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The Procedural Status in West Virginia of a Trustee in a Deed of Trust to Secure a Debt

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above "the average" and so intellectually competent? Would he be required to demand that his grantor submit to mental tests to determine his legal competency? Or otherwise would the purchaser have to buy at his peril? The difficulties in such a rule of mental competency proposed by the case of *Morris* v. *Williams-Garrison* are obvious. It is submitted that every consideration of public policy argues against such a rule.

—F. L. L.

THE PROCEDURAL STATUS IN WEST VIRGINIA OF A TRUSTEE IN A DEED OF TRUST TO SECURE A DEBT.—In a recent West Virginia case,[1] the grantor in a deed of trust sued to cancel the deed of trust and the notes secured thereby on the ground of fraud in their procurement. One of the grounds of demurrer to the bill was non-joinder of the trustee. The Supreme Court of Appeals held that the trustee was not a necessary party. The holding in this case revives in the mind of the writer a previously formed impression to the effect that the West Virginia law has not always been consistent in its treatment of the procedural status of a trustee in an ordinary deed of trust executed for the purpose of securing a debt.

It is perhaps unnecessary to cite authority to sustain the proposition that ordinarily the effect of a deed conveying property to a trustee, for whatever purpose, is to vest the legal title in the trustee. So literally has this principle been accepted as true, and so rigidly has it been enforced in the legal forum, that no small space in the equity reports is taken up by cases in which equity, looking after the affairs of the real party in interest, has found it necessary to curb activities of the holder of the legal title who undertakes to pursue his legal prerogatives too literally. It is in pursuance of this principle that in many jurisdictions—perhaps in all jurisdictions where a different practice is not authorized by statute—the trustee, and not the beneficiary, in a deed of trust to secure a debt is held to be the proper party to execute a release of deed of trust.[2] Of course a legal discharge of the debt secured leaves the trustee shorn of any potentially active or contingent powers that he may have possessed, so that he becomes a bare repository of the legal title and thence has no right to deal in any way with that title except to pass it back to the grantor, but

[1] Petrelli *v.* Petrelli Coal Co., 127 S. E. 915 (W. Va. 1925).
[2] 2 JONES ON MORTGAGES (7th ed.) 598. "Where a mortgage takes the form of a deed of trust, the legal title is vested in the trustee, and he is therefore the proper person to execute a release." 27 CYC. 1417.

such is the effect of the deed of trust conveyance that action on the part of the trustee is necessary in order to revest the legal title in the grantor. In further pursuance of the same principle, it is generally held that the trustee is a necessary party to any litigation in which the court undertakes to make a disposition of the legal title, for instance by decreeing a sale of the property. In this respect, the West Virginia court follows the conventional rule adhered to by courts of equity in other states. It has been held that the trustee is an indispensable party in a suit to enforce a mechanic's lien,[3] a judgment lien,[4] a vendor's lien,[5] or an attachment lien,[6] and in various other suits where the court undertakes to make some disposition of the legal title[7]. It is held to be essential that the trustee be made a formal party to the bill. The fact that the beneficiary appears and proves his debt before a commissioner, in pursuance of a statutory convention of creditors, does not dispense with the necessity of having the trustee before the court as a formal party in order that the court may have jurisdiction of the legal title.[8] All these decisions are based broadly on the bare assumption that the legal title is in the trustee and that the court must bring him in and abstract it from him by operation of the court's decree before it can be passed on to a third party, ordinarily a purchaser at a judicial sale. It will be admitted that the local decisions are in accord with the decisions of other states and that the principle underlying them is sound as tested in the light of conventional legal theory uncolored by statute; but is its uniform application in West Virginia consistent with the general view which the local law, statutory and otherwise, takes of the status of a trustee in a deed of trust executed for the sole purpose of securing a debt?

To the extent that the West Virginia legislature has found occasion to assume an attitude toward the status of such trustees, the tendency has been to deprive them of control over the legal title and to vest such control in the beneficiary. Sections 1 and 4 of chapter 76 of the Code provide, contrary to the rule prevailing in other states, that the beneficiary may execute a release and thus restore to the grantor the legal title which he has conveyed to the trustee. Section 6 of the same chapter further pro-

[3] Lunsford and Withrow Co. *v.* Wren, 64 W. Va. 458, 63 S. E. 308 (1908).
[4] Jackson County Bank *v.* First National Bank of Reedy, 89 W. Va. 165, 109 S. E. 719 (1921).
[5] Turk *v.* Skiles, 38 W. Va. 404, 18 S. E. 561 (1893).
[6] Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237 (1899).
[7] For example, see Bragg *v.* United Thacker Coal Co., 70 W. Va. 655, 74 S. E. 946 (1911)
[8] Bilmyer *v.* Sherman, 23 W. Va. 656 (1884).

