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# Trusts -- Statute of Uses -- Trusts for Separate Use of Married Women

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In jurisdictions having "anti-concession" provisions in their acts, the fate of the trading stamp is almost certain.<sup>13</sup> The "anti-concession" statutes were designed to prevent evasion of the fair trade contracts. They expressly forbid the giving of *coupons* as a concession to the customer. Accordingly, the courts of Connecticut and Oregon have held that the terms of the statute forbid the giving of trading stamps and preclude a judicial distinction between a legal cash discount and an illegal price cut.<sup>14</sup>

These decisions obviate almost any argument that the trading stamp proponents could make in states having the express prohibitions. It would seem that the only defense available in a suit by a manufacturer for an injunction would be a showing that the manufacturer had not been diligent in his efforts to enforce his contracts.<sup>15</sup> But in a jurisdiction where the question has never been raised, the court should be hesitant in holding that a manufacturer has waived his rights to an injunction because of the conflicting opinions in other jurisdictions.

Since the North Carolina "anti-concession" statute<sup>16</sup> is substantially identical to those of Connecticut and Oregon, it is believed that if the question arises in North Carolina, the court will reach a result similar to that in those states.

RICHARD R. LEE

### Trusts—Statute of Uses—Trusts for Separate Use of Married Women

Does the fact that a passive trust is for the sole and separate use of a married woman prevent it from being executed by the Statute of Uses? This question was raised in *Pilkington v. West*<sup>1</sup> and answered by the North Carolina Supreme Court in the negative. The plaintiff wife had conveyed land to a trustee to be held in trust during her lifetime. By the terms of the trust instrument the property was to be held for her "sole

<sup>13</sup> See note 5 *supra*.

<sup>14</sup> *Mennen Co. v. Katz*, CCH TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62,734 (Conn. Ct. Com. Pl. 1950); *Lambert Pharmacal Co. v. Roberts Bros.*, CCH TRADE REG. REP. (1950-1951 Trade Cas.) ¶ 62,669 (Ore. Cir. Ct. 1950), *rev'd on other grounds*, 192 Ore. 23, 233 P.2d 258 (1951). If the court were allowed to make a distinction, it might possibly say that the trading stamp is a transaction independent and separable from the sale of the protected articles, and therefore could not be a cut in price. This would open the way for the court to make an analogy between the trading stamps and the cash discount, and possibly decide that they are the same thing, as the majority of the courts have done in the jurisdictions not having the "anti-concession" statutes.

<sup>15</sup> It is generally held to be a defense to the manufacturer's action if it is shown that he has not been reasonably diligent in enforcing his fair trade contracts. See *Colgate-Palmolive Co. v. Max Dichter & Sons, Inc.*, 142 F. Supp. 545 (D. Mass. 1956).

<sup>16</sup> N.C. GEN. STAT. § 66-53 (1950).

<sup>1</sup> 246 N.C. 575, 99 S.E.2d 798 (1957).

use, behoof and benefit," and she was to "have, hold, use and occupy and enjoy" the property and "all rents, issues and products arising therefrom, separate and apart from all other persons."<sup>2</sup> The trustee, having no duties or responsibilities, was a mere depository of the legal title. While recognizing that trusts created for the sole and separate use of married women were treated as active trusts at common law<sup>3</sup> and therefore not executed by the Statute of Uses,<sup>4</sup> the court concluded that the property rights of married women had been so modified by the North Carolina Constitution of 1868<sup>5</sup> that the reason for the common law exception no longer existed. Since the trust was passive,<sup>6</sup> the court declared that the wife's equitable estate was executed by the statute into a legal life estate.<sup>7</sup>

Prior to 1868, North Carolina was in accord with the common law rules concerning the disabilities of married women.<sup>8</sup> But the equity courts recognized the separate estate doctrine<sup>9</sup> developed by the English

<sup>2</sup> *Id.* at 577, 99 S.E.2d at 799. No technical language is necessary to create an equitable separate estate, but it must appear unequivocally on the face of the instrument that such is the intention. The words "separate use" are appropriate for that purpose. *Rudisell v. Watson*, 17 N.C. 430, 432 (1833).

