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A REVIEW OF THE DECISION AND REMARKS UPON THE DOCTRINE OF KUHN vs. NEWMAN, 2 CASEY, 227.

Some remarks upon the judgment and doctrine promulgated in this case are not improper, for both are of great practical importance in that branch of our law where it may almost be said, that certainty and stability are all that are required.

The decision does, beyond question, overturn three judgments of the same court, and the doctrine, if it is to be a basis for logical consequences, must introduce a new system of conveyancing.

One point decided in the case certainly was, that where lands are devised in trust to maintain and educate grand-children during their minority, and then in trust for them equally, the shares of females to be held to their separate use, neither those of full age nor the minors, neither the sole nor the married, are entitled to a conveyance from the trustees. The reason assigned and elaborately argued, is, not that their estates were legal estates by construction of the will, but that being trusts, the title was as absolutely in the cestuis que trust as if the legal title had been conveyed by the trustees; and it was further declared, as respects the separate uses and the provisions for the minor's education, that neither object could retain the estate in the trustees. The doctrine is therefore—First, that an

equitable title in a trust executed, is so perfect that the owner has no right to the useless form of a conveyance of the legal one. Second, that a trust for a minor's education passes out of the trustee, and he cannot execute it. The former was necessary to the decision as respects the adult grand-children, for as to those females born after the testator, the restriction upon alienation consequent upon such a limitation as that proposed by the will, was contrary to the rule against perpetuities, and it certainly was not intended to say that that rule does not extend equally to legal and equitable estates. The latter point was not needed for the decision, and the profession will scarcely credit the doctrine as that of the five judges.

But the whole tenor of the opinion is this, that our law does not recognize the distinction of complete legal and equitable titles, even for the purpose of perfecting the latter by conveyance from the trustee. It is intended to cite some of the cases recognizing and insisting on this distinction, and to point out some of the consequences of this novelty.

But first, as to that singular declaration that a trust for a minor's education is executed in him as the legal estate. It has been twice decided, that where the law authorizes the appointment of a person to take care of the property of one not *sui juris*, this is confined to cases where there is not already a trustee appointed by deed or will, and that the person appointed by the law cannot interfere with property already clothed with a trust for the same object.

1. In the very case of a guardian—*Vanartsdalen* vs. *Vanartsdalen*, 2 Harris, 387, decided that the guardian could not interfere with property devised in trust for the maintenance of a minor. It was there said that authority is not needed, that a grandfather may entrust his property to a trustee of his own selection, excluding the father, as guardian, from interference.

The circumstances of that case are, as an illustration of the propriety of a rule, worth pages of argument.

And is it not astounding to learn that no one lawyer, conveyancer, scrivener, or citizen, but has been so ignorant as to frame these provisions in innumerable instances, and not one can be found in which a doubt has been expressed of their validity, nor where the excluded

guardian, stimulated by the prospect of a commission, has ever attempted to take possession, except in the one cited, where his pretensions were treated with contempt? What is the result? A minor's property must be entrusted to a guardian, though the donor knows perfectly that he is the most incompetent of men—and the least deserving of the trust—and that litigation must be the only remedy for the object of his bounty.

2. In the matter of *John Wilson's estate*, 2 Barr, 329, a committee of a lunatic was held not to have any right to the lunatic's property if it was clothed with a trust, and he was said to be the very last person in the world to be so entrusted, as it was his business to see that the trustee properly accounted.

It is, therefore, not too much to affirm, that a settled rule of real property is upturned by this case, unless we resort to the explanation that all this was but a wanton scattering of doubt, since it mattered not whether the estate was in the trustee or not, for the decision was that the trustee could not be compelled to convey to the infant.

As to the non-existence of any title in the devisees in trust,—if the decision settles anything, it decides this. For the prayer was by a cestui que trust, having a fee simple for a conveyance from the trustee.

It is not put by the court on the ground that the intention of the will was that the legal estate of the trustees should cease at the majority of the cestuis que trust, nor could it be. For the provisions are such, that a perpetual estate in the trustees, until duly divested by a conveyance, was intended and passed. There was a discretionary power of sale as well in the trustees as their successors, and this, by the statute and the decision of this very court, so absolutely vests a fee simple, that there can be no recovery by the cestuis que trust in their own name, as has been settled in *Cobb* vs. *Biddle*, followed by *Blight* vs. *Ewing*, where the authority to sell was a naked power, as the will (not printed in the report) shows.

