LINDSAY *vs.* HARRISON.

The conveyance of a negro girl to a trustee, upon trust that he permit a feme sole to keep possession of the slave, and receive the rents, issues, profits and services of the slave, and her increase, to her sole use and benefit forever, vests in the cestui que trust, an absolute and indefeasible title; and she may sell the slave without the consent of the trustee.

Upon the marriage of the cestui que trust, the slave became the property of her husband, and was subject to be levied upon and sold under an execution against him.

Writ of Error to the Circuit Court of Pulaski County.

This was an action of detinue in the Circuit Court of Pulaski county, by Isham Harrison against John Y. Lindsay, determined before the Hon. JOHN J. CLENDENIN, Judge, at the May term, 1845. The case was submitted to a jury, who returned a *special verdict,* the material part of which is copied in the opinion of the court.

The Circuit Court rendered judgment in favor of the plaintiff upon the special verdict; and the defendant brought error.

PIKE & BALDWIN, for the plaintiff. Real or personal property

may be so settled on a woman before or after marriage, that it will not to be subject to the marital rights of the husband, and it is not necessary that trustees should be interposed. It has for more than a century been established that the intervention of trustees is not indispensable; and that wherever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties may be effectuated in equity, and the wife's interest protected against the marital rights and claims of the husband. 2 *Story's Eq.* 606, 607, *and cases cited.*

But there is a distinction taken between the case of a gift or bequest to a woman, *married at the time,* and that of a gift or bequest to one *unmarried,* unless it is made in *contemplation of an immediate marriage, and as a provision for that event.* For if a gift or bequest is made to an *unmarried* woman, to be at her own disposal, or for her sole and separate use, or independent of her future husband, the title will vest absolutely in her as owner, and the property will not, upon her subsequent marriage, be held by her in any other manner than her other absolute property, but will be subject to the marital rights of her husband, *ib.* 610, 611. In this respect women take property as absolutely as men, and alienation cannot be prohibited. When property is so given or devised without reference to an immediate and particular marriage, the property may, notwithstanding it is held by a trustee, be taken by the woman herself, be given to any one by her, or by the act of marriage be given to her husband. *Woodmeston* v. *Walker,* 2 *Russ. & M.* 197. *Massey* v. *Parker,* 2 *Mylne & Keen* 174. *Kensington* v. *Dollard, ib.* 184. *Brown* v. *Pocock,* 2 *Russ. & Mylne* 210. *Knight* v. *Knight,* 6 *Simons* 121. *Benson* v. *Benson, ib.* 126.

A trust for the separate use of a woman, with a restraint on alienation, if created with a view to a particular marriage, is good for that marriage: but if created with a view to every marriage a woman may contract, it is bad. *Knight* v. *Knight, and Benson* v. *Benson, ub. sup.*

The deed in this case conveys the trust to Harrison, to allow the woman to receive and keep possession of the slave, to control her ab-

solutely, to receive, without any intervention of the trustee, and use the rents, profits, and services of the slave, and her increase. It vests the whole beneficial interest in her, and a mere naked legal title to him.

Real estate so held in trust is liable to execution for the debts of the trustee. The meaning of the provision in our statute, that all real estate shall be subject to execution, "whereof the defendant, or any person for his use is seized, in law or in equity," is that real estate so held in trust, is liable to execution against the beneficiary, when the whole beneficial interest is in him, and a mere naked legal title in the trustee. *Rev. St.* 377. *Lynch* v. *Utica Ins. Co.,* 18 *Wend.* 236. *Forth* v. *Duke of Norfolk,* 4 *Mad.* 504. *Bogart v. Perry,* 1 *J. C. R.* 52. 17 *J. R.* 357.

At the common law, marriage amounts to an absolute gift by the wife to the husband, of all the goods, personal chattels and other personal estate, of which she is actually or beneficially possessed at that time, in her own right, or which come to her during the marriage. 2 *Story Eq.* 630.

Wherever the husband has reduced the personal estate of his wife, of whatever original nature it may be, whether legal or equitable, into possession, he becomes thereby the absolute owner of it, and may dispose of it at his pleasure; and this being the just exercise of his marital rights, courts of equity will not interfere to restrain or limit it. *Id.,* 631. *Roper on Husband and Wife,* 166.

Before any bill is filed, a trustee who has his wife's property, may pay the rents and profits and hand over the personal estate to the husband. *Murray* v. *Lord Elibank,* 10 *Ves.* 90.

