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COULTER ET AL. V. PLUMMER ET AL.

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Josiah Coulter in any way or manner whatever."

A special trust is given to Moses Jenkins, to hold for the use and support of a married woman. This is the motive, and to carry it out the will creates an action and operative trust, not a mere passive or technical one. Since the decision in Burnett's Appeal, 10 Wright, 392, there has been no question as to the validity of such trusts, when for the benefit of others as well as *femes covert*. Although personal estate, it cannot be taken from the trustee—his right and duty are to hold and use it as directed by the will. Where a testator devised an estate to his executors in trust, to invest in stock, or put it at interest and apply the income to William Wilson's use, or pay him the whole or part of the principal at their discretion, it was held that William Wilson, or his committee, he having been found a lunatic, had no right to demand and take the money or trust out of the hands where the testator had placed it, the testator had a right to appoint his own trustee. Wilson's Estate, 2 Barr, 329.

Words in a will, which in relation to land would create an estate tail, give an absolute right to chattels. 11 Harris, 10, 388; 6 Casey, 118, 180. But in this will there is no right of possession given save to the trustee—no power of disposition in the *cestui que trust*—no right of control, unless the trustee in his discretion, determines to give her the property. No one, as of right, could demand any portion of the estate from the trustee beyond such sums from time to time as were necessary for the support of Ann Coulter and family. To this extent, and no farther, was it the trustee's duty to pay. Anything more would be a moral, if not legal violation of the directions in the will. Had he in 1825, or within many years afterwards, given this personal estate to Ann Coulter, it would at once have vested in Josiah Coulter, and have been liable for his debts and contracts, the very thing expressly prohibited.

It was conceded in argument, and correctly, that by reason of prohibition as to Josiah Coulter, no estate vested in him while the trust remained unexecuted. The use was in Ann Coulter, and the trustee could have given her the money in her lifetime if he had thought best, for such is the power. Had he so determined, in good faith, the "family," after her decease, would have no claims upon him. "The word family, when applied to personal property, is synonymous with kindred or relations. This being the ordinary acceptance of the word family, it may nevertheless be confined to particular relations by the context of the will, or the term may be enlarged by it, so that the term may in some cases mean children, or next of kin, and in others may even include relations by marriage."—*Bouvier's Law Dict.* I cannot doubt the word family in this will means children. Perhaps the children of Ann Coulter, as the equitable owners of the estate, whether it be real or personal, are now entitled to its possession, control, and disposition, but this is not material to the question.

The trustee took a conveyance of the land in trust as executor of the estate; he holds it for the purposes and uses stated in the will. He could have been compelled to account for the

money invested in this land. The power was not given him, and he had not the legal right to convert personal into real estate. The *cestui que trust* was not bound to acquiesce in such conversion for over forty years. She, with her husband and family, immediately went on the land, and have used it and occupied it as they only could have done had the testatrix owned it at the time of her decease, so that by the will it could have vested in the trustee for her use. Instead of such acquiescence and use, she could have refused and demanded of, and compelled the trustee to pay her the money necessary for her support. The trustee invested the personal estate to the satisfaction of the *cestui que trust*, so that it was not liable to the debts or contracts of Josiah Coulter, so that she, her husband and family, received the use for their support. Being so long acquiesced in she has the equitable right to the real estate, and without doubt she, if living, or having deceased, her heirs can elect to keep it. She could not dispose of it, however, during coverture, for it is well settled that a married woman cannot convey an estate vested in a trustee for her sole and separate use, unless authorized to do so by the instrument creating the trust. After the death of the husband she may convey.

In reference to the duties of Jenkins, as trustee no reason exists why he should have conveyed the land to Ann Coulter. If it was not his duty to give her the money when not required for her support, certainly it was not to give her the legal title to the land purchased with the money. No presumption even arises that a conveyance was made by a trustee when it was not his duty to convey. Had he conveyed the legal title to her in 1825, a life-estate would have vested in her husband, liable for his debts and contracts.

The trustee holding the legal title for the uses, expressed in the will, permitted the *cestui que trust* to occupy the land. If, at any time becoming dissatisfied, she should refuse to occupy, she could not hold it on other terms; nothing but the act of the trustee, as in his opinion he should determine and think fit, could vest the money absolutely in Ann Coulter, or the land as the equivalent for the money. He never gave the one nor conveyed the other.

Whether the land, purchased with the trust funds, stands in the place of, and passes as personal estate, in the hands of the trustee held under the will, or as real estate conveyed to a trustee for the separate use of a married woman, the conclusion is the same, that Josiah Coulter and wife had no power to give a good title for the land attempted to be conveyed to Philip Bortner, and on the case stated, judgment must be entered for defendants.

In an English case it was lately decided in the Court of Exchequer, that a creditor who takes from his debtors agent on account of the debt the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fails to do so and by this delay alters for the worse the position of the debtor, the debtor is discharged, although he was not a party to the cheque.