COLUMBIA LAW REVIEW.

Vol. XVII. JUNE, 1917. No. 6

THE NATURE OF THE RIGHTS OF THE *CESTUI QUE TRUST.*

Students of the law of trusts are indebted to Professor Austin Wakeman Scott for an interesting and valuable exposition of the law relating to the rights of the *cestui que trust,* in an article entitled "The Nature of the Rights of the *Cestui Que Trust*", published in the COLUMBIA LAW REVIEW for April.[1] Professor Scott examines the arguments for and against the proposition that the right of a *cestui que trust* is a right *in rem* in the trust *res* rather than a right *in personam,* as is commonly stated. He reaches the conclusion that "it is correct to say that the *cestui que trust* has two classes of rights; he has a number of rights, positive and negative, available against the trustee alone; he has in addition, as equitable owner of the trust *res,* a right against the world at large to insist that it respect his ownership, to insist that it refrain from using the trust property for any purpose which is inconsistent with the trust; that right is not available against a purchaser for value and without notice; and if, unlike some equitable interests, it is not available against one who acts adversely to the trustee, as a disseisor or converter, it is not because equity does not regard the *cestui que trust* as beneficial owner of the trust *res,* but because it considers that the trustee adequately represents him."[2] Elsewhere he says, "It is submitted that the *cestui que trust* is not merely the owner of the equitable obligation of the trustee, but *he is also the equitable owner of the property held by the trustee.* It is submitted that he has more than those rights *in rem* which are possessed by every obligee of a legal or equitable obligation; that he also has proprietary rights in the trust property."[3] With these

[1] 17 Columbia Law Rev. 269.

[2] At p. 290.

[3] At p. 275. Italics, the present author's.

statements, as well as with the conclusion that the trustee has the "duties of an owner" the burden of which "he can, by the aid of a court of equity, shift to the trust property", the present writer does not find himself in entire accord.[4]

That the ultimate effect of enforcing a trust in equity, where the court makes its decree directing the turning over of trust property to the *cestui que trust,* is, in a great many cases, the same as though the *cestui que trust* possessed a right in the property itself, cannot of course be questioned. Here, as in many other instances, the peculiar character of the remedy in equity, whereby the defendant is compelled to give to the plaintiff the specific thing which the plaintiff is entitled to have, ultimately places the defendant in possession of the thing itself and of the legal ownership, which is commonly spoken of as a right *in rem.* But the nature of a right is not determined by the nature of the judgment or decree by which it is enforced.[5] A right to have the defendant give to the plaintiff a particular thing, as Professor Scott concedes, may be a right *in personam,* although the judgment, also *in personam,* will compel the defendant to give to the plaintiff the thing,[6] and thus confer complete ownership of it upon him.

In discussing the question, what is the nature of the right of the *cestui que trust,* it is necessary, therefore, to discriminate sharply between the character of the remedy and the nature of the right which is prerequisite to the remedy, for obviously the fact that equity sometimes gives a remedy which vests the *cestui* with property in the *res* does not establish that he has property either legal or equitable in the *res* at the time when he invokes the aid of a court of equity. It will also be necessary to consider the character of the acts of third persons which give rise to the right in the *cestui* against them, for the purpose of ascertaining whether those acts give rise to the rights of the plaintiff exclusively because of their incidence on the *res* which is affected by the act decreed to be performed, or whether there must be some additional

[4] At p. 290. It is not quite clear from the context just what is meant by the expression "duties of an owner". If the legal duties of ownership are referred to, no argument would be required to prove that such duties, without the aid of a court of equity, pass to and are imposed on subsequent owners by the transfer of the property which is the subject of ownership. It is therefore assumed that the equitable duties of a trustee are referred to.

[5] Professor W. W. Cook, The Powers of Courts of Equity, 15 Columbia Law Rev. 37, 106, 228.

[6] At p. 280.

element or elements before the plaintiff can ask the aid of a court of equity. This is so both because there are many cases where equity aids the *cestui* by making its decree against third persons, where the defendant has never become possessed of or otherwise done any act interfering directly with the trust property, and because, on the other hand, there are some cases where equity withholds its aid even when the defendant has tortiously possessed himself or otherwise interfered with the trust *res*. Each class of cases would appear to be inconsistent with the theory that the right which a *cestui* is enabled to assert in equity against third persons is based on a property right in the trust *res* itself.

At the outset of any discussion of this subject, it should be observed, that it cannot be discussed on the basis of formal definition without danger of the discussion degenerating into a mere dispute over the proper use of language. Indeed Professor Scott's contention is that "it is correct to say that the *cestui que trust* has * * * as equitable owner of the trust *res*, a right against the world at large to insist that it respect his ownership"[8] and that to speak of the right of the *cestui* as equitable ownership is a "perfectly proper use of terms, and one which accurately expresses the nature of his rights,"[9] and that "to speak of equitable ownership is just as accurate a use of terms as to speak of legal ownership."[10] And he proceeds, in substantially the following manner, to demonstrate that this use of language is correct: Rights *in rem* are usually defined as rights against an indeterminate number of persons. A *cestui que trust* may have an equitable remedy for the recovery of the *res* against all the world except innocent purchasers for value. There are an indeterminate number of persons who may acquire the trust *res* without becoming innocent purchasers. Therefore the right of the *cestui* is a right *in rem* in the trust *res* itself.

There are two objections to dealing with the subject in this manner. One is, as will be hereafter pointed out, that it is not strictly accurate to say that the *cestui que trust* has a right to the trust *res* "against the world at large" (except innocent purchasers for value) "to insist that it respect his ownership, to insist that it refrain from using the trust property for any purpose which is inconsistent with the trust".[11] If the phrase "inconsistent with the

[8]At p. 290.
[9]At p. 276.
[10]At p. 275.
[11]At p. 290.

trust" be deemed to mean "inconsistent with the *cestui's* right *in rem* in the trust *res* itself", it is to be observed that there are many tortious acts of interference with or injury to the trust *res* which injuriously affect the right of the *cestui* which, however, gives rise to no right or remedy in the *cestui,* or which, to state the principle in another way, courts of equity do not regard as invasions of the right of the *cestui.* Trespass, conversion, disseisin are acts which are fundamentally invasions of rights of ownership. Yet they are not regarded as wrongs against the *cestui.* It is believed that the reason for this is not, as Professor Scott suggests, that the trustee represents the *cestui* and maintains his action at law for such injuries in a representative capacity. It is believed rather that the true basis of liability of third persons to the *cestui* is not a property right of the *cestui* in the trust *res* at all, but is rather the property right which the *cestui* has in the equitable claim *in personam* against the trustee. This right may or may not be invaded by interference with the trust *res,* depending upon the nature of the act of interference. It may be invaded by one who does not interfere with the trust property or acquire any interest in it. But, in either case, it is believed that the true test of liability of the third person is the interference with the right of the *cestui, in personam* against the trustee, and not the interference with the trust *res* itself.

In the second place, if we accept Professor Scott's conclusion as the logical outcome of a perfect syllogism, the result seems to be the destruction of what has hitherto been regarded as a useful although not altogether scientific generalization expressed by the phrase "rights *in rem*" rather than the establishment of any substantial identity in character of the rights of the *cestui* with the rights of property hitherto commonly spoken of as "rights *in rem*".

The sum total of the legal relations of one who is the owner in possession, or of one who is not the owner but who has possession, may be spoken of as constituting a right *in rem.* If the owner in possession of a chattel bail the chattel, or, if the owner seized of real estate place the realty in possession of a tenant at will, the character of the owner's right is changed. He can then enjoy the use of the thing which is the subject of his right only through the intervention of the bailee or the tenant at will, or by the aid or intervention of a court, neither of which aids are necessary to the enjoyment of the rights of property by one in possession. But, if the owner of the chattel or the realty is disseised, his rights are

still different. He may now maintain an action against the disseisor or his transferee without entry or demand, whereas the bailor or lienor at will had no such right; but, on the other hand, he could maintain no action for injury to the freehold.[12] Moreover, at common law the disseisee of chattels or land, unlike the bailor or lienor, possessed no right which he could transfer to another by gift or sale. Again, if the bailment or lease be for a term, the rights of the owner are still different. Under the doctrine of *Ward* v. *Macauley*[13] and *Gordon* v. *Harper*,[14] the bailor cannot, during the term, maintain trespass or trover against the third person, nor can the lessor maintain trespass or ejectment for trespass upon the leasehold. If the chattel or realty were injured by the tortious act of the third person, the "reversioner" might have an action on the case, not for the injury to the property right of the bailee or the lessee, but for the injury to his reversionary interest. If the bailor chances to be the pledgor, according to the English law, he has no right against the third person who has tortiously interfered with the pledgor until the pledgor has terminated the pledge by payment or tender.[15] But if he is an owner of property subject to a common law lien, although he has no rights against the lienor or a trespasser[16] until the lien is discharged, he may maintain trover or replevin against the third person who converts the chattel.[17] A right of entry upon the freehold for condition broken may be asserted against every subsequent taker of the freehold, but one having the right of entry has no action for injuries to the property itself.[18] The widow who has right of dower possesses a right which, upon the death of her husband, may be asserted against every subsequent taker of the property; but even after the death of her husband and before admeasurement of her dower, she may not maintain an action for injury to the freehold.[19] So, one who has an option right to purchase real estate has a right, upon the exercise of the option, to claim the

[12]United States *v.* Loughrey (1898) 172 U. S. 206, 19 Sup. Ct. 153.

[13](1791) 4 T. R. 489.

[14](1796) 7 T. R. 9.

[15]Donald *v.* Suckling (1866) 1 Q. B. *585.

[16]Wilson *v.* Martin (1860) 40 N. H. 88.

[17]Ames *v.* Palmer (1856) 42 Me. 197; Holly *v.* Huggeford (Mass. 1829) 8 Pick. 73.

[18]United States *v.* Inman-Poulsen Lumber Co. (D. C. 1914) 211 Fed. 679, reversed (C. C. A. 1916) 233 Fed. 941.

[19]15 Columbia Law Rev. 364; see Randall *v.* Kreiger (1874) 90 U. S. 137; Bartlett *v.* Ball (1897) 142 Mo. 28, 43 S. W. 783; 3 Holdsworth, History of English Law, 157, 161.

property of all except innocent purchasers for value. Most lawyers would agree that the character of the rights of the claimant to the property in each of the foregoing cases differs widely in various respects, and, although they all fall within the exact definition of rights *in rem* adopted by Professor Scott, few would agree that in every case the claimant possessed a right *in rem* in the *res* which is the subject of the right.

