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employer-employee relationship but requires the rendition of services may be held to be a capital asset, and payment for the termination of such a contract may constitute a sale if the contract is sold as a part of a going business. Yet, when the contract is in the nature of a negative covenant, payment by the covenantor to the covenantee for its cancellation may be said to be a release of the covenant which transfers nothing to the covenantee, thus preventing a sale or exchange. Ordinarily when a transaction is made with a third party, it has a better chance of producing capital gains than a direct settlement with the obligor which cancels, releases, or surrenders the contract. However, an exclusive agency contract which is framed in terms of a negative covenant may not be aided by this fact. But without this fact, consideration received by a tenant for his agreement to cancel the lease is treated as a capital gain.

WILLIAM J. BRIGGS

"PURCHASE-MONEY" TRUSTS IN KENTUCKY

In the recent case of *Sewell* v. *Sewell*[1] the Court of Appeals of Kentucky reaffirmed the rule that under the Kentucky statute prohibiting purchase-money resulting trusts no trust arises when a deed is made to one person and the consideration is paid by another, unless the grantee takes the deed in his own name *without the consent* of the person paying the consideration or unless the grantee, *in violation of a trust or an agreement,* purchases the land with the effects of another person. The court said there must be clear and convincing proof that title was taken without consent of the payor, and held that no trust would arise in favor of decedent's wife where the admissible evidence tended to show that her husband took title with her knowledge and without objection on her part prior to his death.[2] The court expressly refused to reconcile what it called "the apparent conflict

[1] 260 S.W. 2d 643 (Ky. 1953).

[2] It was held that the only competent evidence was testimony concerning statements made by the deceased to several neighbors. The testimony of the wife that she furnished funds to her husband was held incompetent on the theory that it concerned a confidential communication between husband and wife and a transaction with a person since deceased both within the inhibition of the Civil Code of Practice.

In such situations the wife has been held to be competent on the ground that her rights arose by operation of law and not from any transaction with her husband. 26 AM. JUR. 731 (1940). However, usually a cestui que trust or one attempting to impress a trusteeship on another is incompetent to testify to a transaction with a person since deceased where his interest would be directly effected by the result. 70 C. J. 124 (1935).

(in the Kentucky cases) in the proper designation" of the kind of trust which can arise under the statute, thus sidestepping a good opportunity to point out the difference between constructive trusts and resulting trusts as well as the effect of the statute upon both types of trust.

At common law, when title to property was taken in the name of one person but the purchase price was paid by another, a trust was impressed upon the property because of a presumption that the payor did not intend a gift but intended that the grantee be trustee for his benefit.[3] In order to raise this presumption the payor had to show that he had furnished the purchase money and nothing more. The trust was classified as a resulting trust and was one of three types of resulting trusts which the law recognized: (a) where an express trust fails in whole or in part; (b) where an express trust does not exhaust all of the trust property; (c) where purchase money is paid by one person but title is taken in the name of another.[4] This last type, with which this note is concerned, is frequently referred to as a "purchase-money" resulting trust. In at least five states, including Kentucky, the common law type of purchase-money resulting trust has been abolished by statute.[5] The Kentucky statute provides:

> When a deed is made to one person, and the consideration is paid by another no use or trust results in favor of the latter unless the grantee takes a deed in his own name without the consent of the person paying the consideration, or unless the grantee in violation of a trust purchases the lands deeded with the effects of another person. Such deeds are fraudulent as against the existing debts and liabilities of the person paying the consideration.[6]

On its face the statute would seem only to limit the circumstances under which a purchase-money trust may arise as a resulting trust, although it has been contended that it is so broad in scope as to abolish all resulting trusts, substituting instead constructive trusts which may arise under either of the exceptions mentioned in the statute. It is the purpose of this note to analyze the nature of a purchase-money trust in the light of the Kentucky statute as it has been interpreted by the Kentucky Court of Appeals and to point out why it

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[3] BOGERT, TRUSTS 173 (2d ed. 1942). However, if the grantee is a member of the family of the payor, the presumption is that the money was either a gift or an advancement; REST. TRUSTS sec. 442 (1935).

[4] Evans, *Resulting and Constructive Trusts in Kentucky*, 20 KY. L. J. 383, 384 (1931).

[5] 3 SCOTT, TRUSTS 2244 (1939) lists Kentucky, Michigan, Minnesota, New York, and Wisconsin as having such statutes.

