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THE EFFECT OF THE STATUTE OF USES ON TRUSTS IN PENNSYLVANIA

WILLIAM P. THORN

At first glance the reader might get the impression that the Statute of Uses is of more interest to the antiquary than to the student or lawyer of today. However, the Statute of Uses has had such a tremendous influence upon the law of property that a knowledge of the statute and its effect is desirable, if not imperative, to an understanding of the present law.

A use is a fiduciary relationship with respect to property which arises as a result of a conveyance to one person to the use (*ad opus et ad usem*) of another. It was enforceable only in chancery, and the sole duties of the feoffee to uses were (1) "to permit the cestui que use to take the rents and profits," (2) "to convey the legal title at the latter's direction,"¹ and (3) to protect the property from persons other than the cestui. It "was the exact counterpart of what is known in modern times as a dry or passive trust."² Uses were employed primarily to avoid creditors, the Statute of Mortmain, which prohibited wills of real property, and the incidents of the feudal system.³

In order to prevent this unpopular method of avoiding excises and debts (i.e., unpopular as far as the King, feudal lords, and creditors were concerned) the Statute of Uses⁴ was passed in 1536. In essence, the statute provided that any person having any use of any lands, tenements and hereditaments of which another person was seised "shall from henceforth stand and be seised" of a legal estate of the same quality that he had in the use.⁵ In other words, the legal title was thereafter deemed to be in the cestui que use.

The obvious intent of the draftsmen of the statute was to eliminate the equitable ownership of property and to subject it to the feudal burdens, but as Digby has put it: "A strange combination of circumstances - the force of usage by which practices had arisen too strong even for legislation to do away with, coupled with an almost superstitious adherence on the part of the courts to the letter of the statute - produced the curious result, that the effect of the Statute of Uses was directly the reverse of its purpose, that by means of it secret conveyances of the legal estate were introduced, while by a strained interpretation of its terms the old distinction between beneficial and legal ownership was

¹Foulke, *Rules Against Perpetuities, Restraints on Alienation, and Restraints on Enjoyment in Pennsylvania* (1909) § 109.

²*Ibid.* § 109.

³*Ibid.* § 105, fn. p. 62.

⁴Statute of 27 Henry VIII, chap. 10 (1536)

⁵For a full text of the statute see Digby, *Hist., Law of Real Prop.*, 5th. ed. (1897) pp. 347 et seq.

revived."⁶ No longer was it necessary to employ the formal common law methods of transferring freehold interests in property - the feoffment with livery of seisin, the fine, and the common recovery. The owner need only create a use by a bargain and sale or a covenant to stand seised and the statute would convert the use into a legal estate.⁷ Furthermore, when the doctrine of Tyrell's case⁸ was repudiated and a use upon a use recognized by chancery,⁹ the separation of legal and equitable ownership was revived by construing the statute as being applicable only to the first use.¹⁰ It is to be noted that by this time feudal incidents had lost their efficacy, and to permit the transferee to uses to hold the estate free from the second use worked a species of fraud on the transferor.¹¹

In addition to effecting a complete revolution in the mode of conveyancing, the statute also rendered it possible to create new future legal estates where limitations in conveyances operating under it did not conform to the common law rules on limitations. Shifting and springing uses were valid as uses before the statute and were, therefore, valid legal estates after the statute.¹² And since the statute operates on executory devices,¹³ a shifting use may be created by will as well as by a deed *inter vivos*. Thus, the common law rules governing the creation of future estates, i. e., that a future estate could not be made to commence in futuro, a remainder must vest in possession immediately upon the expiration of the preceding estate, and a remainder cannot take effect prior to the natural termination of the preceding estate, were abrogated. It has also been held that a deed will be construed as a bargain and sale or a covenant to stand seised, if possible, in order to sustain a shifting or springing use.¹⁴

THE STATUTE OF USES IN PENNSYLVANIA

All doubts as to whether the statute was part of the common law of Pennsylvania were set at rest by the Report of the Judges, made in 1808.¹⁵ The operative sections of the statute (the first ten except the eighth) are in force in the Commonwealth.¹⁶ As stated in the preceding paragraph, it was also applied to uses created by will after the Statute of Wills¹⁷ was passed giving the power to dispose of land by will.¹⁸

⁶Hist. of Real Prop., 3rd. ed., p. 303.

