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TRUSTS--CONSTRUCTIVE TRUSTS--EFFECT OF INTER-VIVOS TRANSFER OF LAND ON ORAL TRUST TO RECONVEY TO TRANSFEROR

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TRUSTS—CONSTRUCTIVE TRUSTS—EFFECT OF INTER-VIVOS TRANSFER OF LAND ON ORAL TRUST TO RECONVEY TO TRANSFEROR—Plaintiff, who had courted defendant for six years and had proposed marriage, conveyed a lot and house to defendant after various discussions and immediately upon the written suggestion of defendant. Later their romance terminated when she went abroad and plaintiff turned his attention to another woman. In a suit to cancel deed to the premises, *held*, that because of the confidential relationship which had existed between the parties and in order to prevent defendant from “completing her fraud,” defendant held title as constructive trustee for plaintiff. *Kausky v. Koten*, (Wash. 1947) 179 P. (2d) 950.

Plaintiff sold defendant cascara bark on tree situated on plaintiff's land, giving defendant two years to peel and remove the bark. Plaintiff alleged that to relieve him from any liability caused by fires started on the premises while

defendant was removing the bark, plaintiff executed a deed to the defendant with an oral agreement that the deed was to be cancelled at the end of the two year period. Defendant conveyed shortly to X who, plaintiff alleged, took with notice of the oral agreement. In an action to have plaintiff adjudged owner of the realty, *held*, that no constructive trust arose from the transaction because at the time of the execution of the deed, defendant had no "present intention not to reconvey." *Moe v. Brumfield*, (Wash. 1947) 179 P. (2d) 968.

In jurisdictions where the Statute of Frauds requires express trusts to be evidenced by writing, an oral agreement to reconvey land to the grantor cannot be enforced as an express trust;¹ and in the United States, unlike England,² neither may the oral promise be shown to raise a constructive trust, for to do so would violate the policy underlying the statute.³ To relieve the harshness of this rule, a constructive trust is imposed in several exceptional situations, two of which are presented in the principal cases: (1) when the grantee stands in a confidential or fiduciary relationship to the grantor;⁴ and (2) where there is actual fraud in the procurement of the conveyance.⁵ Breach of the confidential relationship consists merely in the grantee's failure to perform his oral promise, and no improper advantage, fraud; or undue influence need be proved to enforce the trust.⁶ What constitutes a confidential relationship whose breach constitutes a constructive trust is a source of much confusion in the decisions. The natural confidence existing between husband and wife has been held to be insufficient to establish such a relationship;⁷ on the other extreme, some judicial

that mere proof of the sale of a commodity to competing purchasers at different prices is to be sufficient to take the issue of violation to the jury, then the importance of the treble damage action is greatly magnified and a combination of the Moss doctrine and permitting violation as a defense would have a "drastic impact upon the legal collectibility of the price of goods and widespread repercussions on the allowance of mercantile credit." N.Y. BAR ASSN., ROBINSON-PATMAN ACT SYMPOSIUM, pp. 77-80 (1947). For an excellent treatment of the defense, see Lockhart, "Violation of the Anti-Trust Laws as a Defense in Civil Actions," 31 MINN. L. REV. 507 (1947).

¹ See 35 A.L.R. 280 (1925); 129 A.L.R. 689 (1940), and 159 A.L.R. 997 (1945).

² *Hutchins v. Lee*, 1 Atk. 447, 26 Eng. Rep. 284 (1737); In re Duke of Marlborough, [1894] 2 Ch. 133; *Haigh v. Kaye*, L.R. 7 Ch. App. 469 (1872).

³ See 1 SCOTT, TRUSTS, § 44 (1939). Oral testimony to establish the trust is frequently refused on ground that to admit it would be to obliterate express trusts [*Farrell v. Mentzer*, 102 Wash. 629, 174 P. 482 (1918)], or to repeal the Statute of Frauds [*Brock v. Brock*, 90 Ala. 86, 8 S. 11 (1890)].

⁴ Examples of confidential or fiduciary relationship are attorney and client, husband and wife, principal and agent, trustee and beneficiary, parent and child. See cases collected in 35 A.L.R. 280 at 307 (1925) and 159 A.L.R. 997 at 1007 (1945).

⁵ *Sykes v. Reeves*, 195 Ga. 587, 24 S.E. (2d) 688 (1943) (fraud inferred from conduct of grantee showing he never intended to perform promise to reconvey); *Newis v. Topfer*, 121 Iowa 433, 96 N.W. 905 (1903) (fraudulent "deception" by grantee of grantor).

⁶ See RESTITUTION RESTATEMENT, § 182 (1937); 1 SCOTT, TRUSTS, § 44.2 (1939).