<sup>3</sup> *Wilder v. Ireland*, 53 N.C. 85, 88 (1860).

<sup>4</sup> N.C. GEN. STAT. § 41-7 (1950).

<sup>5</sup> N.C. CONST. art. X, § 6. "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried."

<sup>6</sup> A trust is active if it imposes upon the trustee any duties which he could not perform without holding the legal title. *Lummus v. Davidson*, 160 N.C. 484, 487, 76 S.E. 474, 476 (1912).

<sup>7</sup> The scope of this Note is limited to a discussion of this aspect of the case. The trust instrument also provided that the property was to revert to the wife's heirs at her death. If she died survived by a husband, he was to become the beneficiary of the trust for the remainder of his life. If children also survived the wife, they were to share the benefits of the trust with the husband until his death, when the estate was to pass to the heirs. The court found that the husband's interest was voided by the failure of the notary public, who privately examined the wife when the trust was executed, to include in his certificate the findings and conclusions required by N.C. GEN. STAT. § 52-12 (1950). The avoidance of the husband's interest coupled with the stipulation that the wife had no children and could never have any, left the trustee holding the bare legal title for the lifetime of the wife. The trust was executed by the statute into a legal life estate in the wife followed by a remainder in fee to the heirs. The court held that the wife's life estate was converted by the Rule in Shelley's Case into a fee simple absolute. The wife could therefore convey a good title to the defendant who had contracted to buy her property.

<sup>8</sup> *Perry v. Stancil*, 237 N.C. 442, 445, 75 S.E.2d 512, 515 (1953) (a husband was seized of an estate in the real property of his wife during coverture which gave him the right of possession and control and he could appropriate all the rents and profits for his own use and could convey her land for a period not exceeding coverture); *Harrell v. Davis*, 53 N.C. 359 (1861) (a married woman's personal property acquired before and after marriage was vested in the husband); *Revel v. Revel*, 19 N.C. 272 (1837) (a married woman's choses in action which her husband reduced to possession during her lifetime were vested in her husband).

<sup>9</sup> *Davis v. Cain*, 36 N.C. 304 (1840).

Chancery Court<sup>10</sup> to mitigate the harshness of the common law rules. Accordingly, when an intent was manifested in a conveyance for a married woman that the property was to be held for her sole and separate use, the conveyance was treated as a trust.<sup>11</sup> In respect to this property a married woman was regarded as a feme sole; thus the property was free from the control of her husband and the claims of his creditors.<sup>12</sup> Such a trust was declared to be active during coverture, even when there were no express provisions conferring duties of management on the trustee.<sup>13</sup> Otherwise, her resulting legal estate would become subject to the husband's control and thus defeat the purpose of the trust.

According to the English rule, a married woman had an absolute right of disposition over her equitable separate estate unless restricted by the terms of the conveyance.<sup>14</sup> North Carolina followed the English rule in regard to trusts of personal property,<sup>15</sup> and to a limited extent to trusts of real property,<sup>16</sup> until the decision in *Draper, Knox & Co. v. Jordan*,<sup>17</sup> which declared that "a separate estate . . . of a married woman does not confer any faculties upon her except those which are found in the deed."

Following the adoption of the Constitution of 1868, which secured to married women a right to their separate property,<sup>18</sup> dicta in *Withers v. Sparrow*<sup>19</sup> indicated that there was no reason why the English rule should not be followed. But the constitutional provision was declared to have had no effect on a married woman's equitable separate estate in *Pippin v. Wesson*,<sup>20</sup> hence such trusts were to remain active. The court in *Hardy v. Holly*,<sup>21</sup> referring to the *Draper* case as the settled law of the state, held that a married woman's power of disposition over her

<sup>10</sup> 4 POMEROY, EQUITY § 1098 n.17 (5th ed., Symons 1941) cites *Drake v. Storr*, 2 Freem. 205, 22 Eng. Rep. 1162 (Ch. 1695), as showing that the wife's equitable separate estate was a well-settled doctrine of equity as early as 1695.