One might multiply examples, but these suffice to make it evident that, while we use the phrase "right *in rem*" as a convenient and useful method of characterizing the jural relationships of the owner in possession to the thing and to others, the moment the possession is changed to another the phrase becomes almost useless as conveying any definite legal concept of general application. The disseisee has no transferable right, but he has rights against third persons. The pledgor has a transferable right, but he has no right against third persons unless it be an action on the case for injury to the pledge. The owner of property subject to a lien has no right against the transferee, but he has against the converter. The bailor for a term has a transferable right, but no right against third persons for mere interference with the property. One possessing a right of entry for condition broken or the inchoate right of dower has no alienable right, and indeed no right in the property, yet both have a right which may be asserted to the property, in whosoever hands it may be. One having the right of an option to purchase land may have a transferable right, and may follow property into the hands of all takers except innocent purchasers, but he could maintain no action for injury to the property, nor could he acquire or transfer any interest in the property pending the exercise of his option. It is evident, that, if all the varying rights of claimants to property out of possession are to be classified as rights *in rem* merely because they may be asserted against an indeterminate number of persons, then the classification can have very little practical utility, since the phrase is meaningless unless it is known what kind of a right *in rem* is intended to be referred to.

It is difficult and mischievous to teach law by formal definition, and it is even more so to philosophize about law on the basis of definitions. Generalizations are nevertheless useful so far as they enable us to group together those legal concepts which possess a sufficient number of common characteristics to render a common method of treatment convenient. But the definition of man as a featherless biped, even if literally and scientifically true, is not

scientifically useful, because it fails to reveal the essential differences between man and birds; and so the broad statement that the right of the *cestui que trust* is a right *in rem,* even if true because of the breadth of the definition adopted, serves no useful purpose because it ignores the fundamental differences between the rights of the *cestui que trust* and other classes of rights which are more or less perfectly described by the phrase "rights *in rem*". Thus, one, by expanding his definition of "rights *in rem*", may ultimately embrace the whole field of law and thereby make his classification worthless. If the right of the *cestui* is a right *in rem* in the trust *res* merely because the *cestui* may assert a claim to the trust property in the hands of all but innocent purchasers for value, by an identical process of reasoning, one might prove that all relative rights or rights *in personam* are absolute rights.

In considering the nature of the rights of the *cestui que trust,* therefore, our real problem is not one of definition or necessarily of classification, but of consideration of the likeness and differences of the rights of the *cestui que trust* as compared with those rights commonly referred to as rights *in rem,* which most closely resemble them.

The right *in rem* which most closely resembles the right of the *cestui que trust* is undoubtedly the right of the bailor at will, although it can hardly be said to be a typical right *in rem* in the bailor, since he does not have possession of the thing which is the subject of his right. His right is transferable; it may be invaded by physical interference with the thing bailed without the consent of the bailor or bailee, and such interference by any member of the community is an invasion of the bailor's right in the thing bailed.

For purposes of comparison let us now suppose that *A,* the legal owner of a chattel, declares himself trustee of it for the benefit of *B*. Both before and after his declaration of trust, his right would be a typical right *in rem,* good against all the world so far as the law courts are concerned, and good against all the world but *B* in a court of equity. Whatever other rights *B* possesses, all would agree that he has an equitable right *in personam* against *A*. He has a right to call upon *A* to hold the legal ownership in the property for his benefit, and to have *A* convey the title to him on request. If *A* refuses or neglects to perform the duties of his trust, equity will make its decree, which is *in personam,* as distinguished from the law judgment which operates *in rem* even

when enforcing rights *in personam,* directing him to perform the duty. The fact that in early law the rights of the *cestui que use,* and later the *cestui que trust,* were treated as though created upon a grant is interesting historically, but, as Professor Scott concedes, it does not prevent the recognition of the fact that the *cestui* has rights *in personam,* just as all would agree that a debt gives rise to a right *in personam* in the creditor, notwithstanding the ancient theory that a deed was a grant. Indeed, even in the early law of trusts, it was recognized that a use without transmutation of possession could not be raised in favor of a stranger without consideration,[20] a recognition of the fact that the right of the *cestui que use* was a right arising out of obligation. It was only at a comparatively late date that the anomalous doctrine became established that there could be a self declaration of trust without consideration.[21]

But the suggestion is, that the *cestui,* nevertheless, with respect to the ownership of the equitable claim against the trustee, possesses a right *in rem* with respect to persons other than the trustee. This was recognized by Professor Langdell, the most stalwart defender of the theory that the right of the *cestui que trust* is a right *in personam.* He said, "Here again, when it is said that equity cannot create rights *in rem,* reference is had to the *res,* which is the subject of the equitable obligation. Regarding the equitable obligation itself as the *res,* there can be no doubt that an equitable obligation, like a legal obligation, always creates a right *in rem* (*i. e.,* an absolute right), as between the obligee and all the rest of the world except the obligor."[22] That this suggestion is sound does not admit of doubt, but that it tends in any way to establish the proposition that the right of the *cestui* is a right *in rem* in the trust *res* itself does not seem so clear. It is familiar learning that legal ownership of a *chose in action* gives rise to rights *in rem.* It is the duty of the obligor to do or give the thing which he is obligated to do or give by the *chose in action* which makes it a right *in personam;* but it is the duty of the rest of the world to refrain from interfering with the right of the obligee against the obligor. *Choses in action,* because of their nature, cannot be trespassed upon or converted; but, in so far as they are capable of

[20]Doctor and Student (1523) Dialogue II, c. 22, 23; Frampton *v.* Gerrard (1601) 2 Rolle's Ab. 785 (K.) *pl.* 4, 791 *pl.* 1; Sharington *v.* Strotton (1565) 1 Plow. 298 (*semble*).

[21]*Ex parte* Pye (1811) 18 Ves. Jr. 140.

[22]Brief Survey of Equity Jurisdiction (2nd ed.) 6, n. 1.

being injured or destroyed, every system of law tends to throw its protection about them and give them the character of rights *in rem* as to all persons other than the obligor. Thus, in Anglo-American law, the tendency is to liken the ownership of a *chose in action* more and more to the ownership of a chattel as to persons other than the obligor. By process of the application of combined legal and equitable principles, or by statute, *choses in action* have become freely transferable, so that the ownership of a *chose in action* has assumed many of the characteristics of a right *in rem.* That ownership of a *chose in action* was a true right *in rem* was recognized to a limited extent in those decisions which established that trover would lie for the conversion of a written instrument embodying or representing a *chose in action,* the measure of damage being the reasonable value of the *chose in action* and not the value of the parchment or paper.[23] And finally, in *Lumley* v. *Gye,*[24] it was held that the acts of a stranger to a contract, who injuriously interfered with the right of the obligee to enjoy its performance, were actionable wrongs. It was thus established that the owner of a *chose in action* had not only a right against the obligor, imposing upon him a positive duty, but that he had rights against all the world that they should refrain from interfering with his right *in personam.* The existence of the latter is not inconsistent with the former, nor does the development of the former tend to modify the character of the right which the obligee has against the obligor. As Professor Scott points out, this tendency was developed in the courts of equity much earlier than in the courts of law. Equitable rights have always been regarded by courts of equity as freely transferable and, so far as expedient, they have been likened to legal interests which could be created or transferred by the *cestui* in the same way as the legal owner could create or transfer rights from his legal ownership. Upon similar principles, equity should regard those who in any way interfere with the rights *in personam* which the equitable claimant has against the trustee or other obligor, as committing an equitable wrong or tort to that right. The existence of such a right on the part of the *cestui* could not be deemed inconsistent with the character of his right as a right *in personam* against the trustee or equitable

[23]Mercer *v.* Jones (1813) 3 Camp. N. P. 477; Payne *v.* Elliot (1880) 54 Cal. 339; O'Donoghue *v.* Corby (1856) 22 Mo. 393; Hazewell *v.* Coursen (N. Y. 1879) 13 Jones & Sp. 22; Keeler *v.* Fassett (1849) 21 Vt. 539; Bavins *v.* London etc. Bank [1900] 1 Q. B. 270 (*semble*); Hudspeth *v.* Wilson (N. C. 1830) 2 Dev. 372 (*semble*).

[24](1853) 2 Ell. & Bl. 216.

obligor, nor would it tend in any way to support the proposition that the *cestui que trust's* right is a right *in rem* in the trust *res* itself.

So long as courts of equity gave rights to the *cestui* against the trustee only, with respect to the trust property, his right was obviously a right *in personam*. The fact that the right was with respect to the specific *res*, in the case of the trustee, was immaterial, since the right was limited exclusively to the claim against the trustee and could be invaded only by him. "At that time", as Professor Scott agrees, "the *cestui que use* certainly had no rights in the nature of ownership; he had only rights *in personam*."[25] The fact, therefore, that the obligation *in personam* is to do something with respect to a specific thing, which obligation equity will enforce, does not prevent the right of the obligee from being a right *in personam*; and, since equitable rights of the *cestui*, whether against the trustee or a subsequent taker of the trust property, are usually of this character, the mere fact that the right is asserted with respect to the trust *res* is not in itself enough to justify the statement that the equitable right to have the trust property conveyed to the trustee is a right *in rem* in the property itself. For example, at the time of which Professor Scott speaks, a trustee might convey the trust *res* to a stranger to hold for the benefit of the *cestui*, in which case a new trust would be immediately created in favor of the *cestui*, who would thus acquire a new right *in personam* against the new trustee. It is conceivable, therefore, that where equity imposes a trust upon third persons, it does so upon the theory that a new right *in personam* has been created against the third person, and, that what equity actually does in following trust property into the hands of strangers, is to create successive rights *in personam* against successive takers of the trust *res* not essentially different in character from the right which is asserted against the original trustee, although they differ from it in their origin.

To support the conclusion that the right of the *cestui* is a right *in rem*, therefore, an additional element is relied on, and this is the doctrine that the *cestui que trust* may assert his right to the trust property against all but innocent purchasers for value. The *cestui* himself is deemed the equitable owner of the *res* "held by the trustee", and the implication is that his rights against subsequent takers are worked out upon the principle that the trust

[25] At p. 280.

follows the *res* into the hands of any taker except an innocent holder for value, just as the right of the bailor at will follows the bailed property into the hands of third persons and is invaded by tortious acts against the property itself.

