

1-1955

## Trusts: Nature of Trust in Tidelands--A City's Right to Profits from Oil Extracted from Lands Held in Trust

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### Recommended Citation

Charles H. Brock, *Trusts: Nature of Trust in Tidelands--A City's Right to Profits from Oil Extracted from Lands Held in Trust*, 7 HASTINGS L.J. 115 (1955).

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the trustee is solely concerned with the duty of paying the qualified beneficiary and is not involved with the more diverse operations of trust management, where his liability is only predicated on a reasonable man standard. Much like a debtor's liability is freed by a payment to his creditor, the trustee's obligation is only fulfilled by distributions to the properly entitled beneficiary. Since the trustee has a good cause of action against the one improperly paid,<sup>30</sup> he should be held to an absolute standard of liability for the protection of the wronged beneficiary. Only in this way can the *cestui que* trust be assured of obtaining the proper share given him by the trust instrument.

*Harold Silen.*

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TRUSTS: NATURE OF TRUST IN TIDELANDS—A CITY'S RIGHT TO PROFITS FROM OIL EXTRACTED FROM LANDS HELD IN TRUST.—Another episode in the contest for control of the oil deposits lying beneath the tidelands of California was concluded in April of this year when the Supreme Court of California decided the case of *Mallon v. City of Long Beach*.<sup>1</sup> This was a case involving the ownership of approximately \$85,000,000 in present funds and the expectancy of \$12,000,000 annually for an indefinite time to come. The court held, by a four to three decision, that the money was held by the City of Long Beach as trustee and not as owner, and that the State of California was entitled to its use.

The money was derived from oil operations conducted by the city on tidelands within its corporate limits. These tidelands were granted to the city by the state in 1911,<sup>2</sup> subject to certain trusts and on certain conditions for the purpose of developing a harbor. Oil was discovered after this grant and the city's officers were authorized to lease the tidelands for drilling.<sup>3</sup> By 1951 the accumulation of money from this source was so great that it could no longer be economically spent exclusively for harbor development. At this time the Legislature enacted a bill<sup>4</sup> which declared the money excess for the purposes prescribed in the grant<sup>5</sup> and released it from all such restrictions. Section 2 of this act begins:

That fifty per centum (50%) of all revenue heretofore derived and unexpended and to be derived, by the City of Long Beach from oil, gas and other hydrocarbon substances, other than dry gas, produced from lands conveyed by said above entitled acts is hereby declared free from the public trust for navigation, commerce and fisheries, and from such uses, trusts, conditions and restrictions as are imposed by any of said above entitled acts. . . .

Following this act the city established the "Public Improvement Fund" and provided for the transfer of monies released by the statute into this fund, to be spent for general municipal improvements.<sup>6</sup> Mallon then instituted his action to enjoin the city from appropriating and spending this money.

The majority opinion develops from the premise that the trust created by the grant of 1911 is analogous to the normal private trust, the state being the settlor and the city being the trustee. Following this premise, it concluded that the funds which

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<sup>30</sup> *Union Trust Co. of New York v. Gilpin*, 235 Pa. 524, 84 A. 448 (1912).

<sup>1</sup> 44 A.C. 225, 282 P.2d 481 (1955).

<sup>2</sup> CALIF. STATS. 1911, p. 1304; as amended CALIF. STATS. 1925, p. 235; CALIF. STATS. 1935, p. 793.

<sup>3</sup> CALIF. STATS. 1937, p. 2939.

<sup>4</sup> CALIF. STATS. 1951, p. 2443.

<sup>5</sup> See note 2 *supra*.

<sup>6</sup> CALIF. STATS. 1953, p. 3826.

were declared excess by the 1951 statute became the property of the state under the doctrine of resulting trusts. Based upon that premise the opinion reads quite logically, but the premise itself, that the lands are held in simple trust, seems open to question.