⁷Bushong, Pa. Land Law 414.

⁸73 Eng. Rep. 336 (1557), 38 Digest 734, 787, 2 Dyer 155a (1634).

⁹Sambach v. Dalston, Tothill 188, Ames, Select Essays 748; Doe d L'loyd v. Passingham, 6 B & C. 308, 108 Eng. Rep. 465 (1827).

¹⁰Brown, Cases and Mat. on Real Prop. 70.

¹¹*ibid.*

¹²*ibid.*, p. 67. Foulke, *op. cit.*, § 126.

¹³Saunders, Uses, Vol. I, 8 ed. (1861), 148; Challis, Real Prop., 312; Sugdem, Powers, 8 ed., 146.

¹⁴Bryan v. Spires, 3 Brewster 580 (1869); Zollman, Tiffany on Real Prop. §167.

¹⁵3 Binney 618; see 16 L.R.A. (NS) 1148 for other jurisdictions.

¹⁶3 Binney, *supra*.

¹⁷Statute 32 Henry VIII, chap. 1 (1540).

¹⁸Ahl v. Liggett, 246 Pa. 246 92 A. 202 (1914); Carson v. Fuhs, 131 Pa. 256, 18A. 1017 (1890); Com. ex. rel. v. First Nat. Bank of Danville, 46 D. & C. 619 (1943).

Uses Not Executed by the Statute

It is somewhat difficult to determine just what uses are executed by the statute in Pennsylvania and which are not. Practically every writer on the subject has noted this, and they sometimes suffix their remarks with the statement that the cases are in hopeless confusion.¹⁹ At one time it was thought that our law differed basically from that of England. Chief Justice Lowrey, in *Kuhn v. Newman*,²⁰ and in *Bush's Appeal*,²¹ stated that the principle of the Statute of Uses, which strikes down equitable estates where the whole beneficial interest is granted to persons who are *suis juris*, rather than the statute itself, is part of the common law of Pennsylvania. Those who are *suis juris* "must be satisfied with the ordinary remedies and protection of the law."²² Therefore, ". . . even those uses that were not executed by the statute, for example, those that are limited against the rules of the common law, 1 Rep. 129, b; a use limited upon a use, a use of chattels real, and a trust to receive rents and pay them to another, 2 Bl. Com. 335; all these are executed by our principle."²³ Justice Strong, who dissented in *Bush's Appeal*, felt compelled to follow these decisions in *Kay v. Scates*,²⁴ although he very ably stated the correct law. However, the principle announced in these cases was criticized and renounced in later cases.²⁵

In examining the cases, it is well to keep in mind that there are two diametrically opposed principles of public policy.²⁶ Our law favors the private ownership and dominion of property. The right to own property is protected by the Constitution, and the right to dispose of property by the creation of trusts or otherwise is a necessary corollary of that right. "Trusts supply the means of carrying out family arrangements, and of breaking the force of the blow death deals against the head. They furnish a protection against improvidence, indiscretion, inexperience, imbecility, misfortune, and even vice, upholding the wishes of parents, and friends, and inspiring even the dying with comfort. They are contrary to no principle of justice, wisdom, or morality, and therefore demand our confidence and support in proper cases."²⁷

On the other hand, there is an often expressed public policy against interference and restriction in the use and enjoyment of property where one who is *suis juris* has the entire beneficial interest in it.²⁸ Equity will not continue a

¹⁹See for example Foulke, *op. cit.* chap. 6

²⁰26 Pa. 227 (1856)

²¹33 Pa. 85 (1859)

²²*Kuhn v. Newman*, *supra*, p. 232.

²³*Kuhn v. Newman*, *supra*, pp. 230-231.

²⁴37 Pa. 31 (1860)

²⁵*Barnett's Appeal*, 46 Pa. 392 (1864); *Wickham v. Berry*, 55 Pa. 70; *Dodson v. Ball*, 60 Pa. 492 (1869).

