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ТРАСТЫ В ОБЩЕМ ПРАВЕ: ПОНЯТИЕ И КЛАССИФИКАЦИЯ

Аннотация. В статье рассматриваются ключевые аспекты формирования и развития института траста в системе общего права. Особое внимание уделяется историческим предпосылкам появления трастов, а также их эволюции с XII века до конца XIX века, что позволяет понять коренные отличия между трастом и более ранним институтом use. Авторы подробно анализируют сущность и функции трастов, раскрывают влияние английской правовой традиции на становление этой правовой конструкции, а также показывают, как специфика общего права — с его зависимостью от судебных прецедентов и широкими дискреционными полномочиями судей — формирует уникальные черты трастов. Основываясь на этой классификации, авторы представили несколько новое видение доверия, отличное от традиционного, содержащегося в российской доктрине.

Annotation. In this article, the authors examine the key aspects of the formation and development of the institution of trust in the common law system. Special attention is paid to the historical background of the emergence of trusts, as well as their evolution from the 12th century to the end of the 19th century, which makes it possible to understand the fundamental differences between the trust and the earlier institution of use. The authors analyze in detail the essence and functions of trusts, reveal the influence of the English legal tradition on the formation of this legal structure, and also show how the specifics of common law — with its dependence on judicial precedents and the broad discretionary powers of judges — form the unique features of trusts. Based on this classification, the authors presented a slightly new vision of trust, different from the traditional one contained in the Russian doctrine.

Ключевые слова: общее право, use (использование), классификация, понятие, дискреционное право, прецедент, доверительное управление.

Keywords: general law, use, classification, concept, discretionary law, precedent, trust management.

Common law includes a legal institution, such as a trust, which is a legal structure where the management of an owner's property is handled by a trustee or trustees on behalf of a specific beneficiary or beneficiaries.

Historically, certain types of this legal structure have emerged due to the nature of common law. This is because common law includes a source such as precedent, which makes this legal system particularly reliant on historical factors, sometimes introducing a lack of structure to the overall body of legal rules. Richard A. Posner accurately notes that "for most lawyers, common law seems to be a collection of unrelated areas, each with its own history, terminology, and a confusing mix of regulations and principles" [1, p. 339].

It is also important to note that, due to the existence of discretionary rights for judges in common law countries, there is a phenomenon of complete or partial elimination of various sources of law. G.L.A. Hart explains that discretionary law gives judges very wide opportunities to apply the norm and choose a solution. However, they should not do so arbitrarily or irrationally [2, p. 213].

Earlier, Hart correctly pointed out by Roscoe Pound that common law is an Anglo-American tradition. This tradition is based on judicial legal thinking [3, p. 1]. Judges act as lawmakers, which seems justified if only because they should apply the law they created in order to prevent its misuse. However, it also introduces a degree of judicial arbitrariness into the legal system, which is not the focus of this article.

The authors of this article have attempted to systematically and doctrinally formalize the legal matters concerning trusts within the common law systems of the countries that belong to this legal family.

The history of "use" and the concept of trust

From the 12th century until the adoption of the Trustee Act in 1893, there existed a type of trust management in English common law known as "use", which was translated as "usage". This was different from the more well-known concept of a "trust".

One of the features of the use of land during this period was the imposition of feudal duties on those who held certain properties. These properties were typically lands. At the same time, these feudal duties depended on the legal title (seisin) of the holder: for the nobles (landowners), it was military service; for the peasants, it was in-kind service, which later evolved into monetary service. This situation, which emerged under the Tudor dynasty in England, has been referred to as "fiscal feudalism" in foreign literature. This was a mechanism for centralizing resources through partial decentralization of power.

In order to better understand the use, it is necessary to consider it in relation to the concept of trust. During this period, the use served as a tool for the concentration of the king's power and wealth.. This was evident in the fact that the king, in order to organize his state, granted land to lords to carry out their duties (in essence, this was a prototype of binding legal relations). The lords, in turn, could transfer the land they received to their vassals for use. Land and titles were inextricably connected, which is why the king could transfer both at any time. If the lord died, the property would be transferred to the heir or another person designated by the king. However, later, land began to be inherited, and after the holder's death, it would pass to his heir, after paying a certain amount to the treasury.

It should also be noted that during this time, there was a direct ban on the transfer of land to the church. This clearly showed the conflict between the power of the king and that of the church. From a legal perspective, if land was transferred to church ownership, the lord or king automatically lost their feudal rights. This was because the church was an institution, and therefore, the possibility of transferring land owned by it and receiving income from its use was limited for the king and lord, as concepts such as "minority" or "owner's death" did not apply to churches. When

using trust property, the land was no longer owned by the church but by certain individuals who were obligated to use it for the benefit of the church.

The meaning of the trust is that if the ownership of land or movable property is transferred to a trustee, who is supposed to manage and dispose of it in the interests of certain beneficiaries, or if the owner of the land or property declares himself to be the trustee of that property or land for the benefit of the beneficiaries, then the court must consider those beneficiaries to be equal owners of that property transferred for trust management.