In the light of this suggestion, let us now ascertain the theory upon which the *cestui que trust* is able to assert any right against subsequent takers of the trust property. Upon an examination of the authorities, the following propositions will be found to be of practically universal application where equity imposes liability upon third persons with respect to property held in trust:

(1) That, wherever third persons are held responsible because of their interference with the trust *res,* the act of interference must amount to an acquisition by a transfer of the legal interest held in trust, from the trustee to the third person;

(2) That equity never imposes liability with respect to the trust property upon third persons, unless the defendant has notice of the trust or knows facts which would place a reasonable man on inquiry with respect to the trust and which, consequently, the law regards equivalent to notice;

(3) Equity often imposes liability upon third persons with respect to the trust property, although they have not in fact physically interfered with or acquired possession of the trust *res.*

If these propositions are true, it will at once be observed that the real reason for the liability of third persons is the unconscientious interference with the right *in personam* which the *cestui* has against the trustee and which, as we have already seen, is a right *in rem* as against all the world other than the trustee. He is liable, not because he has interfered with the trust *res,* of which the *cestui* is equitable owner, for there are many such interferences which are wrongful and unlawful which nevertheless give rise to no rights in the *cestui,* but only when and because such interference is a direct interference with the *chose in action* which the *cestui* holds against the trustee. If such should prove to be the nature of the *cestui's* right, it would follow that the right which equity asserts on behalf of the *cestui* against strangers to the trust is much more closely analogous to the legal right of the owner of a contract, against strangers to the contract, which was recognized and established in *Lumley* v. *Guy.*[26] The action there was of course at

[26] *Supra,* footnote 24.

law, in tort, for the interference with the legal right. But, in *Lumley* v. *Wagner*,[27] where the plaintiff was entitled to an equitable remedy on his contract, it was held that equity would restrain third persons from carrying out a contract with the plaintiff's contractor which involved a violation of the plaintiff's contract. This, and the many cases which have followed it, have established firmly the principle that equity will protect equitable rights *in personam* from unconscionable interference by strangers, regardless of whether the equitable obligation relates to property or not.[28] In the case of a trust, the equitable right of the *cestui* is interfered with, and the wrong done is in fact an equitable tort to the right of the *cestui* against the trustee which entitles the *cestui* to an equitable remedy against the wrongdoer. It is just here that the elasticity of the equitable remedy gives rise to a superficial resemblance to the right *in rem* enforced by legal remedies. For this equitable tort, equity sometimes holds the third person responsible in damages; but, on the other hand, since, in many cases, it is the acquisition or retention of the trust property by the wrongdoer which prevents the enforcement of the *cestui's* equitable right *in personam* against the trustee, equity will not allow the wrongdoer to retain the fruits of his wrong. This is so, not because his act is a wrong to the right of the *cestui* in the trust *res,* but because it is an interference with the plaintiff's right *in personam* against the trustee, which, if enforced against him, would have resulted in the plaintiff's acquiring the *res.* As, however, the remedy is not necessarily the recovery of the trust property and may be invoked when there is no physical interference with the trust *res* or acquisition of the trust property, the right asserted cannot be said to be a right in the trust *res* itself.

1. Let us now ascertain what kinds of acts by third persons are regarded by courts of equity as invasions of the right of the *cestui que trust.* We are at once confronted with a striking difference between the rights of the *cestui* and the rights of the legal owner out of possession. The right *in rem* of the bailor is literally a right *in rem,* because the right is invaded exclusively by the incidence of acts on the thing itself, which, in legal contemplation, are injuries to the thing and hence to the rights in the thing.[29]

[27](1852) 1 DeG. M. & G. *604.

[28]See Ames, Cases on Equity Jurisdiction, 102, n. 3.

[29]Slander of title may constitute a possible exception to the statement. If so, it illustrates the difficulty of making a comprehensive classification of law into rights *in rem* and rights *in personam* already referred to.

While the owner possesses rights which may be invaded by mere physical interference with the property, however innocent so far as their moral character is concerned, amounting to trespass or conversion or disseisin, such acts affecting the trust *res* are not regarded by courts of equity as invasions of the right of the *cestui.* While the bailor may maintain trespass, trover or replevin and the disseisee may maintain ejectment or one of the various forms of real action against the disseisor, equity affords no equivalent remedy to the *cestui que trust.*[30] If, therefore, the *cestui que trust* has a right *in rem* to the trust *res* itself, we shall have to admit that, unlike any other right *in rem,* it can not be invaded by a tortious destruction of the *res* which is the subject of the right.

There are, however, various kinds of interference with the trust property which equity does regard as invasions of the right of the *cestui.* The purchaser with notice, the innocent heir or donee of the trust property, is deemed to have invaded the right of the *cestui que trust* who is given rights against the person thus acquiring the legal right of the trustee. What is the essential distinction between these two classes of acts? In the latter class, it is to be noted that there is a breach of duty on the part of the trustee, or at least a failure to carry out the duty which equity imposes on him by reason of the fact that he is a trustee, whereas in the former class, there is no breach of duty on the part of the trustee. It is the duty of the trustee to hold the legal right in the trust *res,* with respect to which he is vested, for the benefit of the *cestui que trust,* or else to vest that interest in the *cestui que trust,*[31] and, so as long as he retains that interest,

[30]*Trespass to Land*—Anonymous (1499) Y. B. 15 Hen. VIII., fol. 13, *pl.* 1; Ames, Cases on Trusts (2nd ed.) 251, n. 1, 2, 254, n. 1 at p. 256. *Trespass to Chattels*—Ames, Cases on Trusts (2nd ed.) 254, n. 1 at p. 256. *Trover*—Ames, Cases on Trusts (2nd ed.) 254 n. 1 at p. 256, 372, n. 1; Lord Compton's Case (1580) 2 Leon. 211. *Disseisin*—Lord Compton's Case (1580) 4 Leon. 196; Saunders *v.* Bournford (1679) Finch 424; Earl of Worcester *v.* Finch (1600) 4 Coke, Inst. 85; Chudleigh's Case (1589-1595) 1 Co. Rep. 120a (use); Lewellen *v.* Mackworth (1740) 2 Eq. Cas. Ab. 579; Colburn *v.* Broughton (1846) 9 Ala. 351; Hall *v.* Waterman (1906) 220 Ill. 569, 77 N. E. 142; Crook *v.* Glenn (1868) 30 Md. 55; Kirkman *v.* Holland (1905) 139 N. C. 185, 51 S. E. 856; Cameron *v.* Hicks (1906) 141 N. C. 21, 53 S. E. 728; Young *v.* McNeil (1907) 78 S. C. 143, 59 S. E. 986; Appel *v.* Childress (1909) 53 Tex. Civ. App. 607, 116 S. W. 129; Sugden's Gilbert, Uses, 429. "* * * if there were any disseisin that nothing passed to the plaintiff" (the *cestui*) "either in right or equity, for the dissiesor was subject to no trust, nor any subpœna was maintainable against him, not only because he was in the *post,* but because the right of inheritance or freehold was determinable at common law and not in chancery, neither had *cestui que use* * * * any remedy in that case." Earl of Worcester *v.* Finch, *supra.*

[31]Lewin, Trusts (12th ed.) 1, 13.

he must avoid negligent acts or omissions with respect to it. Thus, where there is a sale or a gift of the trust *res* in breach of the trust, there is a violation of the personal duty which the trustee owes the *cestui que trust.* There is likewise a breach of personal duty when the trustee gives the property to a third person by will, and, while the death of the trustee and the descent of the trust property to the heir does not involve the moral turpitude of a conveyance of the trust property in breach of trust, it nevertheless operates to pass the legal estate with which the trustee is seized out of him, and it results in a failure to perform the personal duty which the trustee has assumed with respect to the trust *res.* In the case of trespass upon or disseisin or conversion of the trust *res,* there is no failure on the part of the trustee to perform his duty as trustee, nor is there any termination of the legal interest with which he is vested as trustee. There is the same distinction between the case of escheat and of forfeiture of the estate of the trustee to the Crown. In the case of escheat, the legal interest of the trustee comes to an end. The lord is in by the *post* not the *per,* and he thus acquires nothing by reason of the breach of the personal obligation of the trustee, nor does he acquire or retain a legal interest which was subject to the personal obligation of the trustee. The trust is just as effectively destroyed as though the trustee had held the trust *pur auter vie* and the life had ended. In such a case, obviously the lord would hold free from any claim of the *cestui,* since there has been no failure to perform the trust and no passing of the estate held in trust, to the third person. In the case of forefeiture of goods, or forfeiture of lands for treason, however, the Crown took by the *per.*[32] The legal estate held in trust passed from the trustee to the Crown and the retention of it pre-

[32]If a trustee disseisee released to his disseisor, the *cestui* acquired no rights, since no right held in trust passed to the disseisor nor did the disseisor participate in the breach of trust. But if the trustee in breach of trust released a reversion to a tenant who was not a *bona fide* purchaser of the reversion, the *cestui* acquired rights against him. Lord Compton's Case, *supra,* footnote 30. But, with the development of the modern notion that a third person may not take advantage of any act of the trustee in breach of his trust, equity, regardless of the acquisition of trust property, would enjoin the defendant from setting up the release. See, *infra,* footnote 52; Saunders *v.* Bournford, *supra,* footnote 30.

In the case of forfeiture for felony of land held upon trust, the lord took just as in the case of escheat, King *v.* Mildmay (1833) 5 Barn. & Ad. 254; see Ames, Cases on Trusts (2nd ed.) 349, n. 3; while in the case of personal property the Crown took the property as *bona vacantia.* Hix *v.* Att'y Gen. (1661) Hard. 176; King *v.* Daccombe (1618) Cro. Jac. 512. But upon forfeiture of real estate for treason, the Crown took the estate of the traitor in the *per* under 33 Henry VIII., c. 39 (1541). Pimbe's Case (1585) Moore 196; Pawlett *v.* Att'y Gen. (1667) Hard. 465.

vented the carrying out of the trust by the trustee. Every reason which would require equity to impose the trust on the heir would lead to the same result in the case of forfeiture to the Crown. Nor does it appear to be helpful to say that the rule should be different because the coming to an end of the estate in the case of escheat is an "accident".[33] Such accidents often cause the termination of an estate, as where a lease is given until the happening of an uncertain event, or where a right of entry is reserved or a gift over is made upon a condition not certain to happen. In each of these cases, if the interest in land were held in trust, we would have no difficulty in reaching the conclusion that, upon the happening of the condition, even though purely accidental, the estate held by the trustee was ended, and, since this termination was without any failure to perform the personal obligation of the trustee, the *cestui* has no further rights either against the trustee or any stranger.

