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Trusts Based on Oral Promises to Hold in Trust to Convey or to Devise Made by Voluntary Grantees

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TRUSTS BASED ON ORAL PROMISES TO HOLD IN TRUST, TO CONVEY, OR TO DEVISE, MADE BY VOLUNTARY GRANTEES.

II.

SITUATION 4.

Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to reconvey or to devise to, the grantor.

The situations heretofore considered have all dealt with conveyances on an oral trust for, or oral promise to convey or to devise to, some one other than the grantor. Is the case of a conveyance where the oral promise is for the benefit of the grantor essentially any different? A correct answer to that question necessitates a brief historical consideration of the origin of uses and trusts.

The history of the court of chancery reveals that from time to time three kinds of resulting uses and three kinds of so-called resulting trusts have been enforced, namely: (1) Uses and trusts arising on conveyances without consideration and without the declaration of a use to the grantee or to some one else; (2) Uses and trusts raised when on a voluntary conveyance the uses or trusts declared do not dispose of the whole use or trust fee or other trust interest which the grantor could dispose of; and (3) uses and trusts arising where one man pays the purchase money for land and the deed is executed and delivered to another as grantee.

The first kind of resulting use or trust owes its origin to the popularity of uses or trusts. Prior to the statute of uses it was so common for land to be conveyed in trust that it was only fair for the court of chancery to presume that a feoffor who enfeoffed another without consideration did so on a trust for himself, and was only right for it to put on the feoffee the burden of rebutting that presumption by establishing affirmatively that a gift was intended, if such was the case. In establishing its presumption the court of chancery simply took judicial notice of the nation-wide practice which had grown up

whereby owners of land vested the titles to their lands in others on secret trusts for themselves. At the same time, chancery left to owners of land the right to make gifts of land and therefore permitted the donees of the land to rebut the presumption of a resulting use or trust by showing that the transfer of title was by way of gift; and in addition chancery made the declaration of a use or trust for the grantee on the feoffment sufficient evidence of a gift intended to rebut the presumption of a resulting use or trust.

The first kind of resulting use practically ceased to exist after the statute of uses was passed, since conveyances operating under that statute became the common mode of conveyance in the place of feoffment. Indeed, it has come to be believed that the statute of uses itself nullified the effect of any feoffment made without consideration and without a statement of the use to which it was made.[43] Very naturally, then, the statute of uses broke up the practice on the part of owners of land of conveying their lands on secret oral trusts, and while some such conveyances undoubtedly took place, they constituted exceptional transactions in which the grantor relied on the honor or conscience of the grantee. In the period of about a hundred years before chancery realized that despite the statute of uses there were a number of situations demanding the recognition and enforcement of passive trusts—the most noteworthy being the passive use on a passive use—and acted upon that realization by giving us the modern passive trust, conveyances without consideration on secret oral or written trusts for the grantor became so relatively rare that the presumption of a resulting trust could not fairly be indulged.

The typical conveyances after the statute of uses were the bargain and sale deed and the covenant to stand seised to uses. In the case of a bargain and sale deed there was a "valuable consideration" on which a use to the bargainee was raised, and there to imply, i. e., presume, a resulting trust would generally have been to act in violation of the intent of the parties. In the case of a covenant to stand seised to uses there was at least a "good consideration," and a "good consideration," with the natural inference from it that a gift to the covenantee was intended and was deserved, made it just as unreasonable to imply, i. e., presume, a resulting trust for the covenantor, after the statute of uses had executed the use in the convenantee, as it would be today to imply a resulting trust where the hus-

[43] "In cases in which before the statute of uses a use resulted to the grantor owing to the want of consideration for the conveyance, in the absence of an express declaration of use, after the statute the use thus resulting to the grantor was converted into a legal estate, and he remained seized as before."—1 Tiffany, Modern Law of Real Property, § 89. But Lord Holt did not agree. See Shortridge v. Lamplugh, 2 Ld. Raym. 798, 801-802.

band pays the purchase money and the title is conveyed to his wife The reasonable presumption, in the absence of special circumstances, was that a gift or advancement was intended. What was true of bargain and sale deeds was deemed true of the statute of uses conveyance of lease and release, where there was in form a bargain and sale lease followed by release, but where in practice no consideration was needed.[44] The result was that even after passive trusts, and among them uses on uses, were recognized and enforced by chancery, the court of chancery would not imply a use on a use in favor of a voluntary grantor where the conveyance operated under the statute of uses, i. e., would not presume a use for such a grantor to be attached to the estate vested by the conveyance and the statute in the grantee. The refusal to presume such a use on a use was not because of any insuperable theoretical difficulty—a conveyance operating under the statute of uses would not be rendered nugatory by a written agreement to hold the estate conveyed in trust for the grantor, and so would not necessarily be contradicted by one implied in fact—but because the condition of land holding had so changed that a presumption that no trust was intended accorded with common experience. There are not wanting intimations in the English books that this is no longer true in England, and that on a voluntary conveyance in England today, even though it be one operating under the statute of uses, there will be indulged a presumption of a resulting trust for the grantor.[45] But the American rule is otherwise and it would seem properly so.

Trusts for a grantor in a voluntary conveyance, which operates under the statute of uses or some modern statute, and which does

[44] Challis, Real Property, 3 ed. 420.

[45] "In England, however, the later decisions have shown a disposition on the part of the judges to imply a resulting trust in favor of the grantor, though the deed recites a consideration, from the mere nonpayment of the consideration money."—15 A. & E. Ency. Law, 2 ed., 1125. "For no valuable consideration I convey land unto and to the use of A and his heirs. Here the use does not result, for a use has been declared in A's favor, so A gets the legal estate, but in analogy to the law of resulting uses, the court of Chancery has raised up a doctrine of resulting trusts. If without value by act inter vivos I pass the legal estate or legal rights to A and declare no trust, the general presumption is that I do not intend to benefit A, and that A is to be a trustee for me. However, that is only a presumption in the proper sense of that term, and it may be rebutted by evidence of my intention."—Maitland's Equity, 63.

See Lewin on Trusts (Flint's Ed.) 144; (12th Engl. Ed.) 164, to the same effect. In a note to Lewin it is said: "But in Lloyd v. Spillet, 2 Atk. [148], 150 [year 1740], and Young v. Peachy, Ib. [254], 257 [year 1741], Lord Hardwicke was apparently of opinion that since the statute of frauds, there are only two cases of resulting trust, viz., 1st, where an estate is purchased in the name of a stranger; and 2ndly where on a voluntary conveyance a trust is declared of part, in which case the residue results. It would seem to follow that, in his opinion, should a voluntary conveyance be made and no trust at all be expressed, the grantee would take the beneficial interest to his own use."

not disclose the trust, are so relatively rare that they cannot fairly be implied in fact, i. e., such a trust cannot fairly be presumed from the mere fact that the grantee paid nothing; and if secret oral trusts are to have any trust effect, or trust consequences, it must be through their operation either as express trusts or as part of the circumstances which impel equity to raise constructive trusts.

But when it is said that it is fair to indulge a presumption against a resulting trust, where a grantor conveys to the grantee by absolute deed, even though no actual consideration is given by the grantee, it must also be said that the presumption against a trust is properly only one of fact. Those American courts which have made it a conclusive presumption of law have gone altogether too far. Like the presumption of no resulting trust where a man pays the purchase money for realty and has the conveyance made to his wife or child, it is fairly to be considered only a rebuttable presumption. And if the presumption is rebutted, the trust which arises, whether it be called resulting or constructive, is on sound principle precisely the same in both cases.

