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Declarations of Trusts and the Statute of Uses

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Declarations of Trusts and the Statute of Uses

In *Neal* v. *Bryant*[1] plaintiff brought a statutory action to determine and quiet title to a parcel of land known as the "Leazenby land". Defendant claimed title as residuary devisee under the will of plaintiff's father, Joseph Bryant. Testator had executed the will under which defendant claimed on July 9, 1915, and had acquired title to the land in suit on January 25, 1916. When testator obtained the land, he did not go into possession himself, but put plaintiff in possession, telling plaintiff and other that the land was not his but plaintiff's. At all times thereafter plaintiff was possessed of the land. She asserted dominion over it just as if she were an obsolute owner, rented some of it and used other portions for her own benefit. In December, 1916, plaintiff wrote to testator asking him to advance her some money, but he, by letter, refused, stating: "I have given you the Leazenby land, and it is yours forever for your own personal benefit, and I think that is help enough now." Upon testator's death defendant claimed the land and plaintiff thereupon brought this action.

Defendant had judgment in the circuit court but the Supreme Court of Missouri reversed this decision. It was held that testator's letter to plaintiff was a declaration of trust, satisfying the statute of frauds; that plaintiff had been invested by testator with the entire beneficial interest in the land; and that testator merely held the legal title for the benefit of plaintiff.[2] This being the case, the court stated that, as the trust was passive, legal title passed to plaintiff under the statute of uses and that defendant gained nothing under the will.[3] Both points decided are important, interesting and worthy of full consideration.

1. (1921) 235 S. W. 1075.
2. 235 S. W. l. c. 1077.
3. 235 S. W. l. c. 1077.

I.
DECLARATIONS OF TRUST

A promise unsupported by consideration to hold property in trust for another is not a trust and is not binding. It is no part of a contract; nor is it a present gift of either the legal title or a beneficial interest in the property. The transaction differs in no material respect from other forms of promissory gifts and, unless it be later executed, no rights become vested in the intended beneficiary or donee. Equity, as a rule, just as much as law insists upon the necessity of consideration to make a promise binding and enforceable.[4] While the above is true, it does not follow that an owner is unable to make a gift of the beneficial interest in property, retaining himself the legal title in trust for the donee. This can be done and the authorities hold that when a donor expresses the intention to separate the legal title from the beneficial interest and to keep the former, while *presently* giving the latter, a valid trust is raised, even though the element of consideration is absent from the transaction. Whenever there is an intention to thus finally dispose of the beneficial interest, the gift is regarded as consummated and there is a valid and effectual declaration of a trust. It is not essential that technical words be used to bring about this result, but it should appear from what is said and done that the donor intended to give at once and has given the benefits to be derived from the property.[5]

4. *Harding* v. *Trust Co.* (1918) 276 Mo. 136, 207 S. W. 68, "Where the gift is imperfect, a court of equity leaves the parties where it finds them - -" *Lane* v. *Ewing* (1860) 31 Mo. 75, 86; *Henderson's Administrator* v. *Henderson* (1855) 21 Mo. 379; *Citizen's National Bank* v. *McKenna* (1912) 168 Mo. App. 254, 153 S. W. 521; *Brannock* v. *Magoon* (1910) 141 Mo. App. 316, 125 S. W. 535; *Museum* v. *Zeller* (1904) 108 Mo. App. 348, 83 S. W. 1021; *Smithwick* v. *Bank* (1910) 95 Ark. 463, 130 S. W. 166; *Barnum* v. *Reed* (1891) 136 Ill. 388, 26 N. E. 573; *Bennett* v. *Littlefield* (1901) 77 Mass. 294, 58 N. E. 1011; *Stone* v. *Russell* (1858) 12 Gray (Mass.) 266. See also *Dexter* v. *Macdonald* (1906) 196 Mo. 373, 95 S. W. 359; *Pitts* v. *Weakley* (1900) 155 Mo. 109, 55 S. W. 1055; *Ex Parte Pye* (1811) 18 Ves. 140; Perry, Trusts (6th ed.) sec. 97; 3 Pomeroy, Equity (4th ed.) sec. 996; *Drosten* v. *Mueller* (1890) 103 Mo. 624, 15 S. W. 967.

5. "But a settler possessed of the legal title may create a valid trust

Holding a trust to exist under the suggested conditions seems to be a sound decision. After all, the right to the beneficial use of property is a kind of a title (although merely equitable in its nature) and what more should be required to find a gift of such an interest than a present intention on the part of the giver to divest himself of all such interest therein and to vest the same

therein by a declaration that he holds the title in trust for the other person. A transfer of the title is not necessary." *Leeper* v. *Taylor* (1892) 111 Mo. 312, 324, 19 S. W. 955. In *Leeper's* case the court held (111 Mo. l. c. 324) that no consideration to support the trust was essential, but indicated that consideration might have been found in the transaction as it occurred. *Moulden* v. *Train* (1918) 199 Mo. App. 509, 204 S. W. 65; *Watson* v. *Payne* (1910) 143 Mo. App. 721, 128 S. W. 238; *Mize* v. *Bank* (1894) 60 Mo. App. 358; *Schumacher* v. *Dolan* (1912) 154 Ia. 207, 134 N. W. 624, citing and following *Leeper* v. *Taylor, supra; Krandel's Executor* v. *Krandel* (1898) 104 Ky. 745, 47 S. W. 1084; *Locke* v. *Farmers' etc. Co.* (1893) 140 N. Y. 135, 35 N. E. 578; *Ray* v. *Simmons* (1876) 11 R. I. 266. *Lane* v. *Ewing* (1860) 31 Mo. 75 expresses the same rule but does not actually decide the point. In *Northrip* v. *Bruge* (1913) 255 Mo. 641, 164 S. W. 584 it was held on the facts that there was no declaration of trust, but the court said (p. 654): "Neither is it requisite to be the valdity of such a trust (i. e. an express voluntary trust) that a third person should be designated as trustee. For the settler may constitute himself a trustee of a completed verbal trust of personal property * *." See also *Re Soulard* (1897) 141 Mo. 642, 43 S. W. 617; *Knapp* v. *Knapp & Co.* (1895) 127 Mo. 53, 29 S. W. 885; *Price* v. *Kane* (1892) 112 Mo. 412, 20 S. W. 609; *Woodford* v. *Stephens* (1873) 51 Mo. 443; *Taylor* v. *Welsh* (1912) 168 Mo. App. 223, 153 S. W. 490; *Murray* v. *King* (1911) 153 Mo. App. 710, 135 S. W. 107; *Goddard* v. *Conrad* (1907) 125 Mo. App. 165, 101 S. W. 1108; *Crowley* v. *Crowley* (1908) 131 Mo. App. 178, 110 S. W. 1100.

