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Constructive Trusts and Contracts to Convey in West Virginia

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liability. But it seems that the manifest intent of the section, so far as such intent is judicially determined, was otherwise.[16] And a common-sense reading of it would seem to support this view. A contrary holding would throw open the avenue to considerable fraud. Persons in a position to know the institution's condition, and at least inferentially aware of the impending catastrophe, could transfer their stock to parties perhaps not financially responsible. Such a transfer would stand on approximately the same ground as a transfer of property in contemplation of bankruptcy.

On the whole the interpretation given by the court to this constitutional provision and its accompanying statutes, as evidenced in *Tabler v. Higginbotham*[17] and other cases, seems consonant with the idea of giving the depositor proper consideration and shortly determining the affairs of a defunct banking corporation.

—ROBERT E. STEALEY.

CONSTRUCTIVE TRUSTS AND CONTRACTS TO CONVEY IN WEST VIRGINIA.—The absence in a jurisdiction of a historic statutory provision that is in existence almost universally may raise as many difficulties as the existence of a peculiar local statute operating upon the general principles of the common law. This fact is strikingly shown in the absence of the seventh section of the English Statute of Frauds in West Virginia. The failure of our legislature to enact this section requiring all declarations of trust in realty to be in writing has caused quite a confusion in the cases as to the validity of oral trusts in West Virginia.

The cases coming within the scope of this problem may be readily divided into two classes—declarations of trust by the grantor, and like declarations by the grantee. As to the first class there are three separate situations set forth in the leading case of *Troll v. Carter*[1], which has been adopted by the cases as the law of this state. They are:

(1) When the grantee orally agrees to hold in trust for the

[16] Dunn v. Bank, *supra* n. 13; MORSE, BANKS AND BANKING (6th ed. Voorhees, 1928) § 675a. Many legal theorists and philosophers maintain that the intent of the legislature is incapable of determination and is a myth used to cloak judge-made law. In the language of Justice Holmes, "A word is but the skin of a living thought". So a statute may be only a pallid skin. Nevertheless, from time and circumstances of its adoption the purpose of legislation can often be determined beyond reasonable doubt.

[17] *Supra* n. 11.

[1] 15 W. Va. 567 (1879).

grantor, the agreement is not enforceable.
(2) When the grantee orally agrees to hold in trust for a third person, the agreement is enforceable, if the grantee paid no consideration.
(3) When the grantee orally agrees to hold in trust for a third person, the agreement is not enforceable, if the grantee paid consideration.

As to the first situation the court said the agreement amounts to a contract to convey and therefore must be in writing. It seems clear that this is not an executory contract, at least in its normal sense, but is a part of the transaction itself and is fully executed.

The court held the second situation a valid trust, because otherwise the grantee would be permitted to commit a fraud. Thus the court does not follow its reasoning in the last situation, that the agreement is a contract to convey. That argument would be equally applicable to this situation, but the court disregarded it and based its decision upon the ground of constructive trusts to prevent the grantee from committing a fraud, which reasoning would be equally true to the first situation.

As to the third question, which was not decided, the court suggested that the agreement would not be binding. Judge Green said that even before the Statute of Frauds a trust had to be created by writing, except in the case of a feoffment in which title passed by delivery without a writing. Since title passes by deed now, he concluded that a writing is necessary to create a trust.[2] This view of the law has been followed in the later West Virginia cases.[3]

The first express statutory provision in this state with regard to trusts is in the 1931 WEST VIRGINIA CODE.[4] It provides that all declarations of trust shall be in writing, except declarations of trust for the grantor and declarations for a third person accompanying conveyances not fraudulent. This statute seems to

[2] In 1 SPENCE'S EQUITABLE JURISDICTION (1846) 449, it is said: "An use or a trust might be raised, by mere verbal directions, upon a conveyance that passed the possession of some solemn act, as a feoffment, fine, or recovery; for as a feoffment with livery of seisin, which passed the estate, might be made at Common Law by parol, so might the uses of the estate be declared by parol; but where a deed was requisite to the passing the estate itself, as upon a grant of a rent or the like, a deed was necessary for the declaration of the uses. A man, it seems, might covenant to stand seised to an use without a deed. A feoffment without livery did not raise an use, for the party could not acquire an use by an imperfect instrument whereby it was intended he should take the legal estate."

[3] See Madden: *Trusts and The Statute of Frauds* (1925) 31 W. VA. L. QUAR. 166, where the cases are collected and discussed.

[4] W. VA. REV. CODE (1931) c. 36, art. 1, § 4.

clarify the law as to declarations of trust and make the agreements set out in the three situations in *Troll v. Carter*[5] valid as express trusts.

But, while the court was deciding case after case upholding the rules laid down in *Troll v. Carter*[6] as to declarations of trust by the grantor, it concluded to the contrary, in its reasoning at least, as to declarations of trust by the grantee. Perhaps all of these cases, from the leading case of *Currence v. Ward*[7] on, could have been decided upon the theory of constructive trusts, but *Floyd v. Duffy*[8] was the first decision resting upon that ground.