<sup>11</sup> *Steel v. Steel*, 36 N.C. 452, 455 (1841).

<sup>12</sup> *Dick v. Pitchford*, 21 N.C. 480, 484-85 (1837).

<sup>13</sup> *Pilkington v. West*, 246 N.C. 575, 579, 99 S.E.2d 798, 800 (1957).

<sup>14</sup> *Jackson v. Hobhouse*, 2 Mer. 483, 35 Eng. Rep. 1025 (Ch. 1817).

<sup>15</sup> *Harris v. Harris*, 42 N.C. 111 (1850). Chief Justice Ruffin cited Chancellor Kent's decision to the contrary in *Methodist Episcopal Church v. Jaques*, 3 Johns. Rep. 77 (N.Y. Ch. 1817), commenting that even the chancellor's great name could not uphold such a position, his decree having been reversed on appeal in *Jaques v. Methodist Episcopal Church*, 17 Johns. Rep. 548 (N.Y. Ct. Err. 1819). *Harris v. Harris*, *supra* at 118.

<sup>16</sup> *Newlin v. Freeman*, 39 N.C. 312 (1846).

<sup>17</sup> 58 N.C. 175 (1859).

<sup>18</sup> See note 5 *supra*.

<sup>19</sup> 66 N.C. 129, 138 (1872).

<sup>20</sup> 74 N.C. 437, 444 (1876). As Vernier has pointed out, family law reform has not always been encouraged by the courts and innovations in the property relationships of spouses have been looked upon with distrust. 3 VERNIER, AMERICAN FAMILY LAWS § 167 (1935).

<sup>21</sup> 84 N.C. 662 (1881).

equitable estate was limited to the mode and manner provided in the trust instrument, and if none were provided, she was powerless.<sup>22</sup>

This rule was acknowledged in subsequent decisions,<sup>23</sup> but the question was raised by Justice Connor as to whether the reason for construing a trust for a married woman as active still existed now that she was protected from the importunities of her husband by the constitution.<sup>24</sup> In *Freeman v. Lide*,<sup>25</sup> the court departed from this policy, holding that a married woman could devise property held in trust for her sole and separate use unless expressly prohibited by the terms of the trust. In the principal case Justice Rodman concludes that the activity of married women in the business world today demonstrates the baselessness of the fear that the wife would be so subject to the dominance of her husband that she could not exercise sole and separate use of her property without the protection of a third person.

The principal case appears to recognize the fact that a married woman's equitable separate estate is now obsolete. While this view is shared by some writers,<sup>26</sup> it has been urged that there is an implied statement of the duties of management by the trustee, and that there is an implied intent against execution because of the practical power which a husband has over his wife's property.<sup>27</sup> But it would be unrealistic to assume that this practical power could be eliminated by declaring an otherwise passive trust to be active. Certainly such was never attempted by the equity courts, for it was their practice to appoint the husband as the wife's trustee when none was indicated in the trust instrument.<sup>28</sup>

There is a conflict of authority in other jurisdictions where the question in the principal case has arisen. Ten jurisdictions<sup>29</sup> have held

<sup>22</sup> The trust then under consideration was active; nevertheless the court went to great length to explain its disposition to pay greater respect to the intention of the parties, for experience had taught that such intention was in danger of disappointment "so long as the wife was left to the solicitations of the husband or was allowed to indulge her own generous impulses." *Id.* at 668-69.

