a joint venture[80] or a partnership,[81] under which the realty partakes of the nature of personalty.[82] It appears questionable, however, whether these cases should be applicable to the land trust, in view of the fact that the land trust specifically provides that the trust is not to be construed as anything other than a common law trust.[83]

National Views

According to Pomeroy, equitable conversion may be defined as "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estates as real, and transmissible and descendable as such."[84] In order to have a conversion it is essential that the trustee be under a clear and imperative duty or direction to sell. The direction may arise by necessary implication as well as by express declaration.[85]

Since the Illinois land trust contains an imperative duty to sell trust property remaining twenty years after inception, the question is not whether there is to be a conversion of the real estate into personalty but whether the conversion will be deemed to occur at the time of the instrument's execution or at the time for actual sale.[86] Illinois holds that the conversion occurs at the time of execution.[87]

[78]See Baker v. Commissioner, 253 Mass. 130, 148 N.E. 593 (1925); 3 POMEROY §§1160, 1162.

[79]Gordon v. Gordon, 6 Ill. 2d 572, 129 N.E.2d 706 (1955) citing Dicus v. Sherer, *infra* note 80.

[80]Dicus v. Scherer, 277 Ill. 168, 115 N.E. 161 (1917).

[81]Nicoll v. Mason, 49 Ill. 358 (1868).

[82]See also cases cited note 58 *supra*.

[83]See CAPLAN, LAND TRUSTS 21, §4 (2d ed. 1958).

[84]3 POMEROY 2305.

[85]Haward v. Peavey, 128 Ill. 430, 21 N.E. 503 (1889); Beaver v. Ross, 140 Iowa 154, 118 N.W. 287 (1908); see 18 C.J.S., *Conversion* §§11-12 (1939).

[86]See, *e.g.*, Berning v. Berning, 320 Ill. App. 686, 51 N.E.2d 997 (1943); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939); Baker v. Commissioner, 253 Mass. 130, 148 N.E. 593 (1925).

[87]See Dicus v. Sherer, 277 Ill. 168, 115 N.E. 161 (1917); Nicoll v. Mason, 49

Pomeroy says that the time of conversion in wills takes place at the death of the testator and in deeds and other inter vivos instruments at the date of execution. He states further, however:[88]

> "The instrument might in express terms contain an absolute direction to sell . . . at some specified future time; and if it created a trust to sell upon the happening of a specified event, which might or might not happen, then the conversion would only take place from the time of the happening of that event, but would take place when the event happened exactly as though there had been an absolute direction to sell at that time."

Under this rule, when the land trust agreement imposes a duty on the trustee to convey upon the direction of the beneficiary, is this such an imperative duty that it would work an equitable conversion at the time of execution? It would not appear so, since this duty is contingent upon the beneficiary's written direction to convey. When the power to sell is discretionary or contingent, the settled rule is that no conversion takes place until there is an actual sale or the contingency occurs.[89] The duty to *convey* upon direction of the beneficiary, aside from being contingent, is not necessarily synonymous with the duty to *sell* on direction. It is possible that the beneficiary could command the trustee to convey to the beneficiary himself for no monetary consideration. If this were the case there would be no conversion even if there were a conveyance.

Authority as to whether the duty to sell any property remaining in trust twenty years from date works an equitable conversion from the time of the execution of the trust agreement is sparse and divergent. It has been argued[90] that the trust provisions work an equitable conversion not only on the authority of Illinois cases but also by virtue of the Massachusetts decisions of *Priestly v. Treasurer*[91] and *Dana v. Treasurer*.[92] The *Priestly* case involved a succession-tax

Ill. 358 (1868).

[88]3 POMEROY 2311-12. See Massey v. Modawell, 73 Ala. 421 (1882); Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020 (1904); Keller v. Harper, 64 Md. 74, 1 Atl. 65 (1885).

[89]*E.g.*, Elliott v. Loftin, 160 N.C. 294, 76 S.E. 236 (1912); Wheless v. Wheless, 92 Tenn. 293, 21 S.W. 595 (1893); Ford v. Ford, 70 Wis. 19, 33 N.W. 188 (1887).

[90]CAPLAN, LAND TRUSTS 18 (2d ed. 1958).

[91]230 Mass. 452, 120 N.E. 100 (1918).