When was this power to cease? It was annexed to the estate of the trustees, and surely it could be exercised until the owner, by his election to take the estate out of them, determined the

power and the trust. This provision is unnoticed. And is it possible the court is to be understood as deciding that a discretionary power of sale shall pass a legal estate to the executors, whilst a devise to them, with such power of sale, to maintain an infant, and then for him, passes the title directly through them, and vest in the infant? Assuming, then, what is admitted in the judgment, that by the common law system here was a case of a legal estate fit for conveyance to the cestui que trust, what is the judgment? That the title passed by operation of law, so that a deed is so unnecessary as to come within the rule *lex neminem cogit ad vana.*

The third case deliberately overruled by the court is *Franciscus* vs. *Reigart*, 4 Watts, 98; a case remarkable as involving the estates of the same family as *Kuhn* vs. *Newman*, and yet one which the judge must have overlooked, or his assertion would have been impossible.

There the deed conveyed the rents to Newman (p. 107) and his heirs, for *his and their use*, in trust as to 2-15 for M. H., her heirs and assigns, as to 1-15 for E. L., her heirs and assigns. It was confessedly a naked trust, except so far as there was a power of sale, precisely as in *Kuhn* vs. *Newman*, and there had been a partition of the equitable estates which had vested in fee simple. The question was, who had the right to distrain for the rent, Newman, the trustee, or the *cestui que trust*, to whom the rents had been allotted in severalty in fee? It was decided that Newman only could distrain. Why? If, says the judge below, (p. 108,) the statute executed the use, no estate remained in the grantee, but as it was limited to the use of the grantee, it was not executed, and Newman was entitled. The language of Kennedy, J., affirming the judgment, ought to be contrasted with that of Mr. Justice Lowrie.

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Although by the terms of the deed, Newman would be considered and treated in equity as a trustee, yet at law he must be considered as the legal owner of the rent, and as having a right to receive

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In relation to titles to land, our law, adopting the forms of both law and equity as legal forms, treats all complete equitable titles as complete legal ones where the persons named as trustees

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and to enforce the payment thereof to him. The rents being granted to him in fee for *the use* of himself, his heirs and assigns, to receive the same in trust for the benefit of others named in the deed, the statute transferring uses into possession does not operate on the second or ulterior use. At law it is considered repugnant to the first use, which is in favor of Newman and his heirs. and it is in equity only he will be considered as a trustee. *This second use not being executed by the statute*, he had an unquestionable right to distrain for the rent. * * * The partition was intended to operate upon the equitable interest of the parties concerned, and not upon the legal title and rights in the estate.

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have no duty to perform that requires the seisin and possession to be in them, and then our common law enforces the trust as a legal estate. * * We have carried it (the merger by the statute of uses) out generally, for even those uses which were not executed by the statute —for example, those that are limited against the rules of the common law, *a use limited upon a use*, a use of chattels real, and a trust to receive rents and pay them *to another, all these are executed* by our principle.

Considerable labor has been bestowed in searching for a precedent to support these assertions. None have been found, whilst two cases at the least are necessarily based upon the existence of a rule the direct opposite of this: *Slifer* vs. *Bates*, 9 S. & R., and *Franciscus* vs. *Reigart*, already noticed. Can it be meant to say that Duncan and Kennedy, JJ., who delivered the judgments in these cases, did not know the simplest rule of conveyancing? It is clear this is so, if the language of Mr. Justice Lowrie is accurate. That there has been fluctuation in the limits of the rule, as to the distinctive nature and qualities of legal and equitable estates, is true, but the extreme length has not, it is believed, gone to this point. Inheriting a system pefected and known, and our Legislature jealously refusing the courts the capacity to work that system by the grant of adequate equity powers, they were compelled either to ignore all trusts, or to do what could be done for them according to common law forms of procedure.

Thence followed the rule of Pennsylvania Jurisprudence. An equitable owner may have the same remedies and defences which he would have if his estate had been turned into a legal one. But this was in aid of the *cestui que trust*, not as a bar to his having the

legal title, if there were means to get it. If a case can be shown to the contrary, let it be produced. What an idle thing was the invention of the action to compel a conveyance by a conditional verdict. This action would never lie but on a perfect equitable title. Yet from our earliest judicial history, in all the cases, and they are pretty numerous, the defence suggested by this cause has never crossed the mind of counsel or court. It would have been thought very much as if a debtor should plead that he had an equitable defence because equity considers that as done which ought to have been done, and he certainly ought to have paid his debt.