<sup>23</sup> *Kirby v. Boyette*, 166 N.C. 165, 166, 21 S.E. 697 (1895), *aff'd on rehearing*, 118 N.C. 244, 24 S.E. 18 (1896); *Broughton v. Lane*, 113 N.C. 16, 18, 18 S.E. 85, 87 (1893); *Mayo v. Farrar & Jones*, 112 N.C. 66, 69, 16 S.E. 910, 911 (1893); *Monroe v. Trenholm*, 112 N.C. 634, 640 (1893); *Clayton v. Rose*, 87 N.C. 106, 110 (1882).

<sup>24</sup> *Perkins v. Brinkley*, 133 N.C. 154, 158, 45 S.E. 541, 543 (1903).

<sup>25</sup> 176 N.C. 434, 97 S.E. 402 (1918). Justice Walker expressed the view that the mere use of the words "sole and separate" in trusts created since the adoption of the constitution, unless active "or creating contingent remainders, ought not to prevent the statute from executing the use. *Id.* at 439, 97 S.E. at 404.

<sup>26</sup> 26 AM. JUR., *Husband and Wife* § 46 (1940); 1 AMERICAN LAW OF PROPERTY § 5.55 (Casner ed. 1952). Equitable separate estates are not considered in the *Restatement* on the subject of trusts "since the special rules of law applicable" to such trusts "are almost entirely superseded as a result of Married Women's Property Acts." 1 RESTATEMENT, TRUSTS § 1, comment *b* (1935).

<sup>27</sup> 1A BOGERT, TRUSTS § 207 (1951); 1 TIFFANY, REAL PROPERTY § 234 (3d ed., Jones 1939).

<sup>28</sup> *Steel v. Steel*, 36 N.C. 452, 455 (1841).

<sup>29</sup> *Frey v. Allen*, 9 App. D.C. 400 (1896); *Nave v. Bailey*, 329 Ill. 235, 160 N.E. 605 (1928); *Brandau v. McCurley*, 124 Md. 243, 92 Atl. 540 (1914) (Mary-

that trusts for the sole and separate use of married women are not executed by the Statute of Uses, while eight jurisdictions<sup>30</sup> have regarded such trusts as no longer active, with the result that legal title passes directly to the beneficiary.

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land provides by statute that a married woman may apply to a court of equity to have a trustee appointed for her sole and separate estate. MD. CODE ANN. art. 45, § 3 (1951); *Cushing v. Spalding*, 164 Mass. 287, 41 N.E. 297 (1895) (Massachusetts provides by statute that a probate court may appoint a trustee for a married woman's separate estate if she so petitions. MASS. ANN. LAWS c. 209, § 12 (1955); *Schiffman v. Schmidt*, 154 Mo. 204, 55 S.W. 451 (1900); *Pittsfield Savings Bank v. Berry*, 63 N.H. 109 (1884); *Dicarlo v. Licini*, 156 Pa. Super. 263, 40 A.2d 127 (1944); *Bowlin v. Rhode Island Hospital Trust Co.*, 31 R.I. 289, 76 Atl. 348 (1910); *Temple v. Ferguson*, 110 Tenn. 84, 72 S.W. 455 (1902); *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S.E. 950 (1895).

<sup>30</sup> *Connolly v. Mahoney*, 103 Ala. 568, 15 So. 903 (1894); *Smith v. McWhorter*, 123 Ga. 287, 51 S.E. 474 (1905); *Allen v. Craft*, 109 Ind. 476, 9 N.E. 919 (1887); *Snell v. Payne*, 25 Ky. L. Rep. 1836, 78 S.W. 885 (1904); *Burdeno v. Amperse*, 14 Mich. 91, 97 (1866); *Milton v. Pace*, 85 S.C. 373, 67 S.E. 458 (1910); *Wood v. Wood*, 83 N.Y. 575 (1881); W. VA. CODE ANN. § 4731 (1955) discontinues the distinction between statutory separate and equitable separate estates, and § 4741 provides that title to property held by a trustee for a married woman is to pass to the beneficiary.