Whatever Mrs. Jeffries' interest was, it passed to her husband on the marriage. The doctrine as to uses and trusts of real estate by analogy decides what was her interest. The Stat., 27 Henry 8, ch. 10, called the Statute of Uses, provided that where any person was or should be seized of any houses, manors, lands, &c., to the use in confidence or trust of any person or body politic, the latter should have the legal seizin and possession nominally given to the former and corresponding to the use, trust and confidence held previously to the Statute in lands, &c., so limited. The words are "shall be in

lawful seizin, estate and possession, to all intents, constructions and purposes, in the law." By virtue of this clause, the actual possession vests in the *cestui*. *Co. Litt.* 266 *b*. *Gill. Uses* 230.

A trust is a use not executed by the Statute of uses. Before this Statute a use and a trust were the same thing, and the Statute itself uses the words synonymously. *Burchett* v. *Durdant*, 2 *Vent.* 312. *Broughton* v. *Langley*, 2 *Ld. Raym.* 878. *Ayer* v. *Ayer*, 16 *Pick.* 330. 10 *J. R.* 494.

By an inquiry into the nature of a use or trust in land, no more is or can be meant than, as to uses, to find out historically on what principles courts of equity, before 27 *H.* 8, received jurisdiction in modifying or giving relief in rights or interests in land which could not be come at but by suing a subpœna; as to trusts, what the court does in modifying, directing and giving relief in the said rights and interests, in cases where there is no remedy but by bill in equity. Whoever shows that the relief given now is more extensive, that it is considered by different or opposite rules, will show the difference and contrast between uses and trusts. The opposition is not from any material difference in the essence of the things themselves. A use and a trust may essentially be looked upon as two names for the same thing; but the opposition consists in the difference of the practice of the court of chancery. Per MANSFIELD, C. J., in *Burgess* v. *Wheate*, 1 *Eden* 207.

In many acts of Parliament an equitable is considered the same as a legal estate. The words "seized in law or equity," show that the word seized is applicable to both. Per Lord THURLOW, in *Shropnell* v. *Vernon*, 2 *Bro. C. C.* 268.

One mode of creating a trust is a limitation of an estate to one for the use of another, in such a way as requires that the former shall be in possession or receipt of the profits: as where it is provided that he *shall take the profits*, and *deliver* them to the *cestui;* or that he shall *pay over* the profits to the *cestui*. A provision that the *cestui* shall *take* the profits, or even that the trustee shall *permit him to receive* them, will make *an executed trust*: because, in order to carry it into effect, the trustee need not be in possession. But in order to receive rents and profits for another's use, the trustee must have the legal

estate. *If this is in the cestui,* a mere power in trust to the trustee is of no effect. Where it appears that the trustee is to be *active* and exercise any control over the estate, so as to show that it was not intended that the estate should vest in the *cestui,* the law holds it a trust and not a use executed: or where something remains to be done by the trustee, which renders it necessary for him to have the legal estate, as payment of the rents and profits to another's use, payment of debts, &c., or receive rents and appropriate them. 1 *Hilliard's Ab.* 202, 203. *Broughton* v. *Langley,* 2 *Ld. Raym.* 873. *Wood* v. *Wood,* 5 *Paige* 596. *Ayer* v. *Ayer,* 16 *Pick.* 330. *Shapland* v. *Smith,* 1 *Bro. C. R.* 75. *Silvester* v. *Wilson,* 2 *T. R.* 444. *Morton* v. *Leonard,* 12 *Pick.* 152. *Bass* v. *Scott,* 2 *Leigh* 356. *Neville* v. *Saunders,* 1 *Vern.* 415. *South* v. *Allen,* 5 *Mod.* 101, 63. 1 *Salk.* 228. *Harton* v. *Harton,* 7 *T. R.* 652. *Donalds* v. *Plumb,* 8 *Conn.* 447. *Keen* v. *Deardon,* 8 *East* 248. *Doe* v. *Simpson,* 5 *East* 162. *In the matter of De Kay,* 4 *Paige* 403. *Benson* v. *Benson,* 6 *Simons* 126. *Spaun* v. *Jennings,* 1 *Hill Ch. R.* 324. *Green* v. *Spicer, Taun.* 396. *Kenrick* v. *Beauclerk,* 3 *B. & P.* 175.

