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STATUTE OF FRAUDS—EXTINGUISHMENT OF BENEFICIAL INTEREST IN CONSTRUCTIVE TRUST IN LAND—In order to increase borrowing capacity the husband conveyed several parcels of land to his wife so as to establish a separate credit for her; parol evidence indicated that the conveyance was for the use of the husband. Subsequently their relations became estranged, and the husband attempted a parol surrender of the parcels to his wife. The New Jersey Statute

of Frauds¹ is the counterpart of the English Statute² requiring the creation of an express trust to be manifested and proved by writing but excluding from the requirement of writing creations, transfers, or extinguishments by operation of law.³ In a suit by the husband to recover the land, *held*, a constructive trust was created by parol, but the beneficial interest could not be released, and the husband recovered. *Moses v. Moses*, (N.J. Eq. 1947) 53 A. (2d) 805.

The court found it necessary to define "resulting"⁴ and "constructive"⁵ trusts, for there is considerable authority for the proposition that a purchase money resulting trust in land may be extinguished by parol⁶ although such rule is not applied to other resulting trusts in land and has been criticized on the basis that the Statute of Frauds requires discharges resting solely on the intent of the beneficiary to be in writing.⁷ The weight of authority is in accord with the court's holding that the trust created in this case was a constructive trust arising by operation of law out of the abuse of the confidential relationship of husband and wife by failure to perform the oral agreement to hold for the grantor;⁸ there is little direct authority relating to the extinguishment of such

¹ N.J. Rev. Stat. (1937) §§25:1-2, 3, 4.

² 29 Car. 2, c. 3, §§ 7, 8, 9 (1677).

³ 3 SCOTT, TRUSTS, § 429 (1939).

⁴ A resulting trust in favor of the settlor arises: (1) where an express trust fails; (2) where an express trust does not exhaust the trust estate; and (3) where property is transferred to one person and purchase price is paid by another; 2 TRUSTS RESTATEMENT, §§ 404, 411, 430, 440 (1935); 3 SCOTT, TRUSTS, §§ 404, 404.1 (1939); 2 BOGERT, TRUSTS AND TRUSTEES, § 451 (1935). Generally, see *Viner v. Untrecht*, 26 Cal. (2d) 261, 158 P. (2d) 3 (1945), noted in 33 CAL. L. REV. 335 (1945). As to the creation of a purchase money resulting trust between husband and wife, see note in 86 UNIV. PA. L. REV. 788 (1938).

⁵ "Although the constructive trust is a remedial device sometimes available for the redress of a breach of an express trust, it is available also in numerous and varied situations wholly unconnected with express trusts. It is available where property is obtained by mistake or by fraud or by other wrong. It is available where a profit is made by an agent or other fiduciary as well as where it is made by a trustee. It is available where a person, whether or not he is a fiduciary, wrongfully disposes of property of another and acquires in exchange other property." 3 SCOTT, TRUSTS, § 461 at p. 2311 (1939). See also *id.*, §§ 462, 462.2 (1939); RESTITUTION RESTATEMENT, § 160 (1937); 3 BOGERT, TRUSTS AND TRUSTEES, § 471 (1946); *Greenly v. Greenly*, (Del. Ch. 1946) 49 A. (2d) 126. The enforcement of neither resulting nor constructive trusts requires writing under the Statute of Frauds. 1 TRUSTS RESTATEMENT, § 40 (1935); 3 SCOTT, TRUSTS, § 404 (1939); 2 BOGERT, TRUSTS AND TRUSTEES, § 452 (1935).

⁶ 2 TRUSTS RESTATEMENT, § 460 (1935); 3 SCOTT, TRUSTS, § 460 (1939).

⁷ 2 TRUSTS RESTATEMENT, §§ 429, 439 (1935); 3 SCOTT, TRUSTS, §§ 429, 439 (1939); 2 BOGERT, TRUSTS AND TRUSTEES, § 466 (1935); Scott, "Parol Extinguishments of Trusts in Land," 42 HARV. L. REV. 849 (1929). *Contra*, annotation in 106 A.L.R. 1313 at 1315 (1937). Express trusts cannot be extinguished by parol, *Coleman v. Coleman*, 48 Ariz. 337, 61 P. (2d) 441 (1936); annotation in 106 A.L.R. 1313 (1937).

⁸ The general American view is that a constructive trust will not arise out of the mere breach of an oral agreement, other circumstances such as the breach of a confidential relationship being required, 1 TRUSTS RESTATEMENT, § 44 (1935);

trusts.⁹ Nevertheless, the holding of the court would appear to be correct in view of the statute and the criticism of decisions sustaining parol transfers of resulting trusts. Presumably the holding of the court would be to the contrary if the trustee had entered into possession and made valuable improvements.¹⁰

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RESTITUTION RESTATEMENT, § 182 (b) (1937); 1 SCOTT, TRUSTS, §§ 44, 44.2 (1939); 3 BOGERT, TRUSTS AND TRUSTEES, §§ 482, 495, 496 (1946); Scott, "Conveyances upon Trusts Not Properly Declared," 37 HARV. L. REV. 653 at 656 (1924); annotation in 159 A.L.R. 997 at 1008 (1945); *Barker v. Barker*, (N.D. 1947) 27 N.W. (2d) 576 (1947); *Knox v. Knox*, 222 Minn. 477, 25 N.W. (2d) 225 (1946); *Metzger v. Metzger*, 338 Pa. 564, 14 A. (2d) 285 (1940), noted in 39 MICH. L. REV. 1049 (1941); *Young v. Jackson*, 140 Kan. 237, 36 P. (2d) 91 (1934), noted in 34 MICH. L. REV. 140 (1935).

⁹ *Hatcher v. Hatcher*, 264 Pa. 105, 107 A. 660 (1919), a case exactly in point, held that such trusts could not be extinguished by parol; *Beatty v. Guggenheim Exploration Company*, 225 N.Y. 380, 122 N.E. 378 (1919), held that trusts created by acquisition of land by one in a fiduciary capacity could be destroyed by parol, the Statute of Frauds not being considered. Professor Scott suggests that where there is no reliance, election of remedies, or compensation for the unjust enrichment creating the trust, writing should be required, 3 SCOTT, TRUSTS, § 481.3 (1939); Scott, "Parol Extinguishments of Trusts in Land," 42 HARV. L. REV. 849 at 858 (1929). But there is some authority for the proposition that a constructive trust raised by parol may be extinguished by parol. 106 A.L.R. 1313 at 1317 (1937).

¹⁰ Principal case at 810; Scott, "Parol Extinguishments of Trusts in Land," 42 HARV. L. REV. 849 at 851 (1929); 106 A.L.R. 1313 at 1318 (1937).