The grant to Long Beach provided that the lands should be held by the city forever, in trust for certain uses and purposes, and upon certain conditions. The use was for a harbor and the conditions were that it should be developed without expense to the state, that it could not be alienated but could be leased for purposes consistent with the trust by which the state held the lands, that the state should have free use of the harbor, and that the rights of use and free access for navigation and fishery should be preserved to the public. The words of the grant clearly give the city the land on some kind of a trust, but an examination of the cases and materials on the subject of tidelands ownership suggests that the interest created in the city was not like that of the ordinary trustee.

The subject of tidelands ownership was exhaustively reviewed by the Supreme Court of the United States in *Illinois Central R.R. v. Illinois*.<sup>7</sup> Quoting from *Stockton v. Baltimore and N. Y. Ry. Co.*,<sup>8</sup> the court said:

" . . . prior to the Revolution the shore and the lands under navigable waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia*<sup>9</sup> of the crown, and devolved to the state by right of conquest. . . . [a]fter the conquest the said lands were held by the state as they were by the king, in trust for the purposes of navigation and fishing. Being subject to the trust they were held for the use of the public at large. . . ."<sup>10</sup>

Illustrating that the law of England recognizes this trust in submerged lands, the court quoted *Blundell v. Catteral*,<sup>11</sup> where the court said this of the public trust in tidelands:

"The soil can only be transferred subject to the public trust, and the general usage shows that the public right has been excepted out of the grant of the soil. . . ."<sup>12</sup>

The traditional explanation of the nature of this trust in which tidelands are held is that the sovereign has a twofold interest, a *public* and a *proprietary* right. The proprietary interest is the right of ownership and use and can be alienated. The public interest is held by the sovereign in trust for the public, and consists of the public right to free use of the navigable waters and lands covered thereby for the purposes of navigation, commerce and fishery. This public right cannot be alienated or destroyed and it imposes a duty upon the state to use the lands, or if alienated to private or municipal owners, to compel them to use them in ways which do not interfere with the public right of navigation and fishery. The private right is always subordinate to the public right in the state. This theory has been adopted by the Supreme Court of the United States and traced to "De Jure Maris," a 17th century treatise by Lord Hale.<sup>13</sup> The court quoted from the treatise where it discusses the alienability of the private right and its subordination to the public right:

"The *jus privatum* that is acquired by the subject either by patent or prescription must not prejudice the *jus publicum*, wherewith the public rivers and the arms of the sea are affected to public use."<sup>14</sup>

<sup>7</sup> 146 U.S. 387 (1892).

<sup>8</sup> 32 Fed. 9 (C.C.D. N.J. 1887).

<sup>9</sup> Royal rights or privileges. BLACK, LAW DICTIONARY (4th ed. 1951).

<sup>10</sup> See note 7 *supra* at 457.

<sup>11</sup> 5 Barn. & Ald. 268, 106 Eng. Rep. 1190 (1821).

<sup>12</sup> *Id.* at 278, 106 Eng. Rep. 1197.

<sup>13</sup> 146 U.S. at 458.

<sup>14</sup> *Ibid.*

The Supreme Court of California has both approved<sup>15</sup> and disapproved<sup>16</sup> this manner of defining the public trust. However the most significant element of this theory has been uniformly applied by the California courts. That is that the lands covered by the tides and held in trust by the state can be alienated and used for purposes not connected with navigation and commerce, if the use will not substantially interfere with that public right which it is the duty of the state to protect. In 1867 the Supreme Court of California said of the tidelands:

"Such land is held by the state in trust and for the benefit of the people . . . the state can make no disposition of it prejudicial to the right of the public to use them for the purposes of navigation and fishery and whatever disposition she does make, her grantee takes them upon the same terms on which she held them, and subject to the public rights mentioned above."<sup>17</sup>

The nature of the so-called trust is further demonstrated by the uses to which the state puts the tidelands over which she has retained control. They have been used for purposes totally unconnected with the trust and the courts have approved such uses.

