No. 14517

Supreme Court of Illinois

Nicoll

vs.

Ogden et al

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. ~~4~~7

~~Nut~~

Nicoll

vs

Ogden

1868

14517

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SUPREME COURT,

APRIL TERM, 1863.

FRANCES B. NICOLL,

vs.

WILLIAM B. OGDEN *et al.*

PETITION FOR REHEARING.

Filed May 12. 1863

L Leland clk

To the Honorable Justices of the Supreme Court of the State of Illinois.

Your petitioners, William B. Ogden, Mahlon D. Ogden, Edwin H. Sheldon, Charles Butler, Eliza A. Butler, James D. Wilson, and the Chicago Land and Dock Company, would respectfully represent that they are the appellees in a cause lately depending in said court, wherein Frances B. Nicoll was the appellant, which was heard at the term of said court, held at Ottawa, on the   of April, 1862, and taken under advisement, and the opinion of the court filed on the 21st day of April, 1863. Your petitioners respectfully ask that a re-hearing of said cause may be ordered by your Honors.

It is manifest to the petitioners that the court in considering the case has overlooked some of the vital points of the controversy between the parties. Those points are so carefully and exactly presented by the bill and answer, that it was deemed unnecessary by counsel to elaborate points not presented by either. The bill does not claim that Edward A. Nicoll became seized of an equitable estate of inheritance by virtue of the deed of April 1, 1842, from Charles Butler to Orsamus Bushnell, and Edward A. Nicoll, and it is not probable such a claim will ever be successfully asserted. The bill asserts that, *by the declaration of trust*, dated April 12, 1842, Nicoll *became* and was seized of an equitable estate of inheritance in six-eighteenths of an undivided half of the "Hunter property," (Record, page 4,) and under this allegation, it was not deemed important to show that he did not become seized of such estate in some other manner. The precise point submitted for your Honors' decision, was, whether the interest which Nicoll acquired *under and by virtue* of the declarations of trust, or either of them, was an equitable estate whereof he was seized in his lifetime.

By an arrangement between the counsel, a *pro forma* decree was rendered in the court below, for the purpose of obtaining a decision upon that point, as the rights of the parties would be thereby settled; but unfortunately the decision made by the court is of no practical importance, as it does not determine the point in dispute. If it becomes material, it can be shown that the deed of April 1, 1842, and the declaration of trust of April 12, 1842, were delivered and became operative at one and the same time; and the same is probably true of the declaration of April 25, 1842. But proof upon these points was not material under the allegations of the bill. In the case before your Honors, which has been remanded to the court below, it is manifest from an inspection of the bill, that the complainant cannot proceed without making the devisees of William E. Jones, deceased, parties to her suit, and thus the whole case is still open. The counsel of the respective parties understood this feature of the case before the appeal was taken, but it was deemed advisable to waive, for the time being, considerations of practice, in order to obtain a decision from the court of last resort upon the points really in controversy between the parties. These remarks are made with a view of calling attention to the fact, that the opinion of your Honors leaves the parties, so far as a determination of their rights is concerned, precisely where they were when the litigation commenced. As before remarked, the true and only question in controversy between the parties, is the true construction of the two declarations of trust mentioned in the bill, and their legal operation. In a former argument, the latter branch of the question was, for convenience, first noticed. (Beckwith's Brief, pp. 9, 10.) It was not deemed necessary to elaborate a point so well settled as the legal operation of a declaration of trust. The rule was stated with a reference to the authorities, but it is manifest that this feature of the case was overlooked by the court. For convenience the appellees will quote from Hill on Trustees, what he says upon the subject. He says, (page 56):

"It will be observed that the 7th section merely requires that the trust should be *manifested and proved* by writing; and upon the construction put upon these words it has been decided, that a trust of land may be still effectually *created* by parol; and in order to satisfy the statute, it will be sufficient to show by written evidence the existence of the trust. [f] This distinction, although at first sight it may appear of little moment, has been attended by consequences of considerable importance.

"If the trust were considered to derive its existence *ab initio* from the written declaration, the trust estate could not form part of the disposable property of the *cestui que trust*, previously to the execution of that declaration; and, moreover, up to that time, it would be liable for the acts and encumbrances of the ostensible owner. But now the declaration, when made, has relation backwards to the time of the creation of the trust, of which it is the evidence, and consequently gives effect to all intermediate acts of disposition made by the *cestui que trust*, between the declaration of the trust and its actual creation; while it defeats the rights which parties claiming under the trustee might have otherwise acquired. This is, of course, subject to the protection always given in equity to persons in the situation of *bona fide* purchasers for valuable consideration without notice.

"Thus where a freeman of London purchased real estate in the name of another person, without any trust being expressed at the time, and the freeman died, having devised the estate, and *after his death* the trustee declared that he held in trust for the freeman; this declaration was held good, so as to entitle the devisee in opposition to the widow, who claimed the estate by the custom of London. [g]

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[f] *Forster* v. *Hale*, 3 Ves. 707; S. C., 5 Ves. 308; *Randall* v. *Morgan*, 12 Ves. 74.

[g] *Ambrose* v. *Ambrose*, 1 P. Wms. 322.

"So, where a copyholder made an absolute surrender to *A*, and died; and *after his death A* admitted that the surrender was made to him in trust for the surrenderor, and after his death, for the purpose of his will; the devisees under the copyholder's will, and not his customary heir, were held to be entitled. [h]

"On the same principle in a case where a lease was granted absolutely to a person, and the grantee afterwards became bankrupt, and *subsequently to his bankruptcy* made a declaration that the lease had been granted to him as a trustee for another person; it was held by the Vice-Chancellor, and the decision was affirmed on appeal by Lord Lyndhurst, that the assignees of the bankrupt were not entitled to the lease. [i]"

So Tiffany & Bullard, in their late work on "Trusts and Trustees," page 353, say:

"This, then, gives rise to a distinction between the *act* creating the trust, and the *written declaration* by which that *act* or *intent* is "*manifested and proved;*" because the creation of the trust might precede the making of the written declaration. This difference of time between the creation of the trust and making the written declaration thereof, has given rise to distinctions of considerable importance. The question to be considered was, whether the trust derived its existence so as to form a part of the disposable property of the *cestui que trust* from the time of its original creation, or from its written manifestation. If it only derived its legal existence from the written manifestation, then, up to that time, it would be liable for the acts and incumbrances of the ostensible owner. [1] But, finally, the courts have decided, that the written declaration relates back to the time of the original creation of the trust, and so they give effect to all the intermediate acts of the *cestui que trust*, and thus [2] defeat the

[h] *Wilson* v. *Dent*, 3 Sim. 385.

[i] *Gardner* v. *Rowe*, 2 S. and St. 346; S. C., 5 Russ. 258.

[1] Hill on Trustees, 56.

[2] *Ambrose* v. *Ambrose*, 1 P. Wiliams, 322; *Wilson* v. *Dent*, 3 Sim. 385; *Gardner* v. *Rowe*, 2 S. and St. 346; S. C., 5 Russ. 258; but see *Morgan* v. *Randall*, 12 Ves. 74.

rights which parties claiming under the trustee might have otherwise acquired, except to *bona fide* purchasers, for a valuable consideration, without notice."

This well established rule in regard to the legal operation ot declarations of trust, was invoked in aid of the construction to be given to the declarations in this case declaring and defining the nature of Nicoll's interest. It was conceded that prior to April 1, 1842, his interest had the character of personalty, and as a part and parcel of the agreement to change its character, the terms and condition upon which such change should take place were agreed upon between the parties in interest. It is evident from the authorities above cited that any declaration in writing made by Nicoll would be evidence against him, and those claiming under him, as to the terms and conditions upon which he was to receive his interest in its reconverted character.

Written documents of any description signed by the trustee are evidence against him of the terms and conditions upon which he holds the property.

Tiffany & Bullard on Trusts and Trustees, p. 355.
Hill on Trustees, p. 61.

When Nicoll conveyed to Anderson on the 31st day of May, 1842, (Record, pp. 50 and 51,) he clearly and distinctly defined the nature of the interest thereby conveyed. He first declares that his interest had been what he was entitled to under the certificate issued by Charles Butler, dated July 1, 1835, which was, on *the said* 31*st day of May*, 1842, canceled and surrendered, in consideration of the conveyances from Butler to Ogden and Nicoll and Bushnell; and he then authorized and empowered Anderson to receive the conveyance of the four-eighteenth parts of the premises conveyed in and by said deed to Bushnell and Nicoll, *whenever* partition thereof should be effected pursuant to the trust thereby created.

No language could more plainly express the idea that the trust of Nicoll and Bushnell was created to make a partition, and that the beneficiaries were to be entitled to their respective shares whenever such partition was made, and not until then.

