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TRUSTS — CONSTRUCTIVE TRUSTS — BREACH OF FIDUCIARY RELATION BETWEEN HUSBAND AND WIFE WITH RESPECT TO ORAL AGREEMENT CONCERNING LAND — In her last illness, Mrs. Jackson desired to transfer realty to her married daughter, plaintiff herein. To prevent creditors of the daughter's husband from reaching the property, Mrs. Jackson conveyed the land to her
husband, Mr. Jackson, with the parol understanding that "he would see that Cora got it." Jackson failed to transfer the land and upon his death it passed under an ante-nuptial settlement to defendant, his second wife. In an action to recover the land, the court stated that defendant was in the position of a bona fide purchaser for value, and held that the statute of frauds precluded recovery. Young v. Jackson, (Kan. 1934) 36 P. (2d) 91.

In those jurisdictions requiring trusts of land to be in writing to be enforceable, the breach of a fiduciary relationship is a well-recognized basis for declaring the grantee of land upon oral trust to be a constructive trustee. Even though the facts do not present a case of actual fraud or of a purchase-money trust, the cases are nearly unanimous to the effect that the breach of a parol agreement by one spouse to hold land upon trust for the other, or for a third person, is sufficient for equity to declare a constructive trust in favor of the intended beneficiary. This proposition has limitations which will serve to reconcile most of the cases containing language to the contrary. There must be an express agreement to hold the land for a particular use; the mere fact of the relationship between husband and wife is not enough to make the grantee a trustee. Consonant with the general rule requiring a high degree of proof to establish a parol agreement to hold property on trust, many courts have refused to declare a trust where the evidence is conflicting and the agreement not clearly established. It is submitted that these requirements are wholesome limitations in cases relaxing the rigor of the statute of frauds. Further restrictions upon the proposition are suggested by the refusal of equity to extend aid when the purpose of the transfer was to defraud creditors, which is just, viewing the constructive trust as essen-

1 Scott, "Conveyances Upon Trusts Not Properly Declared," 37 HARV. L. REV. 653 at 661 (1924); Costigan, "Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantees," 12 MICH. L. REV. 427 at 437 (1914).
2 Scott, "Resulting Trusts Arising Upon the Purchase of Land," 40 HARV. L. REV. 669 at 678 (1927) (purchase in the name of a relative).
3 35 A. L. R. 280 at 311 (1925); 45 A. L. R. 851 at 854 (1926); 80 A. L. R. 195 at 205 (1932).
4 Wehe v. Wehe, 44 N. D. 280, 175 N. W. 366 (1919); Clester v. Clester, 90 Kan. 638, 135 Pac. 996 (1913); Taylor v. Bunnell, 211 Cal. 601, 296 Pac. 288 (1931); and cases generally holding that there is no resulting trust upon a conveyance without consideration, Scott, "Conveyances Upon Trusts Not Properly Declared," 37 HARV. L. REV. 653 at 655 (1924).
6 For a compilation of cases, see 23 A. L. R. 1500 (1923).
7 While the following cases hold that the statute of frauds prevents an oral trust of land from being enforceable, in Stubbings v. Stubbings, 248 Ill. 406, 94 N. E. 54 at 56 (1911), the court said that had the statute of frauds not been pleaded, the evidence would yet have been insufficient to establish a trust; in Glover v. Glover, 153 Ark. 167, 240 S. W. 716 (1922), the court alluded to the conflict in the evidence; in Thomson v. Thomson, (Mo. Sup. Ct. 1919) 211 S. W. 52 at 56, it was said that the evidence was far from being clear, cogent and convincing, and even preponderated against the claim. Cf. Howard v. Foskett, 96 Ore. 446, 189 Pac. 396 (1920); Fitzgerald v. Fitzgerald, 168 Mass. 488, 47 N. E. 431 (1897).
7 Moore v. Horsley, 156 Ill. 56, 40 N. E. 323 (1895); Kalinowski v. McNeny, 68 Wash. 681, 123 Pac. 1074 (1912); MacRae v. MacRae, 37 Ariz. 307, 294 Pac. 280 (1930), containing an excellent discussion.
tially a remedial device for achieving justice. Relief has likewise been denied when at the time of the agreement husband and wife were separated and "confidential relations were suspended," so to speak. While the decision in the instant case might be sustained upon the theory of bona fide purchase for value, which the court advanced, it stands with little support among the more recent decisions in holding upon facts in which the evidence of an agreement is clear, that equity will not declare one spouse trustee of land which he or she has expressly agreed to hold on trust. The broad current of authority, with the limitations set forth, would seem to be the sounder view in so far as it takes cognizance of and protects the confidence which one spouse reposes in the other.

A. H. R.

8 Brock v. Brock, 90 Ala. 86, 8 So. 11 (1889).
9 Irving Trust Co. v. Reikes, 228 App. Div. 510, 240 N. Y. S. 232 (1930); Bartos v. Bartos, 138 Misc. 117, 244 N. Y. S. 713 (1930). Both of these cases cite Foreman v. Foreman, 251 N. Y. 237, 167 N. E. 428 (1929), a case of purchase-money trust in which Judge Cardozo discusses the fiduciary relation between husband and wife and the statute of frauds.
10 Gemmel v. Fletcher, 76 Kan. 577, 92 Pac. 713 (1907). The Kansas court referred to the relationship between husband and wife as confidential in the highest degree known to the law, though the prevention of the making of a will was present. Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171 (1893), where it was said that the relation between husband and wife, apart from the exercise of undue influence in the sense of persuasion or importunity, is sufficient basis for a constructive trust.