In *Zeidman* v. *Molasky* (1906) 118 Mo. App. 106, 94 S. W. 754 defendant persuaded plaintiff to come and work for him, promising to pay her for such services as she might render. It was agreed that the defendant should invest the amount of plaintiff's earnings and pay over the amount of the investment on plaintiff's marriage. Defendant did not account at such time and plaintiff sued. The court held that there was an express trust. The decision seems questionable. It does not appear that defendant declared himself to be a trustee, but rather that he agreed to set aside money as earned and to hold it in trust. There was not and could not have been a present gift of a beneficial interest. The theory of the decision is wrong, although the defendant probably should have been held liable.

in the beneficiary? If this intent exists and is clearly expressed, the gift by way of trust should be complete and the rights vested as desired. The statement should be taken as equivalent to a grant of the intended interest.[6]

Suppose, however, that A owns land and attempts to convey to B full and complete title by way of gift, but for one reason or another his attempt fails and title does not pass. Should a court

6. "It has been decided that upon an agreement to transfer stock the court will not interpose; but if the party has declared himself to be a trustee of the stock it becomes the property of the *cestui que trust* without more, and the court will act upon it." Lord Edlon in *Ex parte Pye, supra,* note 4, 18 Ves. l. c. 150.

Conceding that courts regard a declaration as sufficient to vest an equitable interest in the beneficiary, still the trust will not be enforced unless the Statute of Frauds is compiled with. The statute does not make a parol declaration invalid, but merely provides that a trust which touches and concerns real estate cannot be proved except by a written memorandum. In other words, the trust is good, even though the declaration be oral, but the *cestui* can be put to written proof in an action to enforce the same. The case under review stands for this proposition (235 S. W. l. c. 1076) and follows a long line of authority: *Mugon* v. *Wheeler* (1912) 241 Mo. 376, 145 S. W. 462; *Thomson* v. *Thomson* (1919) 211 S. W. (Mo.) 42; *Crawley* v. *Crafton* (1906) 193 Mo. 421, 91 S. W. 1027; *Heil* v. *Heil* (1904) 184 Mo. 665, 84 S. W. 45; *Phillips* v. *Hardenburg* (1904) 181 Mo. 463, 80 S. W. 891; *Mulock* v. *Mulock* (1900) 156 Mo. 431, 57 S. W. 122; *Curd* v. *Brown* (1898) 148 Mo. 82, 49 S. W. 990; *Hillman* v. *Allen* (1898) 145 Mo. 638, 47 S. W. 509; *Pitts* v. *Weakley, supra,* note 4 (*dictum*); *Rogers* v. *Ramey* (1896) 137 Mo. 598, 39 S. W. 66; *Price* v. *Kane* (1892) 112 Mo. 412, 20 S. W. 609; *Green* v. *Cates* (1880) 73 Mo. 115; *Woodford* v. *Stephens* (1873) 51 Mo. 443; *Mansur* v. *Willard* (1874) 57 Mo. 347; *Cornelius* v. *Smith* (1874) 55 Mo. 528; *Lane* v. *Ewing* (1860) 31 Mo. 75 (*dictum*); *Wolfskill* v. *Wells* (1911) 154 Mo. App. 302, 134 S. W. 51; *Forest* v. *Rogers* (1908) 128 Mo. App. 6, 106 S. W. 1105, (*dictum*).

The Statute of Frauds requires no written evidence of a declaration of trust touching personal property. *Wilhtuchter* v. *Miller* (1918) 276 Mo. 322, 208 S. W. 39; *Northrip* v. *Burge, supra,* note 5, (*dictum*); *Harris etc.. Co.* v. *Miller* (1905) 190 Mo. 640, 89 S. W. 629; *Moulden* v. *Train, supra,* note 5, (*dictum*); *Alexander* v. *Woodman, etc.* (1916) 193 Mo. App. 411, 186 S. W. 2; *Bank* v. *McKenna* (1913) 168 Mo. App. 254, 153 S. W. 521 (*dictum*); *Murray* v. *King* (1911) 153 Mo. App. 710, 135 S. W. 107; *Ewing* v. *Parrish* (1910) 148 Mo. App. 492, 128 S. W. 538; *Crowley* v.

of equity construe the transaction, which purported to be a conveyance of the legal title, as a declaration of trust? Is it proper to hold that because A desired to give all the title which he had in the land to B, that he intended, failing in this, to give the beneficial use to B and to retain the legal title himself? The leading case, perhaps, on this question is *Richards* v. *Delbridge*.[7] There, one D was a tenant of a mill and wished to give his interest in the leasehold and the business which he conducted thereon to plaintiff. To bring about this result, D endorsed on his lease, dated, and signed the following memorandum: "This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock in trade." The memorandum did not serve as a legal assignment of the lease because the statute required such an act to be done by deed, but plaintiff contended that the memorandum was a declaration of trust and that he was entitled to take as a *cestui que trust*. The court, however, held that plaintff took nothing as there was neither an assignment nor a declaration of trust. It was said, "for a man to make himself a trustee, there must be an expression of an intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary, or otherwise".[8] The court also seemed to fear that a decision that D's memorandum created a trust would establish a dangerous doctrine, "whereby every im-

Crowley (1908) 131 Mo. App. 178, 110 S. W. 1100; *Carrol* v. *Woods* (1908) 132 Mo. App. 492, 111 S. W. 885; *Pitts* v. *Weakley, supra, (dictum)*; *Zeidman* v. *Molasky, supra,* note 5; *Huetteman* v. *Viesselmann* (1892) 48 Mo. App. 582; *Kramer* v. *McCaughey* (1882) 11 Mo. App. 426. See *contra,* but overruled by *Harris etc. Co.* v. *Miller, supra, Mt. Calvary Church* v. *Albers* (1902) 174 Mo. 331, 73 S. W. 508; *State ex rel* v. *Hawes* (1903) 177 Mo. 360, 76 S. W. 653.