In *Boone v. Kingsbury*<sup>18</sup> the court upheld a statute authorizing drilling on tidelands held in trust by the state. In *Oakland v. Oakland W. F. Co.*<sup>19</sup> the state's authority to reclaim and alien tidelands into private ownership was upheld. The court there said:

"There is no decision of this court which conflicts to the slightest degree with the doctrine of these cases . . . that the submerged lands of the state, though held subject to a public trust, are nevertheless alienable to private ownership where capable of reclamation without detriment to the public right. . . ."<sup>20</sup>

The state not only uses the land for purposes outside the trust, it deposits the proceeds from its own tidelands oil operations in the general fund, to be spent for purposes not in any way connected with the trust.<sup>21</sup>

These observations show two facts which are important in determining the nature of the interest created in the City of Long Beach. One is that lands such as those granted to the city have always been held subject to a trust, and were known as trust lands when the grant was made. The second is that this trust is of a unique sort, and bears no similarity to the normal private trust to which the doctrine of resulting trusts applies. Considering these facts it seems natural to inquire whether the Legislature intended to create a new type of trust in these lands, one which would be governed by the rules of simple trusts; or whether it intended to pass the lands subject to the same trust in which it held them, giving the city the entire proprietary right, subject to the public trust and to the control of the Legislature as protector of that trust. If the latter interest was passed the city should have as much latitude in its uses as has the state, subject of course to the state's right to protect the public use. It would follow that it could make general use of the proceeds in the absence of legislative restrictions.

The opinions in early cases concerning this and similar grants of trust lands speak of the grants as passing the lands subject to the same trust. They indicate that

<sup>15</sup> *Oakland v. Oakland W. F. Co.*, 118 Cal. 160, 50 Pac. 277 (1897).

<sup>16</sup> The theory was disapproved in *Long Beach v. Marshall*, 11 Cal.2d 609, 82 P.2d 362 (1938), but it was by way of refuting an argument of counsel which was erroneously based upon the theory. Instead of merely pointing out the error the court denounced the theory as unnecessary.

<sup>17</sup> *Ward v. Mulford*, 32 Cal. 365, 372 (1867).

<sup>18</sup> 206 Cal. 148, 273 Pac. 797 (1928).

<sup>19</sup> 118 Cal. 160, 50 Pac. 277 (1897).

<sup>20</sup> *Id.* at 185, 50 Pac. at 299.

<sup>21</sup> CALIF. STATS. 1921, p. 404; CALIF. PUBLIC RESOURCES CODE § 6816.

the entire proprietary interest of the state passed, subject to the same public trust or use which has always been impressed on these lands. In *City of Long Beach v. Lisenby*,<sup>22</sup> decided six years after the grant, the court said this of the grant, indicating that the trust in the city was the same as that in the state:

"The title to the tidelands . . . are vested in the state, impressed with a public use for purposes of navigation and commerce. . . . It (the state) may . . . commit the execution of this trust in any specified territory to a local administrative agency such as an incorporated city with the necessary powers. . . . It being lawful (under the city's charter) . . . for the city to accept the donation of the property, it thereupon became municipal property, subject to the public use."<sup>23</sup>

In *City of Long Beach v. Marshall*<sup>24</sup> the court again likens the city's trust to that of the state, saying:

". . . it is established law that the state became the owner of the tidelands in fee simple upon its admission to the union, holding them subject to the public trusts for navigation, commerce and fishery; that it became the owner of the minerals therein; and it should reasonably follow that it has the power to grant these lands to municipalities subject to these same trusts."<sup>25</sup>

In the same case the court considered the words of the grant to Long Beach and said:

"Giving this language its ordinary and reasonable meaning, it would seem clear that the state intended to and did convey whatever title or interest it had in these lands to the city, in fee simple, subject to certain conditions and upon certain trusts."<sup>26</sup>

In *Atwood v. Hammond*<sup>27</sup> the court passed upon a statute much like the one in question in the *Mallon* case, which declared a parcel of tideland free from the public trusts upon which it was granted to the City of San Diego.<sup>28</sup> Another statute,<sup>29</sup> passed in the same session, purported to convey this parcel of reclaimed tideland to the city and county jointly. The court held that the city had owned the land subject to trust and that the statute freed it from the trust restrictions. The second statute was held inoperative since it purported to convey title to land which was owned by the city, not the state.

