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RESULTING TRUST-STATUTE OF FRAUDS-ADVANCE OF PURCHASE MONEY IN EXCHANGE FOR TRANSFEREE'S PROMISE TO FURNISH A LIFE HOME FOR THE PAYOR

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RESULTING TRUST—STATUTE OF FRAUDS—ADVANCE OF PURCHASE MONEY IN EXCHANGE FOR TRANSFEREE'S PROMISE TO FURNISH A LIFE HOME FOR THE PAYOR—Plaintiff, an illiterate sharecropper, advanced money to purchase an eighty acre farm, record title being taken in the name of defendant and wife with whom plaintiff had been living for more than a year pursuant to an agreement that defendant was to furnish plaintiff with a home for life. The arrangement worked satisfactorily for more than thirty years, during which time the premises were improved and a mortgage discharged by plaintiff. Defendant then remarried and the friction which followed was climaxed by defendant ordering plaintiff off the premises. Suit was filed in equity, under an Oklahoma statute,¹ to have defendant declared constructive trustee and plaintiff the equitable owner. *Held*, one justice specially concurring in the reversal of the judgment of the lower court, although dissenting² with the holding of the majority that the presumption of resulting of the fee was rebutted by parol evidence, and that plaintiff should have a life tenancy in an undivided half interest in the farm. *Brinkley v. Patton*, (Okla. 1944) 149 P. (2d) 261.

The writer has failed to uncover a prior case in which the payor has advanced purchase money for property in exchange for the transferee's promise to furnish a life home for the former. But the analogy to those cases in which the grantor conveys his property in exchange for the grantee's promise to support the former is quite apparent. Though some courts have held that the grantor has an adequate remedy at law and is limited to his suit for breach of contract to sup-

¹ "When a transfer of real property is made to one person, and a consideration therefore is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment was made." Okla. Stat. (1941) tit. 60, § 137. Similar enactments, merely declaratory of the common law, may be found in California, Georgia, Montana, North Dakota and South Dakota. Cal. Civ. Code (Deering, 1941) § 853; Ga. Code (Park, 1936) § 108-106; Mont. Rev. Codes Ann. (1935) § 6785; N.D. Comp. Laws Ann. (1913) § 5365; S.D. Code (1939) § 59.0102. In five other states, Kentucky, Michigan, Minnesota, New York and Wisconsin, statutes do away with resulting trusts of this variety unless the title was taken in the name of another than the payor without the payor's consent, or the person taking title in violation of a trust purchases the property with the money of another. Ky. Rev. Stat. (1942) § 381.170; Mich. Stat. Ann. (1937) §§ 26.57-26.60; Minn. Stat. (Mason, 1927) §§ 8086-8088; 49 N.Y. Real Prop. Law (McKinney, 1936) § 94; Wis. Stat. (1941) §§ 231.07-231.09.

Indiana and Kansas also abolish the purchase money trust unless the grantee takes the same as an absolute conveyance in his own name without the consent or knowledge of the persons paying the consideration, or in violation of some trust purchases the property so conveyed with money or property belonging to another, or there was an oral agreement that the grantee should be a holder for the payor of the consideration. Ind. Stat. Ann. (Burns, 1943) §§ 56-606 to 56-608; Kan. Gen. Stat. Ann. (1935) §§ 67-406 to 67-408.

Even though the statute prohibits resulting trusts, if the payor of the consideration and the grantee have any confidential relationship the courts quickly seize that fact as a basis for a constructive trust. *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N.Y.S. 788 (1898), *aff'd*. 163 N.Y. 574, 57 N.E. 1113 (1900).

² Although Vice Chief Justice Gibson concurred in the reversal of the cause, he declared that the complainant should be given the beneficial interest of the entire fee on the theory of constructive trust and failure of consideration.

port,³ a variety of equitable relief appears available. Some courts have interpreted the deed to convey only a title in fee on condition subsequent, subject to be defeated by grantee's failure to properly support the grantor.⁴ Another line of cases grant rescission of the deed on the theory of failure of consideration.⁵ Still other courts have imposed a constructive trust upon the grantee to hold for the beneficial interest of the grantor, simply on the broad grounds of unjust enrichment.⁶ The majority in the principal case held that, since the plaintiff prosecuted his cause only on the theory of resulting trust, his remedy could not be enlarged on appeal by the court, which could only grant him such relief as was available under his theory of resulting trust. While hinting that the plaintiff would have fared better had he rested his suit on other grounds, the court declared that the oral agreement between the parties to the effect that they should share equally in the premises for the life of the plaintiff rebutted the presumption of the resulting trust of all the payor's interest in the property save a life tenancy in an undivided half in the premises. Where the payor and the transferee agree that the payor shall pay the whole price of the land but shall become the equitable owner of a lesser interest only, most courts hold that the oral agreement may be used as evidence to confirm the resulting trust of the lesser interest, and rebut the presumption of resulting trust of the entire fee.⁷ Other courts treat the oral agreement as an effort to create an express trust in contravention of the statute

³ *Lindsey v. Lindsey*, 62 Ga. 546 (1879); *Devereaux v. Cooper*, 15 Vt. 88 (1843).