The second kind of so-called resulting use or trust, namely, where the donor creator of a trust fails to dispose, in so many words, of the whole equitable interest, has not been the subject of controversy. Such so-called resulting trusts seem to be recognized and enforced everywhere. The grantor who is paid nothing is deemed to get the seemingly undisposed of equitable interest as a trust which is called by the courts resulting, but which seems instead to be a trust found by construction of the express trust, and hence to be entitled to be called an express trust.[45a] Where the creator of the trust is not a

[45a] See 27 Harv. Law Rev. 437, 454-455. If this kind of a trust is an express trust defined by construction, the practical consequence will be that oral evidence offered by the grantee that it was the oral agreement of the grantor and himself that he should keep for himself any undisposed of equitable interest, or, perhaps, even that he should be trustee of it for third persons, will properly be inadmissible, against objection, because it would vary or contradict the deed. Though an oral agreement that the grantee should hold for himself the undisposed of equitable interest might perhaps be deemed the grantor's contemporaneous oral assignment to the grantee of the equitable interest which "results" to the grantor by construction of the trust instrument, and so would not have to meet the parol evidence rule, it would then be void under the 9th section of the statute of frauds. If, on the other hand, the trust above mentioned is a resulting trust by presumption, such oral evidence will properly be admitted to rebut the presumption of resulting trust and to point out the third person constructive cestuis for whom on principle the grantee must hold, if he is not to keep for himself.

It ought here to be pointed out that the view that the trust is express by construction, where a trustee is given a larger estate than is needed for the trust stated in explicit words or where the trust so stated fails, may be entertained and yet a conveyance expressly "in trust" but wholly silent as to the nature of the trust may be deemed not express but resulting, or, on occasion, constructive. In the former case, the expression of the trust in apt words as to part of the equitable interest makes it fair, if not

necessary, under a liberal interpretation of the principle that expressio unius est exclusio alterius, to say that no express trust can be considered that is not found by a scrutiny of what is within the "four corners" of the document. The non-payment of consideration, however, can be shown; for the rules of construction permit proof of the circumstances of the transaction, since such proof simply enables the court to put itself in the position the parties occupied and to construe the document accordingly. In the situation mentioned in the text, therefore, the trust which is found for the grantor, in the light of that fact of non-payment of consideration, seems fairly to be deemed express by construction. But where the conveyance is "in trust," yet no part of the equitable interest is given in so many words to anybody,—as, for instance, if the deed should recite that the grantee is to hold for those whom the grantor has privately instructed him about—the express language seems to be awarded its full effect when it is taken to show that the grantee is not to take beneficially but is to hold in trust for some one, and the writing is not contradicted or even varied by oral evidence that the conveyance was on an oral trust for third persons alone, or for third persons and the grantor, or even for third persons and the grantee.

The difference between the two kinds of situations above discussed is that suggested somewhat inartistically in the following statement on p. 170 of the 12th English edition of Lewin on Trusts, namely: "Where a trust results to the settlor of his representative not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol."

In the second situation above discussed, in the absence of any evidence of an oral trust, i. e., of what "the trust" referred to in the conveyance is, a resulting trust to the grantor will be found, if the conveyance was voluntary (Ames, Cases on Trusts, 1st ed., 211, n.); but that is ex necessitate, since the express language prima facie shows that the grantee does not take beneficially and, by supposition, the unpaid grantor alone comes forward with an equitable claim. As Dean Ames pointed out, "In Taylor v. Haygarth, 14 Sim. 8, for the same reason, there being no heir or next of kin of the testator, the real estate went to the trustee and the personal estate to the crown."—Ames, Cases on Trusts (1st ed.) 211, n. If, however, evidence is offered that one of the oral trusts above suggested was undertaken by the grantee, expressly or by conduct, as the inducing cause of the conveyance, the statute of frauds (though not, it would seem, the parol evidence rule), will stand in the way of enforcement of the express oral trust as such; but on principle a constructive trust for the intended cestuis should be enforced. The better considered statute of wills cases make this plain. See Riordan v. Banon, Irish Rep. 10 Eq. 469; Curdy v. Berton, 79 Cal. 420; In re Huxtable [1902] 2 Ch. 793. But see contra Olliffe v. Wells, 130 Mass. 221; Smith v. Smith, 54 N. J. Eq. 1; Heidenheimer v. Bauman, 84 Tex. 174; Sims v. Sims, 94 Va. 580. It being clear only that the voluntary grantee is to hold for some one, that some one may be selected on sound resulting trust or constructive trust principles.

While in those statute of wills cases which do not permit the oral evidence that a trust for third persons was intended to stand in the way of a trust for the heirs of the testator, the courts do not articulate the proposition, but instead follow the Massachusetts court's indefensible lead in regarding the testator as having had in separate ownership both the legal and the equitable interests in the property affected and as having devised only the legal and therefore as having died intestate as to the equitable, it would seem as if they really affirm that on a devise "in trust," the trust being otherwise not set out, there is by construction an express trust for the testator's heirs which the oral evidence contradicts. Though the writer can see the possibility of that position, he does not accept it, and, accordingly, does not find an express trust for the grantor in a deed which shows on its face that it is made in trust but does not in words set out any trust. In dealing with situations in this "twilight zone," there is no overwhelming necessity of seeing one thing rather than another, but the writer cannot see an express trust by construction for the grantor where only the words "in trust" are in the instrument but is convinced that he does see one in the situation mentioned in the text supra.

If either kind of conveyance in trust discussed in this note is not voluntary, but the property really is purchased by the grantee, there can be no trust for the grantor not

donor but is paid for the property, there is no trust for him if the equitable interest is not fully disposed of to the designated *cestuis,* but instead there is the third kind of resulting trust for the payer of the purchase money.[45b]

The third kind of trust called resulting—the name in this case is deserved—we have already mentioned sufficiently in the discussion of situation 1 *supra.* The presumption of fact of a resulting trust for the payer of the purchase money for realty, where the deed is made to one not his wife or child and not a person to whom he stands *in loco parentis,* prevails wherever a state statute has not abolished the presumption or the trust itself, and wherever it prevails it is a rebuttable presumption of fact.

With this historical retrospect, we are ready for the question whether a grantor should be allowed to show that, despite the recitation of consideration in his deed and despite a recitation in it that the grantee was to have and to hold to the grantee's own use, the deed was in fact made on an oral trust for the grantor or on an oral promise of the grantee to reconvey or to devise to the grantor. Two objections to the admission of such evidence are urged: (1) That there is a conclusive presumption against such a trust from the very form of the deed, i. e., that to permit such evidence would violate the rule that a written instrument should not be contradicted, altered or varied by oral evidence; and (2) that the statute of frauds renders the evidence incompetent.

Objection (1) has a statutory phase which should be noted in passing. That is due to the state statute which provides that a conveyance shall pass the fee in the absence of a contrary intent clearly

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stated in so many words in the instrument, and because of the statute of frauds defense the purchasing grantee may keep for himself whatever is not in so many words expressed to be held for the designated cestuis, even if he did orally agree to hold that part for other third persons. The grantee, having bought the property, is not unjustly enriched if he retains that part of it as against orally designated cestuis, so there is no chance to raise a constructive trust against him, and the express oral trust is unenforcible. In the absence of an oral trust for third persons, and on a failure of the express trust, the grantee for a valuable consideration of course keeps for himself. Kerlin v. Campbell, 15 Pa. St. 500; Gibson v. Armstrong, 7 B. Mon. (Ky.) 481. The same result is sometimes reached in another way. See In re West [1900] 1 Ch. 84, where Kekewich, J., points out that before a presumption of a resulting trust can arise in the case of a gift in a will to trustees, it must be ascertained by construction that the whole fund was given for the particular purpose, instead of the fund being given to the persons named as trustees with a charge on the fund for the carrying out of that purpose. The first paragraph of the syllabus is a good summary of the point: "A gift by will, for a particular purpose only, gives rise to a resulting trust of any surplus not required for that purpose, but a gift, subject to the performance of a particular purpose, gives the donee a beneficial interest subject to that purpose."

[45b] Heiskell v. Trout, 31 W. Va. 810; In re Davis, 112 Fed. 129.

expressed in the conveyance.[46] Objection (1) is voiced in two judicial utterances now to be quoted.