If this distinction appears to be artificial, the fault lies, not with the law of trusts, but with the feudal notion of tenure. If the effect of escheat is to terminate the legal estate which is the subject of the trust, whereas the effect of forfeiture in the cases mentioned was to transfer it, and, if the true theory of imposing liability on third persons is the passing of the estate held subject to the trust and its retention by the transferee so as to prevent the performance of the trust, it would follow that the trust could not survive the escheat but would survive the forfeiture. The authorities bear this out.[34] In the case of the allodial ownership, as in the case of personal property, the trustee lost his ownership only by transferring his interest, both in the case of forfeiture and of

[33] 17 Columbia Law Rev. at p. 284.

[34] *Escheat*—The trust does not survive. Burgess *v.* Wheate (1759) 1 W. Bl. 123 (*semble*); Williams *v.* Lonsdale (1798) 3 Ves. Jr. 752; King *v.* Mildmay, *supra,* footnote 32; Att'y Gen. *v.* Leeds (1833) 2 M. & K. 343, repudiating the *dictum* of Lord Hale in Burgess *v.* Wheate, *supra,* that a mortgage title which had escheated would be subject to redemption. See Lewin, *op. cit.,* at p. 278; Ames, Cases on Trusts (2nd ed.) 349, n. 3. The operation of the rule was changed by statute in England. See Ames, Cases on Trusts (2nd ed.) 349, n. 3, at p. 350; Down *v.* Morris (1844) 3 Hare 394, 399; Evans *v.* Brown (1842) 5 Beav. 114.

Forfeiture—See, *supra,* footnote 32. Personal property. The Crown takes the goods as *bona vacantia.* King *v.* Daccombe, *supra,* footnote 32; Hix *v.* Att'y Gen., *supra,* footnote 32; Middleton *v.* Spicer (1783) 1 Bro. C. C. 201; Barclay *v.* Russell (1793-7) 3 Ves. Jr. 424; Taylor *v.* Haygarth (1844) 14 Sim. 8; Powell *v.* Merrett (1853) 1 Sm. & G. 381; Cradock *v.* Owen (1854) 2 Sm. & G. 241; Read *v.* Stedman (1859) 26 Beav. 495; see Ames, Cases on Trusts (2nd ed.) 353, n. 4, 366, n. 1, 2. Forfeiture of real estate for treason. Pimbe's Case, *supra,* footnote 32; Pawlett *v.* Att'y Gen., *supra,* footnote 32; Sugden's Gilbert, Uses, 429.

the failure of next of kin, and the Crown took the forfeited property subject to the trust. As the subject could not maintain an action against the Crown, the remedy of the *cestui* was by petition, but this was purely procedural.[35] The *cestui* could maintain his bill against the grantee of the Crown unless he was a *bona fide* purchaser.[36]

It is suggested by Professor Scott that the doctrine of *Nesbit and Pott's Contract*[37] is inconsistent with the view here expressed, and that the "easiest explanation" of that case "is that the right created by the restrictive covenant is analogous to a legal easement. It is an equitable property right. It continues until it is barred by adverse user, or, since it is an equitable interest, until the property comes into the hands of an innocent purchaser."[37a] Such, it is submitted, is not a correct explanation, for it ignores one essential difference between the obligation of a trustee and the obligation upon a restrictive covenant. The obligation of the trustee is to hold the legal estate for the benefit of a *cestui que trust.* All his other obligations are dependent upon the existence of this primary obligation. Liability is imposed upon third persons, as we have already seen, in most instances, by reason of their having acquired the estate held in trust or in some other manner prevented the carrying out of the primary obligation. Disseisin of the trustee involves no breach of trust and no liability of the disseisor to the *cestui.* The obligation of the covenantor upon the restrictive covenant, on the other hand, relates only to the physical use of the land of which he is possessed, and is, in effect, an undertaking that the land shall or shall not be used in a particular way. He assumes no duty with respect to the estate in the land. He violates no duty by transferring the land. If, however, the physical use of the land is contrary to the provisions of the covenant, the equitable right of the obligee is defeated. He acquires the land, therefore, whether by transfer or by disseisin, with knowledge of the equitable rights of the obligee, and, by his threatened use of the land, he would defeat that right just

[35]Pimbe's Case, *supra,* footnote 32; see Ames, Cases on Trusts (2nd ed.) 215, n. 1.

[36]Where the ownership of land is allodial, the Crown or the state takes by the *per* and of course takes subject to the trust on the same theory as at common law in the case of personal property.

[37][1905] 1 Ch. 391, affirmed [1906] 1 Ch. 386. See Professor Scott's article, *supra,* at pp. 285-286. In this case it was held that a transferee who was not a *bona fide* purchaser from a disseisor took subject to a restrictive covenant which antedated the disseisin.

[37a]At pp. 285-286.

as effectively as the purchaser of trust property with notice would defeat the right of the *cestui* if equity did not interfere. The principle upon which liability is imposed upon a third person is in each case the same, but the particular equitable right of the plaintiff interfered with is different, the right, in one case, relating to the legal ownership, and, in the other, to the physical use of the property. The right in each case is consequently invaded by different kinds of acts, in the first, by the acquisition of the trustee's legal right, in the second, by the character of defendant's use of the property. It would, therefore, seem entirely consistent to hold that a *cestui* has no rights in law or equity against the disseisor, although the disseisor is deemed to be bound by restrictive covenants.

2. It is commonly said that equity will enforce the claim of the *cestui* against all subsequent takers of the trust property from a trustee except innocent purchasers for value; that it is the transfer of the property itself which transfers the burdens of the trustee's ownership to the subsequent taker. It is said that "The courts, speaking of conscience, of presumed notice, of unjust enrichment, may not always have recognized the implications of their decisions, but it seems that none the less the subjection to the trust of persons who have taken without notice, but who have paid no value, involves a recognition of a proprietary right in the *cestui que trust.*"[38] If this statement were strictly true, it would follow that *bona fide* purchase for value is the ultimate test of the liability of the third person for interference with the trust property. But neither of these statements is strictly accurate. That the innocent purchaser has no better moral right to retain the trust property than the *cestui* to claim it is a debatable question; but the doctrine of purchase for value has been adopted by courts of equity, perhaps more because of their disinclination to disturb legal rights acquired in good faith when such disturbance would throw loss on the owner of the legal right, than because of any supposed moral superiority of the innocent purchaser over the *cestui.* As Professor Scott justly observes, the rule has become firmly fixed in our law because it conforms to commercial convenience.

Accepting the doctrine of purchase for value as establishing the limit beyond which equity will not impose liability on the taker of trust property, still, it is not always enough to fasten liability

[38] 17 Columbia Law Rev. at p. 283.

on the taker of trust property transferred by a recreant trustee, to say that he is not an innocent purchaser for value. He must not only interfere with the trust property, but his liability is dependent upon his knowledge that he is interfering with the right which the *cestui* has against the trustee. That is to say, his liability is fixed only when his conscience is affected. Thus the innocent donee is not liable to the *cestui* until he knows that, by his possession and retention of the trust property, he is interfering with the right of the *cestui.* If he gave the property away before notice, he would not be liable for his interference with the trust property[39] and he might reacquire the property from his subsequent *bona fide* purchaser without incurring any liability to the *cestui,*[40] although a strict trustee may not repurchase the trust property from the *bona fide* purchaser and hold it free of his personal obligation to the *cestui.*[41] The duty arises when the knowledge is acquired or, as courts of equity state the case, when his conscience is affected. These results indicate that the test of liability of the third person, in every case, whether a purchaser or donee, is conscious interference with the right of the *cestui.* It is his act, accompanied with knowledge of the *cestui's* right, which fixes upon the third person the obligation *in personam,* without which there can be no right against the third person.[42] The emphasis placed in these cases upon conscientious conduct as a basis of liability requires that we should scrutinize the doctrine of purchase for value with the purpose of ascertaining whether its effect is to cut off a right in the thing itself, as is done by the recording acts, by the market *overt,* and by the factor's acts, or whether the doctrine of purchase for value is made a test of conscientious conduct in determining whether an obligation *in personam* is to be imposed upon the taker of trust property. If the *cestui* is found to have rights in the *res* itself, which are invaded by mere physical interference with the property, we might justly say that the doctrine of purchase for value is exactly analogous to the operation of the recording acts or to the doctrine of market *overt.* But, on the other hand, if it is necessary to impose a personal obligation on the third person, in order to charge him with responsibility, and, if

[39]Bonesteel *v.* Bonesteel (1872) 30 Wisc. 516; see Giddings *v.* Eastman (N. Y. 1836) 5 Paige Ch. 561.

[40]Mast & Co. *v.* Henry (1884) 65 Iowa 193, 21 N. W. 559; see Haviland *v.* Willets (1894) 141 N. Y. 35, 35 N. E. 958.

[41]Ames, Cases on Trusts (2nd ed.) note at p. 287.

[42]Giddings *v.* Eastman, *supra,* footnote 39.

the obligation is sometimes imposed without any direct interference with the trust property, then we shall be led to the conclusion that purchase for value is important only as an element in determining whether the third person has brought himself into a relationship of personal responsibility to the *cestui*. It, therefore, becomes important to examine our third proposition.

3. It is not necessary, in order to impose liability on third persons in favor of the *cestui*, that the third person should acquire the trust *res* or interfere with it. In the case of the assignment of a *chose in action*, the debtor, after notice, may pay the assignor and destroy the debt at law, but equity will compel him to pay it over again to the assignee.[43] Here the debtor holds no property for either the assignor or the assignee. It is sometimes said that the assignment of a *chose in action* is valid in equity but not at common law. Yet the assignee's remedy was at law. He sued in his assignor's name at law and not in equity. He could resort to equity only when the common law remedy on the power of attorney to sue became inadequate.[44] His equity, therefore, was the equity to restrain interference with the power of attorney by either the assignor or the debtor. Hence the double liability of the debtor cannot be predicated upon any theory of property which came into his hands or legal right which remained with the assignor, but must rest on the fact that he, with knowledge of the assignee's right, has so acted as to interfere with the equitable protection which a court of equity throws about the power of attorney acquired by an assignee. The rule is the same where the claimant is not a true assignee but is an equitable claimant only to the *chose in action*. Thus one who has an equitable charge on a *chose in action*, by partial assignment or otherwise, may give notice to the debtor, who will then pay the creditor at his peril.[45] In the case where an agent or fiduciary, in breach of his trust, deposits trust funds in a bank, acquiring thereby a *chose in action* in his own name against the bank, the principal may give notice to the bank, which will then pay its depositor at its peril.[46] Upon the same principle,

[43]Roberts *v.* Lloyd (1840) 2 Beav. 378; Jones *v.* Farrell (1857) 1 DeG. & J. *208; see Ames, Cases on Trusts (2nd ed.) 63, n. 1.