⁴ If a nonperformance of the agreement to support goes to the entire subject of the contract and constitutes the whole consideration for the conveyance so that it appears to be the intent and substance of the contract that if the support is not furnished as agreed there would be no consideration for the conveyance, equity may treat the entire transaction as creating an estate upon condition, subject to be defeated by a substantial breach by the grantee. The condition may even be inferred from the instrument and the existing facts unless there is something in the instrument to show that such a condition could not have been intended. *Cree v. Sherfy*, 138 Ind. 354, 37 N.E. 787 (1894); *Lowman v. Crawford*, 99 Va. 688, 40 S.E. 17 (1901); *Bank of Hartford v. Buffalow*, 217 Ala. 583, 117 S. 183 (1928). *Contra*, *Lowrey v. Finkleston*, 149 Wis. 222, 134 N.W. 344 (1912).

⁵ Equity will set aside a deed for breach by the grantee of his agreement to support the grantor where this agreement formed the consideration for the deed. *O'Ferrall v. O'Ferrall*, 276 Ill. 132, 114 N.E. 561 (1916); *Houston v. Greiner*, 73 Ore. 304, 144 P. 133 (1914).

⁶ *Foreman v. Foreman*, 251 N.Y. 237, 167 N.E. 428 (1929); *Grant v. Bell*, 26 R.I. 288, 58 A. 951 (1904).

Equity will construe a contract for support literally in favor of the grantor and will find some means for its enforcement. Although the relief required is without exact precedent, some remedy will be devised to fit the circumstances. For example, where the grantor is not entitled to rescission of the deed, a receiver will be appointed or other appropriate means taken to impound the income of the land conveyed to the extent necessary to secure the support of the grantor; *Blose v. Blose*, 118 Va. 16, 86 S.E. 911 (1915); *Simmons v. Shaffer*, 98 Kan. 725, 160 P. 199 (1916).

⁷ *Baily v. Dobbins*, 67 Neb. 548, 93 N.W. 687 (1903); *Haliday v. Haliday*, (D.C. Ct. App. 1926) 11 F. (2d) 565; *Short v. Short*, 62 Ore. 118, 123 P. 388 (1912).

of frauds and wholly void, giving the payor nothing.⁸ Still other courts have given the payor the beneficial interest in the entire fee, ignoring the void oral agreement.⁹ In their merry pace to circumvent the statute of frauds, the courts have even included under the "lesser interest" theory reservations to the payor of limited interests in all the land, such as life tenancies, tenancy for years, and leasehold interest.¹⁰ Now the court in the principal case takes a still further step forward in the gradual process of discarding the Statute of Frauds as to trusts by including in the "lesser interest" doctrine a limited interest in a part of the premises, a life tenancy in an undivided half.

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⁸ These courts go on the theory that an effort has been made to create an express trust orally and hold that the express trust must stand or fall as such; *Kinley v. Kinley*, 37 Colo. 35, 86 P. 105 (1906); *Ferguson v. Winchester Trust Co.*, 267 Mass. 397, 166 N.E. 709, 64 A.L.R. 573 (1929).

⁹ *Smithsonian Institution v. Meech*, 169 U.S. 398, 18 S. Ct. 396 (1898); *Stacy v. Stacy*, 175 Ark. 763, 300 S.W. 437 (1927); *Root v. Kuhn*, 51 Cal. App. 600, 197 P. 150 (1921); *Yetman v. Hedgeman*, 82 N. J. Eq. 221, 88 A. 206 (1913).

¹⁰ "If it appears that the payor and transferee agreed that the payor should have the whole interest in a particular part of the property or a particular estate in the property, there is a resulting trust to the extent of the interest or estate which it was agreed the payor should have." 2 TRUST RESTATEMENT § 454, comment j (1935).

"It is often said that it is sufficient to raise a resulting trust that the payment was made for a 'particular interest, as a life estate, or tenancy for years or remainder, in the whole.'" 2 SCOTT, TRUSTS § 454.4 (1939).

Byers v. Doheny, 105 Cal. App. 484, 287 P. 988 (1930); *McGowan v. McGowan*, 14 Gray (80 Mass.) 119 (1859).