In *Patton* v. *Beecher*[47] BRICKELL, C. J., pointed out that in Alabama all conveyances operate under the statute of uses or substantially the same Alabama statute and said:

"These conveyances are founded on a consideration expressed on the face—a bargain and sale on a *valuable consideration*—a covenant to stand seized on a *good consideration*. The statute intervenes and by its own force converts the use into a legal estate in the bargainee or covenantee. Parol evidence disproving the consideration expressed, changing the character of the conveyance, is inadmissible, without violating the principle that parol evidence cannot control, alter, vary or contradict a writing, as, between the parties, no part of a conveyance is more essential, or more solemn, than the expression of the consideration, which determines its character, either as a bargain and sale, or as a covenant to stand seized. The grantor is bound by it, as he is by any other recital or admission the deed may contain. The consideration may, as in the present conveyance, be pecuniary, and it may be permissible for either party to show a greater or less consideration of the same kind, than that expressed. *Sanders v. Hendrix,* 5 Ala. 224. But in the absence of fraud or mistake, it is not permissible for them, by parol, to show a want of consideration, or a consideration of another kind."

In *Porter* v. *Mayfield,*[48] LOWRIE, J., for the court, said:

"There are cases wherein trusts may be proved by oral testimony; but not in violation of the rule that protects written agreements against such testimony. As a deed of conveyance is intended to define the relations between the parties to it, it is not contradicted when it is shown that the vendee purchased in trust for a third person; for such evidence only establishes a new and consistent relation. But evidence that at the time of the conveyance, the vendee agreed to hold the title in trust for the vendor, is a flat contradiction of the written instruments executed by the parties as the bond and the evidence of their relation, and would make them void from their very inception. Oral testimony can have no such power. As between vendor and vendee, such testimony cannot be heard to change a title, absolute on its face, into a trust."

It will be noticed that in the two passages above quoted the old

[46] Campbell v. Noble, 145 Ala. 233. In that case it was held that the statute dispensed with the necessity of showing consideration in a deed of bargain and sale to prevent a resulting trust for the grantor.

[47] 62 Ala. 579, 588.

[48] 21 Pa. St. 263, 264.

notion that a use on a use is a nullity is really reasserted. The use on the use cannot be allowed, it is said, because the statute has executed the first use and to allow the second use any effect would be to render the first use nugatory and even void. The answer is, of course, that uses on uses are allowed as trusts or otherwise every day, and if they are expressed in the one conveyance, as in the case of a bargain and sale deed to B to the use of C, or a deed to A to the use of B to the use of C, no one would contend that the vesting by the statute of uses of the legal title in B was at all interfered with or nullified or rendered void by the enforcement of the use to C as a trust. So far then as the use implied in the grantee from the bargain and sale, or the use expressly stated to be in the grantee, is concerned, any trust for the grantor or for any one else, whether that trust be express or be implied in fact, is perfectly permissible as a matter of logic. All that was really settled by chancery, beginning about one hundred years after the statute of uses was passed. If then a conclusive presumption against a resulting trust or a constructive trust for the grantor is to stand in the way of showing an oral agreement by the grantee to hold in trust for him, some other reason must be found.

The other reasons urged are the stated consideration, and, where they exist, the warranties in the deed. The grantor, it is said, is estopped by the recital of consideration and the warranties to show that there was no consideration and to show that a trust for himself was intended. And why is he estopped? The admission contained in the passage quoted from LOWRIE, J's, opinion that there is no estoppel against showing an oral trust for a third person is significant. Not all courts will concede that there is no estoppel in such a case,[49] but in one situation, at least, it is well settled that there is no such estoppel, namely, in the case where one man pays the purchase money and the deed is taken in the name of a legal stranger. In such case, despite the fact that the deed is expressly to the use of the grantee,[50] that the consideration is expressly stated in the

[49] See the discussion of the matter in Troll v. Carter, 15 W. Va. 567, 578-582. But West Virginia at last adopted the view of no estoppel in a case where the grantee took on express oral trust for the buyer of the property. Currence v. Ward, 43 W. Va. 367. See Richardson v. McConaughey, 55 W. Va. 546, 555.

[50] Stratton v. Dialogue, 16 N. J. Eq. 70; Cotton v. Wood, 25 Ia. 43.

[51] Brooks v. Union Trust & Realty Co., 146 Cal. 134; Howard v. Howard, 52 Kans. 469; Buck v. Pike, 11 Me. 9; Livermore v. Aldrich, 59 Mass. (5 Cush.) 431; Blodgett v. Hildreth, 103 Mass. 484; Dismukes v. Terry, Walker (Miss.) 197; Chicago, B. & Q. R. R. Co. v. First Nat'l Bk., 58 Neb. 548, 59 Neb. 348; Page v. Page, 8 N. H. 187, DePeyster v. Gould, 3 N. J. Eq. 474; Boyd v. McLean, 1 Johns. Ch. 582; Rank v. Grote, 110 N. Y. 12; Dudley v. Bosworth, 10 Humph. (Tenn.) 9; Neil v. Keese, 5 Tex. 23; Pinney v. Fellows, 15 Vt. 525; Murry v. Sell, 23 W. Va. 475.

deed to have been paid by the grantee[51] and that the covenants in the deed are unqualified, the trust for the payer will be enforced. All the payer resulting trust cases are cases to that effect even if the question is not expressly considered, as it is in the cases cited.[51a] But if the consideration can be negatived and the use stated can be added to and the covenants can be shown to be consistent with a trust of some kind for a third person, why may not all these things be shown where a trust for the grantor is sought to be enforced? The answer is that there is no reason why not, and that as a matter of fact in all jurisdictions they may be shown in any case where the grantee had at the time of the conveyance an actual intent to defraud. In the opinion in *Patton* v. *Beecher*[52] this was clearly recognized. Given a sufficient emergency—given fraud of the right kind —and in every jurisdiction all these objections about contradicting written instruments, estoppels by deeds, etc., will go by the board and a trust for the grantor will be enforced.[53]

[51a] In Cotton v. Wood, 25 Ia. 43, 47, Beck, J., for the court, said:

"It is further objected that where there is an express declaration in the deed that the conveyance is for the use of the grantee and for a good and valuable consideration, there can be no presumptive or resulting trust; and that, inasmuch as the deed of the property in question, as to the wife, states these facts, she will be presumed to have the beneficial interest in the property, and the presumption cannot be rebutted by parol evidence.

"This may be the rule, but it does not extend to cases where land is purchased with the funds of a party, or the consideration paid by him, and the conveyance taken in the name of another. Such cases are exceptions to the rule. Unless such exceptions are recognized there could be, in fact, no such thing as a presumptive trust unless evidence thereof appeared in the body of the deed," as by recitation in the deed that the purchase money was paid by A when B was grantor and C was grantee.

In Stratton v. Dialogue, 16 N. J. Eq. 70, 71, Chancellor Green said:

"The material question in the case is, whether the land was in fact paid for with the funds of the company. If it was, there is clearly a resulting trust in favor of the company, although the deed is made absolute to Dialogue and purports upon its face to be for his own use and benefit."

[52] 62 Ala. 579.

[53] In Brison v. Brison, 75 Cal. 525, 532-533, Hayne, C., for the court, said:

"Nor does the recital of a consideration stand in the way of the relief. As is well known, it was a settled rule of the early law that if no consideration was expressed or proved a use resulted to the grantor. To prevent this, it became common to make the deed recite a consideration. And while such recital could be contradicted for collateral purposes, it could not be contradicted for the purpose of avoiding the deed (Farrington v. Barr, 36 N. H. 89; Coles v. Soulsby, 21 Cal. 47; Rhine v. Ellen, 36 Cal. 369; Martin v. Splivado, 69 Cal. 614); or for the purpose of raising a resulting trust (Russ v. Mebius, 16 Cal. 356; Graves v. Graves, 29 N. H. 129; Philbrooke v. Deland, 16 Me. 412, 413). But this only means that the recital could not be contradicted for the mere purpose of showing a want of consideration. Where fraud is charged, the want of consideration may be shown in connection with and as part of the fraud. In cases like the present, the confidential relation [merely that of husband and wife] is one circumstance, the parol promise is another, and the want of consideration is a third. In cases of fraud, actual or constructive, no mere form of words which the parties have made use of can shut

The question then comes down to what fraud will serve. In the preceding pages the fraud that on sound principle should suffice has been discussed,[54] as has also the statute of frauds defense. Whether the fraudulent intent of the grantee be contemporaneous with the conveyance or be conceived first at the time for performance, it is actual fraud, and all actual fraud should have the effect of rendering unavailable to the fraudulent party all technical defenses and of enabling equity to hold him a constructive trustee.[55]

As for the statute of frauds defense, it must be repeated again that Parliament expressly gave chancery a free hand as to resulting and constructive trusts. And as for the parol evidence rule, the courts ought not to let that creation of theirs be used to foster fraud. The failure to realize the needs of the situation is the occasion for such a remark as that of LUMPKIN, J., in *Robson* v. *Harwell*,[56] namely:

"Let the doctrine be once established that a failure to comply with a parol promise made contemporaneous with a deed is *ipso facto* a fraud and can be proved, and the promise decreed to be performed in equity, on the ground of fraud, and you do what the Master of the Rolls, in *Portmore* v. *Morris* refused to do—*demolish one of the foremost rules of law.* You have but to allege a *failure* to comply with any *parol* stipulation, and equity must relieve on the score of fraud."