[44]Hammond *v.* Messenger (1838) 9 Sim. 327; Hayes *v.* Hayes' Executrix (1889) 45 N. J. Eq. 461, 17 Atl. 634.

[45]See Ames, Cases on Trusts (2nd ed.) 63, n. 1.

[46]Van Alen *v.* American National Bank (1873) 52 N. Y. 1; Justh *v.* National Bank (1874) 56 N. Y. 478; Roca *v.* Byrne (1895) 145 N. Y. 182, 39 N. E. 812; and see Hindmarch *v.* Hoffman (1889) 127 Pa. 284, 18 Atl. 14, where claimant of stolen money was allowed to recover from the bank in which the thief had deposited the money. See Ames, Cases on Trusts (2nd ed.) 265, n. 1.

one who deposits negotiable paper with a banking agent to collect may give notice to a sub-agent bank which has collected the paper and claim payment direct from the sub-agent, which will then pay the agent bank at its peril.[47] In each of these cases, the position of the plaintiff is closely analogous to that of a *cestui que trust.* By an anomaly of procedure, he may enforce his rights at law without privity of contract, but the liability of the debtor to pay twice can only be ascribed to the equitable wrong committed by him in so acting as to interfere with the plaintiff's equitable right against the creditor. In the case of a strict trust of a *chose in action,* the *cestui* has, in the first instance, no claim on the *chose in action* directly against the obligor, whose only legal duty is to pay to the obligee.[48] If, however, the obligee assigns the claim or directs its payment in violation of his duty to the *cestui* and the obligor pays the claim with knowledge of the breach of trust, he becomes directly liable to the *cestui* for the amount of the claim.[49] It is upon like principle that equity restrains a debtor who owes a debt to the trustee from counterclaiming on a legal claim held by him against the trustee individually, although the *cestui* could maintain no action at law or equity on the *chose in action* held by the trustee.[50] Here the debtor acquires no property and he does not interfere directly with the *res* in the hands of the trustee, but his act is such as to prevent the carrying out of the trust by the trustee, since it would in effect permit the trustee to pay his personal debts by the use

[47]Kirkham *v.* Bank of America (1900) 165 N. Y. 132, 58 N. E. 753; Ames, Cases on Trusts (2nd ed.) 265, n. 1.

[48]Ames, Cases on Trusts (2nd ed.) 265, n. 1.

[49]Evans *v.* John (1841) 4 Beav. 35; Bridgman *v.* Gill (1857) 24 Beav. 302; Upham *v.* Wyman (1863) 89 Mass. 499; Duckett *v.* Mechanics' Bank (1897) 86 Md. 400, 38 Atl. 983. It is upon like principle that a bank which honors the check of a trustee or corporate officer with notice that the check is drawn in breach of trust is liable to the *cestui* although the legal claim against it is discharged by the payment of the check. National Bank *v.* Insurance Co. (1881) 104 U. S. 54; American Trust Co. *v.* Boone (1897) 102 Ga. 202, 29 S. E. 182; Murphy *v.* Farmers' & Merchants' Bank (1900) 131 Cal. 115, 63 Pac. 368, 731; American Bonding Co. *v.* Mechanics Bank (1903) 97 Md. 598, 55 Atl. 395; Batchelder *v.* Central National Bank (1905) 188 Mass. 25, 73 N. E. 1024 (*semble*); Coleman *v.* Bucks and Oxon Union Bank [1897] 2 Ch. 243 (*semble*); Havana Central R. R. *v.* Knickerbocker Trust Co. (1910) 198 N. Y. 422, 92 N. E. 12; Bischoff *v.* Yorkville Bank (1915) 170 App. Div. 679, 156 N. Y. Supp. 563; 16 Columbia Law Rev. 341, 615.

[50]Pannell *v.* Hurley (1845) 2 Coll. *241; Bodenham *v.* Hoskyns (1852) 2 DeG. M. & G. *903; National Bank *v.* Insurance Co., *supra,* footnote 49; Flournoy *v.* City of Jeffersonville (1861) 17 Ind. 169; Wolfe *v.* Bate (Ky. 1848) 9 B. Mon. 208; Bourne *v.* Wooldridge (Ky. 1850) 10 B. Mon. 492; Falkland *v.* St. Nicholas National Bank (1881) 84 N. Y. 145; see Ames, Cases on Trusts (2nd ed.) 269, n. 3 at p. 270.

of the trust *res*. If, however, the debtor had no notice of the trust when he acquired his claim against the trustee, no injunction would issue.[51]

Again, when a trustee releases his debtor or disseisor without consideration, equity will not permit the releasee to set up the release against the trustee.[52] In neither case does the defendant acquire the trust *res* in a strict sense, yet his act in setting up the release would aid in making effective the breach of duty to the *cestui*. Professor Scott admits that here "there is no privity of title, for the trust *res* is destroyed. But the *cestui que trust* should have a right against the remainderman or surrenderee."[53] The right is one obviously not resting in property right in the trust *res*, but in the right which the *cestui* has in equity to have all persons refrain from participating in or furthering any breach of the obligation which the trustee owes the *cestui*. Until the breach of trust in executing the release, the *cestui's* right was not invaded, and the *cestui* acquired no rights against the releasee or surrenderee. In the same way, equity imposes liability upon the third persons who aid or induce a breach of trust, although they neither physically interfere with the trust *res* nor acquire an interest in it.[54] The injury suf-

[51]School District *v.* First National Bank (1869) 102 Mass. 174.

[52]See 17 Columbia Law Rev. 287; Chicago etc. Land Co. *v.* Peck (1885) 112 Ill. 408; *supra*, footnote 32.

[53]At p. 287, n. 60, 61.

[54]Cowper *v.* Stoneham (1893) 63 L. T. R. [N. S.] 18; Andrews *v.* Tuttle-Smith Co. (1906) 191 Mass. 461, 78 N. E. 99; Holderman *v.* Hood (1904) 70 Kan. 267, 78 Pac. 838; Tapley *v.* Tapley (1902) 115 Ga. 109, 41 S. E. 235; Murphy *v.* Farmers' & Merchants' Bank, *supra*, footnote 49; Fyler *v.* Fyler (1841) 3 Beav. 550 (*semble*); Att'y Gen. *v.* Leicester (1844) 7 Beav. 176; Harris *v.* Rees (1867) 16 Week. Repr. 91; Webb *v.* Ledsam (1855) 1 K. & J. 385 (*semble*); Mara *v.* Browne [1896] 1 Ch. 199 (*semble*). The rule that one paying money to a trustee must see to the application of the trust money is a misapplication of the doctrine that third persons who aid or participate in the breach of trust are liable. This doctrine has not been generally followed in the United States. See Perry, Trusts (6th ed.) § 790, n. (a); Rogers *v.* Skillicorne (1753) Ambler 188, n. 3. Where, however, the third person paying money to the trustee has notice that a breach of trust is being committed, the third person is generally held liable. See Hedges *v.* Hedges (1708) 2 Vern. 614; Hill *v.* Simpson (1802) 7 Ves. Jr. *152; M'Leod *v.* Drummond (1807) 14 Ves. Jr. *359; Montford *v.* Cadogan (1811) 17 Ves. Jr. 484; Montford *v.* Cadogan (1816) 19 Ves. Jr. 635, 640; Watkins *v.* Cheek (1825) 2 Sim. & Stu. 199; Eland *v.* Eland (1839) 4 My. & Cr. 420, 427; Keane *v.* Robarts (1819) 4 Madd. 332; Stroughill *v.* Anstley (1852) 1 DeG. M. & G. *634, *648; Potter *v.* Gardner (1827) 25 U. S. 498; Dodson *v.* Simpson (1824) 23 Va. 294; Pendleton *v.* Fay (N. Y. 1830) 2 Paige Ch. 202; Miller and Mayhew *v.* Williamson (1853) 5 Md. 219; Wilson *v.* Doster (N. C. 1851) 7 Ired. Eq. 231; Williamson *v.* Morton (1851) 2 Md. Ch. 94; Austin *v.* Wilson's Executors (1863) 21 Ind. 252; Redford *v.* Clarke (1902) 100 Va. 115, 40 S. E. 630; Murphy *v.* Farmers' & Merchants' Bank, *supra*, footnote 49.

fered by the *cestui* is the same; the nature of the right against the third person is the same; only the remedy is different. Since the defendant has not the property, equity gives the property's worth to the *cestui* as the measure of the value of his right *in personam* against the trustee.

It is believed that similar principles control the liability of third persons to perform a contract specifically enforceable in equity. The theory that the contract vendee has an equitable ownership in the land might serve to explain the liability of the donee of the vendor, or the purchaser from the vendor with notice, but it would not explain the established rule that an option vendee of land may enforce the option against all but *bona fide* purchasers of the land, even though they acquire the land before the exercise of the option.[55] There is no privity of contract between plaintiff and defendant, and it cannot be said that the vendee was equitable owner of the land when the defendant acquired it. Indeed, in the limited class of contracts which equity will enforce where the contract does not relate to the conveyance or use of property, equity may impose liability on third persons in the same way. It is only on this theory that equity will restrain a rival theater manager from employing a singer in breach of his contract with the plaintiff, as in *Lumley* v. *Wagner*.[56] It seems that equity, here, as in the case of every other equitable right *in personam*, actual or inchoate, whether it relates to property or not, says to all the world "If you, with knowledge, do any act to interfere with the plaintiff's right *in personam*, we will treat your act as an equitable wrong to the right of the plaintiff, and, for the interference with the right, the court will find an appropriate remedy."

It is believed that the burden of restrictive covenants relating to land is imposed upon third persons upon similar principles. Professor Scott, however, does not share in this view. He says, "But this explanation of the reason for subjecting a purchaser to equities of which he has notice does not take care of some kinds of equity to which a purchaser is now subjected. In the case of a purchaser with notice of a restrictive covenant, for example, it seems impossible to base a suit upon any such idea. The covenantor does no wrong in selling the property to one who has notice of the covenant, and the purchaser does no wrong in buying the property".[56a] This suggestion, however, disregards a distinction already pointed

[55]Ames, Cases on Equity Jurisdiction, 200 n. 2, 431, n. 2.