[92]227 Mass. 562, 116 N.E. 941 (1917).

problem. Non-resident owners of shares in a Massachusetts land trust were being taxed by the non-domiciliary state. The beneficial interests were represented by transferable shares, the res was a fund of realty and personalty, and there was an express provision that the beneficial interest was personalty. The court held that the beneficiaries were technically the equivalent of partners and that since a partner's interest is deemed personalty, the beneficiaries' interest was also personalty. In the *Dana* case, discussed previously, conversion was deemed to occur from the date of the trust agreement. The trusts considered in these cases can be distinguished from the Florida form of land trust by the latter's express foreclosure of any possibility of construing the trust as a partnership.[93]

A great deal of light has been shed on the question by the Massachusetts case of *Baker v. Commissioner*,[94] which dealt with a trust formed by a group of real property owners for the purpose of rental, lease, and conservation of the property. Their beneficial interests were represented by trust certificates, and the trust agreement provided that the interests should be deemed personal property. Each shareholder had the right to an undivided interest in the income derived from the trust but was expressly declared to have no right in or to the land held in trust and no right to partition. At the end of certain lives in being plus twenty years the trust was to be terminated by the trustee and the funds, construed to be the proceeds from liquidation, distributed to the beneficiaries. Massachusetts wanted to tax the beneficial interest as an interest in land lying within that state. The beneficiaries claimed that the beneficial interest was personalty and taxable only in the domiciliary state, not realty taxable by the state of the land's situs. The Massachusetts Supreme Court held that the time when an equitable conversion takes place depends on the terms of the particular instrument under consideration and the intent expressed therein, and that when the parties specify a definite time for the conversion to take place it does not occur until the time arrives. To accelerate the time of conversion from the future to the present is outside the proper bounds of the doctrine of equitable conversion; and the provision in the trust instrument that the shares shall be personal property, whatever may be its effect in showing the intent of the parties, cannot rightly be construed as converting land in the hands of the trustee into personal property.

---

[93]See CAPLAN, LAND TRUSTS 21, §4 (2d ed. 1958).
[94]253 Mass. 130, 148 N.E. 593 (1925).

The trust under consideration in the *Baker* case is extremely similar to the Illinois land trust, with the exception that in the *Baker* case the trustee had active duties of management and distribution of net proceeds. The Illinois courts seem to have overlooked or ignored this exception to the general rule that there is no equitable conversion from the date of execution when the agreement specifies a future date for sale. The *Baker* case does not stand alone in its position on the doctrine of equitable conversion and on the efficacy of the duty to sell on termination date.[95] Other cases also draw a distinction between an absolute duty to sell and convert that is present from the execution of the instrument, or its effective date, and the duty to convert at the end of some specified period or for purposes of termination of the trust. When the duty is to sell at a specified date it is not, in effect, a present duty; hence there is no premise upon which a court can correctly apply the doctrine of equitable conversion.

The doctrine, which is an intent-effectuating device, should be applied only to carry out the intent of the settlor to sell and convert realty to personalty absolutely, but not to give effect to the mere intent that the beneficial interest be considered personalty. What is the intent of the parties under the Illinois land trust? Examination of a typical trust[96] reveals that the object of the trust is to hold and preserve property until its sale or other disposal. In reality this type of trust is being used to serve many functions, such as to finance the purchase of expensive realty, to hold title for the purpose of deriving rental income, to secure loans, to avoid dower, to avoid taxes, to hold title for value speculation, to develop and subdivide large parcels of land, and to secrete title.[97] In view of the purposes served by the Illinois trust, do the parties intend an absolute and unconditional sale of the real property held in trust, or is the duty to sell remaining trust property at the end of twenty years imposed in order that the trust may not be voided by the rule against perpetuities? Illinois has apparently taken the position that, by agreement and the application of the doctrine of equitable conversion, the parties can maintain control over the trust res and yet not have legal title because the passive trust of "personalty" is not executed.

Can the parties control the nature of the beneficiaries' interest by

---

[95]See, *e.g.*, Masters v. Smythe, 342 Ill. App. 185, 95 N.E.2d 719 (1950); Wheless v. Wheless, 92 Tenn. 293, 21 S.W. 595 (1893); Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952).

[96]CAPLAN, LAND TRUSTS 21, §4 (2d ed. 1958).

[97]See 2 BOGERT, TRUSTS AND TRUSTEES §250 (1953); CAPLAN 50.

an agreement that this interest shall be deemed personalty? Bogert says that "these clauses have been given their intended effect. They are in their essence applications of the doctrine of equitable conversion, it would seem."[98] He also observes:[99]

> "The exact status of these real estate trusts will remain somewhat dubious until the courts have determined the nature of the interest of the cestuis, both in the case where there is no express provision and where there is a direct effort to have such interests regarded as personalty. . . . Except as the doctrine of equitable conversion can be applied, it seems extremely dubious whether the parties can control the question by agreement."