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out inquiry as to the real facts. And this from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown?"

[54] See ante pp. 437-441.

[55] In these cases of trusts for the grantor, as in the other cases, the oral trust, if honestly entered into, is a valid, if unenforcible, trust at the start, and for the trustee to breach it to his own financial gain at the expense of his cestui is grossly fraudulent. Not only is the oral trust valid until repudiated, but in those cases where the oral promise of the grantee is to sell the land conveyed and turn over the proceeds or part thereof to the grantor, it is held in some jurisdictions that as soon as the grantee sells and the trust res becomes reduced to personalty, to which the statute of frauds does not apply, the oral trust immediately becomes valid, and the promise to turn over the proceeds becomes enforcible in equity or at law. Collins v. Tillou, 26 Conn. 368; Woolfolk v. Earle, 19 Ky. L. Rep. 343, 40 S. W. 247; Zwicker v. Gardner, 213 Mass. 95 (semble); Peacock v. Nelson, 50 Mo. 256; Bork v. Martin, 132 N. Y. 280; Logan v. Brown, 20 Okla. 334; Kollock v. Bennett, 53 Ore. 395. But that the trust is unenforcible even after the conversion into personalty is held in Chesser v. Motes, (Ala.) 61 So. 267; McGiness v. Barton, 71 Ia. 644; Randall v. Constans, 33 Minn. 329; Wolford v. Farnham, 44 Minn. 159; Cameron v. Nelson, 57 Neb. 381; Marvel v. Marvel, 70 Neb. 498. In some jurisdictions, and perhaps in all, the trust may be enforced in equity or recovery had at law, if after the conversion of the land into personalty the trustee orally acknowledges the trust and promises to perform it. Mohn v. Mohn, 112 Ind. 285; Thomas, Adm. v. Merry, 113 Ind. 83; Calder v. Moran, 49 Mich. 14 (semble); Collar v. Collar, 75 Mich. 414, 86 Mich. 507; Cooper v. Thomason, 30 Ore. 161; Maffitt's Adm. v. Rynd, 69 Pa. St. 380; Bechtel v. Ammon, 199 Pa. St. 81.

[56] 6 Ga. 589, 615-616.

That remark misconceives the doctrine at which it is directed. It is not claimed that a mere failure to comply with any parol stipulation to which the parol evidence rule or the statute of frauds is pleaded as a defense can constitute fraud. It is only where the breaker of a promise is unjustly enriched through its breach that fraud remediable, despite the parol evidence rule and despite the statute, can exist and on sound principle does exist. As Dean AMES so forcibly said with reference to another situation but in language applicable here:

"It is one thing for a promisor to save himself from a loss by reliance upon the statute and quite another to make the statute a source of profit to himself at the expense of the promisee. Justice demands the restoration, so far as possible, of the *status quo* by compelling the trustee to surrender to the *cestui que trust* whatever he received from the latter upon the faith of his promise to perform the trust. Such relief does not in any way infringe upon the statute. The invalidity of the express trust is fully recognized. Indeed, it is the exercise of the trustee's right to use it as a defense that creates the *cestui que trust's* right of *restitutio in integrum*."[57]

Any attempt to confine the jurisdiction of equity to enforce constructive trusts for grantors to the case of fraudulent intent on the grantee's part at the time of the conveyance is unsound. As was said by SMITH, C., for the court, in *Kimball* v. *Tripp*,[58] where the grantor at the time of the conveyance made the grantee his agent to dispose of the property as directed on the grantor's death, and where the court held that a confidential relation was constituted which made it unnecessary to prove fraud:

"The position of the appellant upon this point is that as there was no fraud in the procurement of the conveyances, the plaintiff can have no relief. But assuming the absence of fraud (though in view of the defendant's relation to the grantor as her agent this can hardly be assumed), it does not follow that equity cannot afford relief. The deeds, it is found, were made to the defendant simply as her agent, and were therefore taken by him in trust for her; and though the trust was not expressed in writing, equity will not permit the defendant to convert the property to his own use, contrary to the intention of the parties and to the confidence reposed in him. '[Fraud, accident and mistake are special grounds of equity jurisdiction, and may be shown by any satisfactory evidence, written or verbal, with reference not merely to mortgages,

[57] Ames, Lectures on Legal History, 426. See same passage in 20 Harv. L. Rev. 549, 550.

[58] 136 Cal. 631, 634-635.

but to all written instruments. From their nature they must generally be established by parol evidence. And the evidence is admissible, not for the purpose of contradicting or varying the terms of the instrument—not to make its language mean one thing when it speaks another, but to show a state of facts *dehors* the instrument, raising an equity, which a court of chancery will enforce by annulling or reforming the instrument, or limiting its operation, or enjoining its use.][59] And the doctrine is both novel and startling which restricts, in matters of fraud, its jurisdiction over the operation of written instruments to those cases where the fraud has been committed in their creation. If maintained, it will sweep away its heretofore admitted jurisdiction in an infinite variety of cases, of almost daily occurrence, where the fraud alleged consists in the use of instruments entered into upon a mutual confidence between the parties. Fraud in their use is as much a ground for the interposition of equity as fraud in their creation. There is no distinction in the principle upon which the jurisdiction is asserted in the two cases. In both there is the same abuse of confidence and from both the same injury results' (*Pierce* v. *Robinson*, 13 Cal. 127). In the case cited the instrument was a deed absolute in its terms, shown by parol evidence to have been intended as a mortgage. But the principle applies equally to other cases. . . . There is also another principle upon which the rule may be sustained, which is, that in such cases generally, and in this case especially, there is an entire failure of consideration."

In an Indiana case where the grantee, who solicited the conveyance, conceived the idea of holding the property as his own only after the deed was executed and recorded, HOWARD, C. J., for the court, said:

"Counsel make no claim that the land rightfully belongs to appellant, but only that he did no wrong up to the time of procuring the deed; in other words, that the wrongful taking of the property and the appropriation of the proceeds to his own use occurred only after the deed was made, and hence 'this breach of contract is not fraud, and would not take the case out of the statute.'

"It is a salutary maxim that the statute against frauds cannot be used as a cover for fraud. The fraud in this case is clear, shameless and barefaced. A young business man, a favorite grandson, under pretense of aiding the old people in caring for their property, proceeds deliberately to appropriate to his own use the whole estate of

[59] The brackets contain a part of the opinion quoted by Smith, C., but not quoted by him.

his aged grandparents; and when called upon to account for the transaction, he coolly informs the court that the statutes enacted to protect innocent holders of real estate from the results of fraud in transfers of title have become to him a shield under cover of which he proposes to keep his ill-gotten gains. It would be a reproach to the law if such a claim could be allowed."[59a]

But there is no need to amplify the argument, and instead we may proceed to collate the authorities and to make suggestions for the future.