What is the proposition of the learned Judge on which his argument is founded. Our law "treats all complete equitable titles as complete legal ones, where the persons named as trustees have no duty to perform, that requires the seisin and possession to be in them, and then our common law enforces the trust as a legal estate;" but the consequence from this, that the unhappy owner of the equity cannot have a legal title, because it is already one by operation of law, is certainly a violent wrenching of a rule adopted by necessity in aid of justice. What is a complete equitable title? It is that which lacks but a conveyance to be a legal one; that conveyance being a duty on the part of the holder. Now the very reason for what we call legal titles, is to have the existence of such a right put into form, not disputable as matter of evidence, nor uncertain as matter of effect. For this deeds were invented, and the statute of frauds passed. But equitable titles shade off in both these things from what is so certain, that a deed is a ceremony only, down to that about which no two men would chance to agree. Yet before the Judge can give the property to one or the other, he must decide that he has a complete equitable title. Surely no one can recover in equity on what is not, as to the other party at least, a complete equitable title. From the estate not vested under the statute of uses, because of the limitation to the feoffee's own use, down to that which arises ex malificio, where the scale is turned by the recollection of a single witness, where is the line to be drawn as to what constitutes a perfect equitable title. As soon, however, as protracted litigation has authorized the decree that the complainant has a complete one,

the court must stay its hand, because a legal title had vested by operation of law long before, viz: when the circumstances happened, which conferred an equitable title. Can it be said that this rule is confined to equitable titles complete by being evidenced by a deed or will? But what are the cases in which the rule, relied on as supporting the doctrine, has been laid down and applied. They are equitable titles arising from fraud, from misapplication of money, purchases from such parties with notice, and all the endless variety of cases falling under the head of trusts ex malificio, or by parol agreements. On what ground is it that these cases profess to go; simply in the language of Kuhn *vs.* Newman, that our law considers the equitable estate as the legal one (for the purpose of affording relief) not of preventing the perfection of the title. And what more complete equitable title exists, than that of a purchaser under articles who has paid the price, at the time agreed upon. Is he to have no deed? Yet if he has, what is equivalent in every respect, or rather "the result of all this, that devisees under a limitation in trust for them, take a legal estate as soon as they are entitled to have it;" how can he ask to have that bettered which is perfect. Yet no man in his senses would say that such a title is a perfect one, even according to Pennsylvania Law; if it were, what becomes of the rule that a deed in execution of the contract may vary that estate, and all the stipulations are merged in that deed; while if a legal title has passed the subsequent deed cannot vary the former—*Kenrick* vs. *Smith*, 7 W. & S. 41. And again, words of limitation are not required in a contract of purchase; it imports a fee simple. But a deed to a man and his posterity, so long as the River Delaware shall run, is but a life estate. Are we to introduce into conveyancing the distressing uncertainty which prevailed in the construction of wills, as to the quantity of the estate. What benefit accrues by thus dividing equitable estates into those which may and may not be perfected by conveyance of the legal title. And why deny to the cestui que trust the power of having the termination of the trust evidenced by a title deed; and what is of no little consequence, having such a title as will be recognized in the Circuit Court of the United States.

And on the other hand, is it not most inconsistent to see the courts so rigidly adhering to the distinction of legal and equitable titles in everything but land. Is not the assignee of a bond or debt the absolute equitable owner; may he not sue in equity in his own name. Nay, will not courts of law compel the assignor to permit his name to be used, and give the entire control of the action to the cestui que trust. Or is it meant judicially to extinguish this distinction also. What cases are cited for this.—1st. *Hemphill* vs. *Hurford*, 3 W. & S. 216. That on a bequest of money in trust for a person, sui juris, with a discretionary power of withholding it for three years, the legatee or his assignee may sue for it at the end of that time. The 2d, *Smith* vs. *Starr*, 3 Wharton, 62. That a trust for a separate use ceases on discoverture, and may be conveyed. No question was made as to this distinction of titles, nor could there have been any, because the legal title had actually passed; the point was, whether the cestui que trust could convey. The 3d, *Hammersley* vs. *Smith*, was the same point, on a bequest of money in trust; the action being an equivalent to a bill to compel payment by a trustee. All very good illustrations of the rule that trusts may be enforced through common law forms. Now let us look at some of the decisions to the contrary. Dicta are so numerous that but a few can be quoted, but their weight as evidence of the understanding of the profession on such a point as this, is enormous.

1. The distinction as to the right to rescind for mistake or misdescription, or to recover back purchase money for defect in title, depends on the fact of transfer of the legal title by conveyance having been made or not. *Lighty* vs. *Shorb*, 3 Penna, 447.

