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SMU Law Review

Volume 6
Issue 3 *Survey of Southwestern Law for 1951*

Article 15

January 1952

Trusts

Donald E. Snyder

TRUSTS

RESULTING AND CONSTRUCTIVE TRUSTS

Arkansas. In *Crain v. Keenan*[1] the question was whether an oral agreement to purchase land was enforceable under the principle of a resulting trust. Crain alleged that he orally agreed that Keenan should purchase a farm with title to be taken in Keenan's name. The consideration was to be not more than $15,000, all to be paid by Keenan. Thereafter Crain was to pay $4,000 cash and to receive title to the land upon final payment of a mortgage.

After the purchase by Keenan, the land increased in value. Thereafter Keenan insisted that the farm was purchased for his own benefit and not pursuant to any oral agreement. Even if the oral agreement was made as alleged, Keenan's position was that it was unenforceable.

The trial court found that the evidence of record consisting of Crain's testimony, which was corroborated, was sufficient to establish the oral agreement. Also, the evidence of record showed that Crain had taken possession and made some improvements consisting of uprooting stumps and destroying Johnson grass so that the land could be cultivated. Crain, however, had not made the initial payment of $4,000 to Keenan because certain defects in the title had not been cured. The trial court dismissed the complaint, holding the contract unenforceable under the Statute of Frauds.

The appellate court stated that the oral agreement was evidence of the establishment of a resulting trust and reversed and remanded the case. The court properly stated that the Statute of Frauds[2] did not apply to a resulting trust.

It is submitted that it is difficult to ascertain how a resulting trust could have been established. There was no evidence of Crain's ever making any payment whatsoever to Keenan or that he assumed to do so. The most important class of resulting trusts is that arising where *A* pays the consideration for property and the con-

[1] .....Ark....., 236 S. W. 2d 731 (1951).
[2] ARK. STAT. 1947 ANN. § 38-107.

veyance is made to *B*. On account of the improbability of a gift to a stranger, the law implies that the one who holds the title, without having paid any value for it, is a resulting trustee for the one who in fact paid the purchase price.[3] The resulting trust arises at the time of the conveyance, if ever.[4] Furthermore, payments made to assist the owner of property in improving do not ordinarily give the payor any rights as a resulting *cestui que trust*.[5]

It seems that the essence of the transaction between Crain and Keenan was that Keenan was to take a deed to himself, pay for the land with his own money, and later convey to Crain, upon the latter's payment of a certain sum. No constructive trust could be made out merely because Keenan refused to deed to Crain upon demand.[6] Certainly a breach of promise is not sufficient to give rise to a constructive trust.

Accordingly, it appears that an oral agreement for a conveyance of an interest in land will be enforced as a resulting trust if it can be established that the apparent purchaser was to be merely the mortgagee. The *Crain* case seems contrary to *Lisko v. Hicks*,[7] wherein it was stated that a parol agreement by a purchaser that he buys for another, without an advance of money by that other, falls within the Statute of Frauds and cannot give birth to a resulting trust.

In *Barger v. Baker*[8] it is believed the Arkansas court properly determined that a resulting trust was established. The daughter testified that when she was a minor she made a down payment for a tract of land and that the grantor required that her mother be joined as a grantee in order that the grantor could discount the note due for the balance of the consideration. The daughter testified that thereafter she paid the notes due on the property from her own funds. The mother, however, testified that the property

[3] Spradling v. Spradling, 101 Ark. 451, 142 S. W. 848 (1911).
[4] Butterfield v. Butterfield, 79 Ark. 164, 95 S. W. 146 (1906).
[5] Bodwell v. Nutter, 63 N. H. 446, 3 Atl. 421 (1886).
[6] Worthen Co. v. Vogler, 145 Ark. 161, 224 S. W. 626 (1920).
[7] 195 Ark. 705, 114 S. W. 2d 9 (1939).
[8] .....Ark....., 237 S. W. 2d 37 (1951).

was deeded to both her and her daughter because they had both contributed to the down payment. Thus, the mother claimed a one-half interest in the property. The chancellor found in accordance with the daughter's testimony. The supreme court held that a resulting trust had been established and that the daughter was entitled to a deed to the land.

It is observed that all of the requisites for establishing a resulting trust were present and that the court found that the daughter did make at least a partial payment at the time of conveyance and that the mother made no payment. Thus, the mother, who jointly held title without having paid any value for it, was merely a trustee for the daughter.

New Mexico. In *Brown v. Sieg*[9] the trial court found that the deceased son had orally agreed to purchase a city lot for his mother, and the supreme court enforced the agreement, holding that a constructive trust existed instead of a resulting trust as was indicated in the *Crain* case.[10] In the *Brown* case, however, there was testimony by the mother and her granddaughter that the mother had desired to purchase a lot, that she had requested her son to purchase the lot for her in his name, and that the son was to look after the investment for his mother. Moreover, there was sufficient evidence to support the trial court's finding that the property in question had been paid for by a check written on the mother's account by the son. After the son's death the present suit was instituted by the mother to gain possession of and title to the lot on the theory of a constructive trust. The supreme court said that the evidence was clear, satisfactory, and convincing in showing the confidential relation of the parties, their intention in the transaction at issue, and the violation of the trust on the part of the decedent.

