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TRUSTS-STATUTE OF FRAUDS-ORAL TRUST OF LAND AND PROCEEDS

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TRUSTS—STATUTE OF FRAUDS—ORAL TRUST OF LAND AND PROCEEDS—
A conveyance was made of real property impressed with an oral trust unenforceable because of the statute of frauds requiring trusts of interests in land to be in writing. The land was later sold and the plaintiff as beneficiary of the parol trust sought to reach the proceeds of the sale. *Held*, the statute of frauds does not apply to personal property. Therefore the oral trust may be impressed upon the proceeds even though it could not have been enforced while the trust res remained realty. *Simpson v. Clark*, (Mass. 1944) 55 N.E. (2d) 10.

Following the generally accepted view,¹ the Massachusetts court interpreted the applicable statute of frauds² to mean that an oral trust concerning land is not non-existent, but simply unenforceable.³ *Chace v. Gardner*,⁴ is a leading case in point. In that instance a brother conveyed land to his sister upon her oral promise that she would hold the land in trust, income to herself for life, remainder on her death to the plaintiff with the provision "that if said real estate was converted into money, the proceeds of the sale were to be held by the grantee to enjoy the income thereof during her life, the plaintiff to be the sole 'beneficiary and owner of the principal of the proceeds after his aunt's death. . . .'"⁵ The land was sold and the money deposited to the vendor's account with no mention of the trust. Mrs. Gardner then died and the plaintiff sought to impress a trust upon the funds still on deposit in decedent's account (in accordance with the terms of the oral trust). The court said, "If the oral agreement concerned real estate alone the statute [of frauds] would apply, the trust could not be enforced and no constructive trust would arise. . . . The statute requiring an instrument in writing for the creation or declaration of a trust applies to a trust concerning land only; an oral trust in personal property is valid."⁶ Upon the theory that the trust though unenforceable is not unlawful, the court may attempt to give effect to the trust if the part which is unenforceable has been performed

¹ See BOGERT, TRUSTS, 2d ed., § 25, p. 85 (1942).

² The New Hampshire statute in this case because the land lay in New Hampshire. N. H. Rev. Laws (1942) c. 259, § 16.

³ ". . . it would seem that the trust should be regarded as existing from the moment of the conveyance, and although unenforceable because of the lack of a writing while the property remained in the form of real estate, it would become enforceable as soon as the real estate was converted into money. By so converting it the trustee has 'withdrawn it from the shield of the statute.'" *Simpson v. Clark*, (Mass. 1944) 55 N.E. (2d) 10 at 11.

⁴ 228 Mass. 533, 117 N.E. 841 (1917).

⁵ *Id.*, 228 Mass. at 535.

⁶ *Ibid.*

and that which remains is valid.⁷ The Massachusetts court in impressing a trust on the proceeds of the sale of the land in question, said, "That part of the agreement relating to the proceeds of the sale is separable and distinct from the part relating to the land."⁸ The doctrine of the case was succinctly stated by the court. "Accordingly, where land has been conveyed on a parol trust to hold the proceeds for a certain purpose, if that event [sale] has taken place and the land is converted into money, the statute of frauds is not a defense. The trust will be enforced although there was no declaration of trust subsequent to the conversion."⁹ This classification is a narrow one, for an oral trust of the land alone will not be good even though the realty should later be converted into personalty. And an oral promise to hold the land and the proceeds when sold will be enforceable only if and when the land is sold.¹⁰ If the owner orally declares himself trustee after selling the land and receiving the proceeds, the trust is enforceable since it is then a trust of personalty and there is no problem. But where the trust of the land and proceeds is declared only before the land is sold there is a difficulty, for a parol trust of realty as an interest in land is unenforceable under the statute of frauds, and at the time the trust was declared there was no personalty in existence which could be considered the res of an oral trust. Under the doctrine of *Chace v. Gardner*¹¹ the promise to hold the land in trust cannot be enforced, but if there was a collateral promise to hold the proceeds in trust when the land should be sold that promise is enforceable against the proceeds if and when the real estate is converted into personalty. A logical difficulty may arise as to the nature of the collateral promise. If it is a trust, it would arise upon the original declaration. Yet at that time there was no personalty and hence no trust res. Professor Scott suggests that the difficulty may be surmounted by regarding the agreement as a promise to hold the proceeds in trust, the consideration for the promise being the conveyance of the land.¹² This theory is somewhat

⁷ This is recognized in the TRUSTS RESTATEMENT § 52 (g) (1935).

⁸ 228 Mass. 533 at 535 (1917).

⁹ Id. at 536.