The declaration of trust, dated April 12, 1842, declares, in substance, that the trustees were to hold the property until partition should be made of the same, and that such partition should be made, if practicable, within six months from that time. If this declaration of trust relates back to the execution of the deed, as it clearly does, then it is evidence of the trusts thereby created. The law will not prescribe the terms and conditions of the trust, where it is manifested by a written declaration of such terms and conditions. The trustees, therefore, in contemplation of law, never held the property for the beneficiaries absolutely. In contemplation of law, at the time the trustees agreed to hold the property, the beneficiaries agreed that they should hold it until partition was made, and that then conveyances should be made to each party of his divided interest. Although it is true that all of the beneficiaries might have joined together and have had the property conveyed to them as tenants in common, yet no one of them had a right to a conveyance of the legal title to an undivided interest; and such a conveyance could not have been compelled in a court of chancery. The trustees could not have been compelled to have conveyed to one of the *cestuis que trust* his undivided share, and continued the trust for the other beneficiaries. It was therefore a condition precedent to Nicolls' receiving his share, that a partition should be made, or that all of the beneficiaries should come to a new agreement by which the contemplated partition should be dispensed with.

Hill on Trustees, p. 395.
Goodson v. *Ellison*, 3 Russ. 593.
Hodgson's Settlement, 4 Eng. L. and E. 182.

If the declaration of April 12, 1842, were ambiguous in its terms, it was clearly competent for all of the parties in interest to remove the ambiguity. This the parties undertook to do. They did not undertake to create a new trust in regard to the terms upon which the property should be held, but simply to declare more fully the terms and conditions of the one already created. Now, when it is considered that these declarations of trust are mere evidence and nothing more, it will be perceived that the last mentioned declaration is as good evidence as the first one, and that they are both to be considered together in determining what the rights of the beneficiaries were. Thus considered, and giving to them their well-established legal operation, the appellees believe that Nicoll was not seized of an equitable estate to which his wife's right of dower attached. The perusal of your Honors' opinion has satisfied the appellees, that some of the considerations before mentioned have been overlooked by your Honors, and they therefore respectfully ask that the case may be re-heard.

WILLIAM B. OGDEN ET AL.,

By C. BECKWITH,

Their Attorney.

47

SUPREME COURT,

APRIL TERM, 1863.

FRANCES B. NICOLL,

— VS. —

WILLIAM B. OGDEN, ET. AL.

Reply to Petition for Re-hearing.

ARRINGTON & PEABODY.

Beach & Barnard, Print, 14 Clark st.

Filed May 14, 1863

L. Leland Clk

FRANCES B. NICOLL,

VS.

WILLIAM B. OGDEN, ET. AL.

If the petition for a re-hearing, in this case, had not involved a singular discourtesy against the authority of all precedent, by interposing circumstances, real or imaginary, *dehors* the record, we should have tendered no word in reply. For, we do not, in the least degree, doubt the entire competency of the court to perform the easy task of maintaining its own opinion—an opinion not uttered in haste, but deliberately announced after long consultation; and one, too, as cogent in its logic as it is elaborate in its form.

Since, however, the learned counsel has proffered an appeal to extraneous matters, we beg leave to criticise very briefly, not only his array of foreign facts, but also his unaccountable misconstructions of the record itself, including the opinion of the court.

First. The petition sets out with a strange misconstruction of the bill. It says: "The bill does not claim that "Edward A. Nicoll became seized of an equitable estate "of inheritance by virtue of the deed of April 1, 1842. "The bill asserts that, by the declaration of trust, dated "April 12, 1842, Nicoll became and was seized of an equitable estate of inheritance," &c. "And under this allegation, it was not deemed important to show that he did

" not become seized of such estate in some other manner." (Petition, p. 1.)

And hence, the learned counsel argues, that "the precise " point submitted," to this court, " was whether the inter- " est which Nicoll acquired *under* and *by virtue* of the " declarations of trust, or either of them, was an equitable " estate whereof he was seized in his lifetime." (Petition, p. 2.)

This is the primary mistake in the petition. And from this error arises the thick and blinding fog which diffuses itself over all the subsequent reasoning.

From this assumption, the counsel infers that the court altogether failed to grasp the true point in controversy; and "that the opinion of your honors leaves the parties, so " far as the determination of their rights are concerned, " precisely where they were when the litigation com- " menced." (Petition, p. 2.)

But can the assumption itself, which is to sustain so grave a charge, be justified by any semblance of assertion in the bill? The part of the bill adduced by the counsel for that purpose, is in these words:

" And your oratrix submits that by the last-mentioned " declaration of trust, the said Edward A. Nicoll, her late " husband, became and was seized of an equitable estate " of inheritance in six-eighteenths of the said undivided " half of the Hunter property, so vested in the said Nicoll " and Bushnell as aforesaid, and that she is entitled to her " dower in the same." (Record, p. 4.)

The learned counsel calls that " an allegation," or " averment," and treats it as the predication of a fact upon which to hang a variance. He has thus totally misapprehended the legal, as well as the logical, character of the sentence. It is not the statement of a fact at all, but the submission of a matter of law to the court. For, the legal effect of a written instrument is certainly a matter of law; but the sentence in question, if it affirms anything, only affirms the legal effect of the declaration of trust, which had just before been presented in the bill *in haec verba.* Therefore, it affirmed only a matter of law.

Hence, too, the sentence was wholly unnecessary; because no evidence could be offered, in relation to it, either by way of proof or disproof.

"The best test of what are proper averments of facts in a " bill or answer is, whether they are such matters as a wit- " ness may be called upon to prove, or the truth of which " must be established by evidence to enable the court to " act; if they are not, then such averments are mere prin- " ciples of equity, or some of those public and established " facts, of which the court is bound to take judicial notice " without any proof."

Canal Co. vs. *Railroad Co.*, 4 Gill & Johns., p. 1; cited in Lubes Equity Pleading, p. 24, note 1.

Could a witness have been called to prove that "by virtue of the declaration of Trust," referred to, Nicoll became seized of an equitable estate of inheritance?" The learned counsel will not say so. No lawyer will say so. Therefore, the averment was unnecessary, and could have no effect in the case. Indeed, it is a subject of astonishment how any tyro in jurisprudence, much less its *facile princeps*, could be led astray by such a legal *ignis fatuus;* and more especially when it is considered that, before introducing the sentence submitting the proposition of law, the bill had stated all the principal facts, and, among the rest, the substance of the deed of April 1.

Moreover, the very sentence which has caused the counsel so much inconvenience and error, contained another submission, as to a matter of law, though he seems to have forgotten it in his petition—namely, that the complainant "is entitled to her dower" in the Hunter property, and without any discrimination as to the particular instrument by which she became entitled. (Record p. 4). And the same submission is repeated subsequently. (Record p. 8). Both statements, however, were unnecessary.

Second. The next point in the petition, to which we will call the attention of the court, is the introduction of an imaginary fact. It is alleged in these words: "By an arrangement between the counsel, a *pro forma* decree was rendered in the court below, for the purpose of obtaining a decision upon that point, as the rights of the parties would be thereby settled." The counsel alludes to the statement made in the preceding sentence, that the only question for decision was, "Whether the interest which Nicoll acquired under and by virtue of the declarations of trust, or either of them, was an equitable estate whereof he was seized in his lifetime." (Petition, p. 2).

In regard to this, we desire to make several remarks:

1. The record shows no "arrangement between counsel" for a *pro forma* decree. What right, then, has the learned gentleman to obtrude it into a grave legal argument? It has no business in this presence at all.

2. The assertion implies, though doubtless unintentionally, that the court below gave no opinion on the questions at issue; when, in fact, Judge Manierre decided every one in our favor; yet suggested afterwards, that it would be best, by arrangement, to let the bill be dismissed *pro forma*, so that all the points might be adjudicated upon appeal, before the heavy expense should be incurred of assigning dower in property so complicated. We only consented to the arrangement, however, under the private stipulation that the defendants should pay all the costs of taking up the case—a stipulation which they have ob-

served. I can only justify myself in presenting these outside facts by an argument *ad hominem*. The counsel has set me the example. One can only reply to facts, *dehors* the record, by traveling away from the record.

3. The petition alleges that the "arrangement" was made "for the purpose of obtaining a decision" upon the one point suggested, to wit: that Nicoll became seized, etc., by virtue of one or both the instruments which the counsel calls "declarations of trust."

To this, we can only answer, that no arrangement was ever made, on our part, for any such purpose. The arrangement was made to secure, at as early a period as possible, a final adjudication upon the question of Mrs. Nicoll's right to dower, and especially in view of the fleeting nature of her interest. We never affirmed, never conceived, that Nicoll's equitable estate was derived exclusively from the declaration of trust, or that the widow's title to dower turned upon that point alone. That may have been the only luminous point to the counsel's comprehension; but it was never so to ours. In proof of the fact, we need only cite our former brief in this case. In that we said:

"Hence, the only question for the court, as to the "Hunter property, is this: Had Edward A. Nicoll, by virtue of the deed from Butler to Nicoll and Bushnell, as "trustees, and by virtue of their subsequent declaration of "trust, an equitable estate of inheritance?" (Brief, p. 3.)

Again, on the subject of re-conversion, we said: "So "soon as the original partnership speculation was abandoned, and the land resumed its character of realty, even "without any declaration of trust, a trust would have resulted in favor of the beneficiaries who, at first, paid the "purchase money." (Brief, p. 7.)

