



January 1951

Trusts

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Recommended Citation

Scott McDonald, *Trusts*, 5 Sw L.J. 358 (1951)
<https://scholar.smu.edu/smulr/vol5/iss3/14>

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TRUSTS

BREACH OF TRUST BY TRUSTEE

*Arkansas. Hardy v. Hardy*¹ was an action by a beneficiary of a trust to require the trustee to restore to the trust estate certain funds. The testator had provided for a testamentary trust in favor of three minor children, and his widow, the defendant, was to act as trustee. The testator's estate included certain timber lands; the will directed that his widow was to receive a life estate in one-third of the timber lands with the other two-thirds and remainder after the widow's life estate to be included in the trust *corpus*. As timber was sold, the trustee set aside one-third of the proceeds from such sales, invested the same and paid the income from the investment to herself, individually, but held the principal as an asset of the trust. Each year the trustee filed a report in the chancery court for the previous calendar year; these reports were to continue during the life of the trust; and each report was approved by the court, including those for the years 1945 and 1946.

Up to this point the entire proceedings were regular. However, in 1945 the Arkansas General Assembly passed Act No. 143,² which provided that a widow's dower interest in timber should be an absolute one-third of the proceeds of any sale. In spite of the fact that the Pulaski County Chancery Court had rendered a decree many years previously that defendant had elected to take under the will and not by right of dower, the defendant for the years 1945 and 1946, upon the advice of counsel, took for herself absolutely the full one-third of the proceeds of the timber sales. It was for the return to the trust estate of this one-third of the proceeds of the timber sales that the plaintiff sued. The trial court held that the trustee acted in good faith and that the chancery court orders approving the annual trustee reports for the years 1945 and 1946 were final and could not be set aside.

The supreme court reversed the trial court and held that Act

¹Ark....., 230 S. W. 2d 6 (1950).

² ARK. STAT. 1947 ANN. § 61-204.

No. 143 of the 1945 Arkansas General Assembly had no effect on this case, as defendant had accepted the chancery court decree which had declared that defendant had abandoned her claim to dower by having accepted benefits under the will. In addition, the supreme court held that the act of the defendant in taking for her own personal use one-third of the timber sales in 1945 and 1946 was a breach of trust. The court stated that this was true in spite of the fact that the trustee acted in good faith in thinking that Act No. 143 legally entitled her to one-third of the proceeds of the timber sales. Finally, the supreme court held that the orders of the chancery court approving the accounts of the trustee each year were only interlocutory and did not become final until the trust was terminated; therefore, they could be set aside in this action.

This case properly applied the general rule that any act of a trustee which results in his private gain and which was done without the knowledge of the beneficiary is a breach of trust.³ The breach is not mitigated by good faith or because of reliance upon advice of counsel.⁴ The harshness of this rule may be avoided by submitting the matter to the court for instructions.⁵

Arkansas is among the minority of states in holding that an intermediate accounting by a trustee is not *res judicata* as to matters included in the accounting.⁶ However, because of the duty of the trustee not to do anything for his own personal benefit, any act which does result in personal gain to the trustee will likely be held to be "constructive fraud," even in the absence of actual fraudulent intent; therefore, had the court followed the majority rule by holding that the annual reports of the trustee were final, they probably could have been set aside on the ground of "constructive fraud".⁷

A companion case to the case just discussed is *Hardy v. Hardy*⁸

³ 3 BOCERT, TRUSTS AND TRUSTEES (1935) §§ 492, 543; 2 SCOTT, THE LAW OF TRUSTS (1939) § 201.

⁴ *Ibid.*

⁵ 2 SCOTT, THE LAW OF TRUSTS (1939) § 201.

⁶ 4 BOCERT, TRUSTS AND TRUSTEES (1935) § 973.

⁷ 3 BOCERT, TRUSTS AND TRUSTEES (1935) § 493.

⁸ _____ Ark. _____, 230 S. W. 2d 11 (1950).

in which the trustee and a beneficiary had agreed on a valuation date for the purpose of determining the beneficiary's final interest in the trust. An appraiser set the value of certain stocks at \$20,834.60 as of the agreed date. The trustee paid the beneficiary on the basis of this valuation; however, in the interim between the date of valuation and the date of payment dividends on said stock were received in the amount of \$9,869.64. Although the trustee had agreed to pay the beneficiary his pro-rata share of any dividends received during this period, she failed to do so on the ground that the agreed valuation date was the termination date of this beneficiary's interest in the trust.

The court properly found that the trustee had breached her trust. The general rule was applied that a fiduciary in dealing with his principal must conduct himself in utmost good faith.⁹ The fact that the trustee did not personally benefit from the act was not material because when there are two or more beneficiaries, the trustee is under a duty to deal with them in an impartial manner.¹⁰

CONSTRUCTIVE TRUSTS

Arkansas. In *Jones v. Gachot*¹¹ the question involved was whether or not the necessary elements were present to impress a constructive trust upon certain real estate. The property in question was granted by Mrs. Felice Field by warranty deed to her two nephews, L. C. Gachot and J. F. Gachot; it was alleged that there was an oral agreement that they were to hold the property as trustees for themselves and their brothers and sisters. The trial court rejected the evidence as to the alleged trust agreement and dismissed the case for want of equity.

On appeal plaintiffs conceded that an express trust cannot be established by oral evidence.¹² But they contended that a constructive trust should be imposed, basing their argument on the doctrine stated in the *Restatement of the Law of Trusts*:

⁹ 3 BOGERT, TRUSTS AND TRUSTEES (1935) § 493.