[6] KY. REV. STAT. 381.170 (1953). The reason for such a statute was that generally the object and effect of one paying for property but having the legal title placed in another was to defraud creditors. Matthews v. Abritton, 83 Ky. 32 (1884).

is desirable that the trust be labeled either a resulting trust or a constructive trust.

The conflict and confusion surrounding the interpretation of the statute seems to have been increased by a failure to distinguish carefully between the basic nature of a resulting trust and a constructive trust. A resulting trust may be said to be an intentional trust. In a resulting trust there is no element of fraud but there is always the element, although an implied one, of an intention to create a trust.[7] A constructive trust, on the other hand, does not arise by virtue of intention either express or implied; it arises purely by construction of law for the purpose of providing a remedy.[8] Although both constructive and resulting trusts are said to arise by construction of law, fraud or unjust enrichment is the basis of the constructive trust, whereas implied intention is the basis of resulting trusts.

By the language of the statute itself, it is clear that no trust arises from the mere fact that the consideration is paid by one person and title is taken in the name of another.[9] However, it is also clear that a trust does arise (1) where the grantee takes title in himself without consent of the person whose money or effects are used to purchase the property; (2) where the grantee takes title in his own name in violation of a trust; (3) where the result would be to defraud creditors of the person paying the purchase price. In addition to these exceptions, it is well settled that if there is an oral agreement to hold the property in trust for the benefit of the person paying the consideration, the grantee will be declared a trustee for the payor's benefit.[10] The burden of proof is upon the person seeking to have a trust established, and he must, in order to bring himself within one of these exceptions, show by clear and convincing evidence[11] that an exception exists. The rule that no trust arises where the grantee has obtained consent, and the difficulty of proving an oral agreement or nonconsent, is not as harsh as it may seem since the grantee is liable for any money advanced upon his implied promise raised by law to refund the money.[12]

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[7] 54 AM. JUR. 152-153 (1945).

[8] See Note, 43 A. L. R. 1417 (1926).

[9] Since the statute applies only to real property, a resulting trust may still arise as to personal property from the mere fact that one paid the purchase price. Aynesworth v. Haldeman, 63 Ky. (2 Duv.) 565 (1866).

[10] Erdman v. Kenney, 159 Ky. 509, 167 S.W. 685 (1914); Meadors v. Meadors' Adm'r, 192 Ky. 457, 233 S.W. 1053 (1921); Morris v. Thomas, 310 Ky. 501, 220 S.W. 2d 958 (1949).

[11] *Supra* note 1; Masters v. Masters, 222 Ky. 427, 300 S.W. 894 (1927); Neel's Ex'r. v. Noland's Heirs, 166 Ky. 455, 179 S.W. 430 (1915).

[12] Martin v. Martin, 68 Ky. (5 Bush) 47 (1868); Howser v. Johnson, 297 Ky. 213, 179 S.W. 2d 897 (1944).

Once a trust has been declared in a purchase-money situation, the next problem is to determine under what *theory* the trust is said to arise. From this viewpoint and in view of the fundamental difference between a resulting trust and a constructive trust, already pointed out, the statute is susceptible of at least three possible interpretations: (1) It abolishes only the common law type of purchase-money resulting trust; that is, a resulting trust based merely on the fact that one furnishes the purchase price and title is taken in the name of another. (2) It abolishes all purchase-money resulting trusts, but does not prevent the raising of a constructive trust in a purchase-money situation if the circumstances warrant it. (3) It abolishes all purchase-money trusts except those specifically authorized by the statute, which take effect as resulting trusts. In other words, the questions which must be answered are: (a) Is the trust one which has not been abolished by statute because it is not one of the common law purchase-money type? (b) Is the trust one which arises as a kind of statutory purchase-money trust? (c) Is the trust a constructive trust arising out of a purchase-money situation in spite of the statute? In order to answer these questions it seems best to begin by analyzing the situations where the statute clearly does not apply.

Where the grantee takes property in his own name without consent. Where a trust is declared as a result of the grantee taking title in his own name merely because he did so without the consent of the person furnishing the purchase price, it is not apparent whether the trust declared is a constructive trust or whether it is a resulting trust under the theory that the statute only abolished purchase-money resulting trusts in those situations where there was consent for the grantee to take title in his own name. The question might appear to be whether the mere taking of title in the name of the grantee, without more, is sufficient cause for the court to impose a constructive trust. In some cases involving non-consent where there is actual fraud, a trust, if declared, would clearly be constructive. For example, where a husband took funds jointly belonging to himself and his wife and bought property in his own name with a "survivorship clause" but fraudulently had the survivorship clause removed without the knowledge or consent of his wife, before he signed the deed, the husband's heirs would clearly be constructive trustees for the wife's benefit.[13]