It is true, we did not elaborate the point, so clearly demonstrated by this court, in its opinion, that the deed of Butler to Nicoll and Bushnell operated, *per se*, as a re-conversion; because, as we frankly confess, until reading the opinion, we had not conceived so fully the irresistable strength of that position. But, we suppose, that it is not the first time when the bench has shed a new light upon the legal questions in controversy; and if a counsel might always, in such cases, plead surprise to insure the opportunity for a fresh argument, there would seldom be wanting the grounds for a re-hearing.

4. The petition goes on to say, that "the decision made "by the court is of no practical importance, as it does not "determine the point in dispute." (Petition p. 2.)

But if this be so, one may well ask, *cui malo?* Why does the counsel want a re-hearing, if the opinion works him no injury? For, if he is correct, it is we who should have filed the petition — the widow who is excluded from her rights, not the defendants who are in the enjoyment of her property. But we are so simple minded as to be perfectly content with the opinion of the court. We think it will answer our purpose. Is it not needlessly cruel in the counsel to disturb the tranquility of our ignorance? We owe him small thanks for it.

Third. We now quote another unintentional fiction. The petition says, p. 2: "If it becomes material, it can "be shown that the deed of April 1, 1842, and the decla-"ration of April 12, 1842, were delivered and became "operative at one and the same time; and the same is "probably true of the declaration of April 25, 1842. But "proof upon these points was not material under the alle-"gations of the bill." (Petition, p. 2.)

To this, we reply:

1. That it is a fact *dehors* the record; and its insertion in the petition is most extraordinary. In the name of the

profession, we earnestly, though respectfully, protest against such a practice. Does the learned counsel imagine that this court, like a common jury, is to be influenced by a statement of what the orator could have proved, if he wished? Or is the allegation thrown in for ornament or use elsewhere?

2. The suggestion is an after-thought, which never entered into the brain of any one, before the enunciation of the opinion by this court; and we will prove the fact from the answer. For the answer admits, "that on or about the 12th day of April, 1842, the said Nicoll and Bushnell made a declaration of trust in writing," etc. (Record, p. 20.)

The answer also admits, that the instrument, made by the beneficiaries, was executed, on the 25th of April, 1842. (Record, p. 21.)

And these admissions show conclusively, that the counsel had never heard of a joint delivery, as to all these papers, when he penned the answer. It was the opinion of your Honors that refreshed the recollection of the defendants. It revealed, as by a flash of lightning in the darkness, the chasm yawning in their facts as well as their law.

3. The proof, real or fancied, if to be had, would not avail the defendants, on account of other confessions of truth in their answer. They admit, "that on the first day "of April, 1842, it was the desire of all the shareholders, "that the half interest in said property, which did not be-"long to Charles Butler, in his own right, should, as to the "legal title thereof, be vested in other trustees;" and that in accordance with such desire, and at the request of the other parties interested, "on or about that day," the conveyance was made to Nicoll and Bushnell, *as* trustees." (Record, p. 20.)

The answer also admits, that on the 1st day of April, 1842, the several interests of the shareholders in said property, were as stated in the bill, but setting up new matter in avoidance, as to Nicoll, of which there is no evidence, namely, that he held his share in trust for other parties. (Record, p. 19.)

Now, take these two admissions together, and they prove all that the court, in its opinion, considered proven by the declaration of April 12, and the instrument of April 25, to wit: that the property was re-converted, on the 1st of April. And whenever it was so re-converted, dower, *eo instanti*, attached. Because, since, as the answer admits, Record, p. 18, the purchase money was paid by the beneficiaries, all that prevented dower from attaching, at the outset, was the mere fact of the partnership speculation, to sell and divide the proceeds; and hence, the moment that intention was abandoned, the right of dower became fixed.

4 The averment that the deed from Butler and the declaration of trust were delivered, at the same time, is contradictory. "The declaration of trust was delivered," says the counsel. Delivered to whom? Why the counsel himself shows in the sequel of his argument, that a declaration of trust is nothing more than evidence. Is there any such legal entity as the delivery of evidence?

5. The proof that the deed from Butler and the subsequent papers were jointly delivered, would be futile, upon the counsel's theory; because, according to that, the declaration of trust related back, and took effect simultaneously with the deed. Therefore, if he is right, there can be no necessity for such proof.

Fourth. The petition alleges, "that the complainant "cannot proceed without making the devisees of William "E. Jones parties; and that the counsel of the parties un-"derstood this feature of the case before the appeal was "taken." *Petition*, p. 2.

Here, we have more foreign matter, but for what purpose, it is difficult to conjecture. Perhaps, the counsel means to intimate that because the case will be subjected to some delay, this court should not hesitate to delay it still longer.

Let this much suffice, by way of specimen, as to the extraneous facts and internal misconstructions contained in the petition. And we will only add a few more brief observations.

Fifth. The learned counsel presses the same point which he made in his brief: that a declaration of trust always relates back to the time when the trustee became clothed with the legal title. (Petition, pp. 2 and 3.)

But the very authorities he cites prove that this is only the case when the trust is created by parol; and then, only for the purpose of conferring the power of disposition on the *cestui que trust.* The doctrine of relation is adopted to enlarge the rights of the beneficiary; not to fetter and restrain them. Besides, what has the doctrine to do with this case, where the trust was not created by parol? For the very conveyance to Nicoll and Bushnell showed on its face that they took the property as trustees; and property, too, which had long previously been owned in equity by the beneficiaries, though in the artificial form of personalty.

Sixth. The counsel insists that there were two declarations of trust: that of the 12th of April, by the trustee; and that of the 25th, by the beneficiaries. Is not this a startling novelty in jurisprudence? Can a person constitute himself *cestui que trust*, by a declaration in his own favor? At all events, the rule is thoroughly established, that the declaration of trust must proceed from the trustee:

Hill on Trustees, top p. 95, side p. 61.

Seventh. The counsel attempts to convert the deed of Nicoll to Anderson, of May 31, 1842, into another declaration of trust. Now, leaving out of view the fact that the deed to Anderson was made by only one of the trustees, and that he was not acting as such, but in the character of a *cestui que trust*, it would be most absurd to say that a trustee could go on making declarations of trust *ad infinitum;* and thus vary, at pleasure, the rights and interests of beneficiaries.

Eighth. The counsel makes one concession which is fatal to his whole argument: "That all the beneficiaries might have joined together, and have had the property conveyed to them as tenants in common." (Petition, p. 6.)

If this were so, the beneficiaries must have been already —even before the partition—tenants in common of an equitable estate; and, of course, the right of dower was an incident.

Ninth. The learned counsel has totally misconceived the reasoning embodied in the opinion of the court. He seems to understand the decision as turning upon some point connected with the technical doctrine of trusts; when it turns entirely upon the established principles of conversion and re-conversion; and the court employs all the documents—the deed of April 1, the declaration of April 12, and the specification of April 25—merely as the tests of an intention to reconvert the property.

But the counsel has manifested his critical sagacity in one particular. He did not attempt to assail the last and central point upon which the court predicated its opinion. That point was demonstrated by the court, in the following luminous words:

" That an equitable estate of inheritance was designed " to be created by this deed (Butler's), and continued under

" the declaration and specification of trusts, dated the 12th
" and 25th of April, there can be no dispute, Both these
" papers, in express terms, declare that the trusts shall be
" performed to the heirs of the *cestuis que trust.* That it was
" the design of these papers that the right, title, interest,
" or claim—whatever it was—which the beneficiaries had
" in this property, should descend to their heirs, instead
" of going to their personal representatives, is placed be-
" yond all dispute by the express language of these pa-
" pers. This, of itself, is sufficient to show a design to
" to re-convert the property into real estate. In any aspect
" in which we can view this case, we think the complain-
" ant is entitled to have her dower assigned in one-third
" of the trust half of the Hunter property."

In conclusion, we have no sort of apprehension that a re-hearing will be granted. But we do fear the effects of any delay, as dangerous to an interest so transient as that of dower. And so long as the petition is pending, it will be reported that the law of the case is undetermined; thus necessarily preventing other parties from coming to an adjustment, thereby causing increased litigation and heavy costs.

47

SUPREME COURT,

APRIL TERM, 1863.

FRANCES B. NICOLL,

vs.

WILLIAM B. OGDEN *et al.*

PETITION FOR REHEARING.

Filed May 12, 1863

L. Leland Clk

To the Honorable Justices of the Supreme Court of the State of Illinois.

Your petitioners, William B. Ogden, Mahlon D. Ogden, Edwin H. Sheldon, Charles Butler, Eliza A. Butler, James D. Wilson, and the Chicago Land and Dock Company, would respectfully represent that they are the appellees in a cause lately depending in said court, wherein Frances B. Nicoll was the appellant, which was heard at the term of said court, held at Ottawa, on the of April, 1862, and taken under advisement, and the opinion of the court filed on the 21st day of April, 1863. Your petitioners respectfully ask that a re-hearing of said cause may be ordered by your Honors.