²⁶*Earp's Appeal*, 75 Pa. 119 at pp. 122-123; *Dodson v. Ball*, *supra*.

²⁷Agnew, C. J., in *Earp's Appeal*, *supra*.

²⁸*Shallcross' Est.*, 200 Pa. 122, 49 A. 936 (1901); *Ritter's Est.*, 190 Pa. 102, 42 A. 384 (1899); *Bennett's Est.*, 41 Pa. Super. 579 (1910).

trust that serves no legitimate or useful purpose, particularly when the trust creates a useless cloud on the beneficiary's title. A trust "continues in equity no longer than the thing sought to be secured demands."²⁹

a. Active Uses or Trusts.

Trusts are composed of the old special trusts that existed before the statute of uses and those uses which the statute did not destroy.³⁰ All trusts can be classified as either active or passive. Passive trusts are those which impose no active duties upon the trustee or have no special purpose and are spoken of as being "dry". An active trust is one "where important duties are confided to the trustee, such as renting and managing the estate, investing money, distributing the proceeds, etc."³¹ The Statute of Uses does not execute an active trust. "Others, not strictly active . . . trusts will be saved where, (a) it is necessary for the protection of a married woman; (b) for the protection of a spendthrift child; (c) to support contingent remainders; (d) or to serve some other useful and lawful purpose."³² In *Buch's Estate*³³ it is said: "Active or special trusts are those in which, either from the express direction of the language creating them, or from their very nature, it is apparent the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the property." From these statements, it is obvious that it is necessary to know what are considered "active and substantial" or "important" duties in order to determine whether a particular trust is executed by the statute or not.

Prior to the statute, the foffeee to uses had only two affirmative duties to perform, namely: to protect the legal title and to convey to the beneficiary in accordance with his instructions. After the statute it was not necessary to imply these duties since the beneficiary already had the legal title and he could protect it himself. Generally, therefore, if these duties were specifically imposed on the trustee, it was held that the statute did not execute the trust.³⁴ How could the trustee perform these duties if he did not have the legal title? However, in Pennsylvania, such a trust was held to be executed.³⁵ There is no reason why the title had to pass through a mere conduit if the trustee was to convey to the beneficiary. Furthermore, since the trustee would be under a duty to convey that

²⁹Stafford's Est., 258 Pa. 595, 102 A. 222 (1917).

³⁰Kay v. Scates, 37 Pa. 31 at 38, (1860).

³¹Judge White in *Carson v. Fuhs*, 131 Pa. 256, at 260 and adopted by the Supreme Court at p. 266.

³²*Carson v. Fuhs* supra; see also *DiCarlo v. Licini*, 156 Pa. Super. 363, 40 A. 2d 127 (1944); *Simonin's Est.*; 260 Pa. 395, 103 A. 927 (1918).

³³278 Pa. 185, 122 A. 239 at page 188.

³⁴Restatement, Trusts, § 69, com. a.

³⁵*Behringer's Est.*, 265 Pa. 111, 108 A. 414 (1919); *Bacon's App.* 57 Pa. 540 (1868); *Renziehausen v. Keyser*, 48 Pa. 351.

was enforceable in equity, equity will consider that done which ought to be done without a conveyance.⁸⁶ The beneficiary's title is recognized and protected by the law courts, also.⁸⁷

The trustee must be vested with some power, control, or discretion to make the trust active. "Wherever it is necessary for the accomplishment of any object of the creator of the trust that the legal estate should remain in the trustee, then the trust is a special one."⁸⁸

Thus, the following trusts have been held to be active: to pay over the net income,⁸⁹ or the "income"⁴⁰ (payment of the net income is inferred from the use of the word "income"), "to invest and pay over",⁴¹ to place at interest and pay the income",⁴² to "hold, invest, and mortgage, and pay the income",⁴³ to receive and pay over the rents and profits,⁴⁴ and where there is a direction to the trustee to sell.⁴⁵ However, a mere direction to permit the cestui que trust to possess or use the estate does not make the trust active;⁴⁶ nor does a direction to pay over the gross income,⁴⁷ or to "receive and pay over the rents."⁴⁸ Furthermore, a mere power to partition, or to sell, not exercised before active duties cease does not prevent the operation of the statute.⁴⁹ On the other hand, the power to sell, coupled with an option to "a friend", who is named, to buy the trust res at book value, makes the trust active.⁵⁰

