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TRUSTS — RIGHT OF TRUSTEE'S WIFE TO DOWER IN PROPERTY HELD SUBJECT TO ORAL TRUST — EFFECT OF SUBSEQUENT MEMORANDUM — DOWER WHERE TRUSTEE HAS BOTH LEGAL AND EQUITABLE INTEREST — Pursuant to an oral agreement and upon consideration furnished by them, *A*, *B*, and *C* procured land to be conveyed to *A* by a third party. Six days later *A* executed a self declaration of trust in the terms of the oral agreement; that he would operate it, and within a specified period sell the property and divide the proceeds between himself, *B* and *C*, as beneficiaries. A suit to remove *A* as trustee culminated in a judicial sale of the property to *B* and *C*. In this proceeding by *B* and *C* to quiet title, *A's* wife claimed dower in (1) the whole tract of land, or failing that, in (2) that portion of the land in which her husband held a beneficial interest. *Held*, that under the Michigan dower statute [1] she had

[1] The wife is allowed dower in all lands of which the husband was seized of an estate of inheritance during the period of the marriage. Mich. Comp. Laws (1929), § 13072, Stat. Ann. (1937), § 26.221.

no interest in the land. *Sagendorph v. Lutz*, 286 Mich. 103, 281 N. W. 553 (1938).

There are two theories of law by which it may be held that a self-declaration of trust by the grantee operates coincidentally with a deed executed six days earlier so as to prevent the declarant from becoming "seized of an estate of inheritance" in his own right, and necessarily prevent his wife from taking dower in the property in which others hold the beneficial interest.[2] (1) That the declarant became seized of an estate of inheritance upon the conveyance, yet his beneficial estate in the land was merely transitory, as that conveyance to him and the trust instrument divesting him of his beneficial estate were one transaction. (2) That the written trust instrument pursuant to the oral trust satisfied the statute of frauds and in legal effect related back in point of time to the date of the conveyance. The court in the principal case drew an analogy between the beneficial estate entering the declarant and leaving him, and the transitory seisin doctrine of the law of mortgages, where it is the established rule that when the same act which gives the husband an estate conveys it out of him, or when the husband is a mere conduit for the passage of title, the wife is not entitled to dower.[3] While the doctrine of transitory seisin has generally been applied in the law of mortgages only where there has been one transaction in point of time, absolute identity in point of time is not required in all circumstances. The doctrine has been established in favor of a vendor-mortgagee.[4] It has been held that a purchase money mortgage executed ten months after the conveyance was superior to the dower claim.[5] In view of the fact that the beneficiaries in the principal case had contributed to the consideration, six days does not seem a sufficient lapse of time to defeat them. Arriving at this conclusion upon a basis of the written trust instrument relating back to the date of the conveyance is perhaps somewhat harder to justify. The Michigan Statute of Frauds[6] is not of the usual type which copied the English statute; but it is feasible to interpret it in the same manner[7] and arrive at the result that a sub-

[2] Michigan has abolished purchase money resulting trusts. Mich. Comp. Laws (1929), § 12973, Stat. Ann. (1937), § 26.57.

[3] Where by the same transaction, both as to content and point of time, the married grantee gives back to the grantor a purchase money mortgage, thereby cutting off dower. Gilliam v. Moore, 4 Leigh (31 Va.) 32 (1832); Mayburry v. Brien, 15 Pet. (40 U. S.) 21 (1841); Stow v. Tifft, 15 Johns. 458 (N. Y. 1818); Holbrook v. Finney, 4 Mass. 566 (1808); McCauley v. Grimes, 2 Gill & J. (15 Md.) 318 (1830). Contra: Nash v. Preston, 1 Cro. Car. 190, 79 Eng. Rep. 767 (1630).

[4] Cases refusing to apply the doctrine because the party to whose benefit it would accrue did not have vendor's equities: Root v. Curtis, 38 Ill. 193 (1865); Pettus v. McKinney, 74 Ala. 108 (1883); Anderson v. Fitzpatrick, (Ky. 1899) 49 S. W. 786; Weil v. Casey, 125 N. C. 356, 34 S. E. 506 (1899). Contra: Atkinson v. Hancock, 67 Iowa 452, 25 N. W. 701 (1885); Hazelton v. Lesure, 9 Allen (91 Mass.) 24 (1864).

[5] Wheatley's Heirs v. Calhoun, 12 Leigh (39 Va.) 269 (1841). See also Rawlings v. Lowndes, 34 Md. 639 (1871).

[6] The trust must be created or declared by instrument in writing signed by the party creating or declaring the same. Mich. Comp. Laws (1929), § 13411, Stat. Ann. (1937), § 26.906.

[7] 1 PERRY, TRUSTS AND TRUSTEES, 7th ed., § 81 (1929).

sequent memorandum by a party legally able to declare a trust will satisfy the statute and take effect as of the creation of the oral trust [8] and cut off all intervening interests derived through the trustee except bona fide purchasers.[9] Dower would logically seem to be an interest derived through the trustee; however, perhaps because the doweress is the favorite of the law, the courts have gone both ways when confronted with the equities of the doweress and beneficiaries of a trust.[10] In the state of confusion on this point the court in the principal case could readily find precedent for its conclusion if it sought to do so on this theory. The solution to the question whether the wife had an interest in that part of the property in which her husband was beneficially interested depended upon the existence of a merger, since in Michigan a wife takes no dower in lands to which her husband has merely an equitable title [11] and in this case that beneficial interest was personalty.[12] The doctrine of merger of legal and

[8] Ibid., § 82; Gardner v. Rowe, 5 Russ. 258, 38 Eng. Rep. 1024 (1828).