In *Rogers* v. *Rogers* (1885) 87 Mo. 257, there is a broad statement that trusts in lands require no written evidence. The trust existed in that cause because of fraud. Express trusts are within the Statute of Frauds but resulting and constructive trusts are not. See *Ferguson* v. *Robinson* (1914) 258 Mo. 113, 167 S. W. 447.

7. (1874) L. R. 18 Eq. 11.

8. L. R. 18 Eq. l. c. 15.

perfect instrument (i. e. grant or assignment) would be made effectual by being converted into a perfect trust".[9]

If a trust relationship is that which exists when a title is vested in or retained by one for the benefit of another,[10] there is no question as to the soundness of the decision in *Richards'* case on this point.[11] The donor in that case desired to part with his entire interest in the property. The transaction contemplated did not therefore resemble in any material way the creation of a trust. If the donor had wished to do this, his desire would have been to have kept the title and to have parted with only the right to use the property. Theoretically, therefore, and on this narrow basis the case is sound, and it is not surprising to find most courts agreeing with the principles there laid down.[12] But while most courts agree with this rule still, in some instances, imperfect gifts have been turned into perfect trusts. The courts have done this for the most part by not only finding an intention on the part of

9. L. R. 18 Eq.. 1. c. 15. Two earlier cases, *Richardson* v. *Richardson* (1867) L. R. 3 Eq. 686 and *Morgan* v. *Malleson* (1870) L. R. 10. Eq. 475, had been decided under similar circumstances for the donee, but Jessel, M. R. in *Richards'* case refused to follow this authority.

10. See Perry, Trusts (6th ed.) sec. 1. The definition, for present purposes, is accurate enough and generally accepted.

11. Possibly the donor's intentions might have been carried out on another theory. As to this see *infra* note 14 and text in connection therewith.

12. *Northrip* v. *Burge, supra,* note 5 (*dictum*): "If a settlement has failed for want of a sufficient conveyance when made, a court of equity has no authority to supply that defect by ordering a conveyance, or convert the imperfect settlement or gift into a declaration of trust merely on account of some imperfection. As the donor left the transaction so will the court leave it." *Goodman* v. *Crowley* (1900) 161 Mo. 657, 663, 61 S. W. 850 (*dictum*); *Knapp* v. *Knapp & Co., supra,* note 5 (*dictum*); *Lane* v. *Ewing, supra,* note 4 (*dictum*); *Bank* v. *McKenna,* (*supra*) note 6; "Equity does not lend assistance to voluntary dispositions of property while they are yet executory. If such dispositions are attempted in a mode which fails for want of compliance with some indispensable rule of law, they will not be carried into effect in another mode to which the rule may not be essential. For example, if a gift is attempted without a complete delivery of the property meant to be given, the intention to give will be frustrated, and a court of equity will decline to treat the transaction

the donor to ultimately give the legal title, but also an intention to give presently and in every event (and not merely as one of the consequences of a legal conveyance, or assignment) the beneficial interest in the property. Perhaps sometimes the facts have justified such a finding, but it is felt that other times they have not, and that some courts, while protesting to the contrary, have actually changed a transaction, which fell short of passing a legal title and was not intended to accomplish any other purpose, into a completed declaration of trust.

This seems to be true in *Neal* v. *Bryant*. The testator there said that he had given[13] the land to plaintiff but he had not actually done so. He considered the matter closed; that the land belonged to plaintiff; and that he had no further responsibility whatever. He thought as a result of what he had done plaintiff was the full owner of the land; not that she had certain beneficial interests therein by virtue of his having assumed certain obligations toward her with respect to a title retained by him. The case does not appear to be distinguishable from *Richards'* case and it is believed that no real trust was established.[13a]

While the writer has ventured to question the soundness of the decision under review on the ground that there was no valid declaration of trust, he does not believe that the result of the

as equivalent to a declaration by the would be donor to hold the property in trust for the donee." Goode, J., in *Pennell* v. *Ennis* (1907) 126 Mo. App. 355, 360, 103 S. W. 147 (*dictum*); *Godard* v. *Conran* (1907) 125 Mo. App. 165, 101 S. W. 1108. See also *Brannock* v. *Magoon, supra,* note 4. The cases in other jurisdictions are generally *accord*. See 3 Pomeroy, Equity, sec. 997, where the authorieties are collected.

13. 235 S. W. l. c. 1076.

13a. The court in deciding that there was an executed trust in *Neal* v. *Bryant,* cited *Watson* v. *Payne, supra,* note 5. There the alleged trustee being the grandfather of plaintiffs saved plaintiffs' mother's property from being lost through a sale to satisfy her debts. The grandfather converted the property into cash and stated that he held the cash less the amount of his expense for the benefit of plaintiffs. The Kansas City Court of Appeals held this constituted a declaration of trust. The trustee in that case stated with respect to the property (143 Mo. App. l. c. 726) as follows: "I got it all wound up in good shape, and I am going to take care of it - - - for the Page heirs - - - they are my grandchildren." It is sub-

decision is necessarily wrong or undesirable. Perhaps in a case of this kind, the donor, or those standing in his shoes, other than *bona fide* purchasers, should be required to convey or assign the legal title as intended to the so-called donee. It is believed that such a holding could be made without deciding that there was a trust. There will be found scattered through the cases a principle by means of which, quite frequently, a futile effort to bring about a legal result will be regarded as effective—as if the desired end had been accomplished and attained. Sometimes this doctrine finds its application in a decree for specific performance. Occasionally it is applied through what we, for want of a better name, call an estoppel. The doctrine is applied in cases where it would be unjust or inflict injury on an innocent party if the contemplated and intended legal result were not either decreed or regarded as having been brought to pass.