As a general rule it is contrary to sound policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes and to be able at the same time to keep it from his honest creditors. Although the Statute relative to uses and trusts only applies to real estate, yet courts of justice have always endeavored to preserve the analogy between estates or interests in land and similar interests in personal property. An attempt to give a person an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right of property, so far as the rights of creditors are concerned, cannot succeed consistently with public policy or the settled rules of law. *Hallett* v. *Thompson,* 5 *Paige* 585. *Graves* v. *Dolphin,* 1 *Simons* 66. *Green* v. *Spicer,* 1 *Russ. & Mylne* 395.

This deed would have created an executed use in *land.* By analogy it created *an executed trust,* and gave the absolute estate to Miss Kelly. Her interest, if it had been land, could have been sold by her, given away by marriage, or taken on execution against her. By analogy the same consequences result.

Equity will always compel the trustee to surrender the legal estate to the *cestui,* unless the receipt of the profits by the trustee is necessary to effectuate the intention of the creator of the trust. *Jasper* v. *Maxwell, Dev. Eq.* 357.

Where slaves have been conveyed in trust for the benefit of several, the *cestuis* may, without the intervention of the trustee, divide the use among themselves, and the slaves thus allotted to each will be subject to execution for the debts of each respectively. *Strode* v. *Churchill,* 2 *Litt.* 76.

Cestui may alien his estate, and any legal conveyance or assurance made by him has the same effect and operation on the trust as it would have had on the estate at law in case the trustees had executed their trust. *North* v. *Champernon,* 2 *Ch. Ca.* 63, 78. *Boteler* v. *Allington,* 1 *Bro. C. C.* 72. *Wykham v. Wykham,* 18 *Ves.* 325, 418.

Whatever interest Mrs. Jeffries had before marriage passed to her husband. If it was before liable to execution for her debts, it then became liable for his. The law would, if necessary, even *presume* a conveyance by the trustee. If she had sold, the court would not maintain the trustees' right against the purchaser.

Lastly: Under the deed Harrison has no right to possession. That is vested in the woman beyond his control. Jeffries could transfer the possession by sale. Lindsay holds as her assignee, and Harrison's estate on any ground must fail.

WATKINS & CURRAN, contra. The Statute, 27 *Hen.* VIII, called the "Statute of Uses," applies entirely to real estate, (6 *Com. Dig., title Uses* B. I. 7 *Bac. Ab., title Uses and Trusts,* D.) It does not extend to or execute a use of personal property. *Wills on Trustees, p.* 23, *in* 10 *Law Lib. Bacon's reading on the Statute of Uses,* (Ed. Rowe) p. 44, and Editor's note 74. The counsel for plaintiff have anticipated this response and cite *Kenrick* v. *Beauclerk,* 3 *B. & P.* 175. *Graves* v. *Dolphin,* 1 *Simons* 66. *Green* v. *Picer,* 1 *Russ. & Mylne* 395. *Hallitt* v. *Thompson,* 5 *Paige* 585, to show that since the Statute, courts have considered chattels governed by the like rules as real estate, but it will be found that neither of these

cases are authority to sanction the position. In *Kenrick* v. *Beauclerk,* although the devise included both real and personal estate, yet the only question was, whether the trustee took the legal estate in the land. In *Graves* v. *Dolphin,* the devise included both real and personal estate. In *Green* v. *Spicer,* the devise was of real estate in trust to pay the rents and profits to the son. *Hallett* v. *Thompson,* simply decides that the estate of the cestui que trust is subject in equity to the payment of his debts; but the question at bar is whether the legal title is in the trustee. The Statute of New York, under which this decision was made, declares that the cestui shall be deemed to have a legal title. 4 *Kent Com.* 309.

The Statute of uses cannot by *analogy* be made to apply to personal property, because the reason upon which that Statute is based, does not apply to chattels; but even if the same reason or necessity existed, it would require some legislative enactment to change the tenure of said estates.

The rule that an equity in chattels cannot be sold under execution at law is so familiar that it seems needless to cite authorities in support of it. *Vide* 2 *John. Ch. Rep.* 284. 5 *John Rep.* 335.