[9] Blaha v. Borgman, 142 Wis. 43, 124 N. W. 1047 (1910); Sime v. Howard, 4 Nev. 899 (1869).

[10] Subsequent memorandum by the trustee relating back to cut off the claim to dower of the trustee's wife: 1 TRUSTS RESTATEMENT, § 41 (1935); 1 BOGERT, TRUSTS AND TRUSTEES, § 69 (1935); Fontaine v. Boatsmans' Savings Institution, 57 Mo. 552 (1874); Johnston v. Jickling, 141 Iowa 444, 119 N. W. 746 (1909). Contra: Pruitt v. Pruitt, 57 S. Ct. 155, 35 S. E. 485 (1900); Bartlett v. Tinsley, 175 Mo. 319, 75 S. W. 143 (1903). Relating back to cut off the claims of judgment creditors of the trustee: Gardner v. Rowe, 5 Russ. 258, 38 Eng. Rep. 1024 (1828).

Performance of the parol trust in land has also been held to satisfy the statute of frauds and relate back to the time of making the parol trust. Cases holding that performance relates back to cut off the claims of judgment creditors of the trustee: Richmond v. Bloch, 36 Ore. 590, 60 P. 385 (1900); Hayes v. Reger, 102 Ind. 524, 1 N. E. 386 (1885); Patton v. Chamberlain, 44 Mich. 5, 5 N. W. 1037 (1880) (contract creditors); Blaha v. Borgman, 142 Wis. 43, 124 N. W. 1047 (1910); Moran v. Morgan, (C. C. A. 2d, 1918) 252 F. 719. Contra: Connor v. Follansbee, 59 N. H. 124 (1879); O'Hara v. Dilworth, 72 Pa. 397 (1872). To cut off dower claims of trustee's wife: Oldham v. Sale, 40 Ky. 76 (1840).

[11] Dalton v. Mertz, 197 Mich. 390, 163 N. W. 912 (1917).

[12] The court reached this conclusion on the theory of equitable conversion—that the realty is converted to personalty since the trustee is bound to sell and divide the proceeds by the terms of his trust. 2 TIFFANY, REAL PROPERTY, 2d ed., § 463 (1920); Hunter v. Anderson, 152 Pa. 386, 25 A. 538 (1893). The doctrine has familiar application in land contracts. Keep v. Miller, 42 N. J. Eq. 100, 6 A. 495 (1886). As to partnership property, see Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010 (1894); Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733 (1890). Interest of a legatee when an executor must convert by the terms of the will: Phifer v. Phifer, 157 N. C. 221, 72 S. E. 1006 (1911); Grove v. Williard, 280 Ill. 247, 117 N. E. 489 (1917); Ford v. Ford, 80 Mich. 42, 44 N. W. 1057 (1890); Matter of Rowland, 273 N. Y. 100, 6 N. E. (2d) 393 (1937); Bell v. Bell, 25 S. C. 149 (1885).

The fact that the sale was not required to be consummated until a future time, and in the discretion of the trustee or executor, does not prevent application of the doctrine. Carr v. Branch, 85 Va. 597, 8 S. E. 476 (1889); 1 TIFFANY, REAL PROPERTY, § 119 (1920). Contra, to the effect that the conversion does not take place until the time of sale: Massey v. Modawell, 73 Ala. 421 (1882).

equitable estates is based on the concept that one person as beneficiary cannot invoke the aid of a court of equity against himself as trustee, and under those circumstances, there could be no trust.[13] There will be no merger of legal and equitable estates unless the two estates in the one person are coextensive and commensurate,[14] if it is contrary to the intent of the parties,[15] or if it is necessary in justice and equity for the estates to exist separately.[16] In addition to these reasons for maintaining the two estates in the principal case, it is held by the better considered cases that if the trustee holds for himself and others there will be no merger since the other beneficiaries may invoke the jurisdiction of the chancellor to enforce the duties of the trustee.[17]

[13] 1 PERRY, TRUSTS AND TRUSTEES, § 13 (1929); Goodright v. Wells, 2 Doug. 771, 99 Eng. Rep. 491 (1781).

[14] 1 PERRY, TRUSTS AND TRUSTEES, § 13 (1929); Donalds v. Plumb, 8 Conn. 446 (1831).

[15] 1 PERRY, TRUSTS AND TRUSTEES, § 347 (1929); Asche v. Asche, 113 N. Y. 232, 21 N. E. 70 (1889).

[16] Robb v. Washington & Jefferson College, (S. Ct. 1905) 93 N. Y. S. 92; Hildreth v. Eliot, 25 Mass. 293 (1829); Donalds v. Plumb, 8 Conn. 446 (1831); Sherlock v. Thompson, 167 Iowa 1, 148 N. W. 1035 (1914).

[17] In re Fox's Estate, 264 Pa. 478, 107 A. 863 (1919); Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519 (1905); Robb v. Washington & Jefferson College, (S. Ct. 1905) 93 N. Y. S. 92; Donalds v. Plumb, 8 Conn. 446 (1831). Contra: Bolles v. State Trust Co., 27 N. J. Eq. 308 (1876); Greene v. Greene, 125 N. Y. 506, 26 N. E. 739 (1891); Woodward v. James, 115 N. Y. 346, 22 N. E. 150 (1889); Swisher v. Swisher, 157 Iowa 55, 137 N. W. 1076 (1912). In general on the problem of merger in commercial trusts, see 29 YALE L. J. 97 (1919).