In other cases involving non-consent where no fraud is present, it is arguable that no constructive trust should be imposed and that if a trust is imposed it is resulting rather than constructive. No fraud

[13] See Williams v. Scott, 216 Ky. 688, 288 S.W. 672 (1926).

seemed to be present in the case of *Roche* v. *Roche*.[14] In that case the deed was prepared so as to convey the land to the husband absolutely. The evidence showed that the consideration for the property was paid by the wife and that she never knew that the deed was made in the husband's name. It was shown that in matters pertaining to the property, the husband had always recognized the wife's dominion over it and had repeatedly stated that the land belonged to his wife. The Kentucky court declared a trust for the wife's benefit but failed to designate the nature of the trust. Since there was no apparent fraud it would seem that the trust, whatever its nature, was not constructive. However, it is held generally that trusts arising under this type of exception in statutes abolishing purchase-money resulting trusts are classified as constructive rather than resulting.[15] It is submitted that this is the correct view since it is imposed in order to prevent an unjust enrichment.

There are two good reasons why a trust which arises because of non-consent, and where no actual fraud is present, is *not a resulting trust*. First, a resulting trust is based upon an implied intention of the payor to make the grantee a trustee for his benefit, and where the payor does not even know that the grantee has taken the property in his own name, an implied intention on the part of the payor cannot be made out. Second, it is sounder reasoning to declare it a constructive trust on the theory of unjust enrichment. It is not necessary that the acquisition of the property be wrongful. Mere retention of the property would result in the unjust enrichment of the person retaining it, and a constructive trust should arise.[16]

It is arguable that the theory of unjust enrichment could be applied in those cases where there is consent. That is, the payor could enforce a constructive trust on the basis of unjust enrichment even though the statute would not allow him to enforce a resulting trust from the mere fact that he paid the purchase money. However, the Kentucky court has refused to impose a constructive trust where consent is present.[17] Since the effect of a holding that a constructive trust exists in such a situation would defeat the purpose of the statute and all but nullify it, the court probably reasons that the right of action against the grantee for the return of the purchase price is sufficient to prevent an unjust enrichment under the circumstances. Thus, it is apparent that the Kentucky statute not only abolishes the resulting trust in this situation but also limits the scope of the constructive trust.

[14] 188 Ky. 327, 222 S.W. 86 (1920).
[15] Scott, *Resulting Trusts Upon the Purchase of Land*, 40 HARV. L. REV. 669, 675 (1927).
[16] 3 SCOTT, TRUSTS 2317 (1939).
[17] Cooksey v. Tolliver, 208 Ky. 160, 270 S.W. 719 (1925).

Where grantee takes property in his own name in violation of a trust or where the effect would be to defraud creditors. Where the grantee takes property in his own name in violation of a trust or fiduciary relationship, it is clear that the trust which arises is a constructive one since equity would not allow the grantee to benefit from his own wrongdoing in such a situation. Likewise, a constructive trust would be imposed if the purpose or effect of the transaction would be to defraud creditors of the payor. In both these situations it is evident that the trust imposed is raised by the wrongdoing or fraud of the grantee and not by the implied intention of the payor to make the grantee a trustee for his benefit.

Where the grantee takes property in his own name with an oral agreement to hold the property in trust. As already stated, the statute has been held not to apply where it is shown that the grantee is holding the property in trust under an oral agreement. It should be noted that this is wholly a case where the one paying the consideration has consented that another take the property in his own name. Thus it would seem that this is the exact type of trust which was intended to be abolished by the statute. However, the fact that the grantee takes title by virtue of consent does not affect the right of the party paying the consideration to have a trust declared where, in addition to the consent, there exists a parol agreement that the grantee hold in trust. It is said that such a trust is not a resulting trust within the statute abolishing resulting trusts because "a resulting trust is one arising from the naked fact that one furnishes the consideration while the title is taken by another, without any agreement as to the use or trust."[18] This supports the theory that resulting trusts are those based on implied rather than express agreements.