A vendor makes an oral agreement to convey land. The vendee goes into possession. The vendor will not be heard to say that the agreement is not binding. The arrangement was thought to be legally effective and will be so decreed.[14] A borrows money from B and purports to give a mortgage to secure the debt. The mortgage is defective as a legal conveyance. Yet equity will construe the transaction as a contract to give a mort-

mitted that there is a real distinction between a statement that one has given and a statement that one holds property for another. The first statement does not contemplate a retention of legal title for the benefit of another while the second does, and hence, amounts to a trust. In another portion of the evidence in *Payne's* case the trustee was said to have stated: "They (*i. e.* plaintiffs) are my grandchildren, and I am going to see that they get it, and after they become of age, why I will pay it over to them." This last statement was not a declaration of trust. If the decision were based on this evidence alone there would not appear to have been a trust. The statement first quoted, however, amounted to a clear and unequivocal declaration of trust. The decision was therefore proper and the case is distinguishable from the principal case.

14. *Young* v. *Montgomery* (1859) 28 Mo. 604; *Butcher* v. *Stapley* (1865) 1 Vernon 363. *Miller* v. *Lorentz* (184) 39 W. Va. 160, 19 S. E. 391, contains a clear discussion of the reasons for the rule and is worth reading.

gage and decree the desired legal result.[15] A promises to give B a parcel of land. The promise is unsupported by consideration and is not legally binding. Still, in some instances, if B believes the promise to be obligatory and acts upon it, B may require a conveyance from A. It is just that B's expectations should be realized.[16] A group of individuals in good faith attempt to incorporate. There is less than substantial compliance with the terms of the incorporation law. No one, save the state, will be permited to assert that the association has not attained legal incorporation. It would be unjust to attribute any other effect to the honest efforts of the associates.[17] In each of the foregoing illustrations the intended legal consequence was brought to pass (although it did not actually occur) because it was deemed proper and just to do so.

If A says to B, "I hereby give you my farm," and puts B into possession, there may be no impelling reason to prevent a court from requiring A to make good his expression of gift and decreeing a conveyance. The parties believed that there had been an effective gift. It is not so certain, if the evidence is clear and unequivocal, that B would be unreasonable in thinking that he had a right to the farm or that it would be just to deprive him of the expected gift.

In the case under review there is a great deal to be said in favor of plaintiff's contention that she had a right to the "Leazenby land". Testator desired to give it to her and thought that he had done so. She had acted on his representations more or less to her detriment. It might not be unreasonable to hold that she had a specifically enforceable equity, entitling her to a convey-

15. *Hamilton Trust Co.* v. *Clemes* (1900) 163 N. Y. 423, 57 N. E. 614; *Sprague* v. *Cochrane* (1894) 144 N. Y. 104, 38 N. E. 1000. See also *Holroyd* v. *Marshall* (1861) 10 H. L. C. 191.

16. *West* v. *Bundy* (1883) 78 Mo. 407; *Dozier* v. *Matson* (1887) 94 Mo. 328, 7 S. W. 268; *Seavey* v. *Drake* (1882) 62 N. H. 393.

17. *Finch* v. *Ullman* (1891) 105 Mo. 255, 16 S. W. 863; *Granby etc. Co.* v. *Richards* (1888) 95 Mo. 106, 8 S. W. 246; *Society Perun* v. *Cleveland* (1885) 43 Ohio. St. 481.

ance. Her right, however, should be predicated on this kind of an equity and not upon a non-existing declaration of trust.

Of course, it could be said in answer to the above suggestion that the law required certain formalities to perfect a passage of legal title. This is true. Law has often set up technical conditions and requirements, only to find equity brushing them aside and circumventing them. A possible answer to any such contention as this is the doctrine of part performance and the statute of frauds[18] and the specific execution of promissory gifts. Equity has sometimes proceeded in the "very teeth" of legal provisions, nullifying them because of the supposed existence of special and peculiar equities in the case under consideration. Perhaps the rules of law concerning gifts of property are sometimes too strict. Perhaps rigid compliance with them should not always be required. It is apparent that some courts feel this way about them. Otherwise there would not be more or less continuous effort to construe imperfect gifts as trusts.[19a] But, as has already been said, the attempted gift is not believed to be a trust and should be enforced if at all upon some other principles.

Suppose that A has a fund in a bank and desires B to have it in the event of his death; that A takes out a certificate of de-

18. See, *supra,* note 14.

19. See, *supra,* note 16.

19a. "The rule of law that delivery is essential to a gift, and also the rules as to what constitute delivery, have been rather strictly adhered to in equity, thereby defeating occasionally the plain purpose of donors. To avoid this result courts have found now and then that the real purpose was to settle the property in trust in favor of the alleged donee instead of to give to him outright." Goode, J., in *Pennell* v. *Ellis, supra,* note 12, 126 Mo. App. l. c. 361 (*dictum*). For other cases in accord with the holding in the case under review where the facts were similar see: *Morgan* v. *Malleson* (1870) L. R. 10 Eq. 475; *Richardson* v. *Richardson* (1867) L. R. 3 Eq. 686; *Lynch* v. *Rooney* (1896) 112 Cal. 279, 44 Pac. 565; *Rache* v. *George's Executor* (1893) 93 Ky. 609, 20 S. W. 1039; *Barkley* v. *Lane's Executor* (1869) 6 Bush (Ky.) 587. But see *Harding* v. *Trust Co., supra,* note 4. In *Goodman* v. *Crowley, supra,* note 12 A stated that she was buying land for B. After the purchase A stated that B was "running it now"; that those who wished to rent must see B. It was stated by way of *dictum* that there was no trust and that the gift would not be perfected.

posit and endorses it to B but does not deliver; that A states to B that the fund is B's on A's death; but that until then he (A) wants the interest on the money and the control of the fund. Should B, if he survive A, be entitled to the money? It has been held on substantially these facts in *Harris Banking Co.* v. *Miller* that B is entitled to the money as a *cestui que trust*.[20] It was said that A set aside the fund for B and by so doing constituted himself a trustee.[20a] The only difference between the *Harris* case and *Neal* v. *Bryant* is that in the former the donor attempted to presently give a right to enjoy on his death (a thing which cannot be done at law without delivery[21]) while in the latter the donor attempted to presently give a right to enjoy from the date of the atempted gift (a matter equally impossible at law without delivery).