¹⁰ SCOTT, TRUSTS, p. 287, § 52.1 (1939) points this out. "The result reached by the courts in these cases seems sound enough, although it may lead to rather thin distinctions. The beneficiary cannot enforce the trust of the proceeds unless the proceeds were mentioned in the oral agreement, since otherwise it cannot be said that there are separable agreements with respect to the land and the proceeds. . . ." And on p. 286, "In other words, the trustee cannot be compelled to hold the land in trust or to deal with it for the benefit of the beneficiary or to sell it; but if he ever does sell it, he can be compelled to hold the proceeds in trust for the beneficiary."

¹¹ 228 Mass. 533 (1917).

¹² SCOTT, TRUSTS 288 (1939), "Since . . . the conveyance of the land is sufficient consideration for the grantee's agreement to hold the proceeds in trust, there is at least a contract to hold the proceeds in trust, which is binding on the grantee since there is a promise for consideration which relates to personal property and is not within the Statute of Frauds." Bogert also advocates this theory. He says, "The oral agreement in the case assumed has two parts—a present trust of land and a promise to hold in trust personal property if and when acquired. . . . If the contract to hold that personalty in trust was made upon consideration, equity ought to treat the holder of the personalty as a trustee of it from the moment of its acquisition by him. If the promise to hold in trust in the future was a voluntary promise, then equity ought to refuse to

technical and could only apply in jurisdictions where third-party beneficiary contracts are recognized and where there is a conveyance of land to the "trustee" or some other consideration given for the promise to hold in trust. An alternative theory is also set forth by Scott and this seems to be the one adopted by the court in the principal case. "It is possible to hold that even though ordinarily a declaration of trust of after-acquired property does not automatically create a trust when the property is acquired, yet where there is a declaration of trust with respect to land and its proceeds, a trust of the land at once arises, although the trust is unenforceable because of the Statute of Frauds, and that when the proceeds are received, the trust becomes automatically enforceable."¹³ Among the Michigan cases, in *Rapley v. McKimney's Estate*, the court indicated a disapproval of the doctrine of *Chace v. Gardner* saying, "The difficulty with this view is that there was no personal property when the arrangement was made. . . . Moreover, the right to redress would be left to depend upon what the grantee should do with the land."¹⁴ But in a somewhat later case, *Stewart v. Young*, the Michigan Supreme Court enforced a trust of the proceeds from the sale of realty. It declared, "When real estate in which several persons are interested is conveyed to one or more of them upon a parol agreement that it is to be sold by the grantees and the proceeds divided between the parties . . ., such contract after the sale of the property is valid and enforceable, is not within the statute of frauds, and if the grantees after sale and receipt of the purchase price refuse to account to any and all persons in interest, they may maintain a bill for an accounting."¹⁵ The opposite view would regard the nature of the property at the time of the original promise as the sole criterion of the validity of the trust.¹⁶ If realty, the trust would be unenforceable regardless of what later happened to the land. If personalty, there is an enforceable trust even though it should later be converted into realty. The decision in *Simpson v. Clark* illustrates the tendency of the courts to whittle down the statute of frauds and give effect to parol trusts if possible when an equitable result seems to demand it.¹⁷

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compel the promisor to perform. . . ." 1 BOGERT, TRUSTS AND TRUSTEES, p. 268, § 66 (1935).

¹³ SCOTT, TRUSTS, p. 288, § 52.1 (1939).

¹⁴ 143 Mich. 508, 107 N.W. 101 at 103 (1906).

¹⁵ 247 Mich. 451, 226 N.W. 222 at 224 (1929).

¹⁶ *Chesser v. Motes*, 180 Ala. 563, 61 S. 267 (1914), which decision was followed by *Willard v. Sturkie*, 213 Ala. 609, 105 S. 800 (1925), involved a conveyance of lands by a husband to his wife under a parol agreement that she would sell the land after his death and divide the proceeds among his children by his first wife. The Alabama court held that the conversion of the realty to personalty did not make the trust enforceable.

¹⁷ See also *Logan v. Brown*, 20 Okla. 334 at 346, 95 P. 441 (1908) where the Oklahoma Supreme Court discusses at length the application of the statute of frauds to this problem. The court pointed out that it was dealing with "a situation where the grantee, under a parol contract to sell, has actually fulfilled that portion of the contract within the statute of frauds, and nothing remains to be enforced by a court but that part of the contract that never was in the statute and against which it does not operate. . ." In *Bork v. Martin*, 30 N.E. 584, 132 N.Y. 280 (1892), land was conveyed to one Box as security for a loan of \$4000. Though the conveyance was