Only one jurisdiction—England—has been practically consistent in its refusal to make a distinction between the case where there is actual fraudulent intent on the grantee's part at the time he makes his promise and the case where there is such actual fraudulent intent only at the time of the subsequent refusal to perform.[60] A Canadian case accords with the English rule.[61]

The overwhelming weight of American authority—the cases will be found cited a little further on—is contrary to the English rule, though in some jurisdictions which in fact do not adopt the English rule there are stray cases which but for an ambiguous reference to "confidential relation," "fiduciary relation," etc., would properly be classed as in support of that rule.[62]

Because of the danger of misjudging a decision, it is impossible to say with certainty that any American jurisdiction holds the English rule. It would seem, however, as if California has, at last, achieved the English point of view,[63] and as if it is possible to hope that Nevada,[64] New York,[65] North Dakota,[66] and Oklahoma,[67] will

[59a] Giffen v. Taylor, 139 Ind. 573, 577-578.

[60] Davies v. Otty, 35 Beav. 208; Haigh v. Kaye, L. R. 7 Ch. App. 469; Booth v. Turle, L. R. 16 Eq. 182; In re Duke of Marlborough [1894] 2 Ch. 133; Rochefoucauld v. Boustead [1897] 1 Ch. 196, [1898] 1 Ch. 550. See the earlier cases of Hutchins v. Lee, 1 Atk. 447, and Young v. Peachy, 2 Atk. 254. It was in the last case that Lord Hardwicke said that the retention of the property in breach of promise is fraud for "the doing it is dolus malus." In Davies v. Otty, 35 Beav. 208, Lord Romilly, M. R., put the decision on the proposition that "it is not honest [of defendant] to keep the land."

[61] Clark v. Eby, 13 Grant Ch. (U. C.) 371.

[62] See Hall v. Linn, 8 Colo. 264; Hilt v. Simpson, 230 Ill. 170; Myers v. Jackson, 135 Ind. 136; Koefoed v. Thompson, 73 Neb. 128; Gray v. Beard, — Ore. —, 133 Pac. 791. Nevada and North Dakota have not yet positively—and fortunately not even impliedly—taken a stand against the English rule or it would be necessary to cite here the cases of Bowler v. Curler, 21 Nev. 158, and Hanson v. Svarverud, 18 No. Dak. 550.

[63] Taylor v. Morris, 163 Cal 717, which impliedly overrules such cases as Barr v. O'Donnell, 76 Cal. 469, and Smith v. Mason, 122 Cal. 426. Compare the confidential relation case of Bradley v. Bradley, (Cal.) 131 Pac. 750.

[64] See Bowler v. Curler, 21 Nev. 158, where the confidential relation spoken of seems to have been no more than exists in every case of conveyance on an oral promise of the grantee to hold in trust for, or to convey to or devise to, the grantor. In that case

achieve it, if New York and Oklahoma have not already done so; but in these jurisdictions the courts are anxious to find a special confidential relationship on which to base a trust,[68] and are loath to hold squarely that the conveyance on the oral promise in itself constitutes a confidential relationship and that the refusal to perform when coupled with the retention of the property conveyed confidentially is necessarily a breach of a special confidential relationship, and necessarily fraud redressible in equity even against a plea of the statute of frauds,[69] and even against the grantee's reliance on the parol evidence rule.[69a]

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at p. 161, Belknap, C. J., said of a conveyance by plaintiff to his father-in-law on oral trust for the plaintiff, and, in case of the plaintiff's death, for his infant daughter:

"The plaintiff conveyed the property to the defendant because of the confidence reposed in him without consideration other than he should hold it subject to the trust mentioned. If defendant were permitted to retain it, plaintiff could be defrauded, and the statute, which was intended to prevent frauds, would be the means for the accomplishment of a fraud. To prevent such a result, equity raises a constructive trust in the grantee and in favor of the grantor."

[65] Medical Laboratory v. New York University, 178 N. Y. 153; Lang v. Lang, 131 N. Y. Supp. 891. Compare the confidential relation cases of Goldsmith v. Goldsmith, 145 N. Y. 313, and Gallagher v. Gallagher, 135 N. Y. App. Div. 457. See 21 Bench and Bar (N. S.) 61, for a discussion of the New York law.

[66] In Hanson v. Svarverud, 18 No. Dak. 550, 553, 555, Morgan, C. J., for the court, said:

"A trust relationship may be enforced, and the refusal to enforce it declared constructively fraudulent although no fraudulent conduct or acts are shown as a fact. Implied or constructive fraud is sufficient to warrant a court of equity in declaring a deed absolute in form to be in trust for the grantee [grantor], or in trust for some other person at the grantor's request. A court of equity will enforce a trust agreement under such circumstances, although the requirements of the statute of frauds have not been complied with. The agreement is enforced because it would be inequitable and unjust to permit the grantee to profit by his wrongful conduct in refusing to execute and carry out the terms of his agreement. * * * In the case at bar, the complaint states facts showing that the grantors had confidence in their two sons, and relying upon such confidence, conveyed their land to them in trust for the grantors as a matter of fact while they lived and after their death the land was to be equally divided between all their children. It would be giving effect to a constructive fraud to permit the defendants to hold the land under such circumstances, although the contract would not be enforcible in a court of law. * * * We think the allegations of the complaint in this case sufficient to allege a constructive trust."

[67] Flesner v. Cooper (Okla.) 134 Pac. 379. See J. I. Case Threshing Mach. Co. v. Walton Trust Co. (Okla.) 136 Pac. 769.

[68] Bradley v. Bradley, (Cal.) 131 Pac. 750; Brison v. Brison, 75 Cal. 525, 90 Cal. 323; Cooney v. Glynn, 157 Cal. 583; Goldsmith v. Goldsmith, 145 N. Y. 313; Wood v. Rabe, 96 N. Y. 414; Gallagher v. Gallagher, 135 N. Y. App. Div. 457.

[69] Taylor v. Morris, 163 Cal. 717, and Medical College Laboratory v. New York University, 178 N. Y. 153, seem, however, to be in substance such holdings.

[69a] In Taylor v. Morris, 163 Cal. 717, 722, Henshaw, J., said of argument that the grantee in a deed absolute in form could not properly be held to be a trustee because of an oral agreement to hold in trust:

"To this proposition the familiar sections of the code and the familiar decisions under them, forbidding the attempt to vary the language of written contracts by parol are cited. But appellant mistakes the scope of the rule. The statute of frauds is never

By the great weight of American authority the plea of the statute of frauds, and the objection that a deed cannot be varied or contradicted by parol evidence, will prevent the enforcement of a constructive trust in favor of a grantor and against his grantee who obtained the conveyance without solicitation, without fraudulent intent and without special confidential relations with the grantor, even though he took on the oral agreement to hold in trust for the grantor, or to reconvey or to devise to him, the land conveyed. That general American rule is announced or assumed in cases which recognize a trust from the pleadings or the proof because the grantee solicited the conveyance[70]—which is taken as satisfactory evidence of fraud or of duress—or because of the existence of a special confidential relationship between the parties,[71] or because of an actual fraudulent intent on the part of the grantee at the time of making the promise,[72] and is the actual basis of decision in cases where the court refuses to recognize a trust on the pleadings or the proof because of the lack of a fraudulent intent by the grantee at the time of the conveyance,[73] or of the absence of a special confidential relationship

permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary * * *."

[70] Lehrling v. Lehrling, 84 Kans. 766; Giffen v. Taylor, 139 Ind. 573; cf. Ashby v. Yetter, 19 N. J. Eq. 196; Goodwin v. McMinn, 193 Pa. St. 646.