In *Currence v. Ward*[9] there was an agreement by the purchaser to buy in land at a judicial sale for the benefit of the debtor. Before all the purchase money was paid by the debtor and before legal title was taken by the purchaser, he sold to a third party and the debtor sought to set the sale aside. Judge Brannon in the course of his discussion as to the distinction between express and constructive trusts said: "It is well settled that before that statute in England (Statute of Frauds) such a trust in lands could be created without a writing, and, of course, it can be so here now. . . . Such a trust must be created before the trustee obtains legal title, for, if the agreement be subsequent, it would fall under the provisions of the statute of frauds requiring the transfer or sale of lands to be in writing. . . . I think the evidence, which I will not entail, established the fact that prior to the first sale under decree, the purchasers and Currence had an agreement and understanding by which the said purchasers were to buy in the land in their names for the benefit of Currence, and that upon his payment of the purchase money the land was to be his. This surely created a direct or express trust".

It is apparent from the above statement that the view of our court upon the effect of the absence of the seventh section of the English Statute of Frauds was contrary to the view taken as to an oral trust declared by the grantor. Without expressing an opinion as to the correctness of the view as to trusts declared by the grantor, it is submitted that the view of the court in *Currence v. Ward*[10] is erroneous, because such agreements by the grantee, if

[5] *Supra* n. 1.
[6] *Supra* n. 1.
[7] 43 W. Va. 367, 27 S. E. 329 (1897).
[8] 68 W. Va. 339, 69 S. E. 993 (1910).
[9] *Supra* n. 7.
[10] *Supra* n. 7.

made before the grantee takes legal title, violate the statute's requirement that contracts for the sale of land be in writing, just like the agreement after title is taken violates the requirement of the statute, that the transfer of title shall be by writing. Under our present trust statute both situations are invalid.

It should be noticed that Judge Dent concurred in *Currence v. Ward*[11], not upon the ground of express trust, but because a constructive trust arose from the relationship of the parties. But cases prior to *Floyd v. Duffy*[12] proceed upon the theory of express rather than constructive trust. In *Hamilton v. McKinney*[13] land was bought by two parties jointly for the purpose of speculation, but title was taken only in the name of one. The court held that an express trust was created, since both the agreement and the payment of money took place before legal title passed. The majority opinion in *Currence v. Ward*[14] was again upheld in *Johnson v. Ludwick*,[15] where property was purchased by the husband in the name of the wife under an agreement to hold in trust for the husband, and it was held to create an express trust.

In all of these cases there was a basis for the court to declare a trust to arise by operation of law, as is the ordinary case of resulting and constructive trusts elsewhere. This view of the situation was taken by the court in the case of *Floyd v. Duffy*[16]. There the facts were like *Hamilton v. McKinney*[17]. Land was bought jointly for the purpose of resale at a profit, but title was taken only in the name of one. Judge Poffenbarger said the agreement was merely a contract to convey, but a trust would be declared, not upon the ground of an express trust, but constructive trust, because the agreement to hold for speculation and profit constituted "an independent equity, a right in respect to the property, resting in justice, equity and good conscience, and not denied to him by the statute of frauds". Thus the trust was not based upon the agreement, as such, but upon the joint undertaking as constituting an independent equity. Although this note is not directed at the insufficiency of circumstances constituting a constructive trust, it does seem that the court in adopting a purchase for purpose of speculation as such an independent equity is minimizing

[11] *Supra* n. 8.
[12] *Supra* n. 8.
[13] 52 W. Va. 317, 43 S. E. 82 (1902).
[14] *Supra* n. 7.
[15] 58 W. Va. 464, 52 S. E. 489 (1905).
[16] *Supra* n. 8.
[17] *Supra* n. 13.

the requirement to almost nothing more than the agreement itself.

An agent in the case of *Henderson v. Henrie*[18] bought under a prior oral agreement to hold in trust for his principal. The court declared the agreement directly within the teeth of the statute and there was no independent equity to raise a constructive trust. The court announced as the rule in West Virginia, that oral agreements by the grentee with a third person before legal title is taken, to hold in trust for such third persons are not express trusts, but contracts to convey, which are in violation of the statute, and no trust will be declared unless there are facts creating an independent equity, so as to constitute a constructive trust.

As mentioned before, the new code requires, in addition to the provisions that conveyances of land and contracts for the sale of land must be in writing[19], that all declarations of trust must be in writing to be enforceable, except declarations of trust for the grantor or a third person accompanying a conveyance not fraudulent[20]. All doubt as to the validity of oral agreements by the grantee with third persons before legal title is taken is now seemingly removed by statute, and only oral trusts declared by the grantor are enforceable.

—JOHN HAMPTON HOGE.

TRUSTS—USE OF THE TRUST DEVICE TO ESCAPE FEDERAL ESTATE TAXES.—The federal estate tax is levied on the privilege of transmission of property, the shifting of the legal interest at death.[1] Undoubtedly the trust, long a device used for avoiding burdens imposed by law, has been used to evade this tax. Congress has closed this avenue of escape by legislation, hindered however, by the frequently reiterated words of the Supreme Court of the United States, that "such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."[2]

[18] 68 W. Va. 562, 71 S. E. 172 (1911).
[19] W. VA. REV. CODE (1931) c. 36, art. 1, § § 1, 3.
[20] *Supra* n. 4.

[1] Edwards v. Slocum, 264 U. S. 61, 44 S. Ct. 293 (1924).
[2] Gould v. Gould, 245 U. S. 151, 38 S. Ct. 53 (1917); U. S. v. Merriman, 263 U. S. 179, 44 S. Ct. 69 (1923); Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123 (1929).