[56]*Supra*, footnote 27.

[56a]At p. 281.

out between the nature of the obligation of a trustee and the nature of the obligation of a covenantor upon a restrictive covenant, which is fundamental. The obligation of a covenantor does not relate to the estate which the covenantor may have in the land, but his undertaking is that the land shall be used permanently in a particular way. Anyone acquiring the land with knowledge of the covenant, who refuses to carry out the covenant, thus, by his act, deprives the covenantee of the benefit of his equitable right upon the covenant. Equity thus imposes upon every taker with notice the obligation of not interfering with the plaintiff's equitable right. The disseisor does not impair the *cestui's* right *in personam* to have the trustee hold and assert his legal right to the trust *res,* but the disseisor or tort-feasor may interfere with the equitable right of the covenantee upon a restrictive covenant just as effectively as a purchaser with notice who disregards it. As was said by Knight Bruce, *L. J.,* "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."[57] It is, therefore, the equitable tort or wrong which the subsequent taker does to the equitable right *in personam* of the covenantee which is the basis of the claim against the taker.[58]

Although equity has shown a reluctance to impose the obligation to do affirmative acts upon the taker of land subject to covenants, this is a reluctance exhibited by courts in enforcing the covenant against the covenantor himself, not because of want of right of the plaintiff, but because of want of convenience in the specific performance of continuous acts or acts requiring supervision.[59] When once equity has overcome this reluctance as against the covenantor, it may likewise overcome it as against the third person. Equity undoubtedly has power to compel affirmative acts beyond the mere restitution of property or restraint of interference with property

[57]De Mattos *v.* Gibson (1859) 4 DeG. & J. 276, 282.

[58]See, expressing this view: Fairclough *v.* Marshall (1878) 4 Ex. D. 37; Haywood *v.* Brunswick Building Society (1881) 8 Q. B. D. 403, 409; Hall *v.* Ewin (1886) 37 Ch. D. 74; Clegg *v.* Hands (1890) 44 Ch. D. 503, 519; Tolk *v.* Moxhay (1848) 11 Beav. 571; Johnstone *v.* Hall (1856) 2 K. & J. 414; Eastwood *v.* Lever (1863) 4 DeG. J. & S. *113.

[59]Ames, Cases on Equity Jurisdiction, 68, n. 4, 73, n. 1, 81, n. 1, 87, n. 2.

rights.[60] Thus it is that, in cases of purchase of land with notice from a trustee, equity is not content with compelling the purchaser to give a quit-claim deed to the *cestui.* It may compel the purchaser to warrant the title.[61] The duty to warrant is not an obligation flowing from the mere interference with property, but rather an obligation arising out of the tortious interference with the plaintiff's right against the trustee. If equity can compel the purchaser with notice to warrant the title of the trust property, it can likewise enforce a covenant compelling the purchaser to perform affirmative acts to which the covenantee is equitably entitled if the purchaser by his purchase has prevented their performance. And the only question for the court should be how far it is expedient for the court to direct such action to be performed.[62]

That "equity regards the covenant as giving the owner of the property to be benefited an equitable interest in the burdened property analogous to a legal easement" upon a covenant which runs with land at law[62a] is a doctrine directly traceable to the celebrated *dictum* by Jessel in *London and South Western Ry.* v. *Gomm,*[63] where he said, in speaking of *Tulk* v. *Moxhay,*[64] "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case,* 5 Co. Rep. 16a, to another line of cases, or else an extension in equity of the doctrine of negative easements". That this, however, is not the true explanation of the liability of third parties on covenants touching and concerning the land is made evident by the consideration

[60]Wolverhampton Corporation *v.* Emmons [1901] 1 K. B. 515; Jones *v.* Parker (1895) 163 Mass. 564, 40 N. E. 1044; Whittenton Mfg. Co. *v.* Staples (1895) 164 Mass. 319, 41 N. E. 441; Chester Traction Co. *v.* Philadelphia etc. R. R. (1896) 174 Pa. 284, 34 Atl. 619; Cooke *v.* Chilcott (1876) 3 Ch. D. 694; Kirkpatrick *v.* Peshine (1873) 24 N. J. Eq. 206; Blackett *v.* Bates (1865) 1 Ch. App. Cas. 117; 10 Columbia Law Rev. 574; Ames, Cases on Equity Jurisdiction, 78, n. 1, 83, n. 1, 86, n. 7.

[61]Taylor *v.* Stibbert (1794) 2 Ves. Jr. 437 (*semble*); Lovejoy *v.* Potter (1886) 60 Mich. 95, 26 N. W. 844.

[62]This was undoubtedly the view of the English courts before Haywood *v.* Brunswick Building Society, *supra,* footnote 58. See Morland *v.* Cook (1868) 6 Eq. 252, 265; Cooke *v.* Chilcott, *supra,* footnote 60, at p. 700; Aspden *v.* Seddon (1876) 1 Ex. D. 496, 502. Haywood *v.* Brunswick Building Society, it would seem, rests rather on the ground of expediency than principle.

[62a]17 Columbia Law Rev. at p. 281.

[63](1881) 20 Ch. D. 562, 583.

[64]*Supra,* footnote 58.

of such cases as *Purchase* v. *Lichfield Brewery Co.*,[65] and *Mander* v. *Falcke*.[66]

In *Purchase* v. *Lichfield Brewery Co.*, *A* leased to *B* with the usual covenants for the payment of rent. *B* thereupon entered into an executory contract with *C* for the assignment of the lease to *C*. The plaintiff filed a bill to collect the rent from *C*, and, it was urged that, under the doctrines of equity and the Judicature Acts, *C* was the equitable owner of the land,[67] and that, by analogy to covenants running with the land at law, the defendant should be liable in equity to perform the covenant. It was held, however, that the plaintiff could not recover. In *Mander* v. *Falcke*, the plaintiff sued upon a restrictive covenant in a lease where there had been a sub-lease, but the plaintiff was unable to establish the legal relation of the defendant, who occupied the premises, to the lessee. The court held that this was immaterial. The fact that the defendant, with full knowledge of the covenant, was using the land in a manner inconsistent with the covenant and thus depriving the plaintiff of the benefit of the covenant was sufficient to give the court jurisdiction to restrain the defendant. These cases seem to dispose of the contention that the theory of liability of third persons upon restrictive covenants is either an extension in equity of *Spencer's Case* or the acquisition of an equitable interest in land analogous to an easement. In *Purchase* v. *Lichfield Brewery Co.*, the defendant, according to all the doctrines of equity, was the equitable owner, yet he was not bound by the covenant. It was the interference with the plaintiff's equitable right by one who acquires no interest in the land which was the basis of the injunction in *Mander* v. *Falcke*, and it was the absence of such interference which prevented equitable relief in *Purchase* v. *Lichfield Brewery Co.*[68]

Nor does the decision in *London County Council* v. *Allen*[69] tend to strengthen the opinion that the true theory of liability of third persons on restrictive covenants is property right in the plaintiff. In that case, the plaintiff acquired from the owner of

[65][1915] 1 K. B. 184.

[66][1891] 2 Ch. 554.

[67]See Walsh *v.* Lonsdale (1882) 21 Ch. D. 9.

[68]For a discussion of the development of the alternative theories with respect to restrictive covenants, whether a burden on the conscience of a subsequent taker or a right analogous to an easement, see Jolly, Restrictive Covenants, 12-17.

[69][1914] 3 K. B. 642.

land a restrictive covenant not to build on the land without the plaintiff's consent. The owner sold to the defendant who had notice of the covenant but who proceeded to build on the *locus quo* in violation of the terms of the covenant. In denying an injunction to the plaintiff, the majority of the court rested their conclusion upon the ground that, since the plaintiff owned no land in the neighborhood, there was no dominant tenement, and, by analogy to the law of easements, this so-called equitable easement could not be enforced against a subsequent taker of the land. Mr. Justice Scrutton, in concurring in the result, reached the conclusion that he was bound by authority, but ventured to express the hope that a higher tribunal might "see its way to revert to what I think was the earlier doctrine of notice, or at any rate, to treat it as co-existing with the later refinement of 'an equitable interest analogous to a negative easement'." The unfortunate result of the "property theory" of equitable easements could not be better illustrated than by the decision in this case, where Mr. Justice Scrutton said: "I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood."[70] As Mr. Justice Scrutton pointed out, the notion, that the theory upon which liability was imposed upon subsequent takers of the land was the inequitable conduct of the taker in disregarding the rights of the covenantee or "notice", had been repeatedly recognized by the English courts. Had the court seen fit to apply the doctrine of the earlier cases, *De Mattos* v. *Gibson*,[71] *Catt* v. *Tourle*,[72] *Luker* v. *Dennis*,[73] a different and more satisfactory result would have been reached. What was here done, however, was to limit the application of the equitable doctrine of restrictions upon land by likening them to legal easements. This may, of course, be permissible on grounds of policy, and, when so limited, the limitation does not affect the theory upon which the liability is imposed on third persons, when equity elects to impose that liability.[74] This was recognized in *Brewer* v. *Marshall*[75] where

[70]At pp. 672, 673.

[71]*Supra*, footnote 57.

[72](1869) 4 Ch. App. Cas. 652.

[73](1877) 7 Ch. D. 227.

[74]This is the doctrine of Norcross *v.* James (1885) 140 Mass. 188, 2 N. E. 946; Taylor *v.* Owen (Ind. 1830) 2 Blackf. 301; Kettle River R. R.

the court, in denying relief because the covenant in effect created a novel right dissimilar from rights in land which could be acquired by way of common law easements, said, in referring to the cases of restrictive covenants:[76]

"It will be found upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. * * * From this review of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title."

The court held, however, on grounds of policy, that covenants affecting the use of land in a novel way should not be enforced.

Professor Scott's explanation of the doctrine of restrictive covenants relating to land affords no explanation of the running of such covenants against the purchaser of personal property as it was recognized in *De Mattos* v. *Gibson*[77] and established by American decisions,[78] or of the English "tied" public house covenants.[79]

v. Eastern Ry. (1899) 41 Minn. 461, 43 N. W. 469; Tardy *v.* Creasy (1886) 81 Va. 553; American Strawboard Co. *v* Haldeman Paper Co. (C. C. A. 1897) 83 Fed. 619; but *cf.* Hodge *v.* Sloan (1887) 107 N. Y. 244, 17 N. E. 335; Ames, Cases on Equity Jurisdiction, 186, n. 1.