If active duties are imposed for only a limited period, the trust is executed at the expiration of that period;⁵¹ likewise, upon the completion of active duties.⁵²

⁸⁶Rife v. Geyer, 59 Pa. 393 at 396 (1868); Bacon's App., 57 Pa. 504 at 513 (1868); Kay v. Scates, 37 Pa. 31 at p. 40 (1860).

⁸⁷Beneficiary can maintain ejectment at law, Peebles v. Reading, 8 S. & R. 484 (1822); Pennock v. Freeman, 1 Watts 401 (1833).

⁸⁸Rife v. Geyer, 59 Pa. 393 (1868); Barnett's App., 46 Pa. 392 (1864).

⁸⁹Hemphill's Est., 180 Pa. 95, 36 A. 409 (1897); (necessarily involves discretion).

⁴⁰West's Est., 214 Pa. 35, 63 A. 407 (1906); Eshbach's Est., 197 Pa. 153, 46 A. 905 (1900); Keene's Est., 81 Pa. 133 (1876); Phillip's App., 80 Pa. 472 (1876).

⁴¹Xander v. Easton Trust Co., 217 Pa. 485, 66 A. 759 (1907).

⁴²Eshbach's Est., supra n. 40.

⁴³Henderson's Est., 258 Pa. 510, 102 A. 217 (1917).

⁴⁴Barnett's App., 46 Pa. 392 at 399 (1864); see also, Boyd's Est., 199 Pa. 487, 49 A. 297 (1902); McIntosh's Est., 158 Pa. 528, 27 A. 1044 (1893); Ashhurst's App., 77 Pa. 464 (1875); Earp's App., 75 Pa. 119 (1874); Bacon's App., 57 Pa. 504 (1868); Sheet's Est., 52 Pa. 257 (1866); Shankland's App., 47 Pa. 113 (1864); Pratt v. McCowley, 20 Pa. 246 (1853); Vaux v. Parke, 7 W. & S. 19 (1844).

⁴⁵Koenig's App., 57 Pa. 352 (1868).

⁴⁶Phila. Trust Safe Dep. & Ins. Co's App., 93 Pa. 209 (1880); Kinsef v. Ramey, 87 Pa. 248 (1878).

⁴⁷Kay v. Scates, 37 Pa. 31 (1860); Rodrigue's App., 1 Monag. 59, 15 A. 680, (1888).

⁴⁸Pullen v. Rianhard, 1 Wharton 521 (1836)

⁴⁹Chamberlain v. Maynes, 180 Pa. 39, 36 A. 410 (197); Dodson v. Ball, 60 Pa. 492 (1869).

⁵⁰Remensnyder's Est., 267 Pa. 348, 110 A. 244 (1920).

⁵¹Fisher v. Wister, 154 Pa. 65, 25 A. 1009 (1893); Cable v. Cable, 146 Pa. 451, 23 A. 223 (1891); Keyser's App., 57 Pa. 236 (1868).

⁵²Kipp's Est., 286 Pa. 90, 132 A. 822 (1926); Hanlon v. Martin, 234 Pa. 55, 82 A. 1024 (1912); Sheaff's Est., 231 Pa. 251, 80 A. 361 (1911); Sheridan v. Sheridan, 136 Pa. 14, 19 A. 1068 (1890); Steacy v. Rice, 27 Pa. 75 (1856).