There would seem to be no reason why the gift in either case should not be upheld upon the equitable principles above suggested unless there is a policy against its sustention. None is perceived in the case of the attempted and *established* gift *inter vivos*. But where the gift is to become effective, or it is attempted to establish it after the death of the donor, the case is not so clear. In the case where it is to take effect for the first time after the donor's death, the question might well be asked, should a man be able to give his property away in this manner except by a duly executed and published will? Is there not a policy firmly established in the law against such dispositions?[22] In the second case, namely, where it is sought to establish a prior gift after the death of the

20. (1905) 190 Mo. 640, 89 S. W. 629.

20a. The evidence showed that the deceased stated to the intended donee: "Now that is yours (meaning the certificate of deposit) but I want the use of it while I live." 190 Mo. l. c. 658. But most of deceased's statements were expressive of an intention to give when he died.

21. 190 Mo. l. c. 662, *et seq.* The cases all concede this proposition.

22. "The danger is great if such an attempt were to succeed; because then the result of such a transaction as this would be, that the solemn disposition of property which the law requires to be made in the shape of a will, would be entirely lost sight of, because this would be as good a disposition, or perhaps better than any will which could be made." *Warriner* v. *Rogers* (1873) L. R. 16 Eq. l. c. 353.

donor, there is a difficulty of much the same kind. It is relatively easy to manufacture evidence showing a gift after the donor is gone and cannot present his own evidence to the contrary. Apparently, however, some courts are not disposed to regard either of the above suggestions as controlling. At least, such transactions are being sustained from time to time as trusts.[23] If the courts have decided on this policy, there seems to be no obstacle to holding that the intended donee has a right to a conveyance or assignment.

II.

THE STATUTE OF USES AND PASSIVE TRUSTS

In *Neal* v. *Bryant* the court held that the trust was passive and for this reason the statute of uses put a title in plaintiff, the *cestui que trust*.[24] The case raises the question of the effect of the statute of uses on inactive trusts, that is, on trusts where no active duty in connection with the administration of the trust is imposed on the trustee. The statute was originally enacted in 1536 by the British Parliament[25] and was probably regarded as a part of the common law in the original English settlements in this country.[26] It was passed by the legislature of Missouri in substantially its original form in 1825[27] but was perhaps in force here from 1816. At that time a statute was adopted providing that the common law of England and appropriate statutes of the British Parliament, enacted prior to the fourth year of James I, should be the law of the land.[28] The meaning and purpose of the

23. See *Both* v. *Oakland etc. Bank* (1898) 122 Cal. 19, 54 Pac. 370; *Roche* v. *George's Executor,* and *Barkley* v. *Lane's Executor, supra,* note 19a.

24. (1921) 235 S. W. 1. c. 1077.

25. 27 Henry VIII, c. 10.

26. *Horton* v. *Sledge* (1856) 29 Ala. 478; 1 Perry, Trusts sec. 299. See also *Guest* v. *Farley* (1853) 19 Mo. 147.

27. R. S. 1825, p. 215, now sec. 2262, R. S. 1919.

28. 1 Mo. Ter. Law 436; *Guest* v. *Farley, supra,* note 26. See also Hudson, Land Tenure in Missouri, 8 Law Ser. Mo. Bul. 1. c. 8 *et seq.*

Missouri statute has been regarded as the same as that of the English statute and it has been construed in the same way.[29]

At the time of the adoption of the original statute in England, trusts in land as they exist and are understood today were not known to the law. There were, however, certain equitable interests in land which could be created and were sanctioned on equitable principles. A, having a legal title, could convey it to B to the use of C. C would have the right to enjoy the property without the legal title according to the use.[30] Also, A could, instead of conveying land to B, bargain and sell to the use of C with the same result.[31] In the last case the use would be effectively raised without transmutation of the legal title. There was considerable hostility to the use in land[32] and the main purpose of the statute was to destroy these interests, not by entirely abolishing them, but by converting the right of the beneficiary, whenever created, into a corresponding legal title.

To this end the statute provided in substance that whenever one stood seised of land to the use of another, the beneficiary should be vested with the legal title corresponding to the *quantum* of interest that he had by way of use.[33] For example, if A, having a fee simple, bargained and sold a use to C for C's life, the statute would give to C a legal life estate, and A would have a legal reversion.[34] The result of the statute, accordingly, was that the "use was transformed into a legal estate of the same size as

29. *Cornwell* v. *Wulff* (1898) 148 Mo. 542, 550, 50 S. W. 439; *Pugh* v. *Hayes* (1893) 113 Mo. 424, 21 S. W. 23; *Guest* v. *Farley, supra,* note 26.

30. 1 Tiffany, Real Property (2nd ed.) sec. 97; Bigelow, Introduction, Law of Real Property, 68 *et seq.* It should be noted also that where A enfeoffed B, B paying no consideration therefor, there was a use resulting to A. Tiffany, *supra,* sec. 97.

31. Tiffany, *op. cit.* sec. 97; Bigelow, *op. cit.* p. 70. See also *Guest* v. *Farley, supra,* note 26; *Farrar* v. *Christy's Adm'rs.* (1857) 24 Mo. 453.

32. The preamble to the English statute recites some "inconveniences" resulting from the existence of uses, such as uncertainty of title, loss of dower and curtesy, and loss to the crown of certain feudal incidents.