An analysis of the cases holding the interest of the cestui to be personalty when the trust instruments so stipulate bears out Bogert's observation that they are in essence an application of the doctrine of equitable conversion, but the courts make no specific mention of the doctrine. For example, in *Smith v. Bank of America*[100] the landowners executed a trust agreement pursuant to an arrangement with certain subdividers which designated the subdividers as beneficiaries and their interests as personalty. The beneficiaries were obligated to discharge taxes and liens. The trustee was given the power to sell and release lots and to sell the beneficial interests on default. The question was raised whether the beneficial interests under the trust were personal property. The California appellate court held that under the California Civil Code[101] a trust agreement vests the whole legal and equitable estate in the trustee. It held further that the beneficiaries' interest must be personalty because, as against the trustee and those claiming under him, the beneficiary has no interest in the land itself but only in the proceeds of sale, which is personal property. This section of the California code has no counterpart in most other jurisdictions, including Illinois and Florida. The effect is to place full legal and equitable title in the trustee when he has the

---

[98] 1A BOGERT, TRUSTS AND TRUSTEES §185 (1951). See also, *e.g.*, Ephriam v. Metropolitan Trust Co., 28 Cal. 2d 824, 172 P.2d 501 (1946); Smith v. Kelly, 387 Ill. 213, 56 N.E.2d 360 (1944); Union Guardian Trust Co. v. Nichols, 311 Mich. 107, 18 N.W.2d 383 (1945).

[99] 2 BOGERT 91; see 4 OHIO ST. L.J. 260 (1938).

[100] 14 Cal. App. 2d 78, 57 P.2d 1363 (1936).

[101] CAL. CIV. CODE §863 (1949).

duty to sell and convey. The beneficiary is deemed to have a mere chose in action — a right to the profits or proceeds of sale. Thus the stipulation that the beneficial interest shall be personalty does not in and of itself accomplish a conversion of the beneficial interest to personalty.[102]

Perhaps the California rule might be labeled "conversion by statute." The intent of the parties that the land be sold is the key to the application of the California code, just as it is the key to the operation of the doctrine of equitable conversion. The California result hinges to a great degree, however, upon that state's code provision, a factor that would appear to distinguish it from the Illinois view.

In conclusion, the argument that there can be a conversion by mere force of agreement is weak. Bogert feels that both Illinois and California are in effect applying the doctrine of equitable conversion. Unless the doctrine is applicable, it is doubtful whether parties can control the matter by agreement.[103] There is authority not only from California but also from Illinois and other jurisdictions to sustain his position.[104]

Florida's Position

Although the Florida case law on equitable conversion is relatively undeveloped, an examination of the existing cases reveals that the doctrine does exist in Florida, and that the Florida Supreme Court has adopted some of the generally accepted principles for its construction and application.[105]

Christopher v. Mungen [106] established that in order to have a conversion of real estate into personalty the trustee must have an absolute duty to sell, because conversion rests upon the principle that equity considers that as done which ought to have been done.

---

[102]Smith v. Bank of America, 14 Cal. App. 2d 78, 57 P.2d 1363 (1936).

[103]2 BOGERT, TRUSTS AND TRUSTEES §250 (1953).

[104]See, *e.g.*, Bartlett v. Gill, 221 Fed. 476 (D. Mass. 1915); Harrison v. Kamp, 395 Ill. 11, 69 N.E.2d 261 (1946); Gallagher v. Drovers Trust & Sav. Bank, 404 Ill. 410, 88 N.E.2d 870 (1949); Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952).

[105]*E.g.*, Hull v. Maryland Cas. Co., 79 So.2d 517 (Fla. 1955); Archer v. Puffer, 146 Fla. 568, 1 So.2d 565 (1941); Mitchell v. Bogue, 142 Fla. 787, 196 So. 306 (1940).

[106]61 Fla. 513, 55 So. 273 (1911).

The Court held that a mere discretionary power to sell produces no such conversion.