Even though an oral express agreement is present, it is unenforceable as an express trust in a great majority of jurisdictions because of the statute of frauds. Nevertheless, a constructive trust is usually imposed in such cases on the theory that the grantee has been guilty of fraud in not carrying out his agreement or, if unable to carry out the agreement because of death or disability, on the theory that the grantee or his heir would be unjustly enriched if permitted to retain the land. The leading case holding that a trust arises is the case of *Foreman* v. *Foreman*,[19] a New York case decided under a statute abolishing purchase-money resulting trusts similar to the Kentucky statute. In that case the husband paid for property with his own

[18] Erdman v. Kenney, 159 Ky. 509, 512, 167 S.W. 685, 686 (1914).
[19] 251 N. Y. 237, 167 N.E. 428 (1929).

money but had the deed placed in his wife's name in order to keep the property separate from other property which he used in his business. There was an oral promise by the wife to reconvey the property to him, but the wife died without making the reconveyance and the husband brought action to charge the wife's heir as trustee of the land. In upholding the trust in favor of the husband, Chief Justice Cardozo said that the husband was not precluded from enforcing the trust because of the statute of frauds or because of the statute abolishing purchase-money resulting trusts. The court stated that the effect of the statute was to do away with the inference of a resulting trust; if, however, the grantee was not intended to benefit, it would unjustly enrich him if he were allowed to retain the property, and therefore a constructive trust arose in spite of the statute.

An interesting line of cases has developed in Kentucky on the problem of enforcing an oral express agreement as an express trust. Our court has held under certain conditions that the grantee is trustee of an express trust although the agreement was oral. This solution is possible in Kentucky because at common law an express trust could be established by parol, and Section 7 of the English Statute of Frauds changing this rule was not enacted until 1676 and did not become a part of the American common law and was never adopted by Kentucky.[20] Under some conditions Section 6 of the Kentucky statute of frauds, relating to contracts for the sale of real estate, has been applied to trust cases. It is believed that this explains why an express trust arises in some but not all cases involving an oral agreement in Kentucky.

There is at least one Kentucky case where there is no doubt that a parol agreement was enforced as an express trust since the statute of limitations had run on constructive trusts. This is the case of *Smith* v. *Smith*[21] where a grantee made an oral agreement to hold the land in trust for the benefit of those paying the purchase price. It was conceded that a constructive trust existed, but it was argued that the facts presented an express enforceable parol trust with respect to the land and, therefore, that the statute of limitations governing constructive trusts did not apply. After stating that Kentucky had not adopted the trust section of the statute of frauds, the court said:

> Whether a trust in land may be created by parol in this state has been much debated, and the cases do not seem to be reconcilable upon principle. Still it is firmly fixed as the law of this state that such trusts may be created, under certain conditions, but not under all conditions.[22]

[20] Vizard Inv. Co. v. York, 167 Ky. 634, 181 S.W. 370 (1916).
[21] 121 S.W. 1002 (Ky. 1909).
[22] *Id.* at 1004.

The court went on to state that this case belonged to the class where a trust may be declared, but it did not state why this was such a case.

There are a number of Kentucky cases which state that an oral express agreement by the grantee to hold in trust for the payor is valid and enforceable, and even designate the trust which arises an express trust. However, in these cases it is hard to determine whether the Kentucky court really intends to enforce an express trust or is relying on a constructive trust theory. For example in the case of *Erdman* v. *Kenney*,[23] where a father took money belonging to his daughter and bought property in his own name, promising to hold the title in trust for her, the court stated that the parol promise of the father was valid and enforceable. This might indicate that the court was enforcing an express trust by holding the parol promise valid. However, in its opinion the court discussed the relationship of trust existing between father and daughter, thus establishing the existence of a constructive rather than express trust. But in *Morris* v. *Thomas*,[24] where it was alleged that Thomas furnished the consideration but had the title placed in Morris upon Morris's promise to convey, the court stated that the allegations did not establish the kind of equitable resulting trust forbidden by the statute, but rather established a "voluntary express trust" which was valid and enforceable. Also in *Gibson* v. *Gibson*,[25] a 1952 Kentucky case, the court enforced an oral agreement of the grantee to hold in trust for the payor as an express trust. The court in that case failed to mention constructive trusts, and gave no indication that the decision was based on a constructive trust theory. The court merely said ". . . there was an express trust . . . and not a resulting trust."[26] However, in *Sherley* v. *Sherley*,[27] where a father purchased land with his own money and made a parol declaration that he was holding the land in trust for his son, the court held that the oral promise was within the statute of frauds and unenforceable. It must be noted that this was not a case where the grantee made a promise to hold for the payor. Instead the *grantee used his own money* in making the purchase and the court evidently did not believe the money used was intended as an advance to the son.