⁷ *McCartney v. Fletcher*, 11 App. D.C. 1 (1897); *Binkowski v. Moskiewitz*, 144 App. Div. 161, 128 N.Y.S. 803 (1911).

definitions seem broad enough to embrace a case where the only evidence of a confidential relationship is the execution of the deed to the grantee on the oral promise.⁸ Dominance or superiority in the transferee,⁹ and family, blood, or business ties¹⁰ are usually deemed a sufficient basis. In finding a confidential relationship in the first of the principal cases, the court was aided by adoption of a very broad definition of the term,¹¹ within which it was able to bring the facts of the case. Although this process of "inclusion by definition" may subject the doctrine to indiscriminate use,¹² the equitable result here achieved seems desirable. The second situation in which a constructive trust is imposed, where there is a fraudulent procurement of the conveyance, may be evidenced by the fact that at the time of the transfer the grantee did not intend to perform the oral trust or promise to reconvey, coupled with his subsequent refusal to perform.¹³ Fraudulent intent may be inferred from false representations by the grantee at or before the transaction,¹⁴ or from the fact that the grantee was the active party in inducing the conveyance.¹⁵ It is generally held that mere breach of the oral promise to reconvey or hold in trust does not constitute fraud which will raise a constructive trust,¹⁶ although the *Restatement of Restitution* provides that this fact is evidence that at the time of the transfer the transferee did not intend to carry out his promise.¹⁷ In the second of the principal cases, which was decided by the same court on the same day as the first case, the court first defined narrowly the scope of the constructive trust doctrine,¹⁸ and then

⁸ "A fiduciary relation exists in all cases in which influence has been acquired and abused. The origin of the confidence is immaterial. It may be moral, social, domestic, or purely personal. If the confidence is in fact reposed by the one party and accepted by the other the relation is fiduciary." *Seeburger v. Seeburger*, 325 Ill. 47 at 51, 155 N.E. 763 (1927).

⁹ See *McCord v. Roberts*, 334 Ill. 233, 165 N.E. 624 (1929); *Briley v. Roberson*, 214 N.C. 295, 199 S.E. 73 (1938). For a discussion of this subject, see Bogert, "Confidential Relations and Unenforceable Express Trusts," 13 *CORN. L. Q.* 237 (1928).

¹⁰ For cases on family, blood, and business relationships, see 35 *A.L.R.* 280 at 311 (1925).

¹¹ "Such a [confidential] relationship is said to exist 'where confidence is reposed on one side and resulting superiority and influence on the other.'" *Kausky v. Koten*, (Wash. 1947) 179 P. (2d) 950 at 956.

¹² See 39 *MICH. L. REV.* 1049 (1941).

¹³ See *RESTITUTION RESTATEMENT*, § 182 (1937).

¹⁴ *Rance v. Gaddis*, 226 Iowa 531, 284 N.W. 468 (1939); *Burrows v. Burrows*, 136 Cal. App. 323, 28 P. (2d) 1072 (1934).

¹⁵ *Smith v. Smith*, 153 Ala. 504, 45 S. 168 (1907) (grantee promised that deed would not be filed until approval by grantor's attorney and should be destroyed if not so approved); *Fischbeck & Gross*, 112 Ill. 208 (1884) (grantor was induced fraudulently to convey land to grantee instead of to grantor's wife to avoid suspicion that conveyance was made in fraud of creditors).

¹⁶ *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E. (2d) 666 (1945); *Sneiderman v. Kahn*, 350 Pa. St. 496, 39 A. (2d) 608 (1944).

¹⁷ Sec. 182, comment (a) (1936).

¹⁸ "In order that the doctrine of trust *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a verbal promise, however unequivocal; . . . *there must be an element of positive fraud ac-*

denied equitable relief by finding an absence of a "present intention of the grantee not to reconvey." The result reached by this process of "exclusion by definition" is not surprising in view of the questionable motive of plaintiff in executing the conveyance—to relieve himself from liability for losses resulting from fires started on his land by causing others to believe that the grantee was the real owner. Despite the lip service it pays to the Statute of Frauds as a bar to admission of evidence of an oral trust or contract of land, the Washington court in the principal cases follows the practice of many courts in granting or denying the equitable remedy by expanding or contracting the scope of the doctrine of constructive trusts. In view of the confusion into which this process of "elastic definitions" has today cast the law of constructive trusts, it would seem highly desirable that the Statute of Frauds should not be construed to prevent proof of an oral trust or contract, but should operate as creating a presumption against the existence of such a trust which plaintiff must overcome by clear and convincing evidence.

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companying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." *Moe v. Brumfield*, (Wash. 1947) 179 P. (2d) 968 at 971.