In *Trotter v. Van Pelt*[107] the Florida Supreme Court dealt with the construction of a will in which the testator directed the executor to dispose of certain real estate as conditions became favorable for realizing the full market value. The question was raised whether this was such an absolute direction to sell as would work an equitable conversion. The Court held that the intent of the testator controls. If there is a mandatory duty to sell, "the fact that the trustees are vested with some discretion as to time, terms, and manner of sale does not militate against the doctrine of equitable conversion."[108]

In a case dealing with a devise to a testator's widow for life, with provision for sale of land and distribution of proceeds among certain residuary legatees upon the widow's death, the Florida Supreme Court in discussing the application of the doctrine held that under the provisions of the will the testator contemplated that at the termination of the life estate the entire estate would be converted into personal property under the power of sale given the executors.[109] Florida also applies the doctrine in contracts for the sale of land, whereby equitable conversion becomes operative upon the entry into an agreement to convey title to realty.[110] The purchaser is deemed to become the beneficial owner immediately, and the vendor retains only naked legal title as security for payment of the purchase price.

These cases are the only ones dealing with equitable conversion in Florida. Thus it may not be predicted with any degree of accuracy how the Florida courts will treat an express trust provision that the beneficial interest shall be deemed personalty. There is an opinion of the Attorney General, discussed earlier, that expresses the belief that Florida will follow rules similar to those announced in the Illinois decisions,[111] but this is a rather frail reed upon which to lean. In order to answer questions concerning the applicability of equitable conversion to the land trust, the Florida courts will have to look to other jurisdictions. In view of the contingent nature of the duties to convey upon direction and to sell at the termination date of the trust, it is doubtful that the Florida courts will apply the

---

[107] 144 Fla. 517, 198 So. 215 (1940).

[108] *Id.* at 524, 198 So. at 218.

[109] Archer v. Puffer, 146 Fla. 568, 1 So.2d 565 (1941).

[110] Hull v. Maryland Cas. Co., 79 So.2d 517 (Fla. 1955).

[111] OP. ATT'Y GEN. FLA. 056-271 (Aug. 31, 1956).

doctrine to the Illinois land trust. If they refuse to accept the argument for equitable conversion, it is even less probable that they will accept conversion by mere agreement. If there is no conversion, the passive trust of realty will be executed by the statute of uses and the cestui will have both legal and equitable title.

Is a Passive Trust of Personalty Executed?

Assuming that the Florida Court will find an equitable conversion of the trust res into personalty, will the statute of uses or some other theory automatically execute the passive trust of personalty and place the legal and equitable title in the beneficiary?

In Illinois the settled rule is that the statute of uses[112] does not operate upon trusts of personal property, regardless of whether the trust is active or passive.[113] The rationale of this rule stems from a provision of the English statute of uses[114] that the statute was to execute estates of those *seised* with uses, with the result that the beneficiary obtained the whole legal and equitable title. The courts feel that the word *seised* is used in its technical sense; therefore they apply the statute only to freehold interests in land.[115] Since an owner is not seised but is merely possessed of an interest in personalty, Illinois has held that the statute of uses will not execute a passive trust of personalty.[116] Illinois is not alone in this view; many of the several jurisdictions so hold.[117] Any sense of uniformity, however, seems to end with the technical application of the statute.

Bogert makes the following observation with regard to passive trusts of personal property in the modern context:[118]

> "While the Statute of Uses applied only to property interests of which one was 'seised' to the use of another, and

[112] Ill. Ann. Stat. ch. 30, §3 (Smith-Hurd 1935).

[113] Breen v. Breen, 411 Ill. 206, 103 N.E.2d 625 (1952); Craig v. Kimsey, 980 Ill. 321, 118 N.E.2d 895 (1939); Smith v. Smith, 254 Ill. 488, 98 N.E. 950 (1912); Ure v. Ure, 185 Ill. 216, 56 N.E. 1087 (1900).

[114] 27 Hen. 8, ch. 10.

[115] See 1 Scott, Trusts §70 (2d ed. 1956).

[116] Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

[117] *E.g.*, Bellows v. Page, 88 N.H. 283, 188 Atl. 12 (1936); McDowell v. Rees, 22 Tenn. App. 336, 122 S.W.2d 839 (1938); *In re* Evenson's Will, 161 Wis. 627, 155 N.W. 145 (1915).

[118] 1A Bogert, Trusts and Trustees 293 (1951).

> therefore did not affect uses of personal property, modern courts execute passive trusts of personalty, either by analogy to the Statute of Uses, or on the theory that any trust without a purpose is automatically executed."