[71] Brison v. Brison, 75 Cal. 525, 90 Cal. 323; Jones v. Jones, 140 Cal. 587; Becker v. Schwerdtle, 141 Cal. 386; Crabtree v. Porter, 150 Cal. 710; Cooney v. Glynn, 157 Cal. 583; Bradley v. Bradley (Cal.) 131 Pac. 750; Hall v. Linn, 8 Colo. 264; Bohm v. Bohm, 9 Colo. 100; Jerome v. Bohm, 21 Colo. 322; Stahl v. Stahl, 214 Ill. 131; Hilt v. Simpson, 230 Ill. 170; Noble v. Noble, 255 Ill. 629; Catalini v. Catalini, 124 Ind. 54; Myers v. Jackson, 135 Ind. 136; Giffen v. Taylor, 139 Ind. 573; Henderson v. Murray, 108 Minn. 76; Peacock v. Nelson, 50 Mo. 256; Koefoed v. Thompson, 73 Neb. 128; Bowler v. Curler, 21 Nev. 158; Coffey v. Sullivan, 63 N. J. Eq. 296 (semble); Wood v. Rabe, 96 N. Y. 414; Gallagher v. Gallagher, 135 N. Y. App. Div. 457; Hanson v. Svarverud, 18 No. Dak. 550; Gray v. Beard (Ore.) 133 Pac. 791. The Oregon case has, however, a leaning toward the English rule, and the California, Nevada, New York and North Dakota cases are cited here without prejudice to the statements about those states found in the text on pp. 527-528, supra.

[72] Smith v. Smith, 153 Ala. 504; Crabtree v. Porter, 150 Cal. 710; Hall v. Linn, 8 Colo. 264; Brown v. Doane, 86 Ga. 32; Gregory v. Bowlsby, 115 Ia. 327; Ashby v. Yetter, 79 N. J. Eq. 196; Parrish v. Parrish, 33 Ore. 486; Goodwin v. McMinn, 193 Pa. St. 646, as explained in O'Donnell v. Vandersaal, 213 Pa. St. 551, 556; Chadwick v. Arnold, 34 Utah 48 (semble); Rozell v. Vansyckle, 11 Wash. 79.

[73] Patton v. Beecher, 62 Ala. 579; Brock v. Brock, 90 Ala. 86; Manning v. Pippen, 95 Ala. 537; Jacoby v. Funkhouser, 147 Ala. 254; Barr v. O'Donnell, 76 Cal. 469; Dean v. Dean, 6 Conn. 284; Verzier v. Conrad, 75 Conn. 1; McCartney v. Fletcher, 11 App. D. C. 1; Biggins v. Biggins, 133 Ill. 211; Williams v. Williams, 180 Ill. 361; Skahen v. Irving, 206 Ill. 597; Lancaster v. Springer, 239 Ill. 472; McHenry v. McHenry, 248 Ill. 506; Fouty v. Fouty, 34 Ind. 433; McGuire v. Smith (Ind. App.) 103 N. E. 71 (semble); McClain v. McClain, 57 Ia. 167; Luckhart v. Luckhart, 120 Ia. 248; Willis v. Robertson, 121 Ia. 380; Ostenson v. Severson, 126 Ia. 197; Heddleston v. Stoner, 128 Ia. 525; Burch v. Nicholson (Ia.) 137 N. W. 1066; Wentworth v. Shibles, 89 Me. 167; Wilson v. Watts,

between the grantor and the grantee,[74] both of which things are sometimes assumed in the short reason for decision given that the trust was express and not manifested in writing as required by the statute[75] or in the further reason offered that to enforce a trust would be to allow the recitation of consideration in the deed, or the statement that the grantee is to hold to his own use, to be contradicted or varied by parol evidence.[76] This last parol evidence rule reason is, as we have seen, unsound[77] and if it is accepted it renders useless any discussion of the seventh section of the statute of frauds as applicable to the oral trust for grantor situation.[78] In Massa-

9 Md. 356 (semble); Tatge v. Tatge, 34 Minn. 272; Moore v. Jordan, 65 Miss. 229 (semble); Horne v. Higgins, 76 Miss. 813; Feiss v. Heitkamp, 127 Mo. 23; Rogers v. Ramey, 137 Mo. 598; Marvel v. Marvel, 70 Neb. 498; Connor v. Follansbee, 59 N. H. 124; Lovett v. Taylor, 54 N. J. Eq. 311; Holton v. Holton, 72 N. J. Eq. 312; Down v. Down, 80 N. J. Eq. 68; Sturtevant v. Sturtevant, 20 N. Y. 39; Hutchinson v. Hutchinson, 84 Hun. 482, 32 N. Y. Supp. 390; Barry v. Hill, 166 Pa. St. 344 (semble); Grove v. Kase, 195 Pa. St. 325; Braun v. First Church, 198 Pa. St. 152 (semble); O'Donnell v. Vandersaal, 213 Pa. St. 551; McHendry v. Shaffer (Pa.) 89 Atl. 587; Turney v. McKown (Pa.) 89 Atl. 797; Kinsey v. Bennett, 37 S. C. 319, (But see Lee v. Lee, 11 Rich. Eq. (S. C.) 574); Salisbury v. Clarke, 61 Vt. 453; Arnold v. Hall, 72 Wash. 50; Troll v. Carter, 15 W. Va. 567 (semble); Whiting v. Gould, 2 Wis. 552; Fairchild v. Rasdall, 9 Wis. 379; Fillingham v. Nichols, 108 Wis. 49.

[74] Biggins v. Biggins, 133 Ill. 211; Moore v. Horsley, 156 Ill. 36; Burch v. Nicholson, (Ia.) 137 N. W. 1066; Bullenkamp v. Bullenkamp, 34 N. Y. App. Div. 193, 43 N. Y. App. Div. 510.

[75] O'Briant v. O'Briant, 160 Ala. 457; McDonald v. Hooker, 57 Ark. 632; Stevenson v. Crapnell, 114 Ill. 19; Lawson v. Lawson, 117 Ill. 98; Mayfield v. Forsyth, 164 Ill. 32; Stubbings v. Stubbings, 248 Ill. 406; Hemstreet v. Wheeler, 100 Ia. 290; Gee v. Thrailkill, 45 Kans. 173; Blackwell v. Blackwell, 88 Kans. 495. (But see Clester v. Clester, 90 Kans. 638, 640-641); Walker v. Locke, 5 Cush. (Mass.) 90; Curry v. Dorr, 210 Mass. 430 (semble); Waldron v. Merrill, 154 Mich. 203; Bartlett v. Tinsley, 175 Mo. 319; Crawley v. Crafton, 193 Mo. 421; Walker v. Brungard, 13 Sm. & M. 723 (semble); Cameron v. Nelson, 57 Neb. 381; Veeder v. McKinley, etc., Co., 61 Neb. 892; Taft v. Dimond, 16 R. I. 584; Spaulding v. Collins, 51 Wash. 488; Kalinowski v. McNeny, 68 Wash. 681; Pavey v. Amer. Ins. Co., 56 Wis. 221.

[76] McGuire v. Smith (Ind. App.) 103 N. E. 71; Byerly v. Sherman, 126 Ia. 447; Shelangowski v. Schrack, (Ia.) 143 N. W. 1081; Blodgett v. Hildreth, 103 Mass. 484; Gould v. Lynde, 114 Mass. 366; Curry v. Dorr, 210 Mass. 430 (semble); Brown v. Bronson, 35 Mich. 415; McKusick v. County Comrs., 16 Minn. 151; Graves v. Graves, 29 N. H. 129; Farrington v. Barr, 36 N. H. 86; Taylor v. Sayles, 57 N. H. 465; Hogan v. Jaques, 19 N. J. Eq. 123; Baker v. Baker, 75 N. J. Eq. 305; Gaylord v. Gaylord, 150 N. C. 222 (semble); Ricks v. Wilson, 154 No. Car. 282 (semble); Jones v. Jones (N. C.) 80 S. E. 430 (semble); Taft v. Dimond, 16 R. I. 584; Salisbury v. Clark, 61 Vt. 453; Eaves v. Vial, 98 Va. 134; Troll v. Carter, 15 W. Va. 567; Pusey v. Gardner, 21 W. Va. 469; Handlan v. Handlan, 42 W. Va. 309; Poling v. Williams, 55 W. Va. 69; Crawford v. Workman, 64 W. Va. 19. The North Carolina and West Virginia cases are in jurisdictions not having section 7 of the statute of frauds.

[77] See the discussion on pp. 520-527, ante and the quotation from Brison v. Brison, 75 Cal. 525 in note 53 ante. See also Hall v. Livingston, 3 Del. Ch. 348; Fleming v. Donohoe, 5 Ohio 255; Williams v. Emberson, (Texas Civ. App.) 55 S. W. 595.