This is an action at law, and if by the terms of the deed the naked legal title is in the trustee, there is no question but what the judgment is correct. The cases cited by counsel are determinations in equity, and are for that reason inapplicable. In view of a court of equity the beneficiary is esteemed the owner, but in courts of law the legal title prevails. A trust is an estate for the most part cognizable only in courts of equity and not by courts of law. 1 *Hilliard's Abr.* 201. 2 *Ventr.* 312. 10 *J. R.* 494. 16 *Pick. Rep.* 330. 2 *Ld. Raym.* 878. Where personal chattels are conveyed in trust, the legal title is vested in the trustee, and consequently he has a legal remedy for the recovery thereof, and is the only person who has such remedy; but the cestui may, as in other cases, apply for relief to a court of equity. *Lady Arundell* v. *Phillips & Taunter,* 10 *Ves.* 139: and in case the property is molested, that court will, on application of any person interested, compel the trustee to assert his legal right. *Foley* v. *Bennell,* 1 *Bro. C. C. Rep.* 377. Notwithstanding the party beneficially interested has an estate in equity equivalent to the

legal ownership, he cannot sue at law on his equivalent title, (1 *Chit. Pl.* 190), but the action must be in the name of the trustee. 1 *Saud. on Uses and Trusts. Willis on Trustees* 109, in 10 *Law Lib.* The trustee can maintain an action against the cestui. 1 *Dougl. Rep.* 721. 5 *East* 138. *Selwyn N. P.* 660. *A fortiori,* could he recover at law against a purchaser under execution against his cestui? This is the consequence of the legal title being vested in the trustee. In view of a court of equity the cestui que trust has an estate equivalent to the legal ownership; but such title is not recognized and cannot be enforced in a court of law. *Shapnall* v. *Vernon, Bro. C. C.* 270. 1 *Edens Rep.* 226. *Cruise Dig.* 484. 7 *Bac. Abr.* 185. This of itself shows that the cases relied on, by plaintiff in error, are not applicable.

We rest the case upon the ground that a trust created in *personalty* stands precisely as it did at common law, in the absence of any statute to declare it a use executed: consequently, no evasion is necessary by limiting a use upon a use, or by vesting executory powers in the trustee—the mere declaration of the use is sufficient.

This is an active and not a passive trust. *Carleton & Co.* v. *Banks,* 7 *Ala. Rep.* 37. Much stress is laid by counsel, on the fact that the deed provides that the trustee shall permit Mrs. Jeffries to remain in possession. The response to that is, that the possession of Mrs. Jeffries is the trustee's, because at his sufferance. The deed conveys the legal title and right of possession to the trustee in trust that he will permit her to hold possession. The deed gives the trustee the legal right of property, which carries with it the right of possession, and is sufficient to maintain this action. *Wilson* v. *Royston,* 2 *Ark. Rep.* 526. A trustee who has even constructive possession of personal property may sustain an action for an injury done to the trust property. *Wilson Trustees* 206, *in* 10 *Law Lib. Selwyn N. P.* 1220. The proceedings of the trustee, instead of violating, are in strict accordance with the trust. The evident object of the deed in vesting the legal title in the trustee was to protect Mrs. Jeffries' possession from being violated by others. In *Gregory* v. *Henderson,* (4 *Taunt. Rep.* 772), there was a devise of lands to trustees to permit testator's wife to have, hold, use, occupy, possess and enjoy the full, free and unin-

terrupted possession for her life, if she should continue unmarried. The court said it was true, there was very little for the trustee to do; but if it was intended that the devisee should have the legal estate, there would have been no need of any trustee.

The general principle, that upon marriage the personal property of the wife vests in the husband, is not controverted; but it must be remembered that he does not take an absolute estate unless the wife has such an interest: he succeeds to her rights. The tenure of the property is not changed, but remains in his hands subject to all the qualifications and limitations existing before the marriage. If the wife has but an use or equity, the husband can take no more.

But waiving all other positions and placing the case upon the same footing as if the negro had been conveyed directly to Mrs. Jeffries, the judgment must be affirmed, because Lindsay failed to show that the negro was liable for Jeffries's debts. Unless the debt accrued *after* the marriage, the negro was not in any event liable to the execution. *Rev. Stat. sec.* 22, *p.* 377.