The holding in *Atwood v. Hammond* indicates that the doctrine of resulting trusts does not apply to the tideland trust, for if it had been applied the land would have resulted to the state, giving it an interest to convey by the second statute. In reaching its conclusion in that case the court restated and followed the principles laid down in prior decisions involving the tidelands. They held that the grant of the lands to the city did not divest the state of its control over them, for this right of control is superior to the grant of the proprietary interest, but that this did not indicate that the city's proprietary right was imperfect. This is the dual interest theory which is referred to above.

Thus it appears that at least until 1935, when the *Atwood* case was decided, the California courts looked upon the tidelands trust as a severable thing made up of an alienable element and an inalienable one. The courts considered the grants to the cities as passing the whole of the alienable proprietary interest, subject as it had been in the state, to the limitations imposed by the inalienable and indestructible

<sup>22</sup> 175 Cal. 575, 166 Pac. 333 (1917).

<sup>23</sup> *Id.* at 579, 166 Pac. at 337.

<sup>24</sup> 11 Cal.2d 609, 82 P.2d 362 (1938).

<sup>25</sup> *Id.* at 614, 82 P.2d at 367.

<sup>26</sup> *Id.* at 613, 82 P.2d at 366.

<sup>27</sup> 4 Cal.2d 31, 48 P.2d 20 (1935).

<sup>28</sup> CALIF. STATS. 1929, p. 1058.

<sup>29</sup> CALIF. STATS. 1929, p. 1550.

public right. The premise adopted by the majority in the *Mallon* case, that the land is held by the city as trustee of a normal trust, is diametrically opposed to this view of the law and seems to wholly ignore the nature of that trust as defined by its prior decisions.

There would appear to be a similar departure from the traditional view of the tidelands trust in *Long Beach v. Morse*,<sup>30</sup> decided in 1948, where the court likened the city's interest to that of a trustee of a private trust; but that case did not require such a comparison, and the decision shows no actual change in the law. As in the *Mallon* case, the issue was whether the city could make general use of the tidelands oil proceeds, but there was then no legislative declaration that the funds were excess. The court held that the city could not make such use of the funds, but said this was so "in the absence of a legislative provision to the contrary."<sup>31</sup> (Emphasis added.)

These words clearly imply that if the Legislature made such provision the funds could be so used. This follows the prior decisions on the subject. A legislative declaration of excess has always been required before the tidelands could be free of the trust restrictions.<sup>32</sup> Since there was no such provision in 1948, the decision could rest on this fact, without the unnecessary "private trust" premise. Furthermore the case shows that the court still recognized that the doctrine of resulting trust did not apply, for if the legislative provision was to enable the city to spend the money it could not operate to give the same money to the state by way of resulting trust.

Thus when the *Mallon* case came before the court the fundamental law on the subject was unchanged, but it was not to remain so. Out of this body of law the majority chose the least consistent element, the superfluous definition of the trust from the *Morse* case, and took it for its premise. To it was applied the resulting trust rule, which was nowhere included in that body of law and which had repeatedly been shown not to apply to the tidelands trust. The basic law on the subject seems to have been abandoned.

Mr. Justice Spence, in an excellent dissenting opinion on the *Mallon* case, points out that it is unfortunate that the value of the oil included in the tideland grant was not realized at the time of the grant, so that it could have been excepted out of the grant, as it was in those made to cities in later years, but he denounces the policy of overturning established law in order to return to the state what was improvidently given. This is the effect of the decision in *Mallon v. City of Long Beach*.

Charles H. Brock.

<sup>30</sup> 31 Cal.2d 254, 188 P.2d 17 (1948).

<sup>31</sup> *Id.* at 258, 188 P.2d 21.

<sup>32</sup> *Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156 (1912).