Cf. John Brothers etc. Co. *v.* Holmes [1900] 1 Ch. 188 and footnote 79, *infra.* Where there is no dominant tenement and no public interest involved, equity might refuse an injunction because the plaintiff would suffer no actual damage. Where there is a dominant tenement, legal damages are inadequate, since a breach of the covenant affects the enjoyment of the dominant tenement. Lord Manners *v.* Johnson (1875) 1 Ch. D. 673; 1 Ames, Cases on Equity Jurisdiction, 131, n. 4. But where there is no dominant tenement, the weight of authority supports the view that the plaintiff must show substantial damage in order to secure equitable relief. Johnstone *v.* Hall, *supra,* footnote 58; see 5 Columbia Law Rev. 153.

[75](1868) 19 N. J. Eq. 537.

[76]Beasley, *C. J.,* at p. 543, 544.

[77]*Supra,* footnote 57; but *cf.,* Ellman, Son & Co. *v.* Carrington & Son, Ltd. [1901] 2 Ch. 275; Taddy & Co. *v.* Sterious & Co. [1904] 1 Ch. 354; McGruther *v.* Pitcher [1904] 2 Ch. 306.

[78]Murphy *v.* Christian Press Ass'n Co. (1899) 38 App. Div. 426, 56 N. Y. Supp. 597; N. Y. Bank Note Co. *v.* Hamilton Bank Note Co. (1898) 28 App. Div. 411, 50 N. Y. Supp. 1093; Standard American Pub. Co. *v.* Methodist Book Concern (1898) 33 App. Div. 409, 54 N. Y. Supp. 55; Littlefield *v.* Perry (1874) 88 U. S. 205; see also Ames, Specific Performance For and Against Strangers to the Contract, 17 Harvard Law Rev. 174, 181, n. 1, 2.

[79]See John Brothers etc. Co. *v.* Holmes, *supra,* footnote 75; Jolly, *op. cit.,* 21-23.

Here we have no doctrine of dominant and servient tenement, and yet equity does not hesitate to impose the equitable obligation on all, except innocent purchasers for value, who interfere with it by acquiring the property. Nor does equity hesitate to restrain third persons when the covenant involves no property right, as in *Lumley* v. *Wagner*.[80]

The true theory upon which the liability of third persons to the *cestui que trust* is worked out is best indicated by a consideration of the cases in which the Statute of Limitations is set up as a bar to the claim of a *cestui* arising during his infancy. By the weight of authority, in the case of a *chose in action* held by the trustee in trust, the *cestui* is deemed to be barred whenever the trustee is barred, and, this is the case, even though the *chose in action* is one arising from disseisin, conversion or trespass affecting the trust *res*.[81] The right invaded is the right of the trustee and not the right of the *cestui*, since the wrong done involves neither a transfer of the trust property nor a failure to perform any obligation which the trustee owes to the *cestui*. Obviously this would not be the rule if the trustee, as Professor Scott suggests, were suing in a representative capacity. Thus, if trover or disseisin of the trust *res* were in any legal sense wrongs to the *cestui*, the trustee could not be deemed so to represent the *cestui* that his negligence in permitting the statute to run would bar the *cestui*, whose rights he represented. If this were the rule, then obviously the trustee would so far represent the *cestui* in every case of breach of trust as to bar any relief to the *cestui*. On the other hand, when there has been a breach of trust by the trustee which the third person has aided, or in which he has participated, it is well settled that the trustee may maintain an action in his representative capacity to enforce the rights which the *cestui* has against the third person for his unconscientious conduct. In such a case, therefore, either the trustee or the *cestui* may maintain an action to assert the *cestui's* right, and the statute does not run against the *cestui* during his disability, even though the trustee, under the doctrine of *Wetmore* v. *Porter*,[82] might have maintained an action. These cases clearly

[80] *Supra*, footnote 27. See Manchester etc. Co. *v.* Manchester etc. Co. [1901] 2 Ch. 37, 51; Bagot etc. Co. *v.* Clipper etc. Co. [1902] 1 Ch. 146.

[81] Wych *v.* East India Co. (1734) 3 P. Wms. 309; Ames, Cases on Trusts (2nd ed.) 271, n. 1; see cases under disseisin, *supra*, footnote 30.

[82] (1883) 92 N. Y. 76; see Woodbridge *v.* Bockes (1902) 170 N. Y. 596, 610, 63 N. E. 362; Squire *v.* Ordemann (1909) 194 N. Y. 394, 87 N. E. 435; Mansfield *v.* Wardlow (Tex. Civ. App. 1906) 91 S. W. 859; Greenwood *v.* Wakeford (1839) 1 Beav. *576.

establish the principle that, where the trustee represents the *cestui*, still the failure of the trustee properly to represent the *cestui* by bringing an action will not bar the *cestui* during his minority, and, indeed, if the trustee maintains the action in his representative capacity, he may set up that fact to prevent the statute's running.[83]

Thus, where a trustee, in breach of his trust, had loaned trust moneys upon the promissory note of the borrower, it was held that the claim on the *chose in action* was barred by the statute but that the infant *cestui* was not barred from maintaining an action for the original breach of trust in making the loan, and that on coming of age he might proceed against the borrower and recover the amount represented by the note.[83a] Again, where the debtor who owed money to a trustee collusively induced the trustee to apply the loan upon a claim held by the trustee against him, it was held that the trustee might, in his representative capacity, maintain a suit in equity to recover the amount of the debt, although, if there had been no collusion, both the *cestui* and the trustee would have been barred.[84] The defendant, by inducing the trustee to allow the statute to run, interfered with the right of the *cestui in personam* against the trustee. This gave rise to a new and independent right in the *cestui* against the third person, which could be barred only when the statute had run against the infant *cestui*,[85]

[83]Saunders *v.* Dehew (1692) 2 Vern. 270; Bridgman *v.* Gill, *supra*, footnote 49; Ernest *v.* Croysdill (1860) 6 Jur [N. S.] Part I, 740; Robinson *v.* Pierce (1897) 118 Ala. 273, 24 So. 984 (*semble*); American National Bank *v.* Fidelity Co. (1909) 131 Ga. 854, 63 S. E. 622; Upham *v.* Wyman, *supra*, footnote 49; Duckett *v.* Mechanics' Bank, *supra*, footnote 49; Elliott *v.* Landis Machine Co. (1911) 236 Mo. 546, 139 S. W. 356; Yeager *v.* Bank of Kentucky (1908) 127 Ky. 751, 106 S. W. 806 (*semble*); Marshall's Estate (1890) 138 Pa. 285, 22 Atl. 24; Jones *v.* Godwin (S. C. 1858) 10 Rich. Eq. 226 (*semble*); Sullivan *v.* Latimer (1892) 35 S. C. 422, 14 S. E. 933; Beecher *v.* Foster (1902) 51 W. Va. 605, 42 S. E. 647; Redford *v.* Clarke, *supra*, footnote 54; 11 Columbia Law Rev. 686; 12 Harvard Law Rev. 132.

[83a]Ernest *v.* Croysdill, *supra*, footnote 83.

[84]"In my opinion the trustees here represent the *cestui que trust*, and are entitled to represent them for the purpose of compelling the Defendants to make good the trust fund, if notice of the trust be proved." *Per* Romilly *M. R.*, in Bridgman *v.* Gill, *supra*, footnote 49, at p. 306. See Upham *v.* Wyman, *supra*, footnote 49. Where infant beneficiaries were represented by testamentary trustees, held that the statute ran against them at once where the executor committed a breach of trust. Wilmerding *v.* Russ (1865) 33 Conn. 67.

[85]"The relief is founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property is converted by the Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against

and, since the trustee sued in a representative capacity, he was not barred until the *cestui* was barred, although, if he had sued in his own right, the statute would have run. It is submitted that the only adequate explanation of this result is that injuries to property of trover, trespass, conversion and disseisin are legal injuries to the right of the trustee in the trust property and actionable by the trustee, giving rise only to rights in him, and are not injuries to the *cestui,* and that, on the other hand, only those acts are injuries to the *cestui* which, regardless of interference with the trust *res,* amount to an interference with the right of the *cestui* against the trustee.

The liability of one who acquires trust property and then converts it into other property can only be fully worked out on the theory that the right of the *cestui* against the wrongdoer is a right *in personam,* arising out of his wrongful conduct in interfering with the rights of the *cestui, in personam* against the trustee. Professor Scott would admit that, in the case of a strict trustee who has dissipated the trust fund, the right of the *cestui* "is a personal right against the trustee; it is an equitable obligation",[86] the obligation arising presumably from his undertaking to be a trustee. But, if the purchaser with notice converts the trust *res* into other property, what is the theory of his liability with respect to the newly acquired property? That he must hold the substituted *res* for the *cestui,* all authorities agree. The property which he has now acquired is not the trust *res* in which the *cestui* had a property right. He can be deemed to have a property right in the substituted *res* only on the theory of personal obligation analogous to the right which the *cestui* had against the original trustee. The obligation of the original trustee was an obligation *in personam,* arising from intention of the trustee because of his undertaking to become a trustee. The obligation of the third person is likewise an obligation *in personam,* but one imposed on him by law regardless of intention, because of his equitable wrong in knowingly interfering with the right *in personam* of the *cestui* of the express trust. The obligations are alike in character and differ only in their source, and without the obligation, express or constructive, there can be no trust. Clearly, the *cestui,* in order to establish a claim to the proceeds in the hands of the wrongful taker, will have

an express trustee who had fraudulently committed a breach of trust." *Per* Lord Westbury in Rolfe *v.* Gregory (1865) 4 DeG. J. & Sm. *576, *579; see Hovenden *v.* Lord Annesley (1805) 11 Sch. & Lef. *607, *632.

[86]At p. 269.

to rely on some right other than his "equitable ownership" of the original trust *res* which is now no longer subject to his equitable claim. The proceeds are not the trust *res* of which the *cestui* was "equitable owner" and can be made a new trust *res* only on the theory that a new obligation *in personam* has arisen from the conduct of the defendant.