And if active duties are to begin in the future, the trust is executed until that time.⁵⁸

Where it is apparent that the trustee has any discretion or duty of management, the statute does not apply;⁵⁴ nor does it have any application if the continuance of the trust is necessary to preserve the property for remaindermen.⁵⁶

The trustee of a spendthrift trust has at least a quasi-active duty to perform in protecting the property from the beneficiary's improvidence and his creditors. The sole and separate use trust falls into the same category, but in this case it is the husband and his creditors against whom the protection is afforded. In both of these cases the statute has been held inapplicable.⁶⁶ However, a sole and separate use trust is executed if the beneficiary is unmarried and "not in immediate contemplation of marriage".⁶⁷ The fact that additional active duties are imposed does not seem to prevent its execution.⁶⁸ Two reasons might be advanced for this apparent anomaly. Either the courts have overlooked the additional active duties or they have been ignored on the ground that they were only incidental to the main purpose of the trust and, therefore, immaterial in determining whether the use was executed or not. It is executed "not because it is inactive, but because it is special".⁶⁹ A sole and separate use trust is executed when the beneficiary becomes discovert even though she later remarries.⁶⁰ It has been intimated that since the married women's property acts make a sole and separate use of no practical value, such a trust will not be sustained,⁶¹ but the courts have not as yet so held.

b. Personal Property.

There is no definite holding in Pennsylvania that the Statute of Uses does or does not apply to personal property. The overwhelming weight of authority elsewhere is that it does not.⁶² The very language of the statute itself would seem to exclude personal property as the word "seised" is only properly used in reference to freehold interests in land. In *Sharp's Estate*⁶³ we find the only definite state-

⁵³Hay's Est., 201 Pa. 391, 50 A. 775 (1901).

⁵⁴Frantz v. Race, 205 Pa. 105, 54 A. 492 (1903). *Kreb's Est.*, 184 Pa. 222, 39 A. 66 (1898); *Marshall's Est.*, 147 Pa. 77, 23 A. 391 (1892); *Barnett's App.*, 46 Pa. 492 (1864).

⁵⁵*Buch's Est.*, 278 Pa. 185, 122 A. 239 (1923); *Mooney's Est.*, 205 Pa. 418, 54 A. 1094 (1903); *Kuntzleman's Est.*, 136 Pa. 142, 20 A. 645 (1890); *Kay v. Scates*, 37 Pa. 31 (1860).

⁵⁶Spendthrift trust; *Thompson v. Carmichael*, 122 Pa. 478, 15 A. 867 (1888); *Phila. Trust Co. v. Guillon*, 100 Pa. 254 (1882); *Rife v. Geyer*, 59 Pa. 393 (1868). Separate use; *DiCarlo v. Licini*, 156 Pa. Super. 363, 40 A. 2d 127 (1944); *Carson v. Fuhs*, 131 Pa. 256, 18 A. 1017 (1889); *Little v. Wilcox*, 119 Pa. 439, 13 A. 468 (1888).

⁵⁷Hay's Estate, 286 Pa. 520, 134 A. 402 (1926); *Kuntzleman's Est.*, 136 Pa. 142, 20 A. 645 (1890); *People's Sav. Bank v. Denig*, 131 Pa. 241, 18 A. 1083 (1889).

⁵⁸*ibid.*, *Zollman, Tiffany on Real Property*, §173.

⁵⁹*Koenig's App.*, 57 Pa. 352 (1868).

⁶⁰*Freyvogel v. Hughes*, 56 Pa. 228 (1867); and cases cited in annot., *Rest., Trusts*, §69.

⁶¹*Bower's Trust Est.*, 346 Pa. 85, 29 A. 2d 519 (1943); *Zollman, supra*, fn. 58, §173. (Note that in *Bower's Trust Est.*, the sole beneficiary was petitioning the court for the termination of the trust.)

⁶²*Rest., Trusts*, §70.