2. The holder of the mere equitable title, though perfected by payment of price and possession, may pledge that for another debt to the holder of the legal title, and a purchaser of his right is bound to take notice of it. *Keifer* vs. *Altman*, 3 Penna, 27; *Cahoon* vs. *Hollenback*.

3. The purchaser of a perfect equitable title is bound by secret trusts, if he chooses to permit the legal title to remain outstanding, and it is got hold of by the owner of the secret trust—*Kramer* vs. *Arthurs*, 7 Bar. 165; and this case is the more striking, because

the rule as laid down in Kuhn *vs.* Newman was so laid down in the court below by the same judge, and carried the case. For which cause the judgment was *reversed.* In accordance with this will be found *Chew* vs. *Parker*, 3 Raw. 338; *Beltzhoover* vs. *Darrah*, 16 S. & R. 238; *Chew* vs. *Barnett*, 11 S. & R. 389; the limitation probably being that stated in *Bellas* vs. *McCarty*, 10 W. 13, that the legal title is available only to fix with notice of the rights of the holder of it.

4. Where a conveyance is by bargain and sale, all limitations after that to the bargainee, are but trusts. *Slifer* vs. *Bates*, 9 S. & R. 166. Nor was this a dictum; it was the ground, and the only one, on which a limitation for life and an ulterior one to the right heirs of the tenant for life, were kept from uniting under the rule in Shelly's case. *Franciscus* vs. *Reigart*, 4 W. 98, reiterates this as settled so entirely that no authority is cited in support of the rule.

5. A trust (apparently naked) passes under general words of devise of the trustee's property. *Hunt* vs. *Crawford*, 3 Penna. 426.

6. So of a conveyance, it being declared by the court perfectly immaterial whether the trust was a naked or special one. *Huston* vs. *Wickersham*, 8 Watts, 522: *Heath* vs. *Knapp*, 4 Bar, 228.

7. The want of tender of a legal title within six years, bars the right of a vendor to sue under the statute of limitations. *Walters* vs. *Walters*, 1 Whart, 302. The distinctions between the two kinds of title, and the necessity for the legal one being recognized as precisely what it would be in the Queen's Bench in England.

9. To enable a use to be executed under a deed to A, to the use of B, the statute of uses and the recording acts, are deemed essential. *Sprague* vs. *Woods*, 4 W. & S. 195; without them the deed must operate in another manner to pass the legal title.

9. There being a perfect equitable title by devise, (a remainder in fee) an action for waste against the tenant for life must be brought in the name of the trustee; *Woodman* vs. *Good*, 6 W. & S. 173. Where the freehold is in trustees, actions against strangers must be brought in the name of the trustee. *Unangst* vs. *Shorts*, 5 Wht, 523.

10. The limit of the jurisdiction for the appointment of trustees, laid down by Kennedy J. in Carlisle's appeal, 9 W. 532, is based on the descent of a naked trust to the heir at law of the trustee.

Such are some of the decisions; the dicta are not the less striking.

It is erroneous, says Gibson C. J., to consider the two estates as the same but in form, *and then only*, for giving a remedy as a substitute for a bill; *Pennock* vs. *Freeman*, 1 W. 408; and this was the only ground for giving the remedy by partition to cestuis que trust, *Willing* vs. *Brown*, 7 S. & R. 468; which extends to equities resting on oral testimony. *Stewart* vs. *Brown*, 2 S. & R. 461.

I need not refer, says Gibson C. J. in *Coxe* vs. *Blanden*, 1 W. 535, to *Lodge* vs. *Simonton*, 2 Penna. 439, to show that to confound the legal with the equitable title, would confound our most settled distinctions, and throw our jurisprudence into irreparable disorder; and our books are full of instances in which the title depends on the distinction; and it is not too much to say, that an attempt to abolish it would shake our landed property to its foundation.

In *Pullen* vs. *Reinhard*, 1 Wht. 521, Kennedy J. recognizes the distinction as settled between trusts to permit another to receive, and those to receive and pay which are said (p 231, 2 *Casey*) to be equally executed.

When, therefore, we look at the nature of the doctrine, a fundamental law of the forms of title; at the numerous decisions based upon it; at the dicta of the learned judges, whose experience extends back nearly to our beginning as a nation; to the practice of our conveyancers, can it be possible that all were mistaken. Where is this to end; whose learning will solve the questions which will arise. It is like taking away a stone from an ancient foundation; how far the superstructure will be affected no sagacity can predict, and time only will develope, at the expense of the unfortunate inmates.

Already have two questions arisen, which startle practitioners. 1. How far can you take a title by contract and leave a right to a formal deed. 2. Who is to release ground rents where the devise