Nor are the decisions in cases of conflict of laws particularly helpful in ascertaining the true nature of the rights of the *cestui que trust,* for the reason that the rules and principles, as established by judicial decision in the domestic *forum,* must yield to the requirements of expediency or public policy when their application will affect even indirectly a *res* outside the jurisdiction. An equitable right *in personam* may be enforced with respect to realty outside the jurisdiction of the *forum* provided jurisdiction be acquired over the person of the individual subject to the obligation. But even this rule, obviously sound in principle, is not universally enforced. As was said by Mr. Justice Story,[87] "The doctrine of the English Courts of Chancery on this head of jurisdiction seems carried to an extent which may perhaps in some cases not find a perfect warrant in the general principles of international public law; and therefore it must have a very uncertain basis, as to its recognition in foreign countries, so far as it may be supposed to be founded in the comity of nations." And this view has found expression in various limitations upon the application of the rule in the domestic *forum,* based purely upon convenience or policy. Equity, for example, will not ordinarily foreclose a mortgage or equitable lien on real property outside the jurisdiction even though it have jurisdiction over the person of the mortgagor.[88] There is no difference in principle between this and other classes of cases where the jurisdiction is asserted. Both involve rights *in personam.* But there is a world of difference between them as to what is practically expedient. Notwithstanding this tendency to limit the jurisdiction, there is abundant authority for the proposition that courts of equity will enforce a trust obligation against third persons who have acquired the trust *res,* and who are not innocent purchasers, even though the subject of the obligation be real estate

[87]Story, Conflict of Laws (8th ed.) § 544.

[88]Roberdeau *v.* Rous (1783) 1 Atk. 543; Wynne *v.* Hughes (1859) 26 Beav. 377; Norris *v.* Chambres (1860) 29 Beav. 246; Norton *v.* Florence etc. Co. (1877) 7 Ch. D. 332 (*semble*); Bank of Africa, Ltd. *v.* Cohen [1909] 2 Ch. 129; Eaton *v.* McCall (1894) 86 Me. 346, 29 Atl. 1103 (*semble*); 20 Harvard Law Rev. 392; Ames, Cases on Equity Jurisdiction, 22, n. 1, 2.

located outside of the jurisdiction, provided the third person be found within the jurisdiction and is duly served with process. Thus the *cestui que trust* has enforced a trust of land against the purchaser with notice[89] and against the heir of the trustee,[90] and an option vendee has enforced the option against the purchaser with notice of the option,[91] although in each case the *res* was located outside the jurisdiction of the *forum*. Here clearly equity did not regard the right of the plaintiff as a right *in rem* in land located without the territorial jurisdiction of the court, for to have done so would have defeated the jurisdiction. The jurisdiction which it exercised could be predicated only on the personal obligation of the defendant, arising from interference with the claim *in personam* of the equitable claimant. These cases which seem sound in principle are clear authority for the proposition that the right of the *cestui* against a third person is a right *in personam* and not a right *in rem* in the trust *res* itself.

The cases of *Norris* v. *Chambres*[92] and *Martin* v. *Martin*[93] on conflict of laws, which are often cited as authority for the opposite view, afford slender support for it. In each the effort was made to enforce an equitable claim with respect to land located without the jurisdiction of the *forum* and in a jurisdiction where the local law did not recognize such equitable claim. It would have been sufficient ground for the decree of the court denying relief, that the court considered it inexpedient and contrary to the principle of comity to enforce an equitable claim with respect to property located in a jurisdiction where the equitable claim ran counter to the policy of the law. Indeed, as was said by Romilly, *M. R.*,

[89]Briggs *v.* French (U. S. C. C. 1883) 1 Sumn. 504; Remer *v.* Mackay (C. C. 1892) 54 Fed. 432; Guaranty Trust etc. Co. *v.* Delta & Pine-land Co. (C. C. A. 1900) 104 Fed. 5 (*semble*); McGee *v.* Sweeney (1890) 84 Cal. 100, 23 Pac. 1117 (*semble*); Cooley *v.* Scarlett (1865) 38 Ill. 316; Moore *v.* Jaeger (1876) 12 Dist. Col. 465; Johnson *v.* Gibson (1886) 116 Ill. 294, 6 N. E. 205; MacGregor *v.* MacGregor (1859) 9 Iowa 65 (*semble*); De Klyn *v.* Watkins (N. Y. 1846) 3 Sandf. Ch. 185; Davis *v.* Headley (1871) 22 N. J. Eq. 115; Hayden, Syndic *v.* Yale & Bowling (1893) 45 La. Ann. 362, 12 So. 633.

[90]*Ex parte* Pollard (1837) 3 Mont. & Ayr. 340 (trustee in bankruptcy); Vaughan *v.* Barclay (Pa. 1841) 6 Whart. *392; Stuphen *v.* Fowler (N. Y. 1841) 9 Paige Ch. 280; Burnley *v.* Stevenson (1873) 24 Ohio 474.

[91]Hayes *v.* O'Brien (1894) 149 Ill. 403, 37 N. E. 73. In such cases it seems clear that the court is enforcing a remedy for breach of personal obligation, rather than protecting an interest in land. See Beale, Equitable Interests in Foreign Property, 20 Harvard Law Rev. 382, 385-386, and note 1 at p. 386.

[92]*Supra*, footnote 88.

[93](1831) 2 Russ. & Myl. 507.

in *Norris* v. *Chambres,* after referring to Mr. Justice Story's observation that the cases had already gone to the full extent of the assertion of the jurisdiction, "I am not disposed to go one step further than these cases warrant and demand". In fact, in that case, the plaintiff had already intervened in an action in the foreign jurisdiction in which he had obtained a decree. This ground, in itself, the court thought was sufficient reason for denying him any relief, as was also the fact that the relief sought was the establishment of a lien upon land located in a foreign jurisdiction, and was, therefore, within the principle of cases refusing to take jurisdiction already referred to.

In *Martin* v. *Martin* an attempt was made, by a conveyance executed in London and entered into by *A* and wife, to convey land located in Demerara upon certain trusts, under a marriage settlement. After having attempted to create the trust, *A* and wife created a lien upon the land in favor of a creditor with notice, which lien was valid according to the law of Demerara. It was urged, however, that the English court ought to direct a sale of the land and the application of the proceeds upon the trust, to the exclusion of the lienor who was a party defendant. The matter was referred to a Master to take proof of the title and of the law of Demerara and he found that under the Dutch law the conveyance by the husband and wife to the trustee passed no title whatever; that such conveyance could not be by deed alone according to the Dutch law, "but it is necessary that the transfer thereof should be passed and executed before the magistrates and the justices of the place where the property is situated", and that the legal estate in the moiety described in the pleadings did not pass by the deed executed by the husband and wife.[94] The court, therefore, expressly held that "the settlement as executed does, by the law of Demerara, in no manner affect the right and power of the husband and wife over the estate, and leaves them with the same absolute ownership that they would have had, if there had been no settlement. The equity of the wife appears to me, therefore, not to be attached to the estate, but to the person or the husband, by reason of his contracts, and to give the wife a right only to claim an equivalent."[95] The court then pointed out that, under the law relating to marriage settlements, the right to claim an equivalent did not create an equitable claim against other property

[94]At p. 525.

[95]At p. 529.

of the husband until such equivalent was set aside and specifically applied to the marriage settlement. The trust failed then, not because of the absence of a law of trusts in Demerara, but because the law of conveyancing of that jurisdiction was not complied with and no title was vested in the trustee, and accordingly no trust was created according to English law.[96]

To summarize the matter, it is believed that the view of the nature of the right of the *cestui que trust* most consistent with the decisions and which gives greatest promise of the development of the law upon a moral basis is that the right of the *cestui* is a right *in personam* against the trustee, specifically enforceable with reference to the trust *res*; that the *cestui* acquires rights *in personam* against the third persons, not because he is equitable owner of the trust *res,* but through equity's imposing upon third persons, obligations *in personam,* because of their unconscientious interference with the right which the *cestui* has against the trustee; that, therefore, equity imposes on all the world the duty of not consciously aiding in a breach of trust or preventing the *cestui* from having the benefit of the obligation of the trustee. The great advance which equity made over the common law system was in the emphasis which it placed on the duty or obligation of the defendant, whereas law placed its emphasis on the right of the plaintiff. With this difference in fundamental conceptions, it was inevitable that law should to some extent become rigid and technical, and that equity, on the other hand, should approximate more closely the standards of an enlightened morality. If, therefore, the law should adopt the view that the right of the *cestui que trust* rests on the basis of the property right of the plaintiff in the trust *res,* rather

[96]The cases of Hicks *v.* Powell (1869) 4 Ch. App. Cas. 741, Norton *v.* Florence etc. Co., *supra,* footnote 88, and *In re* Hawthorne (1883) 21 Ch. D. 743, while containing judicial expressions to the effect that courts of equity will not enforce equitable rights with respect to land located in a foreign jurisdiction where such rights are not recognized, can hardly be said to establish the proposition that the court is without jurisdiction to give relief, if in its discretion it sees fit to do so. In Norton *v.* Florence etc. Co. there was no equitable right according to the law of the *forum.* In Hicks *v.* Powell the defendant took under a deed which by the law of the *situs* made the deed under which the plaintiff claimed a nullity. And in *In re* Hawthorne there was no fiduciary obligation according to the law of the *forum.* If such obligation existed it depended upon the law relating to immoveables in a foreign jurisdiction and the court refused to take jurisdiction to determine that question on grounds of expediency. That courts may enforce equitable rights with respect to real estate recognized by the law of the *forum* but inconsistent with the law of the *situs,* see: Lord Cranston *v.* Johnston (1796) 3 Ves. Jr. *170; Scott *v.* Nesbit (1808) 14 Ves. Jr. *438; Polson *v.* Stewart (1897) 167 Mass. 211, 45 N. E. 737 (*semble*); Ames, Cases on Equity Jurisdiction, 26, n. 1, 28, n. 2.

than upon the duty of the community at large not to interfere consciously with the right of the *cestui* to have the performance of the trustee's duty, it would not only depart from the historical attitude of equity, but it would commit itself to a doctrine which as Maitland said "is positively mischievous". The truth of this statement could not be better illustrated than by the decision in *London County Council* v. *Allen*,[97] which the court deciding the case could only characterize as "regrettable". It was regrettable only because the court attempted to liken the plaintiff's equitable right to a legal right *in rem* in the land. Had the emphasis been placed on the defendant's duty to refrain from any conduct interfering with the plaintiff's equitable right *in personam*, a different and more fortunate result would have been reached, more consistent with sound morals and with the great body of decisions which have built up our equity jurisprudence.

HARLAN F. STONE.

COLUMBIA LAW SCHOOL.

[97] *Supra*, footnote 69.