vides that, when the beneficiary fails to comply with his duty to execute a release, the release may be secured by statutory proceedings in court and the trustee is not required to be a party to such proceedings. The statute provides that the effect of such a release shall be the same as if it were executed by the beneficiary. Hence it restores the legal title to the grantor. Here are certainly instances in which the legal title may be taken from the trustee without any act on his part and without his presence, either actual or constructive. In these statutory instances, the beneficiary and the court have power to act directly upon the legal title *in rem*, as it were, and are not compelled to act *in personam* through any intermediary cooperation with or jurisdiction over the trustee. In other words, the legal title may be dealt with as standing apart from the trustee. Again, by section 21 of chapter 90 of the Code, the trustee is prevented from using the legal title as a means of ousting the grantor in an action of ejectment.

It is further pertinent to inquire, independently of statutes, how the common law, as distinguished from equity, looks upon the status of the legal title when property has been conveyed in trust to secure a debt. The legal title is the child of the common law and the common law is ordinarily rigid in its strict conformity to pure legal principle. So here, if anywhere, it would seem that if the trustee has the substantial legal title the law must concede to it the incidental rights and prerogatives that go with it. The title incidentals in an action of ejectment may be taken as a fair test. It is fundamental law that only the legal title, and not an equitable title, will avail a plaintiff in an action of ejectment. Hence, if a party has conveyed his property in trust to secure a debt and the trust conveyance truly divests him of his legal title in the interim, he ought not to be allowed to maintain an action of ejectment while the title is so outstanding in the trustee. In other words, since the plaintiff, where his case rests on title rather than on invasion of his possession by a mere trespasser, must recover on the strength of his own title, the defendant in such a case ought to be permitted to show the outstanding title in the trustee as a defense to the action of ejectment, if the trustee has the true legal title in any substantial sense of the term. So far as the writer has been able to determine, the West Virginia Supreme Court of Appeals has never found occasion to decide this question, but in Virginia it has been decided in a comparatively recent case that the fact that the owner of property has conveyed it in trust to secure a debt does not impair his right to sue in

ejectment, and that it will not avail the defendant to prove that the property has been so conveyed in trust. The court says,

> "While technically the legal title is in the trustee, it is only vested in him for a definite purpose, namely, to secure the debt. Such a deed should be construed in actions of ejectment as a mere lien upon the property."[9]

The writer has no doubt that the same rule has been accepted by the profession and applied by the trial courts in West Virginia.

The conclusion would seem to be that under the local statutes and under the common law, at least for some substantial purposes, the trustee is not looked upon as having any control over the legal title, and that there are no procedural functions connected with his person so far as dealing with the legal title or affecting its status is concerned.

The principal case furnishes an additional instance where the participation or presence of the trustee is not necessary for the purpose of dealing with the legal title. One reading this case naturally is prompted to inquire whether it is in harmony with the earlier cases holding that the court cannot change the status of the legal title without the presence of the trustee as a party. It may be suggested that if the earlier cases required the presence of the trustee as the holder of the legal title in order to pass the title on to the purchaser at a judicial sale, for the same reason the trustee was a necessary party in the principal case for the purpose of taking the legal title out of him and passing it back to the grantor. In other words, it would seem that if the court could reach the legal title only through the presence of the trustee in the one case the same would be true in the other case and that the cases could not be legitimately distinguished on the basis of the different dispositions made of the legal title in the two cases. This must inevitably have been the conclusion reached if the question had been decided independently of statute. Hence it is important to note that the principal case is decided on statutory grounds.

It has already been noted that the West Virginia statute empowers the beneficiary to execute a release and provides that a release so executed shall operate so as to revest the title in the grantor;[10] and also that, if the beneficiary fails to execute a release when he should do so, the release may with like effect be

[9] Gravatt v. Lane, 121 Va. 44, 92 S. E. 912 (1917), citing BURKS, PLEADING AND PRACTICE, 196.
[10] W. Va. Code, c. 76, §§ 1 and 4.

executed under the direction of the court without notice to the trustee.[11] In the principal case, the court seems to have acted on the theory that, if the deed of trust was procured by fraud, it was the duty of the beneficiary to release it, and, since he refused to do so, the statute, in spirit at least, authorized the court to accomplish the release through the medium of setting aside the deed of trust.