33. See, *supra,* note 25.

34. Tiffany, Real Property, sec. 99; *Lutwich* v. *Mitton* (1620) Cro. Jac. 604.

the use estate, the legal title of that amount being carried from the holder of the legal title to the holder of the equitable title, by operation of the statute".[35] But an equitable title could be carved out of an estate for years and would be sustained as such, because the statute was only operative where one stood *seised* for the use of another. Ownership of an estate for years does not carry the seisin.[36] Obviously, also, equitable interests in chattels personal could be created without being touched by the statute.[36a]

In certain instances there was a real need for equitable interests in land. Equity, being very much alive to this fact, soon began to strain in every way to bring it about that an owner could vest the beneficial ownership of land in one person, while granting to another or retaining in himself the legal freehold title. As a result of this effort, two exception to the operation of the statute of uses were developed. It was said that where an active duty was imposed upon the party seised for the benefit of another, the duty being in connection with the administration of the use, the statute was not applicable. In such cases the use was not converted into a legal title but was sustained as such.[37] However,

35. Bigelow, Introduction, Law of Real Property, 75.

36. *Slevlin* v. *Brown* (1862) 32 Mo. 176; *Ramsay* v. *Marsh* (1882) 2 McCord (S. C.) 252.

36a. *Fisher* v. *Fisher* (1920) 203 Mo. App. 45, 217 S. W. 845. In *Webb* v. *Hayden* (1901) 166 Mo. 39, 65 S. W. 760 and in *Newton* v. *Rebenack* (1901) 90 Mo. App. 656, the courts seemed to be under the impression that the statute did operate on equitable interests in chattels; but the opinion in each instance went off on another point. See, *infra,* note 37. But see Bogert, Trusts, p. 156.

37. Tiffany, Real Property, sec. 102; 3 Pomeroy, Equity sec. 984; *Shiffman* v. *Schmidt* (1900) 154 Mo. 204; 55 S. W. 451; *Simpson* v. *Erisner* (1899) 155 Mo. 157, 55 S. W. 1029; *Walton* v. *Ketchum* (1898) 147 Mo. 209, 48 S. W. 924; *Pugh* v. *Hayes* (1893) 113 Mo. 424, 21 S. W. 23; *Baker* v. *Nall* (1875) 59 Mo. 265; *Walter* v. *Walter* (1871) 48 Mo. 140; *Schoeneich* v. *Field* (1897) 73 Mo. App. 452. See also *Webb* v. *Hayden* and *Newton* v. *Rebenack, supra,* note 36a; *Meachem* v. *Steele* (1879) 93 Ill. 135, 145.

On the other hand, it is well established that the statute does change a passive use into a legal title. See, *supra,* note 35 and text in connection therewith. See also, *accord, Blumenthal* v. *Blumenthal* (1913) 251 Mo.

whenever the duties were finally performed and use became passive the statute would apply and from that time on the interest of the *cestui que use* became legal.[37a] Finally, it was held that if an owner created a use upon a use, the statute would only affect the first use and serve to vest title in the first *cestui que use*. The second use would remain as a use and the second beneficiary would would have only an equitable interest in the property.[38]

693, 158 S. W. 648; *Glasgow* v. *Mo. etc Co.* (1910) 229 Mo. 585, 129 S. W. 900; *Jones* v. *Jones* (1909) 223 Mo. 424, 123 S. W. 29; *Carter* v. *Long* (1904) 181 Mo. 701, 81 S. W. 162; *Ottomeyer* v. *Pritchett* (1903) 178 Mo. 160, 77 S. W. 62; *O'Brien* v. *Ash* (1902) 169 Mo. 283, 69 S. W. 8; *Walton* v. *Drumtra* (1899) 152 Mo. 489, 54 S. W. 233; *Cornwell* v. *Wulff* (1898) 148 Mo. 542, 50 S. W. 439; *Pitts* v. *Sheriff* (1892) 108 Mo. 110, 18 S. W. 1071; *Roberts* v. *Mosely* (1873) 51 Mo. 282.

37a. *Glasgow* v. *Mo. etc. Co., O'Brien* v. *Ash, Roberts* v. *Mosely, supra,* note 37. See also Perry, Trusts sec. 320 (p. 540).

In *DeLashmutt* v. *Teetor* (1914) 261 Mo. 412, 169 S. W. 34 there was a trust to convey. The court held that when the time for a conveyance, according to the terms of the trust, arrived, the statute would make the conveyance, and a grant by the trustee would be a work of "superrerogation". *Sed qu?* Was the trust or use passive? The duty of conveying was imposed on the trustee. This had led some courts to rule that title would not pass automatically to the beneficiary. See *contra* to *Teetor's* case, *Read* v. *Power* (1878) 12 R. I. 16; *Ayer* v. *Ritter* (1888) 29 S. C. 135. But it is believed that requiring a conveyance when the sole duty of the trustee is to convey is unduly technical. Under such conditions the trust might well be regarded as passive and the statute of uses as operative.

38. Tiffany, Real Property, 359; 3 Pomeroy, Equity, sec. 985; *Guest* v. *Farley* (1853) 19 Mo. 147. It was held in *Doe* v. *Passingham* (1827) 6 B. & C. 305 that if A made a *legal* conveyance to *B's* own use to the use of C that a trust would be raised; that there was a use upon a use. Of course in reality there was only one use, and the title should have been carried to C (the first *cestui que use*) with the aid of the statute.

In *Blumenthal* v. *Blumenthal, supra,* note 37, a grantor, "granted bargained and sold" in trust, the trust being passive. The court held (251 Mo. l. c. 703) that no duty was imposed upon the trustee and that therefore "title passed through him like water through a sieve and became immediately vested in the parties of the third part (*i. e.* the beneficiaries) under the statute of uses, - - -." The court gives the matter no detailed consideration, but it would appear that the grant to the trustees must

Under the last mentioned rule, if A bargained and sold a use to B to the use of C, or if he conveyed to T to the use of B to the use of C, the result in either case would be that B would have the legal title. C's interest would be equitable as in the old days before the passage of the statute. The above described equitable interests in land have survived and escaped the statute and have existed until this time under the name of trusts. It would seem then that the statute of uses does not affect trusts in land. They are interests which have escaped from the statute.