OLDHAM, J. Harrison brought an action of detinue in the Circuit Court of Pulaski county, against Lindsay, for a negro woman. Upon the trial the jury found the following facts as a special verdict: "That William K. Paulding was the original owner of the slave in question, and, on the 15th day of June, 1835, in the State of Alabama, conveyed her to plaintiff, by deed of that date then executed, said Paulding, Harrison, and Harriet Kelly, then residing there, upon trust, that he, his executors, administrators and assigns, should permit said slave and her increase to remain in the possession and under the control of Harriet Kelly, her heirs, executors and administrators, and should permit said Harriet to receive the rents, issues and profits, and the services of the said girl and her future increase, to her and their sole use and benefit for ever. That said slave was thereafter delivered to said Harriet Kelly, who afterwards removed to the State of Mississippi, carrying said negro with her, and there intermarried with Richard Jeffries, in the year 1835 or 1836, the said Harriet being then about twenty years of age; that said slave remained in the possession of said Harriet from the time said deed was made until 1837

or 1838, until said Jeffries and Harriet removed to Arkansas, where they continued to reside, keeping said negro in possession, until she was taken by the sheriff of Saline county in this State, under an execution against said Jeffries, just before the February term, 1840, of the Saline Circuit Court, on which execution she was sold and purchased under such and on such sale by the defendant. Public notice and particular notice to said Lindsay having been first given before and at the sale, by the attorney of Mrs. Jeffries; that the plaintiff claimed the negro as being the property of said plaintiff as trustee for Mrs. Jeffries, and said deed being then produced and shown to and its contents made known to said Lindsay; which sale was made on the 25th day of February, A. D. 1840," &c.

Upon the special verdict rendered by the jury, the Circuit Court gave judgment for the plaintiff below, from which the defendant has brought error to this court.

The question presented, is whether the husband, by virtue of the bill of sale and marriage with the beneficiary, acquired such an interest in, and title to, the slave, as could be levied upon and sold under an execution against him.

The estate granted to Harriet Kelly, was not a life or other limited estate; but was absolute and indefeasible. The gifts of the use, possession, rents, issues and profits of the negro was full and absolute, and depended upon no contingency. Having the possession of the negro by such a title, she could have sold her as any other of her legal property, without the consent of the trustee, even though a clause against alienation had been inserted in the deed. It is impossible to tie up the use and enjoyment of a personal chattel so as to create in the donee an unlimited estate which he may not alien. Even a life estate cannot be so limited and restricted. *Woodmeston* v. *Walker*, 2 *Rus. & My.* 197. *Massey* v. *Parker*, *ib.* 174. *Brown* v. *Pocock*, *ib.* 218. *Brandon* v. *Robinson*, 18 *Ves.* 429. Such fetters may be imposed upon the estates of married females, or estate settled upon females in contemplation of marriage during coverture, but they cease upon the determination of the coverture.

In this case there does not appear to be any attempt to exclude the marital right of the future husband. No mention is made of the husband, nor any allusion to marriage.

By the marriage all the personal chattels of the wife, of which she was in possession, vested in the husband, and also the right to reduce her choses in action into possession, during coverture. The right to the absolute possession and services of the slave by the marriage vested in the husband, and he was clothed with the same unlimited authority over her that his wife was while a feme sole. While single, she could have sold and conveyed the slave to any other person, and by the marriage she conveyed her to her husband.

The case of *Carleton & Co.* v. *Banks, 7 Ala. Rep.* 32, *new series,* is much stronger for the trustee than the one before the court. Certain negroes were conveyed to a trustee upon trust, that he would permit Harriet Smith, who was then a feme sole, "to have and retain the possession of the slaves and their increase, and to receive and enjoy the profits thereof during the time of her natural life, and at her death said negro girls with their increase to descend to the issue of her body, and in the event she should die without issue, then," remainder to specified persons. Miss Smith afterwards intermarried with Hatfield, and one of the slaves was levied upon and sold as his property. The court held, that the life estate of the wife was subject to sale under execution in favor of the creditors of the husband. It is true, that Judge Goldthwaite dissented from the opinion of the majority of the court. but upon grounds not applicable to the case under consideration. He held that the legal title to the slave vested in the trustee, and must remain in him until the complete execution of the trust, unless he should be removed by competent authority; that unless the legal estate should remain in him he could not after the determination of the life estate place the slave in the possession of the person in remainder without a trespass upon some one having the legal title.

No such reasons apply in this case. There is no remainder dependent upon any particular estate, which is to be upheld and supported by the legal title remaining in the trustee. There is no act remaining for him to perform, but every duty required of him by the terms of the deed had been discharged, and so far as he is concerned the trust has been fully executed. If the legal title to the slave still remains in the trustee, when will it determine and in whom will it vest? If it has not already vested in Mrs. Jeffries, will it ever vest in

her or her heirs? What duty remains to be performed by the trustee in the execution of the trust created by the deed? There is none.

We are of opinion that the negro girl in controversy was subject to execution and sale at the instance of Jeffries' creditors, and that the title acquired by Lindsay was valid. Judgment reversed.