As opposed to this method of justifying the court's action, it may be argued that the statute does not authorize the court to proceed against the beneficiary alone in the absence of the trustee for the purpose of setting aside the deed of trust, but merely for the purpose of securing a release. It may be reasoned that this was a direct attack upon the legal title vested in the trustee; that the court must first and primarily, under the theory of the principal case, determine that the trustee had no legal title before it could take any action equivalent to accomplishing a release of the lien; and that the proceeding being primarily for the purpose of changing the legal title, the trustee was a necessary party. It may be said that there is a difference between changing the legal title so as to accomplish a release and decreeing a release which changes the legal title. Again, it may be said that the court would have no power to decree a release in the absence of the trustee if the statute did not give such authority, and hence such authority must be exercised in the manner prescribed by statute; while in the principal case the plaintiff proceeded by an ordinary suit in chancery on the basis of fraud instead of pursuing the statutory proceeding. To all these arguments it may be replied that the parties required to be present in the statutory proceeding were present in the chancery proceeding and that equity looks to the substance rather than to the form.

If it should be conceded that it is not practicable to distinguish the principal case from the cases hereinbefore cited requiring the presence of the trustee in order to make a disposition of the legal title, the writer would be in favor of adhering to the holding of the principal case. It may be conceded that in some cases the trustee may be so situated with reference to the subject matter of the trust as to require his presence as a substantial or even necessary party independently of the fact that he is the holder of the legal title. But where he has taken no action with reference to the trust and circumstances are not such as to indicate that he will take any action that will interfere with the jurisdiction of the

[11] *Idem*, c. 76, § 6.

court over the legal title, is it logical always to require his presence as the holder of the legal title in order that the court may make a disposition of the subject matter of the trust? In the instances where it is expedient to bring him in, should it not be possible to assign some more substantial reason for his joinder? When equity requires the joinder merely on the conventional ground which has been assigned in the cases, is it not departing from the rule that equity looks to the substance rather than the form, and that equity is satisfied with the presence of the real party in interest? Under our local law, does not equity in some instances look with more reverence upon the legal title than does the common law? If under the statutes relating to releases and in the principal case the court can deal with the legal title as detached from the person of the trustee, why can it not do so in creditors' suits unless some substantial reason can be perceived for bringing him in, aside from the fact that the legal title has been conveyed to him? Why will not an adjudication in such a suit making a disposition of the subject matter of the trust, in the presence of the grantor and the beneficiary, extinguish the legal title in the trustee the same as in the principal case? Is it necessary to concede that the trustee has the legal title at all in the substantial sense indicated by the cases? Although the trustee in form gets the legal title by the trust conveyance, does he in substance get anything more than a bare power of sale to be executed upon a contingency? Would it be too much to say that equity, in getting jurisdiction and control of the trust debt through the person of the beneficiary as a party, thus bars the contingency on which a sale by the trustee can take place and so in legal effect extinguishes the power of sale? This, in effect, is what happens when the trustee is brought in as a party. Why not in his absence? If it should be said that the trustee, in the absence of notice in the form of process served upon him warning him that his functions have been superseded by the court, may proceed to an improper exercise of those functions, it may be replied that he is equally liable to do so in the principal case or in any case where the debt has been discharged by act of a party, since he does not participate in the release. As to any aid that he may render in the litigation, all practitioners are aware of the empty role which he usually plays after he has been brought in. When a creditors' suit has been brought, the trustee has no power to proceed with

a sale of the trust property.[12] Nor is his lack of authority to sell affected by the fact that he has not been made a party to the suit.[13] It is true that after the trustee has been made a party, the court may in some cases, in its discretion, very appropriately appoint him a special commissioner of the court to make a sale of the property, but this, it seems, is a mere matter of courtesy extended to him and is by no means of such import as to make him an indispensable party.[14] What has been said is not intended to apply to trusts other than those executed for the purpose of securing a debt, nor to imply that equity in dealing even with the latter class of trusts should look upon the trustee as an improper party. No reason is perceived why he should not in any case be a proper, though not indispensable, party—at least a formal party; and if there were an option as to his joinder, still it is conceived that it would be the better practice to join him as a general rule. The question is whether a decree should be reversed on account of his non-joinder when no other reason can be assigned for his presence than the mere fact that the legal title has been conveyed to him in trust for the sole purpose of securing the payment of a debt.

—L. C.

[12] Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285 (1896); Stafford *v.* Jones, 65 W. Va. 567, 64 S. E. 723 (1908); Carter *v.* Carter, 83 W. Va. 312, 98 S. E. 296 (1919).
[13] W. Va. Code, c. 139, § 7; Parsons *v.* Snider, *supra*, n. 12, p. 521
[14] Sulzberger & Sons Co. *v.* Fairmont Packing Co., 86 W. Va. 361, 103 S. E. 121 (1920).