It is manifest to the petitioners that the court in considering the case has overlooked some of the vital points of the controversy between the parties. Those points are so carefully and exactly presented by the bill and answer, that it was deemed unnecessary by counsel to elaborate points not presented by either. The bill does not claim that Edward A. Nicoll became seized of an equitable estate of inheritance by virtue of the deed of April 1, 1842, from Charles Butler to Orsamus Bushnell, and Edward A. Nicoll, and it is not probable such a claim will ever be successfully asserted. The bill asserts that, *by the declaration of trust,* dated April 12, 1842, Nicoll *became* and was seized of an equitable estate of inheritance in six-eighteenths of an undivided half of the "Hunter property," (Record, page 4,) and under this allegation, it was not deemed important to show that he did not become seized of such estate in some other manner. The precise point submitted for your Honors' decision, was, whether the interest which Nicoll acquired *under and by virtue* of the declarations of trust, or either of them, was an equitable estate whereof he was seized in his lifetime.

By an arrangement between the counsel, a *pro forma* decree was rendered in the court below, for the purpose of obtaining a decision upon that point, as the rights of the parties would be thereby settled; but unfortunately the decision made by the court is of no practical importance, as it does not determine the point in dispute. If it becomes material, it can be shown that the deed of April 1, 1842, and the declaration of trust of April 12, 1842, were delivered and became operative at one and the same time; and the same is probably true of the declaration of April 25, 1842. But proof upon these points was not material under the allegations of the bill. In the case before your Honors, which has been remanded to the court below, it is manifest from an inspection of the bill, that the complainant cannot proceed without making the devisees of William E. Jones, deceased, parties to her suit, and thus the whole case is still open. The counsel of the respective parties understood this feature of the case before the appeal was taken, but it was deemed advisable to waive, for the time being, considerations of practice, in order to obtain a decision from the court of last resort upon the points really in controversy between the parties. These remarks are made with a view of calling attention to the fact, that the opinion of your Honors leaves the parties, so far as a determination of their rights is concerned, precisely where they were when the litigation commenced. As before remarked, the true and only question in controversy between the parties, is the true construction of the two declarations of trust mentioned in the bill, and their legal operation. In a former argument, the latter branch of the question was, for convenience, first noticed. (Beckwith's Brief, pp. 9, 10.) It was not deemed necessary to elaborate a point so well settled as the legal operation of a declaration of trust. The rule was stated with a reference to the authorities, but it is manifest that this feature of the case was overlooked by the court. For convenience the appellees will quote from Hill on Trustees, what he says upon the subject. He says, (page 56):

"It will be observed that the 7th section merely requires that the trust should be *manifested and proved* by writing; and upon the construction put upon these words it has been decided, that a trust of land may be still effectually *created* by parol; and in order to satisfy the statute, it will be sufficient to show by written evidence the existence of the trust. [f] This distinction, although at first sight it may appear of little moment, has been attended by consequences of considerable importance.

"If the trust were considered to derive its existence *ab initio* from the written declaration, the trust estate could not form part of the disposable property of the *cestui que trust*, previously to the execution of that declaration; and, moreover, up to that time, it would be liable for the acts and encumbrances of the ostensible owner. But now the declaration, when made, has relation backwards to the time of the creation of the trust, of which it is the evidence, and consequently gives effect to all intermediate acts of disposition made by the *cestui que trust*, between the declaration of the trust and its actual creation; while it defeats the rights which parties claiming under the trustee might have otherwise acquired. This is, of course, subject to the protection always given in equity to persons in the situation of *bona fide* purchasers for valuable consideration without notice.

"Thus where a freeman of London purchased real estate in the name of another person, without any trust being expressed at the time, and the freeman died, having devised the estate, and *after his death* the trustee declared that he held in trust for the freeman; this declaration was held good, so as to entitle the devisee in opposition to the widow, who claimed the estate by the custom of London. [g]

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[f] *Forster* v. *Hale*, 3 Ves. 707; S. C., 5 Ves. 308; *Randall* v. *Morgan*, 12 Ves. 74.

[g] *Ambrose* v. *Ambrose*, 1 P. Wms. 322.

"So, where a copyholder made an absolute surrender to *A*, and died; and *after his death A* admitted that the surrender was made to him in trust for the surrenderor, and after his death, for the purpose of his will; the devisees under the copyholder's will, and not his customary heir, were held to be entitled. [h]

"On the same principle in a case where a lease was granted absolutely to a person, and the grantee afterwards became bankrupt, and *subsequently to his bankruptcy* made a declaration that the lease had been granted to him as a trustee for another person; it was held by the Vice-Chancellor, and the decision was affirmed on appeal by Lord Lyndhurst, that the assignees of the bankrupt were not entitled to the lease. [i]"

So Tiffany & Bullard, in their late work on "Trusts and Trustees," page 353, say:

"This, then, gives rise to a distinction between the *act* creating the trust, and the *written declaration* by which that *act* or *intent* is "*manifested and proved;*" because the creation of the trust might precede the making of the written declaration. This difference of time between the creation of the trust and making the written declaration thereof, has given rise to distinctions of considerable importance. The question to be considered was, whether the trust derived its existence so as to form a part of the disposable property of the *cestui que trust* from the time of its original creation, or from its written manifestation. If it only derived its legal existence from the written manifestation, then, up to that time, it would be liable for the acts and incumbrances of the ostensible owner. [1] But, finally, the courts have decided, that the written declaration relates back to the time of the original creation of the trust, and so they give effect to all the intermediate acts of the *cestui que trust*, and thus [2] defeat the

[h] *Wilson* v. *Dent*, 3 Sim. 385.

[i] *Gardner* v. *Rowe*, 2 S. and St. 346; S. C., 5 Russ. 258.

[1] Hill on Trustees, 56.

[2] *Ambrose* v. *Ambrose*, 1 P. Wiliams, 322; *Wilson* v. *Dent*, 3 Sim. 385; *Gardner* v. *Rowe*, 2 S. and St. 346; S. C., 5 Russ. 258; but see *Morgan* v. *Randall*, 12 Ves. 74.

rights which parties claiming under the trustee might have otherwise acquired, except to *bona fide* purchasers, for a valuable consideration, without notice."

This well established rule in regard to the legal operation ot declarations of trust, was invoked in aid of the construction to be given to the declarations in this case declaring and defining the nature of Nicoll's interest. It was conceded that prior to April 1, 1842, his interest had the character of personalty, and as a part and parcel of the agreement to change its character, the terms and condition upon which such change should take place were agreed upon between the parties in interest. It is evident from the authorities above cited that any declaration in writing made by Nicoll would be evidence against-him, and those claiming under him, as to the terms and conditions upon which he was to receive his interest in its reconverted character.

Written documents of any description signed by the trustee are evidence against him of the terms and conditions upon which he holds the property.

Tiffany & Bullard on Trusts and Trustees, p. 355.
Hill on Trustees, p. 61.

When Nicoll conveyed to Anderson on the 31st day of May, 1842, (Record, pp. 50 and 51,) he clearly and distinctly defined the nature of the interest thereby conveyed. He first declares that his interest had been what he was entitled to under the certificate issued by Charles Butler, dated July 1, 1835, which was, on *the said* 31*st day of May*, 1842, canceled and surrendered, in consideration of the conveyances from Butler to Ogden and Nicoll and Bushnell; and he then authorized and empowered Anderson to receive the conveyance of the four-eighteenth parts of the premises conveyed in and by said deed to Bushnell and Nicoll, *whenever* partition thereof should be effected pursuant to the trust thereby created.

No language could more plainly express the idea that the trust of Nicoll and Bushnell was created to make a partition, and that the beneficiaries were to be entitled to their respective shares whenever such partition was made, and not until then.

The declaration of trust, dated April 12, 1842, declares, in substance, that the trustees were to hold the property until partition should be made of the same, and that such partition should be made, if practicable, within six months from that time. If this declaration of trust relates back to the execution of the deed, as it clearly does, then it is evidence of the trusts thereby created. The law will not prescribe the terms and conditions of the trust, where it is manifested by a written declaration of such terms and conditions. The trustees, therefore, in contemplation of law, never held the property for the beneficiaries absolutely. In contemplation of law, at the time the trustees agreed to hold the property, the beneficiaries agreed that they should hold it until partition was made, and that then conveyances should be made to each party of his divided interest. Although it is true that all of the beneficiaries might have joined together and have had the property conveyed to them as tenants in common, yet no one of them had a right to a conveyance of the legal title to an undivided interest; and such a conveyance could not have been compelled in a court of chancery. The trustees could not have been compelled to have conveyed to one of the *cestuis que trust* his undivided share, and continued the trust for the other beneficiaries. It was therefore a condition precedent to Nicolls' receiving his share, that a partition should be made, or that all of the beneficiaries should come to a new agreement by which the contemplated partition should be dispensed with.

Hill on Trustees, p. 395.
Goodson v. *Ellison*, 3 Russ. 593.
Hodgson's Settlement, 4 Eng. L. and E. 182.