⁶³155 Pa. 289, 26 A. 441 (1893).

ment in our cases on the problem, and that by way of dicta. At page 294 the court said: "Personal property was never within the statute of uses". That statement is difficult of reconciliation with the cases. For instance, by a per curiam in *Arnold v. Harper*,⁶⁴ the court said: the bequest (stocks and bonds) vested "not only the equitable but legal title in the stocks and bonds bequeathed, the trust, if indeed it can be regarded as such, was executed at the time of its creation; . . ." *McCune v. Baker*⁶⁵ is similar. Again a legacy was involved, and the court, also by a per curiam, said: ". . . no separate use is created. No active duties are imposed on the trustee. . . the trust is dry, and in the absence of a gift over the effect of the gift to his daughter is to be determined as though the testator had made no direction about the custody of the fund during her life. The words of gift are 'I give, devise and bequeath to my daughter, Amanda F. Baker, five hundred dollars'. The effect of these words is clear. They gave an absolute estate. This estate was not reduced to one for life by the added direction creating a dry trust."⁶⁶

The Pennsylvania annotations to §70 of the Restatement of Trust cite *Peters v. Peters*⁶⁷ as being in accord with the proposition that the statute does not apply to personal property. It is believed that the conclusion of the annotators is incorrect. In that case both real and personal property were involved, and it was held that the beneficiary took a fee simple estate subject to an executory devise in the real estate but that the trust of personal property was valid. However, the grounds for upholding the trust of personal property were that "it was not a mere passive or dry one, but that active duties were implied". By implication, therefore, the case stands for just the opposite of the proposition for which it is cited by the annotators.

Justice Mestrezat, speaking for the court in *Henderson's Estate*,⁶⁸ stated: "It may, therefore, be regarded as settled that a testamentary direction to a trustee to hold, invest, and manage the corpus of a fund for a definite period, and pay the income therefrom at stated times to a beneficiary creates an active trust *which the statute does not execute*^{68a} and which will continue to operate and cannot be terminated until the purpose for which the trust was created has been accomplished." Personal property was involved in that case. In *Jeremy's Estate*,⁶⁹ it is said: "No active trust having been expressly imposed upon the trustees, . . . the trust must have become executed, and the . . . estate vested." This statement was cited

⁶⁴44 Sad. 126, 6 A. 751, (construed in *Overbeck v. McHale*, 354 Pa. 177 at 180, 47 A. 2d 142 (1946)).

⁶⁵155 Pa. 503, 26 A. 658 (1893).

⁶⁶For other cases involving personal property where the trust failed because it was passive, see *Kipp's Est.*, 286 Pa. 90, 132 A. 822 (1926); *Rodrique's App.*, 1 Monog. 59, 15 A. 680 (1888); and *Bennett's Est.*, 41 Pa. Super. 379 (1910).

⁶⁷307 Pa. 476, 162 A. 203 (1932).

⁶⁸258 Pa. 510, 102 A. 217 (1917) at page 515.

^{68a}Italics mine.

⁶⁹178 Pa. 477, 35 A. 847 (1896).

and followed in *Friedham's Estate*⁷⁰ where a legacy was left "in trust". A number of cases involving personal property consider the trust as being saved because active duties were imposed on the trustee.⁷¹

In retrospect, however, whether a dry trust of personal property is executed by the Statute of Uses or not seems to be a purely academic question. With the cases in this condition, a flat statement that the statute applies to personal property is not completely justifiable. The loose language of the courts, used without any consideration of the problem involved bars such a conclusion. It is believed that the better conclusion, and the one more likely to find favor with the courts is this. Where personal property is the subject matter of the attempted trust, if the trust is dry or passive, the public policy of this state against restrictions on the use and alienation of property in which the beneficiary alone is interested⁷² strikes down the trust, and it is treated as though it were executed by the statute. Thus, the only ground upon which a trust of personal property will be given effect is the imposition of active duties upon the trustee, and all the considerations in a., above, are applicable.

c. Use Upon a Use

Authority is at a minimum in Pennsylvania on the question of whether a use upon a use is executed by the statute. Only two cases, both well over a hundred years have been found. The first of these, *Slifer v. Bates*,⁷³ held that a bargain and sale implied one use and a second use could not be limited upon it. The court, in a very perfunctory manner, quoted and followed the English authorities on this "driest of all subjects".

The second case found is that of *Franciscus v. Reigart*.⁷⁴ It was there decided that a trustee could distrain for rent, the legal title being in him since the use declared was "repugnant" to the first use at law.

In view of the principle of public policy expressed in more recent cases against the continuance of a dry trust,⁷⁵ it is doubtful whether these cases will be followed.