[78] In Gaylord v. Gaylord, 150 N. Car. 222, 235, Connor, J., who concurred in reversing the judgment below, refused to agree that the parol evidence rule stood in the way of enforcing a trust because of the breach of the oral promise of the grantee, and for himself and Walker, J., quoted from the opinion of Chief Justice Pearson in Shelton v.

chusetts a constructive trust will not be enforced against the grantee in favor of the grantor,[79] but the grantor is allowed to recover a money judgment for the value of the lands against the unconscientious grantee.[80] While that view is not as satisfactory as is the English doctrine, it is not as unsatisfactory as is the general American doctrine.[81]

The argument for the majority American view is perhaps put as strongly in *Patton* v. *Beecher*[82] as anywhere. In that case, BRICKELL, C. J. said:

"The plain meaning of the statute [of frauds] is that a trust in lands, not arising by implication or construction of law, cannot be created by parol—that a writing signed by the party creating or declaring the trust is indispensable to its existence. Fraud, imposition, mistake, in the original transaction, may constitute the purchaser, or donee, a trustee *ex maleficio*. It is *fraud then,* and not *subsequent fraud,* if any exist, which justifies a court of equity in intervening for the relief of the party injured by it—as it is the pay-

Shelton, 58 N. C. 292, the argument that the parol evidence rule has no application to the oral trust or to an oral promise to reconvey, because if it did "the English statute in respect to the declaration of trusts was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title at law, and is not altered, added to, or explained by the trust which is an incident attached to it in equity as affecting the conscience of the party who holds the legal title." Connor, J., added: "As said by Judge Pearson, if an express trust comes within the parol evidence rule, there was no occasion for the adoption of the seventh section of the statute. It is not easy to perceive how the introduction of parol evidence to show that at the time of the delivery of the deed a declaration of trust for the grantor was made and accepted by both parties contradicts the deed, whereas, if made under the same circumstances in favor of a third person, it does not do so. In both cases the land is conveyed to the grantor [grantee]. The additional words, 'to his own use and behoof' adds nothing to the usual form of the habendum. Certainly they do not prevent the engrafting of a parol trust for a third person. I find that in Murphy v. Hubert, 7 Pa. St. 420, Gibson, C. J., held that as the seventh section of the statute of frauds had not been enacted in that state, the court was not authorized to reject parol evidence of the declaration of a trust made at the time the title passed. He asks, 'Why was the seventh section, with others, omitted? Certainly, to prevent its provisions from becoming the law of the land. And how can we make them the law of the land in the face of such a demonstration of legislative intent?'" Cf. Jones v. Jones (N. C.) 80 S. E. 430.

[79] Titcomb v. Morrell, 10 Allen 15; Walker v. Locke, 5 Cush. 90; Blodgett v. Hildreth, 103 Mass. 484; Gould v. Lynde, 114 Mass. 366; Fitzgerald v. Fitzgerald, 168 Mass. 488; Curry v. Dorr, 210 Mass. 430.

[80] Basford v. Pearson, 9 Allen 387; O'Grady v. O'Grady, 162 Mass. 290; Cromwell v. Norton, 193 Mass. 291. Cf. Dix v. Marcy, 116 Mass. 416. In Logan v. Brown, 20 Okla. 334, 346, the doctrine that the money value of the land may be recovered is commended.

[81] See Ames, Lectures on Legal History, 428. See same passage in 20 Harv. Law Rev. 549, 552.

[82] 62 Ala. 579.

ment of the purchase money at the time the title is acquired, which creates a resulting trust and not a subsequent payment, whatever may be the circumstances attending it. *Barnett* v. *Dougherty,* 32 Penn. 371. When the original transaction is free from the taint of fraud or imposition; when the written contract expresses all the parties intended it should; when the parol agreement which is sought to be enforced is intentionally excluded from it; it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a basis for a similar imputation, whenever any promise or contract is broken. *Wilson* v. *Watts,* 9 Md. 356-436. It is an annihilation of the statute to withdraw a case from its operation because of such violation or repudiation of an agreement, [which] it declares shall not be made or proved by parol. There can be no fraud, if the trust does not exist, and proof of its existence by parol, is that which the statute forbids. In any and every case in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation. We are not inclined to establish a precedent in the early days of the construction of the statute of which it can be justly said, that it trenches upon its policy and objects, creating an exception to its words, and opening a door for all the mischief it was intended to suppress."[83]

The first fallacy in that argument is the conclusion that resulting trusts and constructive trusts are of the same nature. A resulting trust for the payer of the purchase money is an intention trust deduced from the conduct of the parties, as we have seen, and unless one was intended at the time of the purchase and conveyance there is not one. A so-called resulting trust for a grantor, deemed to exist where a deed expressly in trust is made without consideration and where a part of the equitable interest is undisposed of in so many words, is also an intention trust, and the trust accordingly arises at the time of the conveyance. A resulting trust for a grantor who con-

[83] Id., 592-593. In McClain v. McClain, 57 Ia. 167, 171, Beck, J., said:

"The case amounts briefly to this: The conveyance was made to defendant without any act or representation on his part inducing it. No fraud has been shown prior to or contemporaneous with the execution of the deed to defendant. His fraud consists in denying and repudiating his agreement to convey the land to plaintiff. However abhorrent this fraud may be in the eyes of honest men, yet it is not a ground upon which the case may be removed from the operation of the statute of frauds, so that parol testimony may be admitted to establish the agreement creating the express trust."

veys by absolute deed but without consideration no longer is presumed, and an attempt to bolster up such a trust by evidence that there was an express oral agreement of trust proves only an express trust instead of a resulting one; for the proof that there was an express trust leaves no room for a presumption of fact of a trust and if the express trust is unenforcible the only possible trust to enforce is a constructive trust. A so-called resulting trust, attempted to be established against a presumption of no trust by oral evidence of an express trust, is logically only express, or, if the express trust is unenforcible, then is only constructive, however much reason in legal history there may be for saying that it is resulting within the meaning and intent of the words "result by the implication or construction of law" in section eight of the English statute of frauds. But, in any event, all three so-called resulting trusts are pure intention trusts, whereas a constructive trust is not an intention trust, but instead is an *ex maleficio* trust. While a resulting trust, being an intention trust, must arise at the time of conveyance or not at all, a constructive trust may arise later. A constructive trust arises when the fraudulently enriching conduct occurs.

The second fallacy in the argument quoted from the Alabama case is the assertion that if a constructive trust is enforced against a grantee who took honestly, but, in breach of his oral promise, is keeping dishonestly, any breach of an oral promise can be redressed in that way. The fallacy lies in the assumption that all who break oral promises are enriched in consequence. It is not the breaking of the promise that constitutes fraud, but the enrichment retained despite the breaking, and accordingly it is only the unjust enrichment that gives equity the right and the duty to raise a constructive trust. The statute of frauds was meant to be a shield to the just and the unjust, but not a sword for the highwayman.

The third fallacy in the argument is in saying that when the express oral promise is made honestly there is no trust because of the lack of a writing. There is a trust until its dishonest repudiation in reliance on the statute. The trustee's repudiation of that trust plus his attempt to retain for his own purposes the trust *res,* constitute fraud sufficient for the enforcement of a constructive trust.

The fourth and last fallacy in the argument that is worth noticing is the notion that the liberal interpretation of the eighth section of the statute of frauds is not consonant with the statute's purpose. The eighth section is indeed a *proviso,* but a *proviso,* dignified by being made into a separately numbered section, is not like an ordinary exception to a statute. The whole legislative history of the statute of frauds shows that the resulting and construcive trust doc-

trines of chancery were to have the free scope which the eighth section expressly stated that they should, namely, to "be of like force and effect as the same would have been if this statute had not been passed." The courts which have slighted the eighth section of the statute of frauds have been the ones to violate the intent of that statute.

Conclusions and Suggestions.