After expressing the purpose of using the trust, it is also important to express the purpose of establishing it. To do so, it can be helpful to quote M. Franklin's words: "A trust is an attempt to avoid the ever-deepening and recurring crises in capitalism. The upper middle class, which has used trusts the most, recognizes that capitalism's contradictions cannot be resolved. Therefore, the risks of capitalism should be minimized through the use of discerning and intelligent money managers who are beyond the owner's control for consumption. However, American lawyers do not need to be reminded that even this mechanism for protecting the class that benefits from capitalism has failed."

In general, it can be said that the trust in common law was created to protect tangible property in difficult situations. Since the Anglo-American legal system is based primarily on precedent, the historical background of all the characteristics and variations of trusts, and not only trusts, can be considered the root cause.

Types of Trusts

In common law, trusts can be classified into the following categories:

1. Express trust.

1.1. Trust by transfer.

1.2. The trust through an application.

2. Implied trust.

2.1. Resulting trust.

2.2. Automatic resulting trust.

2.3. Intended resulting trust.

2.4.Constructive trust (or judicial).

2.5.Institutional constructive trust.

2.6.Restorative constructive trust.

3. Discretionary trust.

4. Others.

It's important to note that there is no universally accepted classification of trust types, and more importantly, they may not be mutually exclusive. This is due to the immense freedom provided in determining the legal status of each common law subject. Now, let's briefly describe each type of trust:

An explicit trust occurs when a person, known as the founder, clearly expresses their intention to establish a trust and follows all the relevant formalities and procedures required for the proper creation of the trust. This type of trust can only exist if the founder has clearly intended to create it.

There are two main types of explicit trusts: explicit trust by transfer and explicit trust through declaration. An explicit transfer trust arises when the founder transfers the trust property to a third-party trustee on behalf of a named beneficiary, while a declaration of trust occurs when the founder assumes the role of trustee for the trust property on behalf of the beneficiary without transferring the property.

In an explicit transfer trust, the founder legally transfers ownership of the trust property to the designated trustee, ensuring that all legal requirements for the transfer of ownership are met. This involves completing any necessary paperwork, paying taxes, and obtaining any required permits or licenses.

However, a declaration of trust arises when it is possible to establish the necessary intention to transfer ownership of the property to a trustee. Obviously, since the property already belongs to the current owner, there is no need for a formal transfer. Instead, it is sufficient for the owner to demonstrate by words or actions his intention to establish a trust.

If there is a clear intention to create a trust, the creator must explicitly state the trustee, property, and beneficiaries of the trust. If any of these aspects are unclear, the trust may not be legally enforceable (i.e., it will be considered void).

A resulting trust arises when there is evidence of an intention to create a specific trust, but the creator has not taken the necessary steps to formally establish the trust (i.e., make it valid). There are two types of resulting trusts: automatic resulting trust and intended resulting trust.

An automatic resulting trust arises when a trust was intended but for some reason has not been established. For example, if a property is transferred to a trustee's name and the creator intends for a beneficiary to have a lifetime interest in the property, but fails to specify what will happen after that, a resulting trust may be created with respect to the future return of the property, so that the trustee holds the property back on behalf of the creator.

The intended resulting trust will arise when there is an implied intention to create a trust and the presumption of ownership is not challenged. This is most commonly the case when one party pays the full purchase price or contributes to the purchase without the payment being reflected in the legal title. In this situation, the court usually assumes that the rightful owner retains title to the property in the amount of the payment.

Alleged resulting trusts are based on the implied intention from the circumstances, but this can be challenged by evidence of an intention to benefit the beneficiary.

A constructive trust, which includes an institutional and restorative element, is imposed by a court in order to prevent unjust enrichment from occurring to the trustee or founder of the trust [8]. In essence, it is a legal tool designed to protect against non-performance of assigned duties, interference with private property, and other wrongful acts [9].

A discretionary trust arises when the founder gives the trustee the power to decide which of the beneficiaries will benefit and how much they will receive. The main idea behind a discretionary trust is that the interests of the beneficiaries are not fixed. If the beneficiaries have fixed interests, the trustees can decide how the money will be spent, but in a discretionary trust, they have the freedom to make those decisions.

In a discretionary trust, the beneficiary does not have an exact share of the property. Instead, they have an expectation that they will be considered for the benefits. The trustee has the power to choose who will receive the benefits from the trust at their discretion. Until that choice is made, the beneficiaries only have the right to be considered for benefits. Similarly, the beneficiary of an unmanaged property has no specific interest in any asset before the management begins, but they have the right to ensure the property is managed appropriately.

Conclusion

The list of trust types in this article is intentionally incomplete. This is due to the very nature of the concept of trust in common law. Trust, translated from English, means "trust", and this legal construct is closely related to concepts such as "management", "possession", "disposition", "use", and "ownership". Many common law sources on trusts imply that trusts create a "split" in ownership. The fundamental principle of the trust is mutual effort to preserve and enhance existing property, which forms the basis for its classification and subsequent development.

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