⁷⁰344 Pa. 542, 26 A. 2d 341 (1942).

⁷¹A number of other cases involving personal property consider the trust as being saved because active duties were imposed on the trustee; *Foulke*, op. cit., §123, citing *West's Est.*, 214 Pa. 35, 63 A. 407 (1906); *Eshbach's Est.*, 197 Pa. 153, 46 A. 905 (1900); *Kreb's Est.*, 184 Pa. 222, 39 A. 66 (1898); *Kreamer's Ex'rs v. Showalter*, 1 Pa. C. C. 453 (1886); *Fetherman's Est.*, 133 Pa. 351, 19 A. 558 (1890); and several others. See also, *Simonin's Est.*, 260 Pa. 395, 103 A. 927 (1918).

⁷²*Bennett's Est.*, supra, fn. 66; and cases cited in fn. 23.

⁷³9 S. & R. 166 (1822).

⁷⁴4 Watts 98, (1835).

⁷⁵*Gerhard's Est.*, 160 Pa. 253, 28 A. 684 (1894); *Eichelberger's Est.*, 135 Pa. 160, 19 A. 1014 (1890); *People's Sav. Bank v. Denig*, 131 Pa. 241, 18 A. 1083 (1889); *Kay v. Scates*, 37 Pa. 31 (1860); and cases cited in fn. 72.

Miscellany

Although it was not necessary to the decision, the case of *Cable v. Cable*⁷⁶ suggested that where a minor is the beneficiary of a use upon which the statute would operate the execution would be postponed until he reached majority.⁷⁷ Just what the learned judge had in mind can only be the subject of speculation. Nothing at common law prevented a minor from taking title to real estate, and, if necessary, a guardian can be appointed to manage it for him until he reaches his majority.⁷⁸ It is thought that such a use would be executed at the time of its creation by the statute. Conversely, an active special trust for a minor is not executed upon his arrival at the legal age of contractual capacity.⁷⁹

When there is a gift to a charity, the operation of the statute depends on whether the beneficiaries are definite or indefinite. There must, of course, be a beneficiary capable of taking title for the statute to operate.⁸⁰

The problem of a contingent use has caused some difficulty, but it is believed that Pennsylvania follows the weight of authority and holds that such a use is executed by the statute.⁸¹ There has been some expression that it does not,⁸² but the arguments for such a holding are invalid.⁸³

Necessity for a Conveyance

If a use is executed by the statute, it is obvious that no conveyance to the cestui que use is necessary - the effect of the statute is to put the legal title in him. It is just as obvious, however, that the declaration of trust might create a cloud on the cestui's title. No one will dispute the statement that he will have a more marketable title if the trustee executes a deed to him even though the deed conveys nothing. Ever since our courts of common pleas have had equity powers they have had the power to compel the trustee to execute such an instrument.⁸⁴ And prior to 1836, our law courts exercised equity powers by allowing the cestui que trust to maintain ejectment against the nominal trustee.⁸⁵ Despite the logical objections to such a deed, and the self-contradiction of the instrument, the better view would seem to be that a conveyance should be decreed in every case where the trust instrument might create a cloud on the cestui's title. This view is ex-

⁷⁶146 Pa. 451, 23 A. 223 (1892).

⁷⁷For a similar expression see *Sheridan v. Sheridan*, 136 Pa. 14, 19 A. 1068 (1890).

⁷⁸*Foulke*, op. cit., § 126; *Kuhn v. Newman*, 26 Pa. 227 (1856).

⁷⁹*Wickham v. Berry*, 55 Pa. 70, (1867).

⁸⁰*App. of St. Luke's Church*, 1 Walk. 283 (1863).

⁸¹*Rife v. Geyer*, 59 Pa. 393 at 397 (1868); *Morton's Est.*, 24 Pa. Super. 246 (1904).

⁸²*Smilie's Est.*, 22 Pa. 130 (1853); *Rockhill's Est.*, 29 Pa. Super. 28 (1905).

⁸³*Sugden, Powers*, Vol. I, 8 ed. (1861), pp. 18-et seq.