The views expressed by Bogert are not shared by all the authorities. Scott contends that the statute does not execute a passive trust of personalty and that the beneficiary must petition in order to compel termination of the trust and transfer of the title to the trust property.[119] He does recognize, however, that "there is language in a few decisions to the effect that the Statute of Uses is applicable to personal property . . . ."[120]

In *Bellows v. Page*[121] the Supreme Court of New Hampshire was confronted with the question whether a testator's will created a valid trust of personalty, and if so whether the trust was passive and executed. The trial court found that the will created a passive trust which would have been executed by the statute of uses if the res were realty. When the case was transferred to the Supreme Court there was no indication as to whether the res consisted of realty, personalty, or both, but the court held the trust to be passive and executed. The rationale of the court's holding is found in the succeeding paragraphs of the opinion:[122]

> "The statute of uses was passed long before the American Revolution. . . . It thus, like other similarly enacted statutes, became part of the body, not of our statutory, but of our common law . . . , and as such it is susceptible to judicial change under the maxim cessante ratione lex.
>
> "In sixteenth century England, at the time when the statute of uses was enacted, there may have been good reason for drawing a distinction between passive trusts involving real property and similar trusts involving personalty only, but today, in this country, and under present conditions, we see no valid reason why this distinction should be perpetuated."

Although land was the basis of the English economy during the reign of Henry VIII and personalty was of minor importance, wealth

---

[119] 1 SCOTT, TRUSTS §70.
[120] *Id.* at 604.
[121] 88 N.H. 283, 188 Atl. 12 (1936).
[122] *Id.* at 285, 188 Atl. at 14.

in the United States today is represented by intangible personalty to a great extent. Hence there should be strong public policy against severance of the legal and equitable title to personalty when a trust is serving no valid or active purpose. When the reason for a law ceases, the rule should cease or be accommodated to changing times and needs.[123]

In *Bowman v. Long*,[124] one of the oldest cases on point, the Supreme Court of Georgia, in determining the interest of a beneficiary under a passive testamentary trust of personalty, held that although the statute of uses applies only to realty, the common law does for personalty what the statute does for realty. Thus the cestui was deemed to have both legal and equitable title. *In re Lowitz' Estate*,[125] a Pennsylvania case, held that a will directing the creation of a trust of $10,000 without limitations or duties created a dry or passive trust which was executed by the statute of uses. The beneficiary was held entitled to receive her legacy free from all trust limitations. The statute of uses is clearly in effect as part of the common law of Pennsylvania,[126] and the Pennsylvania courts appear to derive the *Lowitz* result by common law analogy to the statute of uses.[127] Tennessee has followed the rule laid down in the *Bellows* case,[128] and the North Carolina Supreme Court has held that a beneficiary of a passive trust of corporate stock certificates is entitled to possession of the certificates upon demand.[129] Other jurisdictions following the view that a passive trust of personalty is executed by analogy to the statute of uses are Maryland, Mississippi, New Jersey, Rhode Island, South Carolina, and Vermont.[130] Several states have statutes similar in effect to the statute of uses[131] and construe them to authorize execution of passive trusts of personalty.[132]

---

[123]See 17 B.U.L. Rev. 499 (1937).

[124]26 Ga. 142 (1858).

[125]360 Pa. 91, 61 A.2d 342 (1948).

[126]Kinsel v. Ramey, 87 Pa. 248 (1878); Franciscus v. Reigart, 4 Watts 98 (Pa. 1835).

[127]See *In re* Friedheim's Estate, 344 Pa. 542, 26 A.2d 341 (1942); *In re* Jeremy's Estate, 178 Pa. 477, 35 Atl. 847 (1896); McCune v. Baker, 155 Pa. 503, 26 Atl. 658 (1893).

[128]McDowell v. Rees, 22 Tenn. App. 336, 122 S.W.2d 839 (1938).

[129]Security Nat'l Bank v. Sternberger, 207 N.C. 811, 178 S.E. 595 (1935).

[130]See 1A Bogert, Trusts and Trustees 293 (1951). See also Annot., 165 A.L.R. 550 (1946).

[131]*E.g.*, N.Y. Real Prop. Law §92; Wis. Stat. §§231.05,.14 (1957).