If the declaration of April 12, 1842, were ambiguous in its terms, it was clearly competent for all of the parties in interest to remove the ambiguity. This the parties undertook to do. They did not undertake to create a new trust in regard to the terms upon which the property should be held, but simply to declare more fully the terms and conditions of the one already created. Now, when it is considered that these declarations of trust are mere evidence and nothing more, it will be perceived that the last mentioned declaration is as good evidence as the first one, and that they are both to be considered together in determining what the rights of the beneficiaries were. Thus considered, and giving to them their well-established legal operation, the appellees believe that Nicoll was not seized of an equitable estate to which his wife's right of dower attached. The perusal of your Honors' opinion has satisfied the appellees, that some of the considerations before mentioned have been overlooked by your Honors, and they therefore respectfully ask that the case may be re-heard.

WILLIAM B. OGDEN et al.,

By C. Beckwith,

Their Attorney.

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SUPREME COURT OF ILLINOIS,

1863.

FRANCES B. NICOLL,

VS.

WILLIAM B. OGDEN ET AL.

ADDITIONAL REPLY TO PETITION FOR RE-HEARING.

ARRINGTON & PEABODY.

Filed Aug. 8. 1863.
L. Leland
Clk

FRANCES B. NICOLL,

vs.

WILLIAM B. OGDEN ET AL.

The learned counsel who drafted the petition for a rehearing, has altogether mistaken the opinion of the court, as to the effect of the instrument dated April 25, 1842. The opinion does not affirm, as the counsel seems to suppose, that the instrument referred to operated to produce an "executory trust," except upon a hypothetical construction which the court neither sanctions nor condemns. Nor can any court ever decide the trust to be executory, under that instrument, for two irresistible reasons, which we will now proceed to unfold:

First. The hypothesis that the specification of trusts of April 25, placed the property beyond the control of the beneficiaries, so as to take away their right to demand an immediate conveyance, cannot be maintained, judicially, for a single instant; because no one else had one particle of equitable interest in the property, whether vested or contingent, present or future. This land, in which dower is sought, in every phase of its changing character, whether as real estate, and then personal, and then real estate again, belonged absolutely to Nicoll and his associate *cestuis que trust.* They bought it with their money, and for themselves alone. They were the first and only takers, and without any one having a shadow of prospective beneficial interest subsequent to theirs, unless coming through them.

The answer itself shows:

1. That, on December 1, 1834, the *cestuis que trust* constituted themselves an association for the purchase and sale of Western lands.

2. That, on the same day, a contract was made with Arthur Bronson, "on behalf of the members of said association," for the purchase of these very lands.

3. That the consideration was paid by such members; each contributing his proportionate share.

4. That, on the 15th of May, 1835, it was "mutually agreed between the members that the said lands should be conveyed to, and the legal title thereof be vested in, Charles Butler," to be sold for their common use and benefit. (Record, p. 18.)

It is equally clear, that the transfer of the legal title from Butler to Nicoll and Bushnell, was made at the request and by the direction of the beneficiaries.

Such are the facts. But what then is the legal principle? Evidently this—and it is one of the settled axioms of equity jurisprudence: "That whenever one or more persons have the entire beneficial interest arising under a trust, be it simple or special, they may concur in arresting its execution by calling for the conveyance to them of the legal title."

This results as a corollary from the mere fact of a complete beneficial ownership; since the proprietor of a thing has the sovereign, though private, jurisdiction over that which is his; and, there being no adverse interest, there can be no one to say him nay.

"If there be only one *cestui que trust*," says Lewin, "or there be several *cestuis que trust*, and all of one mind (in each case *sui juris*), the specific execution may be stayed, and the special trust will then acquire the character of a simple trust; for whatever modifications of the estate the settlor may have contemplated, through whatever channel he may originally have intended his bounty to flow, the *cestuis que trust*, as the persons to be eventually benefited, are, in equity, from the creation of the trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors":

Lewin on Trusts, side p. 597.

The rule is universal, wherever property is vested in trustees to be converted, whether it be land into money or money into land, for the exclusive use and benefit of certain persons, such persons may prevent the execution of the trust by choosing to take the property in its original state. And this is called, in the books, the doctrine of "election":

Pearson vs. *Lane*, 17 Vesey, p. 101;
Josselyn vs. *Josselyn*, 9 Sim., p. 63;
Saunders vs. *Vantier*, 4 Beav., p. 115;
Dawson vs. *Hearn*, 1 R. & M., p. 606, and cases cited;
1 P. Wms., p. 389, *Seeley* vs. *Jago*;
1 Eq. Lead. Cases, top p. 559, side p. 552;
1 Sanders on Uses and Trusts, p. 326.

For, if a thing is to be given to A and B, and no one else has any interest in it, whether *in posse* or *in esse*, A and B must have the right to take that thing, when, where and how they choose, as well as to change its present condition into any other imaginable form, at their pleasure; and for the simple reason that no one else has any interest in the thing; because, where there is no interest, there can be no legal right or power.

A multo fortiori, if this be so, in the case of property devised or settled in trust, and when the beneficiaries are mere volunteers, it must be true, in the case of beneficiaries who not only purchased the property with their own money, but also, by their free and independent *fiat*, created both the trust and the trustee. For, who shall resist their will? Who shall limit their power of disposition over what is theirs alone? Who can have a *locus standi* in any court to allege aught against their action? This is, in equity, the land of A, B and C, and they may have it sold, or not, at their option. They may convert it into a garden of roses, or sow it with salt, or sink it in the blue lake, as their judgment or caprice may dictate. For, if any one would oppose their choice in the matter, he must show some interest of his own to be protected.

Hence, there cannot be the slightest pretence for the hypothesis, that the specification of trusts "placed the property beyond the control of the beneficiaries," or precluded them from demanding a transfer of the legal title, at any moment. Can you call this an executory trust, where the first and immediate takers have the absolute *jus disponendi?* You might as well term an estate in fee simple a contingent remainder.

Second. It is impossible to class this with executory trusts, even after the specification of April 25, without doing violence to all authoritative definition. For, no one can mention a case of trust, in the books, to which the epithet "executory" was ever applied, unless there were "successive interests" concerned, or, in other words, first, and second, or subsequent, takers.

Indeed, the question has always arisen in connection with the rule in Shelley's case. A brief explanation will show how the controversy emerges. Where a limitation is made to A for life, remainder to the heirs of B, A has only a life estate. But, if the limitation be to A for life, remainder to the heirs of A, under the rule in Shelley's case, he has an inheritance:

Walker's Theory, p. 45.

And the same construction prevails in the case of trusts:

2 Jarman on Wills, side p. 244.

Now, it is perfectly obvious that the application of the rule never failed to defeat the intention of the donor. But, at last, courts of equity, in a certain description of trusts, contrived a method of effectuating the intention without directly subverting the rule. When something was to be done by the trustee, either after the cessation of the first life estate, or in order to vest an interest in some subsequent taker, they called this an "executory trust," because it contemplated some act to be "executed" by the trustee settling an estate upon some one else, to take effect after the death of the first taker. And, if such act was not performed by the trustee, the courts assumed the right to execute the trust. The courts reasoned thus: Since the trustee was to do some act vesting a remainder in the heirs to be enjoyed after the death of the ancestor, it would be absurd to give the ancestor such an estate as would empower him to extinguish the remainder to his heirs. The process of this natural, as well as technical, logic, is, perhaps, nowhere so well explained as in the following citation from an author whose pages are always luminous with learning:

"Thus," says Jarman, treating of executory trusts, "when a testator devises lands to trustees with a direction to settle them, or bequeaths a money fund to be laid out in

the purchase of lands to be settled, to the use of A, for life; remainder to trustees, during his life, to preserve contingent remainders; remainder to the heirs of the body of A (limitations under which, if literally followed, A would be tenant in tail by force of the rule in Shelley's case), courts of equity, presuming that the testator could not have so absurd an intention as that a conveyance should be made, vesting in the first taker an estate which would enable him immediately to acquire the fee simple by means of a disentailing assurance, execute the trust by directing a strict settlement, *i. e.* limitations, to the use of A for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons, successively, in tail":
2 Jarman on Wills, side p. 253.

And all the cases are in accordance with this distinction. There never was a case, and I defy any lawyer to name one, where a trust was called "executory," unless relating to an interest subsequent to the life of the first taker. Hence, all the authorities say that the test of an executory trust is, that "something" is to be done by the trustee or the court; and the circumstances of each case prove that this "something" is to be done to vest the trust estate in a subsequent beneficiary, after the determination of the interest of a preceding one. In the light of this explanation, the books are in perfect harmony; while, without it, they present a chaos of endless contradictions—*discordia semina rerum.*

The following cases are instances of the distinction above stated:

Edmondson and Wife vs. *Dyson*, 2 Kelly, pp. 321, 323;
Wiley et al. vs. *Smith*, 3 Kelley, p. 559;
Carroll vs. *Renich*, 7 Smedes & Mar., p. 799;
Dennison vs. *Goehring*, 7 Barr., p. 177;

Saunders vs. *Edwards*, 2 Jones' Equity (N. C.), p. 136;
Wood vs. *Burnham*, 6 Paige, p. 514.

In short, there never was an example of executory trusts, unless when the question arose in relation to the successive interests of first and second or subsequent takers. Indeed, in every case which we have been able to discover, the controversy was respecting the successive interests of the ancestor and the heir; the adjudication being in favor of a fee simple in the ancestor, if the trust was considered "executed," and restricting him to a life estate, if the trust was deemed "executory." And, wherever the latter construction prevailed, a title in fee simple, or in fee tail, was always decreed to the heir.

