

Eng. Rep.]

BULTEEL V. PLUMMER—COULTER ET AL. V. BORTNER ET AL.

[U. S. Rep.]

mortgagee, and he desired to have it understood as the settled rule for the future in cases of this kind that a mortgagor, whether served or not, should have no costs out of the lunatic's estate. Under no circumstances ought a mortgagee to bear his mortgagor's costs.

BULTEEL V. PLUMMER.

Marriage settlement—Power of appointment—Will—Defective execution of power.

Under a marriage settlement the survivor of the husband and wife had power to appoint by will to the children of the marriage and the issue of any child who should be dead. One of the children died in the lifetime of the parents, leaving issue. The wife survived the husband, and by her will made appointments in favour of her children and one of her grandchildren, and made one of her children also residuary legatee. It was admitted the power was not an exclusive one.

Held, that so much of the property subject to the power as was comprised in the residuary bequest was unappointed and divisible among the children of the marriage and their representatives.

[V. C. M., 17 W. R. 1058.]

By the marriage settlement of Mr. and Mrs. Plummer, dated in 1809, certain real and personal property was vested in trustees in trust for the husband and wife for life, and upon their decease for the children of the marriage, and the issue of any child then dead as the husband and wife, by deed jointly, or the survivor of them, by will, should appoint; and in default of appointment for individuals of the same class equally. There were five children of the marriage, one of whom attained twenty-one and died a bachelor in the lifetime of Mr. and Mrs. Plummer; another, George Robert Plummer, also died in the lifetime of Mr. and Mrs. Plummer (leaving four children, three of whom survived Mr. and Mrs. Plummer and were living); Henry Plummer; Frances Plummer, a spinster; and Mrs. Westmacott. Mrs. Plummer survived her husband many years, and died in 1867, having by her will in pursuance of the aforesaid power appointed out of the trust property a certain freehold house to Frances Plummer, £2,500 stock to Mrs. Westmacott, £500 to Henry Plummer, and £100 to Maria, one of the four children of G. R. Plummer, she then gave and appointed all the residue of her property to Frances Plummer. The bill was filed by the trustees of the settlement of 1809, to obtain the decision of the Court on the validity of the appointments. It was admitted on all sides that the power in the settlement of 1809 was not an exclusive power of appointment.

Glasse, Q. C., and Waugh, for the plaintiffs.

Pearson, Q. C., and Langley, for Frances Plummer, contended that the appointments other than the residue were good. They cited *Coven-try v. Coventry*, 2 P. W. 222; *Colson v. Colson*, 2 P. W. 478; *Wilson v. Piggott*, 2 Ves. Jun. 351; *Rowley v. Rowley*, Kay, 242; *Ranking v. Barnes*, 12 W. R. 565, 10 Jur. N. S. 463; *Trollope v. Routledge*, 1 DeG. & Sm. 662; *Warde v. Firmin*, 11 Sim. 235.

Cole, Q. C., and Key, for Mrs. Westmacott, supported the same view, and contended that where there were two appointments made by separate instruments, one good and one bad, the good one was allowed to stand; so if the two appointments were made by one instrument, as

in this case, though, as a general rule, the whole would be void, yet it would be not so here, as the appointments in this case were so distinguishable and separate: *Young v. Waterpark*, 13 Sim. 202; *Topham v. Portland*, 12 W. R. 186, 1 D. G. J. & Sm. 517.

Cotton, Q. C., and Bedwell, for the children of G. R. Plummer other than the legatees of £100, contended that as Mrs. Plummer's will was an appointment to some of the objects of the power in exclusion of others, it was a bad execution of the power, and the trust property should therefore be divided amongst the objects of the power as in default of appointment.

MALINS, V. C., said the testatrix's intention was fairly to exercise the power,--there was no undue influence, no fraud. He should endeavour, as far as possible, to carry into effect her intention, by declaring all the appointments good except that of the residue of the trust fund contained in the residuary gift to Frances Plummer: such residue only was unappointed and divisible into fifths among the five children of the marriage, to be paid to them or their representatives.

UNITED STATES REPORTS.

COULTER ET AL. V. BORTNER ET AL.

(From Philadelphia Legal Gazette.)

Where a testatrix bequeathed personal property to a trustee "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said Josiah Coulter, in any way or manner whatever," and the trustee took a conveyance of a tract of land to himself, "in trust for the use of Ann Coulter, with Josiah Coulter and family," and placed them on the land, where they resided until her death.

Held, that the trust was a valid one, that there was no conveyance of the land, or delivery of the personality to the *cestui que trust* by the trustee, and that a conveyance of the land in fee simple by Josiah Coulter and wife was invalid, and passed no title to the vendee.

[Legal Gazette, Sept. 10, 1869.]

Case stated.

Opinion by TRUNKEY, P. J.

The estate of Margaret Campbell consisted of personal property. By her will, Moses Jenkins was appointed executor, and the property given to him as trustee. He took a conveyance, dated March 30th, 1825, of a tract of land in payment of a debt owing to the estate, to himself, as executor of the estate of Margaret Campbell, deceased, in trust for the use of Ann Coulter, with Josiah Coulter and family, and immediately placed them on said land, where she resided until her decease in October, 1867. On May 12th, 1867, Josiah Coulter and wife executed a fee simple deed for thirty acres, part of said tract, to Philip Bortner; a part of the consideration being the note upon which this action is founded. Had they power to convey the land?

The testatrix gave the legal title to the estate to the trustee, who was to perform certain duties for the objects of her bequest. Absolute control over the estate is given him, with power "to apply it to the maintenance and support of Ann Coulter, her husband and family, as in his opinion is fit, at such times and in such amounts as he may determine, and the same not to be at any time liable to the debts or contracts of the said