From the foregoing cases it is clear that in Kentucky an express parol agreement by the grantee to hold in trust may be enforced as an express trust where purchase money is furnished by one other than the grantee. If, however, the grantee used his own money, as in the

[23] 159 Ky. 509, 167 S.W. 685 (1914).
[24] 310 Ky. 501, 220 S.W. 2d 958 (1949).
[25] 249 S.W. 2d 53 (Ky. 1952).
[26] *Id.* at 55.
[27] 97 Ky. 512, 31 S.W. 275 (1895).

Sherley case, the statute of frauds will apply and the promise will be unenforceable. The court may also enforce the trust upon a constructive trust theory as it did in the *Erdman* case.

Conclusion

The Kentucky statute abolishing purchase-money resulting trusts only applies to those cases where the grantee takes title in his own name with the consent of the person paying the consideration and no agreement is present. In such cases the payor, although there is no trust in his favor, may maintain an action against the grantee for the return of the money.

If the grantee takes title in his name without the consent of the payor, a constructive trust may be imposed upon him either on the theory of fraud or on the theory of unjust enrichment. It is obvious that this type of trust is not based on any implied intention and, therefore, cannot be said to be a resulting trust.

Where the grantee takes title in himself in violation of a trust, the trust which arises is clearly a constructive one.

Where the grantee takes title with the consent of the person paying the consideration but there is a parol agreement to reconvey the property, the person seeking to enforce the trust may do so in Kentucky on the basis of an express trust since the statute of frauds as to trusts does not exist in Kentucky and the section dealing with the sale of real estate is not applied in those cases where the person seeking to have a trust enforced paid the consideration for the property. In a jurisdiction where the statute of frauds is applied, a constructive trust may be based on unjust enrichment as was done in the *Foreman* case.

From the foregoing discussion, it is clear that the first two possible interpretations of the Kentucky statute suggested at the beginning are sound and are borne out by the cases. Number (3) is not a sound interpretation because it assumes that a trust which complies with the specific exceptions in the statute is a resulting trust, which is not borne out in the cases. The first two interpretations are not conflicting ones because the only *true* common-law type of purchase-money resulting trust arose where the payor consented that another take title and the law implied an intention on his part to make the title-holder a trustee. Interpretation number (2) merely accounts for the additional fact that a constructive trust may arise in a purchase-money situation in spite of the statute.

It is suggested that the Kentucky court label the type of trust it creates and the theory upon which it is based. This is important for at least two reasons. First, it is important that the litigant know on

which theory to base his case in order that he will not mislead himself or the court by using a theory which might lead to a great injustice. Second, it is important for the court to emphasize and describe accurately the signigcance of what it is doing in order that reasonable uniformity may be achieved in the cases presented to it under the statute.

PAUL E. DECKER

CONTRACTS–ENFORCEABILITY OF CHARITABLE SUBSCRIPTIONS IN KENTUCKY

The enforcement of charitable subscriptions has been the subject of extensive comment throughout the country. Much of the difficulty appears to stem from an attempt to reconcile a strong moral feeling that, as a matter of social policy, such a subscription to a worthy cause should be enforced, with the traditional requirement of law that in order for a promise to be enforceable it must be supported by a consideration which is in fact bargained for. The term "charitable" itself is the antithesis of "bargain." The subscriber does not intend, in most cases, that the promisee exchange another promise for the one in the subscription or that the promisee do some act of forebearance in return. "Charitable" immediately suggests the idea of a mere donation or gift without anything to be given in return. Nevertheless, courts trying to overcome this difficulty continue to enforce charitable subscriptions by one means or another because the encouragement of a worth-while institution, such as a church or a hospital, is socially desirable.

Some courts in their enthusiasm to support the enforceability of charitable subscriptions have visualized the subscription, not as a mere donation, but as an offer for a unilateral contract made by the subscriber. This offer becomes a binding contract as soon as the offeree accepts by undertaking to perform a part of the act on the faith of that offer or promise.[1] For example, a subscription made to a hospital to aid in their "humanitarian work," was held to be an offer which became enforceable after the hospital had expended large sums in the furtherance of its "humanitarian work." The theory of enforceability was that part performance transformed the unilateral offer into a binding contract.[2]

[1] Beginning of performance is sufficient to make the promise irrevocable, RESTATEMENT, CONTRACTS sec. 45 (1933); WILLISTON, CONTRACTS Vol. 1, p. 403 (Rev. Ed. 1936).

[2] I. & I. Holding Corp. v. Gainsburg, 276 N. Y. 427, 12 N. E. 2d 532 (1938).