The reasoning is always clear as crystal, and runs thus: "This was an executed trust; therefore, the ancestor took the fee; and, therefore, his wife has dower: and the heir takes nothing but by descent."

Or, thus: "This was an executory trust; therefore, the ancestor took but a life estate, notwithstanding the rule in Shelley's case; and, therefore, the wife has no dower; and the heir must have the estate executed to him, as a purchaser from the original donor."

Hence, it is difficult to imagine for what purpose the counsel desires to have this viewed as an executory trust. It is admitted that, if such a view were tenable, the claim of dower must be denied; because the husband would then have only a life estate, to which dower never attaches. But, in such case, the heirs of the husband would take the fee as purchasers, and might come into a court of equity to enforce specific execution of the trust. For no case of executory trusts can be found where the heirs were not adjudged to possess this right.

What an absurdity, then, is it to speak of an executory trust here. The *cestuis que trust* were the first and only takers. There was no estate either to precede or to follow theirs. And there never was an instant of time, from the day when they purchased of Bronson until they sold out their interests, when they could not join in an imperative call for a conveyance of the legal title.

But the counsel will probably persist in urging that "something was to be done" by the trustees, at least, under the specification of April 25; and, therefore, that this must be an executory trust.

Let us, then, consider what things remained to be done, and which of them was of a nature to render the trust executory:

I. There was the duty to convey to the beneficiaries. But this could not operate to make the trust an executory one; otherwise, all trusts would be executory; because that duty attaches to all trusts, even to those the most simple and perfect.

Besides, if the instrument, creating the trust, contains no direction that the property is to be conveyed by the trustee to the *cestui que trust*, there is nothing for the trustee to perform, and the statute instantly executes the use by converting it into a legal estate.

Hence, one of the settled tests to show that the statute has not executed the use by giving the beneficiaries the legal estate, is the fact "that there is a direction to the trustees to convey":

Hill on Trustees, top p. 344, side p. 233;
Garth vs. *Balwin*, 2 Vesey, p. 645;
Mott vs. *Buxton*, 7 Vesey, p. 201;
Shelley vs. *Edlin*, 4 Ad. & Ell., p. 582;
2 Washburn's Real Property, pp. 162, 163.

Here, then, is the capital error of the learned counsel for the defendants. He takes the criterion of a use not executed by the statute, and transforms it into a criterion of "executory trusts," in the view of a court of chancery. He says that, "wherever something is to be done, namely, a conveyance is to be made, the trust is executory." But, the law books, as we have seen, hold this very direction to convey to be the criterion which proves that the statute has not executed the use, or, in other words, that the beneficiary has the equitable, and not the legal, estate.

"A trust," says WASHBURN, "may therefore be defined as a use, which, though lawful in itself, the statute does not operate upon to execute in the *cestui que use*, whereby the legal estate is in one, while another has a right to a beneficial interest in, and out of, the same. Thus, a grant or devise to A in trust for B, or to permit B to take the rents and profits, would be an executed use in B, unless B was a *feme covert*, when, in order to carry out the grantor's or devisor's intent, it would be a trust, or use, not executed. If, on the contrary, the trust is created for some special purpose, *as to convey the estate*, or to exercise control over it—such as paying the taxes, or making repairs upon it, and the like—it is a trust which the statute will not execute, and, of course, it leaves the legal estate in the trustee":

2 Washburn on Real Prop., p. 162, § 7.

It must, therefore, be clear to the dullest apprehension, that, if the test of an executory trust, proposed by the counsel, be the true one, then all trusts must be executory; since, in all trusts, a conveyance is to be made; and, if no conveyance is to be made, there is no trust; but the beneficiary, by force of the statute of uses, is already clothed with the complete legal estate.

II. There was the possibility of a sale. But this existed in a mere naked power, and was not a trust at all.

For, certainly, no lawyer will controvert the distinction between powers and trusts, or deny that the authority to sell, given by the specification of April 25, was a mere power.

"A power is not imperative. A trust is imperative, and is made with strict reference to its faithful execution. The trustee is not only empowered, but is required, to act in accordance with the will of the one creating the trust":

Tiffany & Bullard on Trusts, p. 210.

But what is the language of the specification? That "the trustees *may*, before partition, sell and convey"; not that they *must* or *shall* sell and convey. And, even this power emanated from the will of the *cestuis que trust*, its sole and voluntary creators. Will any one, then, pretend that the bare existence of such a power could have the effect of rendering the trust executory? It was, unquestionably, but a mere common law authority, and liable to be revoked, at any moment, by the mandate of those who made it.

Besides, the trustees had the power to substitute William B. Ogden, or, in case of his inability, some other person, with the full delegation of all their authority. But the circumstance is most significant, that the trustees were not to be "responsible for any acts, receipts or defaults" of such substituted attorney, which might happen without their willful default. (Record, p. 45.)

Was there ever any clearer case of common law authority than this? It has not even one element of either a trust, or of a power coupled with a trust. It is purely a discretionary power, such as no court in the world would attempt to control.

III. Again, by the terms of the specification of April 25, a partition was to be effected. This, then, remained to be done, provided the beneficiaries should not choose to take the land as it was, without any partition. But who was to make the partition? Certainly not the trustees; for the specification expressly declares, that "it is not requir d or expected of said trustees, or either of them, that they will personally do any thing to effect such partition, either amicably between us, or by law, but only that they shall execute the conveyances in partition of our several shares to us, when required, after partition has been made," etc. (Record, p. 45.)

How, then, can the counsel say that "this was a trust to effect partition," when not a single active duty was imposed upon the trustees, in relation to that subject? And one may well ask in the name of legal reason, how this can be considered an executory trust, even in a popular sense the most vague, when the trustees had not one positive duty to perform, save the execution of conveyances to the beneficiaries, upon the termination of the trust relation—a circumstance characteristic of all trusts alike?

Nor can it be said that partition was postponed until the end of six months. For, by the terms of the specification, as well as of the declaration of trust, partition might have been made on the very day after their respective dates. The limit of six months was fixed as the extreme boundary in time, beyond which partition might not be deferred. But this was a boundary prescribed for the *cestuis que trust*, and not for the trustees. The limit beyond which a conveyance by the trustees should not be postponed, was a far different one. For they were to convey "whenever a partition should be made"; and, according to both instruments, partition was to be made by the beneficiaries, and not by the trustees. (Record, pp. 4, 45.)

Moreover, at the instant of partition, the power of sale, in the trustees, must have ceased, *ipso facto*. Because, by the express words of the specification, such power was to be exercised before partition, and not after it. And, here, it was obviously within the power of the beneficiaries, by agreement among themselves as to the share of each, to call, at any time, for a conveyance of the legal title to such share.

It is useless, however, to pursue this discussion farther, because the counsel for the defendants has conceded all for which we contend.

"Although it is true," says the Petition (p. 6), "that all of the beneficiaries might have joined together and have had the property conveyed to them as tenants in common, yet no one of them had a right to a conveyance of the legal title to an undivided interest; and such a conveyance could not have been compelled in a court of chancery."

Now, this sentence is literally true, as a whole, and in every part. It is, however, not merely true of the particular case in hand, but of all possible cases of equitable tenancy in common. For, whenever there are two or more beneficiaries, though the trust may be as dry and simple as ever existed, one of them is not entitled alone to call for a conveyance. The reason of this equitable rule was forcibly stated by Lord Eldon, as follows:

"It is quite new to me to be informed that you can call on a trustee, from time to time, to divest himself of different parcels of the trust estate, so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say: If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?"

Goodson vs. *Ellison*, 3 Russ., pp. 593, 596.

And the same rule prevails in all cases of election, where the right to arrest the execution of a trust is vested in any number of common beneficiaries. They must all concur in the election.

1 Eq. Lead. Cases, pp. 548, 560, 569.

If, therefore, the fact that all the *cestuis que trust*, in every possible case, must unite in demanding a conveyance of the legal title, has the effect of preventing the equitable seisin of any one of them, and of precluding the right of dower, what necessarily follows as a universal conclusion? Why, plainly, this startling absurdity, that no beneficiary ever was, or could be, seized of a trust held in common, and that no widow of an equitable tenant in common ever can claim dower in the trust estate of her deceased husband.

Such a proposition requires no comment. It overturns "the maxim which has obtained universally, that trusts and legal estates are governed by the same rules":

2 Washburn's Real Property, p. 181;
Banks vs. *Sutton*, 2 P. Wms., p. 713;
2 Spence, Eq. Jur., p. 875;
1 Sanders on Uses, p. 280.

THE SECOND MISTAKE which the learned counsel has committed, consists in the assumption that the declaration of April 12, and the specification of April 25, both have *relation* back to the deed of April 1, so as to curtail and qualify the trusts vested by that instrument. And in respect to this point, we have several criticisms to offer:

1. In support of his position, the counsel adduces two text-books: Hill on Trustees, and Tiffany and Ballard on Trustees. But, by quoting two authors, the counsel does not strengthen his point; because both writers refer to the very same cases in support of the supposed rule. Let us, then, examine what was determined in each of the cases cited thus confidently to establish the doctrine of re-

lation, in respect to declarations of trust. (See Petition for Re-hearing, pp. 4, 5.)