Under the interpretation of the courts the statute is not aimed to affect *real* trusts in any way but its purpose is to kill all equit-

have been considered not as operating to convey a title by way of use, but rather as serving to pass *legal* title directly to the trustee under sec. 2787 R. S. 1909 (now sec. 2174 R. S. 1919). It has been shown that the statute of uses does not affect in any way uses upon uses. Unless the conveyance in *Blumenthal's* case was a *legal* grant, there was a use upon a use and title would not have passed through the trustee to the *cestuis*. See, *supra*, *Guest* v. *Farley*.

The writer wonders whether at this time in view of the provisions of sec. 2174, R. S. 1919, it is possible to raise a use without transmutation of possession (*i. e.* by bargain and sale or covenant to stand seised)? That section of the statute provides that a *legal* conveyance of land may be made by deed "without any other act or ceremony". If A bargains and sells to B or to the use of B, or if he covenants to stand seised to the use of B, will not the court hold that such a written instrument will serve to pass a legal title and not merely a use? There may be some question in the case of the covenant to stand seised. Section 2180, R. S. 1919 provides for the words "grant, bargain and sell" as the technical words in a legal conveyance implying covenants for title. It would seem as if a court would be practically compelled to regard a deed of bargain and sale as operating to convey a legal title and not to raise a use.

It is interesting to note in this connection *Abbott* v. *Holloway* (1881) 72 Me. 298. There a conveyance could have operated as either a bargain and sale of a use or a covenant to stand seised; yet the court held that it would operate to convey a legal title under the conveyancing statute. That statute provided that "a person - - - may convey - - - by a deed to be acknowledged - - '.' (72 Me. l. c. 302. See also *O'Day* v. *Meadows* (1905) 194 Mo. 588 l. c. 621, 92 S. W. 637, 112 Am. St. Rep. 542.

In 3 Pomeroy, Equity, p. 2140 (note) the learned author in discussing this question says: "By modern stautes in many, if not most states, deeds of land operate as grants to convey the entire legal estate and seisin by

able interests in land other than trusts. It is therefore technically incorrect to speak of the statute as operating on actual trusts. But if we mean by a trust the old use in land, and perhaps any other equitable interest similar in its nature to the old use, it will be proper to say that the statute will execute it, if it is passive or whenever it becomes passive.

For some time after the enactment of the statute of uses no equitable interests in land existed except the trusts heretofore enumerated. In the course of time, however ,new interests of this nature were devised and created. In 1565 a covenant to stand seised to the use of another was sustained in *Sharington* v. *Strotton*.[38a] Still later a declaration of trust was sustained.[39] Now while these transactions raised equitable interests, if anything, they were not uses which were recognized at the time of the adoption of the statute. What should the court have done with such interests? Should it have said that the interests were within the meaning of the statute and affected thereby unless active? Or should it have held that the statute was intended to be limited in its operation to only those uses in land which were known and recognized at the time of its adoption? It would not have been surprising to have found the courts adopting the latter interpretation and narrowing as much as possible the statute's field of of activity. This was not done. Instead, we find the court dealing with the case of a covenant to stand seised as if a use had been raised, holding that the covenantee's interest was converted into a legal title.[40] Placing a narrow construction on the statute did not seem to occur to the court. It held as a matter of course,

force of the words transfer, - - - and it is a misapprehension, in the face of such legislation, to regard any deeds in these states as transferring the legal estate by virtue of the statute of uses. To say, therefore, in most of our states that a deed of bargain and sale raises a use which the statute of uses executes, and that where a use or trust is expressly limited by a deed of bargain and sale, it is not executed by the statute, are, as it seems to me, wholly incosistent with the simplicity of the law as now established by statute throughout the larger part of the United States."

38a. Plowd. 298.

39. See, *supra,* note 5 and text in connection therewith.

40. *Sharington* v. *Strotton, supra,* note 380.

once it was determined that the covenant to stand seised raised an equitable interest, that such interest was a use and was executed.

Sharrington v. *Strotten*[41] was an early authority allowing the courts to interpret the statute as acting not only upon uses in land as they existed at the time of the original statute, but also on all other equitable interests in land created, after the statute, which have the essential elements of a passive use, as such an interest was at that time understood. Such a ruling would seem to be right. The reason back of the adoption of the statute was a policy against upholding a situation which resembled the old use. The policy opposed a separation of the legal freehold title and the beneficial use therein, unless there were active duties thrust on the legal owner in connection with the administration of the use. It should make no difference when such a transaction first arose. The policy, if there is any justification for its assertion, should be applied uniformly whenever the state of facts to which it is applicable presents itself. For these reasons the rule in *Neal* v. *Bryant* is sound.[42]

The problem still remains as to what should occur in the case of a real trust which is passive. Suppose that A bargains and sells land to the use of B and his heirs in trust, nevertheless, to

41. *Supra,* note 38a.

42. The statute of uses has been applied to devises in Missouri and a title held vested in the beneficiary, *Carter* v. *Long, supra,* note 37. The statute of uses, however, was passed before the statute of wills and was originally therefore not applicable to devises in trust. The English decisions would hold today that the statute did apply on the ground that the testator intended the devise to be within the operation of the statute. "- - - It has been settled that a gift to trustees in trust to permit a man to take the rents during his life does not give the legal estate to the trustees without more. It has been treated as analogous to an executed use, not on the ground that the statute of uses directly applies to wills, because the statute was passed before the statute of devises, but upon this ground, that the will showed an intention that the same rules which the statute of uses made applicable to settlements of real estate should be applied to the gifts or devises of wills. It was therefore an index of intention and nothing more. - - - On the same principle when a man gave real estate to the use of A upon trust for B, it was held that A took the legal estate, the language of conveyancers in settlements to which the statute of uses

pay the rents and profits to C during C's life. If the deed of bargain and sale does not operate under a modern conveyancing statute to convey a legal estate to B,[43] B will be a trustee. He is the first *cestui que use* who acquires a title with the aid of the statute of uses. C will be a *cestui que trust* whose interest is simply equitable in its nature.[44] What *quantum* of estate will B get? What will happen to the legal title at C's death when the trust will be fully accomplished? If the words of the grant were taken literally, B would gain with the aid of the statute of uses a fee simple and on C's death, even though the trust were terminated, B would still have the legal title. It is certain that in this case the statute of uses will not aid to divest B of the title because it exhausted itself in executing B's use at the trust's inception.[45] The courts have for the most part avoided this consequence by holding that B took as trustee merely an estate for the life of C. It is said that while A conveyed a fee to B, still he could not have intended that B should acquire an estate of any greater duration than would be essential for carrying out and administering the trust.[46] The same rule usually should be adopted and applied in

applies being so used in the will as to amount to an expression of intention that the same mode of constructions should be adopted." Jessel, M. R. in *Baker* v. *White* (1875) 20 Eq. l. c. 171. See also *Re Tanqueray-Willaume* (1881) 20 Ch. Div. 465.

