UNITED STATES REPORTS.

Bacon's Appeal.—Mary Ann Bacon's Estate.

Trusts—Executed and Executory

1. A trust to receive and pay over the income of real and personal estate to a married woman for life and at her death to convey to her right heirs in fee simple, is an active trust which does not cease on discoverture, but continues until the death of the *cestui que trust.*
2. The trust to convey to the right heirs is not an active trust, and the legal estate is executed in them.
3. The rule in Shelley's case does not apply, because the *cestui que trust* has only an equitable estate for life, while the remainder to her "right heirs" is a legal estate.
4. The act of 8 April, 1833, sect. 12, providing against a lapse, only applies to cases where a legacy is clearly given by a testator to the ancestor.

[Phil. Leg. Int., May 22, 1868.]

Appeal of George W. Bacon and others from the decree of the Orphans' Court of Philadelphia, confirming the report of the auditor in the matter of the account of the executors of Mary Ann Bacon, deceased.

The opinion of the Court was delivered May 7, 1868.

Strong, J.—There are two controlling questions in this case. The first is, whether the trust created by the will of John Warder, for the use of his daughter Mrs. Bacon, continued during her life, though she survived her husband, and the second is whether the estate given in remainder to her right heirs was legal or equitable. Upon the answers to be given to these questions depends the rightful determination of all the matters in controversy between the parties.

By the disposition first made by the testator his sons were constituted trustees of certain real estate, for the sole and separate use of Mrs. Bacon, during her natural life, and, after her decease, for the use of her husband, in case he should survive her, and, after the death of both Mr. and Mrs. Bacon, for the use of her right heirs, and to be conveyed accordingly. By this disposition, no active duties were imposed upon the trustees during the life of Mrs. Bacon. They were made mere depositaries of the title. The only conceivable purpose of the trust was to maintain a seperate use for a married women, and to protect the property against the interference of her husband. On the accomplishment of that purpose, the estate of the trustees must have ended. Consequently had this disposition of the testator's will remained unchanged, when Mrs. Bacon became discovert by the death of her husband, the legal estate would by operation of law have immediately vested in her. But the testator did not leave the matter thus. By a codicil to his will he revoked so much of it as vested any real estate immediately in either of his daughters, and in lieu thereof, he devised their portions to the same trustees, in trust to receive the income thereof, and pay it over to the daughters respectively, for the sole and separate use of each daughter during life, and then to her husband, in case a husband should survive, and after the decease of the said daughters and their husbands respectively, the said portions to be conveyed to the right heirs of the daughters respectively, in fee simple.

It is obvious that the trust substituted by the codicil is very unlike that set up, at first, by the will. It is what is denominated, an active trust. It imposed upon the trustees duties beyond that of passively holding the title. And they were constant and continuous, not at all dependent upon the coverture of Mrs. Bacon or any of the daughters. The trustees were to receive the income of the property and pay it over. For this purpose the title was given to them, and for this purpose it was necessary they should hold it during the life of the cestui que trust. Had the trust no other object than the special one of protecting the property from the seperate use of the daughters, it might have been left as it was first constituted. The imposition of a duty to receive and pay over the income would have been needless. But the injunction of active duties during the the life of each daughter evinces a purpose beyond that of maintaining separate uses. It involved the necessity of management and care of the real estate, and of preservation for those entitled in remainder. The distinction between an active and a passive trust, so well established in England, is fully recognized with us in many cases, and it is one of much importance. It was well said by Sergeant, J., in *Veaux* v *Parke*, 7 W. & S. 19, that unless the distinction between these two classes of trusts be regarded, their existence cannot be preserved. So long as active duties remain to be performed by the trustees the legal estate must continue in them to enable the performance. It cannot, therefore, be held that the purposes of the trust instituted by the testator were all accomplished when the husband of Mrs. Bacon died, and that the legal estate of the trustees then terminated. Her interest under her father's will was equitable, and the use limited for her was never executed.

The second question to be answered is whether the estate limited in remainder to her right heirs was legal or equitable. If it was legal, the rule in Shelley's case has no applicability, and Mrs. Bacon's estate was but an estate for life though a remainder was given by the will to her heirs. As already noticed the codicil directs that the titles shall be held by the trustees in trust to receive and pay over the income during the life of each daughter, and of her husband, if he should survive her, and then the portion of each to be conveyed to the right heirs of the daughter in fee simple No other duties toward the remaindermen are prescribed, than to convey to them. The trustees were not to receive the income and pay it over to them. They were not at liberty to hold a single hour for the use of those in remainder At most they were but the conduit through which the title was to pass. Yet it must be conceded that in England the mere duty to convey, is sufficient to prevent the execution of an use under the statute of uses. There, under a trust to convey, the legal estate remains in the trustee until he makes the conveyance, the reason given being that it is necessary in order to enable the conveyance to be made. It might be doubted whether there is any such necessity, for a power would answer the requirement as well. But in this State when lands are given by will in trust to be conveyed, when no other power or duty is assigned to the trustee, when he has nothing to do with the enjoyment of the property, and is only an instru-