In *Ambrose* vs. *Ambrose*, 1 P. Wms., p. 323, the Lord Chancellor merely decided that a subsequent declaration by a person holding the legal title could be used as evidence to show that he purchased originally for another. But there was not one word said, in the case, about *relation*.

In *Wilson* vs. *Dent*, 3 Simons, p. 388, there was no declaration of trust. The trustee admitted the trust in his answer, and this was held sufficient. Nor was there anything said about *relation*.

In *Gardner* vs. *Rowe*, 2 Simons & Stuart, p. 346, the case was this: A lease had been granted to W., who afterwards committed an act of bankruptcy, and then executed a declation of trust in favor of R. Upon the trial of an issue directed by the court, the jury found it as a fact that, in obtaining the lease, W's name was used in trust for R.; and the court adjudged that the lease did not pass to W's assignees. But still there was not a syllable uttered on the subject of *relation*.

Nevertheless, the two authors quoted by counsel extract the doctrine of relation out of cases which do not even imply it, but directly the reverse. For those cases speak to the question of evidence, which is matter of natural truth —or, at least, probability; whereas, *relation* is a thing of artificial assumption, and always false as a fact. It is *fictio juris*, and supposes an act to have been done at a time anterior to its real occurrence. It is introduced only for the sake of justice, and is never permitted to work a wrong:

Broom's Maxims, pp. 90, 95;
3 Blackst. Comm., p. 43;
Best on Presumptions.

But declarations of trust are not fictions. They are employed as evidence to prove that some one who holds the legal title does so in trust for another.

2. The counsel insists that the instrument of April 25 should be deemed a declaration of trust. Now, we will not cite anew the countless cases which show that the holder of the legal title is the proper person to declare a trust. We simply call attention to the unmixed absurdity that would result, if any one else could declare a trust. If any stranger to a line of conveyances were competent to constitute himself a *cestui que trust*, by simple declaration, few legal titles would stand without many beneficiaries. That would be an easy way to a fortune.

3. The counsel urges that the instrument of April 25, being an admission, and therefore evidence against Edward A. Nicoll, must be evidence against his widow. If it were so, the case would present this strange anomaly, that a right of dower, which could not be defeated by a direct deed, could nevertheless be defeated by an indirect admission!

4. The counsel forgets, and, perhaps, the Court has overlooked the fact, that no declaration of trust was needed in the case. For the property was vested expressly in Nicoll and Bushnell, "as trustees," by the deed of April 1; and Butler, the grantor, had previously made a declaration of trust in respect to the same lands. (Record, p. 37.)

However, the deed of Butler to Nicoll and Bushnell, as trustees, was amply sufficient in itself. Because, "where there is any written evidence that the person apparently entitled is not really so, that will open the door to the admission of parol evidence to prove the trust, notwithstanding the statute of frauds:"

Hill on Trustees, side p. 62.

Besides, the assignment of the personal effects of the association by Butler to Ogden, dated April 1, 1842, showed the precise share of Nicoll in the premises to be "six-eighteenths." (Record, p. 79.)

In conclusion, we ask the court to consider the following brief summary of affirmative arguments in favor of the claim to dower:

I. The purchase money was paid by the *cestuis que trust*, though the title was made to Butler.

II. At the time of the purchase from Bronson and deed to Butler, the land was converted into personalty, for partnership objects.

III. The fact of such conversion alone prevented the right of dower from attaching, at the outset.

Corollary 1. A trust resulted in behalf of those who paid the purchase money, in which trust the widow would have dower, so soon as the property became re-converted into land.

Corollary 2. As soon as the property ceased to be personalty, and regained its natural character of real estate, the right of dower instantly attached.

Corollary 3. As soon as the partnership enterprise was abandoned, the right of dower attached. For, "it is only when, and so long as, they constitute a part of the partnership property, that lands are exempt from the claim of dower":

1 Washburn's Real Prop., p. 160.

IV. It was perfectly competent for the parties beneficially interested to re-convert the property into its original state.

Re-conversion "need not be evidenced by an express declaration of change. It is sufficient, if the conduct of the parties shows an intention to deal with the property in its original, instead of its converted character":

Adams' Equity, p. 137.

V. The property was re-converted as early as April 1, 1842.

The proofs of this fact are of the clearest character that ever were presented, on such a question, to the mind of any court:

(*a.*) The deed of Butler to Nicoll and Bushnell conveyed the lands, *eo nomine*, to them, as trustees, without any direction that the property was any longer to be treated as personalty, nor the slightest intimation of an intended sale.

(*a.*) On the same day as the execution of the deed to Nicoll and Bushnell, Butler assigned to William B. Ogden all the personal property of the association; together with such lands as were designed to be sold for the payment of debts. (Record, pp. 77, 80.)

Corollary. The assignment of the personal estate of the association to one trustee, and of the real estate to others, evinces a strong purpose to re-convert the latter; and more especially, since there are specific directions given as to the sale of the property, in the first case, and none at all in the last.

(*c.*) The declaration of trust, dated April 12, was to the effect that the trustees would convey to "each" of the beneficiaries "his heirs and assigns," or to such person or persons as he or they might designate to receive the same, "his part or share" of the premises in severalty. (Record, p. 4.)

Thus, it is seen, the interest of the *cestuis que trust* was to descend to their heirs, instead of going to their personal representatives. But this is the infallible criterion of an estate of inheritance. It is the very meaning of the term, *inheritance*—"an estate in things real, descending to the heir":

2 Blackst. Comm., p. 201.

Would the learned counsel have this court lay down an opposite definition, which could not fail to excite the derision of the bar throughout the civilized world?

But the trustees were not only to convey to the heirs, but to such persons as the heirs might appoint. For such is the legal signification of the language; and the idea is expressed in still clearer terms in the instrument of April 25: that the trustees were "to convey to such persons as the several heirs and assigns might designate." (Record, p. 44.)

Hence, the declaration contemplated the possibility of the death of the beneficiaries, before either partition or a sale of their interest; and provided that, in such case, the heirs might designate the persons to receive a conveyance after partition. Hence, the heirs were to take the same power of disposition over the trust estate, which was possessed by their ancestors.

Then, will any lawyer, much less any court, venture the assertion that this was not both real estate and an estate, too, of inheritance? For there can be but three kinds of estate in land, as viewed in relation to the category of time. Every such estate must be one for years, or for life, or one of inheritance. But, since no one will pretend that this was either of the former, it must have been the latter.

The case is clear as the sunlight. Here was an equitable interest, limited, by express terms, "to Nicoll and his heirs." And, as if to remove even the possibility of a doubt, it was explicitly provided, by the declaration and specification of trusts, that, not only Nicoll himself, but, in the event of his death before partition, his heirs, also, should have the power of disposition over this equitable interest. Hence, this interest, this estate, this right to the profits, this *jus disponendi*, call it what you will, is vested in Nicoll as one descendible to his heirs and transferable to his assigns. Therefore, if this was not an equitable estate of inheritance, such an estate never existed, and never can exist. If there was no inheritance here, logical definition becomes impotent, and legal rules are but a mockery and delusion.

(*d.*) If we are allowed to adduce documents of a date subsequent to both the declaration and the specification of trusts, we find a powerful proof of the re-conversion, and that the interests of the beneficiaries were considered as inheritable real estate, in the fact that they sold, and Ogden bought, those very interests undivided as inheritable real estate. They were deeded to him, "and to his heirs and assigns forever." (Record, p. 54.) And this before any partition. Indeed, there never was any partition.

Corollary. If the estate was one of inheritance, dower certainly attached. For it is a rule, without any imaginable exception, that whenever the heir takes by descent, the widow will have her dower. The rule is even broader; and the wife has dower in any land of the husband, "of which any issue which she *might* have had, *might by possibility* have been heir":

4 Kent's Comm., p. 35.

In *Yeo* vs. *Marcereau*, 3 Harrison's (N. J.) Rep., p. 397, the test was thus announced: "If the alleged *cestui que trust* had died intestate, and his children *might* have taken by descent, the widow is entitled to dower."

The principle is extremely well illustrated by the case of *Milledge* vs. *Lamar*, 4 Desauss., p. 638. There, the limitation was "to A, and his heirs; but if he should die without an heir of his body begotten, then the estate should go to his brother's children. A married, and died without children; and his widow claimed her dower." The court held that her claim was a valid one, for the reason that, if A had had an heir of his body, such heir might by possibility have inherited the land; and, therefore, that the title to dower attached, according to Littleton, § 53.

It may, however, be objected—and it is the only conceivable objection that can be made which would not subject a lawyer to be disbarred for incompetence—that, although this was an estate of inheritance, the husband did not have such a seisin of it as to vest the right of the wife to dower.