43. See, *supra,* note 38, where it is suggested that deeds of bargain and sale will probably operate today as legal conveyances and not to raise uses.

44. See, *supra,* note 38 and text in connection therewith.

45. See, *supra,* note 38.

46. *McBrayer* v. *Cariker* (1879) 64 Ala. 50; *West* v. *Fitz* (1884) 109 Ill. 425; *Young* v. *Bradley* (1879) 101 U. S. 782, 25 L. Ed. 1044. See also *Cleveland* v. *Hallett* (1850) 6 Cush. (Mass.) 403 and *Gibson* v. *Montfort* (1750) 1 Ves. sr. 485; Bogert, Trusts, p. 566; Perry, Trusts, sec. 312. In this connection, it is interesting to note, that if the trust requires for its due execution a larger legal estate than that granted to the trustees, the courts will by implication increase the *quantum* of title given. Perry, Trusts, sec. 312. See also, accord, *Cleveland* v. *Hallett* and *Gibson* v. *Montfort, supra.*

The English decisions have been more conservative in adjusting the title of the trustee to meet the needs of the trust. It has been held that if by a deed an estate of inheritance is given to the trustees that it will

the cases of trusts of chattels real and personal.[47] So, in this class of cases very generally it is not possible for the trustee to keep the title to the trust property after the ending of the trust. A title for such a period of time is said to be all that was given to the trustee. After the trust is terminated the legal title passes on to those beneficially interested in the trust *res*.

Terminating the trustee's title with the accomplishment of the trust probably does carry out in most instances the intention of the creator of the trust. In any event such a contsruction of the transaction is desirable. If the trustee's sole function is to hold the title for another and at another's command, he serves no useful purpose. It is better, if possible, to place the title in the party having the exclusive beneficial interest. Naturally, however, this construction often has the effect of nullifying technical words of limitation. It cuts down, for example, in the case supposed a clearly conveyed fee to a life estate. In the case of a trust in land, however, no other possible objection to the application of the rule is seen. This is not a serious one.

When it comes to a trust of a leasehold estate or of chattels personal possibly there are some further technical objections in the way of such a construction. There is authority holding that there can be no reversion following a grant of a life interest in a chattel either real or personal.[48] It has been stated that if A grants to B a life interest out of a leasehold or a chattel personal, B has the entire title and A has nothing left in himself. If this be true, it cannot be said consistently with this proposition that where B is the trustee of such an interest for the life of C, his

not terminate sooner even though the trust has been carried out and brought to an end. *Lewis* v. *Rees* (1856) 3 K. & J. 132. But see *Beamont* v. *Salisbury* (1854) 19 Beav. 198; Perry, Trusts sec. 319. In the case of wills, the courts were always willing to give effect to the supposed intention of the testator, and to either enlarge or contract the legal title given the trustee according to the needs of the particular trust. *Gibson* v. *Montfort, supra,* note 46; Perry, Trusts, sec. 319.

47. *Comby* v. *McMichael* (1851) 19 Ala. 747. See Perry, Trusts, section 311, where it is stated that there must be a delivery of a chattel personal by the trustee before title will pass to the party entitled to the beneficial use. *Sed qu?* See, *infra,* note 49 and text in connection therewith.

48. Gray, Rule against Perpetuities, section 807 *et seq* and section 822.

title as trustee ends with C's life. But again the rule is technical and there is other authority, which appears to be better, allowing a reversionary interest in all chattels not of a consummable nature.[49] It is therefore urged that a decision that the trustee's title to personal property ends with the trust is proper.

While, as already noted, some authority denies that there can be a reversionary interest in chattels, following a life interest therein, the rule is practically uniform to the effect that personal property can be limited over by will on the death of a so-called life tenant. The limitation will take effect as an executory bequest.[50] This being the case, most courts are free to hold that a testamentary trustee's title will come to an end with the accomplishment of the trust.

It will occasionally happen that land will be bargained and sold to B and his heirs in trust for C and his heirs, and the deed will operate by way of use and not to convey a legal title.[51] If no duties as a trustee are imposed on B the question will be, will B keep the title, or will it come to C without a legal conveyance? The same problem will be met in every case where there is a trust created which is passive and not within the operation of the statute of uses. This will be the situation in all cases of uses upon uses in land, and trusts of personal property, including trusts in lease-hold interests. It would appear that in this type of case the title is in the trustee and will remain there until conveyed away.[52] While it will be the duty of the trustee to place the title in the *cestui que trust,* still, as no statute serves to fulfill this duty, an act of conveyance should be essential to bring about its performance.

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49. Gray, *op. cit.,* sec. 842. Anonymous (1802) 2 Haywood (N. C.) 161; *Eyres* v. *Faulkland* (1697) 1 Salk. 231.

50. *Manning's Case* (1609) 8 Co. 94 b; *Re Tritton* (1889) 6 Morrell, Bankruptcy Cases, 250.

51. See, *supra,* note 38.

52. See *Ringrose* v. *Gleadall* (1912) 121 Pac. (Cal. App.) 407; *Wooley* v. *Preston* (1884) 82 Ky. 415; *Sears* v. *Choate* (1888) 146 Mass. 395; *Hill* v. *Hill* (1911) 90 Neb. 43, 132 N. W. 738. See also *Rector* v. *Dalby* (1902) 98 Mo. App. 189, 71 S. W. 1078; Perry, Trusts, sec. 520.