We have seen that where one man conveys to another on an express oral trust for, or on the grantee's oral promise to convey or to devise to, a third person who pays the grantor the purchase price, there is deemed to be a resulting trust for the third person despite the express oral trust, but that on principle the trust enforced is constructive. We have seen that such a trust is enforced in favor of the payer and against the grantee practically everywhere if the grantee is not the payer's wife or child or one to whom the payer stands *in loco parentis,* and, in a majority of jurisdictions, even if the grantee is so related to the payer. We have also seen that where one man, without consideration other than the grantee's oral promise, conveys to another on the latter's oral promise to hold in trust for, or to convey or to devise to, a third person who is a volunteer, only a minority of jurisdictions will enforce a trust in the third person's favor, or any trust, in the absence of a solicitation of the conveyance by the grantee or of an actual intent to defraud entertained by him at the time of the conveyance, or of a breach of a special confidential relationship.[83a] We have further seen that where one man pays the purchase money for realty and the conveyance is made by the vendor to a third person on an oral trust for, or an oral promise to convey or to devise to, a fourth person, the few jurisdictions which have considered the question are about equally divided on the question of whether the fourth person shall be allowed to enforce a trust or the repudiating grantee shall keep for himself, in the absence of the solicitation, contemporaneous fraudulent intent, or special confidential relationship noted above, though it seems clear that he should hold for the payer if the fourth person is not allowed to enforce a trust. And finally we have found that, in the great majority of jurisdictions, on a conveyance without consideration other than the grantee's oral promise to hold in trust for, or to reconvey or to devise to, the grantor, a trust will not be enforced

[83a] To the majority cases in note 28, ante, should be added Veasey v. Veasey (Ark.) 162 S. W. 45, and Hunter v. Briggs (Mo.) 162 S. W. 204 (semble). Veasey v. Veasey should also be cited in note 30, ante, to the same effect as Irwin v. Ivers, 7 Ind. 308, but in Veasey v. Veasey the plaintiffs were barred by laches and the statute of limitations.

for the grantor in the absence of such solicitation, contemporaneous fraudulent intent, or special confidential relationship.

In each and every one of the foregoing situations of express oral trust, or express oral promise, the trust enforced, if one is enforced despite the parol evidence rule and despite the plea of the statute of frauds, is on principle constructive; yet some courts regard the express oral trusts or promises for the payer of the purchase money as giving rise to resulting trusts, and enforce them as such when, often, they would not enforce them if they were to regard them as having to meet the constructive trust tests. In view of that fact and of the further fact of the emphasis laid on the existence of a special confidential relationship as a constructive trust test, it would seem that the hope of bringing the courts to the right point of view in situation 4 as well as in the other situations, and of keeping them right, is to proceed along the following lines:

1. Demonstrate that historically, and on reason, a conveyance on an oral trust for the grantor is just as much a resulting trust within the meaning of the statute of frauds or proper trust usage as is a conveyance of land bought by a man who has the title conveyed to his wife or child on an oral trust for himself.[84] In both cases there is a presumption of no trust overcome by affirmative evidence of a trust, and in both cases it is necessary to go behind the recitation of the deed as to payment of consideration by the grantee and behind the *habendum* to the use of the grantee. In both cases there is the same equitable reason for enforcing a trust, whether it be called resulting or constructive, and although in the oral trust for grantor case the objection of estoppel by deed seems at first sight to be stronger than in the other case, the doctrine of estoppel by deed is equitable in its origin and nature and clearly a wrongdoer must not be allowed to use it inequitably even against his grantor.

2. Force home the truth that in all cases of devises and conveyances on oral trusts, or on oral promises to convey or to devise, there is either a constructive trust at the start because of the grantee's fraudulent acquisition, or else there is *ipso facto* a relation of special trust and confidence entered into, the breach of which, to the consequent unjust enrichment of the oral trustee or promisor, is actual fraud, no matter how good the intentions of the promisor were at the start. In every such case it is as true of the grantee as it was of the defendant in an Ohio case, that "He took in confidence what he could not retain without bad faith and fraud."[85] If the

[84] See Flesner v. Cooper (Okla.) 134 Pac. 379.

[85] Newton v. Taylor, 32 Ohio St. 399, 413.

grantee had bad intent at the start his fraudulent acquisition will not keep him from being a constructive trustee, even though because of his fraudulent intent he may possibly never have been, strictly speaking, an express trustee, for his fraudulent retention will make him a constructive trustee. On the other hand, if the grantee had honest intent at the start, and so became and remained while the honesty lasted an express trustee, his breach of trust and fraudulent retention of the trust *res,* constituting a breach of the special confidential relationship of trustee and *cestui,* of course render him a constructive trustee. To quote again the sentence from the opinion of HENSHAW, J., in *Taylor* v. *Morris,*[85a] already twice quoted in this article:

"The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol."[86]

3. Keep emphasizing the proposition that fraud at the start and fraud at the end, actual fraud at the time of the deed and so-called "constructive fraud" at the time of the refusal to perform, all constitute actual fraud which derives its whole trust significance from the unjust enrichment of the grantee through his unconscientious retention of the trust *res.* Even in the case of fraud at the start it is the fraudulent retention alone that gives equity jurisdiction to declare a trust.[87]

[85a] 163 Cal. 717, 722.

[86] As most of the grantees on oral trusts or promises for the grantor or for third persons are relatives of the grantor, the case of Goldsmith v. Goldsmith, 145 N. Y. 313, may be taken as typical of the proper judicial point of view. The court there enforced a constructive trust because of the grantee's unjust enrichment through breach of his oral promise in violation of the oral "arrangement founded upon the relation of mother and son, and brothers and sisters, involving the trust and confidence growing out of that relation, and intended as a settlement of the family affairs" (145 N. Y. 313, 316-317). Compare Hilt v. Simpson, 230 Ill. 170. Of husband and wife living amicably together the court ought to say, as was said in the Kansas case passage quoted in note 18, ante:

"Their relationship—that of husband and wife—was confidential in the highest degree known to the law." Much the same can be said of engaged persons. Bradley Co. v. Bradley, — Cal. —, 131 Pac. 750. Where the grantor and grantee are not so intimately related, and something short of the view above advanced of an express trust relationship begun on the conveyance and later violated by the grantee is deemed desirable, the view that the transaction is at least one of oral agency and hence that a fiduciary duty is violated by the grantee is possible. See Koefoed v. Thompson, 73 Neb. 128; Kimball v. Tripp, 136 Cal. 631.

[87] In some states it is held that from the subsequent wrongful refusal of the oral trustee to perform, whereby he enriched himself, the court will presume a bad intent at the start. Dowd v. Tucker, 41 Conn. 197; Larmon v. Knight, 140 Ill. 232; Gemmell v. Fletcher, 76 Kans. 577. In those jurisdictions the presumption is one of fact and so rebuttable. If the courts in those jurisdictions are going to stick to the language of presumptions on that matter, they should make the presumption from the subsequent fraudulent retention a conclusive presumption of law entitling the grantor to get back the

4. Make it plain that the essential aim of section seven of the statute of frauds was to protect oral trustees from being called to account for breaches of active duties;[88] that the essential aim of section eight was to insure that no unjust enrichment should be tolerated as to any property over which chancery had jurisdiction; and that both sections can be given full and appropriate operation only if a grantee who has taken title on an oral promise which he is refusing to fulfill is compelled to yield to the person really damaged by that refusal the title by which in the absence of that compulsion he would be unjustifiably enriched. The fact that a number of jurisdictions get along quite satisfactorily without sections seven and eight of the statute of frauds shows that most courts overemphasize the value of section seven. All courts should be willing to restrict section seven to its proper sphere and to give section eight its full operation of preventing all unjust enrichment not adequately remediable at law.

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land. The correct way, of course, is not to indulge any presumption of prior fraud but to treat the fraudulent retention of the res in breach of faith as actual present fraud, and as sufficient ground for raising a constructive trust.

[88] Only after Lord Eldon's innovation, in 1811, in ex parte Pye, 18 Ves. 140, established that a voluntary declaration of trust is enforcible was section seven needed as a defense by those who orally declared themselves trustees of real property for voluntary cestuis. The statute of frauds properly became a defense for them. See notes 15 and 20, ante.