⁸⁴Act of 1836 PL 628, 20 PS 2981, "The several courts aforesaid shall have power, on application of the party interested, to compel the conveyance by trustees, of the legal estate, where the trust has been executed or has expired."

⁸⁵*Peebles v. Reading*, 8 S. & R. 491 (1822).

pressed by Justice Strong in *Kay v. Scates*.⁸⁶ Speaking for the court, he said: "yet the nominal trust beclouds the title, and embarrasses the right of alienation, which belongs to the true owner. We think it better, therefore, to decree a conveyance, and such is the practice of courts of chancery, where the purposes of a trust once existing have been accomplished".⁸⁷ It is, however, definitely settled that none is necessary.⁸⁸

Conclusion

Several reasons for the differences in the Pennsylvania law from the law of other jurisdictions in regard to the effect of the statute of uses might be advanced. First of all, most of the cases have been decided on the basis of precedent, and the opinions establishing these precedents make no attempt to analyze the problems involved. Propositions which have caused other courts endless trouble and which have been the subjects of numerous disputes and legal opinion have not even bothered our courts. They are merely stated without comment. For instance, in many cases neither the court nor the reporter has thought it necessary to state whether the property involved is realty or personalty.⁸⁹

In the second place, our courts have consistently failed to distinguish between uses executed by the statute and trusts which can be terminated by the beneficiary because there is no ultimate purpose requiring their continuance.⁹⁰ A conveyance from the trustee is necessary in the latter case, but, prior to 1836 when there were no equity courts, the rule developed that the conveyance would be considered as already made. "When a court of equity would decree a conveyance of the legal title, the trust will be considered as executed without a formal conveyance by the trustee."⁹¹ "Equity considers that done which ought to be done." Thus, it was easy to fall into the habit of treating all trusts whose purposes had failed, or which were dry, as executed without considering the principles applicable to the two entirely different situations. It is believed that this is the reason that a dry trust upon personal property has been said to be "excuted".⁹²

⁸⁶supra p. 154.

⁸⁷See also *Megargee v. Naglee*, 64 Pa. 216 (1870); *Rife v. Geyer*, 59 Pa. 393 (1868); and *Keyser's App.*, 57 Pa. 236 (1868).

⁸⁸*Murphey v. C. I. T. Corp.*, 347 Pa. 591, 33 A. 2d 16 (1943); *Taylor v. Bailey*, 323 Pa. 278, 185 A. 699 (1936); *Ostrom v. Datz*, 274 Pa. 375, 118 A. 313 (1922); *Sheaff's Est.*, 231 Pa. 251, 80 A. 361 (1911); *Chamberlain v. Maynes*, 180 Pa. 39, 36 A. 410 (1897); *Westcott v. Edmunds*, 68 Pa. 34 (1871).

⁸⁹See cases cited by Foulke, op. cit., §124; *Moorehead's Est.*, 180 Pa. 119 (1897).

⁹⁰Foulke, §137; it is to be noted in this connection that the Pennsylvania rule as to the requisites for the termination of a trust has been brought into accord with the *Restatement of Trusts*, §338, by *Bower's Trust Est.*, 346 Pa. 85, 29 A. 2d 519 (1943), followed in *Goodell's Est.*, 53 D. & C. 13 (1945).

⁹¹*Murphy v. C. I. T. Corp.*, supra fn. 88; *Behringer's Est.*, 265 Pa. 111, 108 A. 414 (1919); *Stafford's Est.*, 258 Pa. 595, 102 A. 222 (1917); *Wyant v. Dieffendaffer*, 2 Gr. 334 (1856); *Franciscus v. Reigart*, 4 Watts 98 (1835).

⁹²*Arnold v. Harper*, 4 Sad. 126, 6 A. 751.

Finally, it is thought that the cases of *Kuhn v. Newman* and *Bush's Appeal*⁹⁸ have had some influence on the courts although the rule there cited was too radical to swallow whole. At least they pointed up the policy of the courts in regard to inactive trusts.

⁹⁸Supra, fn. 20 and 21.