To this we reply:

First. That there are two kinds of seisin: "*seisin in deed*, which is actual possession of the freehold; and *seisin in law*, which is a legal right to such possession":

4 Kent's Comm., p. 386, *n*.

The former seisin, of course, is the greater. By the common law, *seisin in deed*, or actual seisin, was necessary in the ancestor to enable the heir to take by descent:

4 Kent's Comm., p. 385.

While the widow had her dower, if the husband had only the inferior *seisin in law:*

4 Kent's Comm., p. 37.

The rule, as to the heir, has been modified in the United States; so that a *seisin in law* of the ancestor is sufficient to pass the land by descent to the heir. And, hence, the rule is the same as to the heir and the widow. The one cannot take the inheritance, nor the other her dower, unless through a person who had a *seisin in law*.

What conclusion follows? Demonstrably this, that if the seisin of Edward A. Nicoll was not sufficient to give the widow dower, it could not be sufficient to transmit the estate to his heirs. But it is conceded to have been sufficient for the latter purpose; therefore, so it was for the former. In short, the rule is universal, "wherever the heir may take by descent, the widow has her dower."

Second. Seisin in equitable estates, does not mean a right to the actual possession, but a right to the rents and profits:

Lewin on Trusts, side pp. 622, 623;
Parker vs. *Carter*, 4 Hare, p. 400.

But who was beneficially entitled to the rents and profits here? Certainly not the trustees; but, as certainly, the *cestuis que trust.* The trustees, by express terms of both the declaration and specification of trusts, were to account for the profits to the beneficiaries, who, as the equitable owners, were assuredly entitled to the rents, had there been any.

Hence, beyond all controversy, the *cestuis que trust* had an equitable seisin of the premises:

See *Casborne* vs. *Scarf*, 1 Atk., p. 603.

Third. The same inference follows from the legal definition of an equitable disseisin—which is constituted by an adverse claim and possession of the equitable estate by a stranger, during the period of limitation prescribed for barring actions in the similar case of legal estates:

Lewin on Trusts, pp. 618, 621;
Cholmondeley vs. *Clinton*, 2 Mer., p. 171;
2 J. & W., pp. 1, 153, 155, 190, 191.

But there was no claim and possession of the equitable estate, here, adverse to the rights of the *cestuis que trust.* No other person than they, claimed or received the rents and profits. Therefore, there was no equitable disseisin in the case.

Fourth. The equitable seisin must have been in some one. The equitable estate, in the language of the court in *Cholmondeley* vs. *Clinton*, "could not become *haereditas jacens*, belonging to no one." Some one must have been beneficially entitled to the rents and profits. Now, the decisive question is, Who was so entitled? And, the counsel himself being judge, the *cestuis que trust* were clearly so entitled, and no one else. Therefore, they had an equitable seisin of the beneficial estate. And therefore, the claim to dower is demonstrably settled upon foundations as enduring as the law itself.

Is not our conclusion, in every aspect, unassailable? Can any stretch of legal genius so much as imagine a plausible answer. It is true that human ingenuity can always fabricate something which may look like an argument, and which may bear the same resemblance to genuine logic that nonsense-verses bear to the divine heroics of Homer and Virgil. But the learned counsel does not deal in such stuff, and therefore he will probably either not attempt a reply at all; or if he do so, he will place his premises and inference as far apart as possible, and thus conceal the chasm yawning betwixt them, by throwing over it the haze of distance, and the mist of learned verbiage. He certainly will not dare cast his reasoning into the syllogistic form.

(*e.*) The specification of trusts, of April 25, bears equally cogent testimony to the fact of a re-conversion, and that the estate was one of inheritance.

It is true that the beneficiaries, by that instrument, conferred on the trustees a power to sell, and to pay over the proceeds to themselves, the grantors of the power. But this, as we have seen, was only a naked power—a mere common law authority—and, as such, revocable at the will of the makers. This is evident from the single consideration that no court would have compelled the exercise of the power. A court of equity enforces the performance of a trust, but never commands action under a discretionary power. If the beneficiaries, in this case, had gone into court asking a decree that the trustees should sell the land, what would have been the reply? The Chancellor would have said: "You have imposed no duty upon these trustees to sell, or to appoint an attorney to sell. You have given them a mere power to sell, or not, at their discretion. I cannot control an absolute discretion, which proceeds from your own voluntary act. Besides, if you want the property sold, it is yours in equity; then take it back, by election, and sell it yourselves, or make another agent to sell it for you."

Whoever, then, contends that the mere existence of such a power, and one never exercised, can have the effect of destroying or qualifying an estate of inheritance, or of preventing it from becoming vested, or from descending to the heirs, or that it can preclude or defeat the right of dower, may be deemed, *pro tempore*, beyond the reach of either forensic or judicial argument. What! shall it be said that, if one owner, or any number of common owners, should bestow a power of sale upon an agent, and to be exercised for their exclusive benefit, they thereby lose all control over their servant, and over the property in his hands, so that they may not, at any instant, revoke the authority delegated by themselves, and regain what belongs to them alone? Can the creature in law resist the will of his creator? Can the agent ever reach a position beyond the jurisdiction of his principal? Can it be pretended, unless in jest, that any power of sale, given to another, by the husband, will, in any event, prejudice the wife's right of dower?

We omitted to notice, in the proper connection, an argument attempted to be deduced by the counsel from the assignment of Nicoll to Anderson. That assignment, dated May 31, 1842, declared that, on the same day, the certificate formerly issued to Nicoll, by Butler, was "cancelled and surrendered," etc.

From this circumstance, together with the peculiar phraseology of the assignment, the counsel draws the *open* inference that "the trust was created to make a partition." (See Petition for Re-hearing, p. 5.)

We need say no more to expose the absurdity of this assumption. The creation of a trust to make partition where the trustees were to have nothing whatever to do with making it, presents the most remarkable instance of the *non sequitur* fallacy which ever appeared in the brief of a lawyer.

The Petition for a Re-hearing, speaking of Nicoll's assignment to Anderson, says: "No language could more plainly express the idea that the trust of Nicoll and Bushnell was created to make a partition." (Petition, p. 5.)

The counsel means, we suppose, that Nicoll and Bushnell were trustees for partition, *de facto et de jure*, because they were not to make any partition! Does the eminent counsel aspire to rival the fame of Servius, who rendered himself immortal in the history of the ridiculous, by his definition of *Lucus, a non lucendo?*

But the counsel, by italicising the date of the assignment, "on *the said* 31*st day of May*, 1842," intended a covert argument—after the manner of the historian, Gibbon—which he could not venture to develop in terms. He left it to be implied that, on May 31, the interest of Nicoll was still a personal one, because the certificate issued by Butler, and representing a personal interest, was not "cancelled and surrendered" until that day.

The clear answer to this logic of innuendo is, that the certificate in question was "cancelled and surrendered," in law, the very instant when Nicoll assented to the conveyance to the new trustees. Will the counsel say that Nicoll could have enforced the trusts imposed upon Butler by that certificate, after the consent of all the beneficiaries, including Nicoll himself, to the conveyance to new trustees, and upon new trusts? Could Nicoll still have compelled Butler to go on and sell the land, and account for the proceeds, after the latter had ceased to have any connection with the matter? Thus, it is evident that the certificate was legally cancelled, and became null, on April 1, 1842, although it may not have been formally surrendered in fact until May 31, of the same year.

This is further conclusively demonstrated by the recital in this very deed, setting forth that the certificate "is cancelled and surrendered this day, *in consideration* of the execution, by said Butler, of the said assignments and conveyances aforesaid, to the said Ogden, and the said Nicoll and Bushnell, respectively." The *consideration* for the cancelling of the certificate was furnished on April 1; and by every rule of law and equity, the certificate became null from that date.

Even the assignment of Nicoll to Anderson runs to the "heirs" of the latter, as well as to his "executors and administrators"—the former term doubtless referring to Nicoll's trust inheritance, of which the legal title stood in his own name and that of Bushnell; while the latter term applied to the personal property of the assignor, in the hands of Ogden. (See Record, p. 50.)

To decide against the claim of dower, in this case, the court must virtually affirm one, or all, of the following absurd propositions:

1. That real estate, once converted into personalty, remains personalty after its re-conversion.

2. That an equitable estate, descendible to heirs and transmissible to assignees, is not one of inheritance.

3. That a *cestui que trust* may be without an equitable

seisin, although the trustee is in possession for his benefit alone, and there is no adverse claim to the rents and profits.

4. That an executory trust is the same legal entity as a use not executed by the statute; and, hence, that all trusts are executory.

5. That a power of sale, conferred by the husband upon an agent, is effectual to defeat the wife's right of dower, and does defeat it, whether the power be exercised or not.

6. That dower never attaches upon equitable estates of inheritance; at least, in the case of tenants in common.

Nor can these strange affirmations be reached at all, unless the court first overturns one of the most elaborate and thoroughly considered opinions that ever adorned our reports; thus according welcome to a double antinomy—a contradictory to the court itself, as well as to the law.

Nicholl
vs
Ogden et al

On petition for rehearing
Ordered that the petition heretofore filed, for rehearing of this Cause, be disallowed — Sept. 30. 1863

J D Caton
P. H. Walker
Sidney Breese

47 274

Nichols

v

Ogden

Rehearing disallowed

Filed Oct. 1. 1863

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