[132]*E.g.*, Reed v. Browne, 295 N.Y. 184, 66 N.E.2d 47 (1946); Stringer v. Young,

Florida, as stated previously, has adopted the statute of uses not only as part of the common law[133] but also in part by statute.[134] The Supreme Court has shown an inclination to execute passive trusts of personalty by analogy to the statute of uses. In *Deauville Corp. v. Blount*[135] the Court was confronted with the question whether a trustee of certain corporate stock should be appointed receiver. The trust instrument limited the trustee in his dealings with the corporate stock to such an extent that the Court held the trust to be passive and the trustee a mere agent. It then held: "We find no support for the contention that the trustee was . . . the owner of the stock. The minutes of a stockholders' meeting brought in question indicate that all stockholders were present . . . ."[136] The fact that the Court indicated that all shareholders were present implies that the beneficiaries were the real owners of the stock. The Court may have been saying that a passive trustee of personalty does not have title and that the full title is vested in the beneficiaries.

Aside from the *Deauville* case, there is little indication as to how the Florida Court will look upon passive trusts of personalty. It is difficult to find a reason for not treating a passive trust of personalty as analogous to one of land for purposes of execution. Since Florida has adopted the statute of uses as part of its common law, the Court may apply the maxim *cessante ratione cessat lex* and execute a passive trust of personalty.

MISCELLANEOUS QUESTIONS

In addition to the aspects of the Illinois land trust discussed, the use of this hybrid trust may raise miscellaneous questions as to its validity and applicability under Florida law. Space does not permit a detailed discussion, but some of these questions are listed below.

(1) Does the trust work a fraud on the inchoate right of dower in realty of the wife of the beneficiary?

(2) Does it violate public policy by carrying on business

---

191 N.Y. 157, 83 N.E. 690 (1908); Cutting v. Cutting, 86 N.Y. 522 (1881); Janura v. Fencl, 261 Wis. 179, 52 N.W.2d 144 (1952).

[133] FLA. STAT. §2.01 (1959).

[134] FLA. STAT. §689.09 (1959).

[135] 25 So.2d 812 (Fla. 1946).

[136] *Id.* at 813 .

activities outside the accepted statutory forms of business organizations?

(3) Is it invalidated by section 689.07 of Florida Statutes 1959, which provides that the trustee who takes under a deed "as trustee" takes the fee simple estate when no beneficiaries are named and the purposes of the trust are not disclosed?

(4) When the beneficiaries join in the execution of the land trust agreement and give express approval of all the terms and provisions of the trust instruments, does their consent constitute the trustee an attorney with power to convey the trust realty even if the trust is deemed passive and executed by the statute of uses or analogy thereto?

(5) Will a third party taking a conveyance from the trustee of a land trust be deemed a bona fide purchaser without notice of the restrictions upon the trustee's power to convey by virtue of the trust deed provisions, which expressly provide that third parties dealing with the trustee are neither privileged nor required to inquire into the authority for any act of the trustee?

These questions are not exhaustive, but they should be considered before the Illinois land trust is adopted in Florida.

Conclusion

The first objection to the Illinois land trust is that the trust instrument creates a passive trust of realty which is executed by the statute of uses, resulting in the placing of both legal and equitable title in the cestui. In rebuttal it is urged, however, that the duties imposed upon the trustee — the duty to convey upon direction of the beneficiaries and the duty to sell remaining trust property twenty years from execution — are active, and that the statute of uses does not execute an active trust of realty.

If the Court fails to find an active trust, it may be contended further that by force of agreement and operation of law the trust realty is converted into personalty and that the statute of uses does not execute a trust of personalty even if the trust is passive. The argument against conversion is that the doctrine of equitable conversion does not apply because the time has not yet arrived when the trustee's duty becomes absolute. There is no conversion of realty unless the doctrine of equitable conversion applies, because realty cannot be converted to personalty by mere agreement. It is improper to draw an analogy to those cases dealing with partnership agreements to share profits from land speculation to show an equitable conversion, since the trust agreement expressly forecloses the application of partnership rules to the trust situation. Therefore there is no conversion, and the trust should be executed by the statute of uses.

If it is held that there has been a conversion of realty to personalty, it may be shown that although, strictly speaking, the statute of uses does not apply to personal property, most modern courts hold that a passive trust of personalty is executed by analogy to the statute.

The Florida Court's reaction to the trust is difficult to predict. It seems that the lawyer who makes use of this trust device in Florida under its present status is treading on tenuous legal ground, for, notwithstanding the fact that the Illinois courts have repeatedly held the trust to be valid, there is well-reasoned authority for an opposite holding. There are many desirable features of the Illinois trust which, but for their questionable validity under established trust principles, would be helpful in the development of Florida real estate. If the land trust is a desirable device, however, it should be validated through statutory enactment, not through judicial innovation.