In the *Restatement of Restitution* it is stated that constructive trusts are created by courts of equity whenever the title to property

[9] 55 N. M. 447, 234 P. 2d 1045 (1951).

[10] Discussed *supra* at note 1.

is found in one who is not in fairness entitled to retain it.[11] Justice Cardozo said,

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.[12]

It is well established that the Statute of Frauds has no application to constructive trusts.[13]

Accordingly, it is quite evident that, from the evidence of record, the court in the *Brown* case properly held that, if the son's widow were allowed to keep the property, she would be unjustly enriched and that the widow should be required to deed the property to the mother who furnished the money therefor. The court did not in effect enforce an oral agreement for an interest in land. The *Brown* case is distinguishable from the *Crain* case because there was a finding by the trial court in the former case that the mother furnished the money, whereas the evidence in the *Crain* case failed to show that Crain ever advanced any funds. Moreover, it is apparent that the court in the *Brown* case could have held that a resulting trust had been established. Such a trust would be on the theory that the mother purchased the lot and merely had it deeded to her deceased son (resulting trustee) for convenience in managing the property. The decision would have been the same because the Statute of Frauds has no application to resulting trusts.[14]

In *Harris v. Dun*[15] the following statute was construed:

> Any agreement entered subsequent to the first day of July, 1949, authorizing or employing an agent or broker to purchase or sell lands, tenements or hereditaments or any interest in or concerning them, for a commission or other compensation shall be *void* unless the agreement, or some memorandum or note thereof shall be in

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[11] RESTATEMENT, RESTITUTION (1936) § 160.

[12] Beatty v. Guggenheim Exploration Co., 225 N. Y. 380, 122 N. E. 378, 380 (1919).

[13] 1 RESTATEMENT, TRUSTS (1935) § 40.

[14] 2 RESTATEMENT, TRUSTS (1935) § 406.

[15] 55 N. M. 434, 234 P. 2d 821 (1951).

> writing and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized.[16]

A real estate agent entered into an oral agreement to purchase real estate for the principal on a commission basis. Later the agent purchased the real estate for himself, taking title in the names of third parties in order to conceal the breach of agreement. The principal brought action on the theory that the oral contract laid the basis for a constructive trust in his favor. The agent, however, contended that suit could not be brought on the oral contract because it was not in writing and was void. The agent had judgment in the trial court.

The majority of the supreme court held that the principal had a cause of action because the statute did not apply to oral agreements which create a relation of trust and confidence. The dissenting opinion argued that the principal did not have a cause of action because there was no enforceable contract and no basis for a constructive trust.

It will be observed (1) that both the majority and minority of the court properly agreed that there must be an understanding or agreement before a constructive trust can be established and (2) that the statute expressly provides that oral contracts of the type here involved are void. The majority surmounted the statute by exempting oral agreements which create a relation of trust and confidence. It may well be asked: is there any contract of employment of an agent or broker which does not create a relation of trust and confidence, and, if not, has the court, in effect, abrogated the statute? The majority defended its holding by stating that the statute was intended by the Legislature to nullify only oral agreements to pay a commission. The dissenting opinion answered that if the Legislature had intended for the statute to apply only to oral agreements for commission, different language would have been employed. It appears that the majority opinion reached its result by ignoring the word "void" in the statute. As argued by the dis-

[16] N. M. STAT. 1941 ANN. § 75-143. Italics supplied.

sent, the statute is so clear that there is no room for the office of construction.

It is submitted that the word "void" means void for all purposes, and thus the dissenting opinion has the better argument. An analogy may be found in the void judgment concept. If a judgment is void, it may be collaterally attacked at any time. A void judgment is ineffective and does not operate, whereas if the judgment is merely erroneous or voidable, it is enforceable and is not subject to collateral attack.

In *Carkonen v. Alberts*[17] the Washington Supreme Court was faced with the same question involving a similar statute, and the majority opinion held that neither a resulting nor constructive trust could be established, since the oral agreement was void for all purposes. A perusal of the cases on this question will reveal hopeless conflict among the jurisdictions.[18]

Perhaps the difficulty encountered by the majority in the *Dun* case would have been lessened if the statute in question had provided that no action shall be brought for the recovery of any commission for the sale or purchase of real estate unless the agreement shall be in writing. A statute was so worded by the Texas Legislature in 1939,[19] and it will be observed that the enactment avoids declaring that the oral contract is void. No Texas cases have been found by the writer which involve the construction of the Texas statute with respect to the issue here in question.

Louisiana. In *Kohlear v. Singer*[20] plaintiff mother owned some property consisting of cash, stocks, and bonds. In order to make herself eligible for a State Old Age Assistance pension she transferred all of the property to her son. Thereafter, the mother was dissuaded by her daughter from applying for the pension. The mother then requested that her property be returned. The son re-

[17] 196 Wash. 575, 83 P. 2d 899 (1938).

[18] The authorities are collected in annotations in 42 A. L. R. 10 (1926), 54 A. L. R. 1195 (1928), and 135 A. L. R. 232 (1941).