¹⁰ 1 RESTATEMENT, TRUSTS (1935) § 183.

¹¹Ark., 230 S. W. 2d 937 (1950).

¹² ARK. STAT. 1947 ANN. § 38-106.

“Where the owner of an interest in land transfers it *inter vivos* to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but only if,

- (a) the transferee by fraud, duress or undue influence prevented the transferor from creating an enforceable interest in the third person, or
- (b) the transferee at the time of the transfer was in a confidential relation to the transferor, or
- (c) the transfer was made by the transferor in contemplation of death.”¹³

The plaintiffs conceded that subsection (a) did not apply, but they did contend that either subsection (b) or subsection (c) was applicable. The reported evidence on these points was meager, and the supreme court held that there was insufficient evidence to justify the application of either subsection. The court expressly refrained from holding that subsection (b) or subsection (c) would have been applied had the evidence been sufficient; however, the inference from the majority opinion and the direct statement of the separate concurring opinion were that these subsections would be applied in a proper situation. However, as recently as 1947 this court refused to apply subsection (b) in a situation involving brothers and sisters in what appeared to be a very close, confidential relation.¹⁴

The principal case indicates that the Arkansas court is reluctant to impress constructive trusts on real estate on the basis of oral evidence in the absence of fraud, duress or undue influence.

Cy Pres DOCTRINE

*New Mexico. Gunderson v. Sage*¹⁵ was a suit to construe the terms of a trust and for determination of the beneficiaries. The

¹³ 1 RESTATEMENT, TRUSTS (1935) § 45.

¹⁴ *Hawkins v. Scanlon*, 212 Ark. 180, 206 S. W. 2d 179 (1947); see Smith, *A Decade in the Law of Trusts*, 3 Ark. L. Rev. 3 (1948-49).

¹⁵ 54 N. M. 347, 225 P. 2d 136 (1950).

trial court found that the trust fund in question was raised by the citizens of West Valencia County and McKinley County for the primary purpose of sending aid to soldiers of those two counties who were Japanese prisoners of war; that a secondary purpose was to distribute the fund among the returning veterans of those two counties who had been Japanese prisoners of war; and that the exigencies of war prevented the primary purpose from being accomplished. The judgment was affirmed by the supreme court.

The Bataan Veterans Association, an intervenor, contended that there was only the primary purpose and that as it had failed, the doctrine of *cy pres* should be applied for the benefit of all returning veterans in the state of New Mexico who had been Japanese prisoners of war. Under the *cy pres* doctrine when the primary purpose of a charitable trust fails, the court may look to the general charitable intent of the settlor, and if a general charitable intent is found, then the purpose of the trust may be changed to conform as nearly as possible to the original intent of the settlor.¹⁶

Although in this case the court did not apply the *cy pres* doctrine because a secondary purpose was found to exist, the situation was a proper one for the application of the doctrine had the secondary purpose of the trust not been established. The court might have held that the fund should be distributed among all returning veterans of the state who had been Japanese prisoners of war, or it could have been confined to such veterans as returned to the two counties which raised the fund.

As it was, the court properly found that the trust fund should be distributed according to the secondary purpose of the settlors.

STATUTE OF LIMITATIONS

*Oklahoma. Turner v. Turner*¹⁷ was an action by the administratrix of the estate of J. D. Turner to quiet title to 140 acres of land which J. D. Turner and seven of his brothers and sisters had inherited. In order to refinance an indebtedness on this land J. D.

¹⁶ 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 436; 3 SCOTT, THE LAW OF TRUSTS (1939) § 399.

¹⁷ _____Okla., 223 P. 2d 536 (1950).

Turner represented to two sisters, Nina Turner and Zelma Stamper, an incompetent, that if they would quitclaim to him their entire interest in the land he would later convey to them the mineral rights included in their quitclaim deeds to him. The trial court rendered judgment in favor of Zelma Stamper, the incompetent, but rendered judgment against the other sister, Nina Turner.

The supreme court reversed the judgment as to Nina Turner on the ground that it was clearly against the weight of the evidence, which had established that J. D. Turner held a one-eighth mineral interest in the land in trust for Nina Turner. The fifteen-year statute of limitations,¹⁸ governing actions to recover realty, rather than the two-year statute,¹⁹ governing actions based on fraud, was held to apply to Nina Turner's claim for recovery of such interest.

The principal question involved was whether the fifteen-year or two-year statute of limitation should be applied to an action such as this. There is little general authority on the subject, the result depending upon a careful study of the wording and interpretations of particular statutes.²⁰ The authority cited by the supreme court in the principal case was the earlier Oklahoma case of *Dillon v. Helm*,²¹ which under a similar set of facts held that the fifteen-year statute of limitations applied. According to that case the test as to which statute is applicable is whether the allegation and proof of fraud is a necessary element of the cause of action. If so, then the two-year statute is applicable; if not, then the fifteen-year statute is applicable. In the instant case Nina Turner was claiming an equitable interest in the land—created by agreement—and fraud was not an element in the case calling into operation the two-year statute of limitations.

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¹⁸ 12 OKLA. STAT. ANN. (Perm. Ed.) § 93.

¹⁹ 12 OKLA. STAT. ANN. (Perm. Ed.) § 95.

²⁰ 4 BOGERT, TRUSTS AND TRUSTEES (1935) § 953.

²¹ 196 Okla. 140, 163 P. 2d 539 (1945).