[19] TEX. REV. CIV. STAT. (Vernon, 1948) art. 6573(a), § 22.

[20] 218 La. 879, 51 So. 2d 307 (1951).

fused, contending that it was transferred to him as a donation, or as payment of a debt, or as compensation for services rendered.

The trial court held the mother should recover on the theory that it was a donation of all her property without reserving enough to herself for subsistence and was null and void under Article 1497 of the Civil Code.[21] This Article provides that a donation *inter vivos* shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do so, the donation is a nullity.

The supreme court affirmed the judgment below. However, it was stated that the evidence did not make out a donation. At the time of the transfer of the property, in order to become eligible for the pension, the mother's intention was always to retain ownership and never to donate the property to her son or to turn it over to him in payment for any debt.

It is submitted that, if, as the court stated, the mother's intention was always to retain the ownership of the property, then an illegal transaction was contemplated because she would not have been eligible for the pension if she retained an interest in the property. In common law jurisdictions it is fundamental that contracts entered into for an illegal purpose are not enforceable. The common law courts generally refuse to aid either party involved in an illegal transaction;[22] thus, in most jurisdictions the court in all probability would not have allowed the mother to recover on the theory of resulting trust. This would be so because the title was in the hands of the son as a result of an illegal transaction.

Texas. See Comment, "Constructive Trusts Under the Texas Trust Act", in 6 *Southwestern Law Journal* 99 (1952).

Right of Trustee to Set Off Private Claim

Oklahoma. In *Morton v. Beidleman*[23] one of the issues was whether a trustee may set off his private claim against the claims

[21] La. Civ. Code (Dart, 1945) Art. 1497.
[22] See authorities cited in 17 C. J. S., *Contracts*, § 272, p. 656.
[23] .....Okla....., 237 P. 2d 421 (1951).

of beneficiaries of the trust. The trial court found that a trust had been established by operation of law in regard to royalty interests, with the attorney as trustee and his clients as beneficiaries. The trial court also found that there was an oral agreement between the attorney and clients whereby the attorney, as trustee, could retain the income from the trust to the extent of his fees relating to other legal matters handled for the individual beneficiaries. The defendants, who were the beneficiaries and clients, contended that a trustee cannot set off his private personal demands against the claims of a beneficiary for the trust funds.

The supreme court held that where all parties involved are competent and *sui juris* and agree that a trustee may set off his private claim against the claims of beneficiaries, then the contract is valid. The court recognized the general rule to be that a trustee cannot use a private demand against the trustor or beneficiary as a setoff against the demand of a beneficiary for trust funds to which he is entitled.[24] The reason for the rule as stated by the court is that a trust is not a pledge to secure an obligation of a beneficiary to the trustee and should give the trustee no superior rights or advantages over other creditors of the *cestui que trust.* The setoff here involved was permitted by the court, however, because of a contract between the parties. Thus, it would seem that there is an exception to the general rule when a beneficiary and trustee are competent and contract for setoff.

Application of "Prudent Man Rule" to Trust Created Prior to 1949

Oklahoma. Prior to 1949 a statute[25] limited investment powers of trustees in Oklahoma to real estate loans, government, municipal, state, county, and school district bonds, and shares in building and loan associations. In 1949 the Legislature repealed this statute and enacted that a trustee, unless otherwise validly re-

[24] 54 Am. Jur., *Trusts,* § 583, p. 450.

[25] 60 Okla. Stat. Ann. (Perm. Ed.) § 175.46.

stricted, can invest in any form of property in which an individual by use of reasonable prudence would invest his own funds.[26]

In Re *Flynn's Estate*[27] presented the issue whether the 1949 "prudent man rule" applied to trustees of a trust established in 1929. The investment powers of the trustees were defined in the trust instrument as follows: "To hold, invest, re-invest and collect the income."

The supreme court held that the 1949 statute applied. The court pointed out that the trustees' powers were broadly defined and that unless a trustor specifically restricts the power of his trustees in investing trust funds, the trustee is governed by the law in force at the time the investment is made. The opinion cites authorities which amply support the result reached.

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Arkansas. In *Sloan v. Robert Jack Post*[28] the Veterans of Foreign Wars and the local American Legion Post solicited funds from citizens of Fort Smith and surrounding communities for the purpose of constructing a veterans' hut which would be available for use by all veterans. A sum of $1,800 was donated by the citizens. A dispute arose between the two organizations as to the type and use of the hut, and, since the difference could not be reconciled, the present suit was instituted to determine the rights in the fund. The trial court rendered a decree directing that the net proceeds should be divided equally between the two organizations.

The supreme court, however, assumed equity jurisdiction over the fund and directed that all contributions be repaid. The court said that if the hut, after its completion, were not available to all veterans alike regardless of membership in any organization, then the purpose of the donations could not be carried out. The court continued that the paramount purpose visualized by those who

[26] 60 OKLA. STAT. ANN. (Perm. Ed.) § 161.
[27] .....Okla....., 237 P. 2d 903 (1951).
[28] .....Ark....., 239 S. W. 2d 591 (1951).