NEW YORK LAW SCHOOL

NYLS Law Review

Vols. 22-63 (1976-2019)

Volume 2 | Issue 3

Article 3

July 1956

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I. STATUTORY AND COMMON LAW BACKGROUND

UNDER the common law rule in New York, where a grant of realty was made to one, for a consideration paid by another, a trust resulted in favor of the payor, inevitably and always, by force merely of the payment, and irrespective of intention.[1] This continued to be the New York rule until 1896 when the legislature enacted the section[2] from which the current section 94 of the Real Property Law[3] is derived. The legislative rule was then stated to be that title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor.

We are in this writing only concerned with the effect of the statute on the person paying the consideration and the grantee, but it is to be noted that the statute presumes that the conveyance is fraudulent as against the creditors of the person paying the consideration and that a trust results in their favor to the extent necessary for them to satisfy their just demands. It is also to be noted that a trust will result in favor of the payor, under the statute, when the grantee takes title in his name against the wishes of the payor or without his knowledge, and where the grantee, in violation of some trust, purchases the property conveyed with money or property belonging to another.

It is obvious that the legislative thinking behind section 94 is that there is *prima facie* a guilty motive on the part of a person who pays

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1 Garfield v. Hatmaker, 15 N. Y. 475 (1857).

2 Laws of 1896, c. 547, § 74.

3 "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration; and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either,

(1) Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or,

(2) In violation of some trust, purchases the property so conveyed with money or property belonging to another."

Section 94 of the Real Property Law and its predecessors apply only to realty. Bork v. Martin, 132 N. Y. 280, 30 N. E. 584 (1892).

for property but puts title in the name of another.[4] The statute is silent, however, on the case of innocent motive, and it directs in absolute terms that no use or trust shall result to the person paying the consideration.[5]

The issue is thus raised as to whether equity may grant any relief to the person paying the consideration when it is established that he acted with an innocent motive.

The answer to this question is not simple or one of easy solution, as is evidenced by the frequent and bitter litigation on the subject. The case of *Foreman* v. *Foreman*[6] provides us with an excellent starting point. Husband paid for a house and lot with his own funds but took title in his wife's name, all with an innocent motive. Wife had promised to reconvey to husband at his desire and husband, after the purchase, managed the property, paid the taxes, insurance premiums, interest on the mortgages, and the cost of improvements and repairs. He at all times acted as the owner of the property.

The wife has died and her estate refuses to reconvey the property to husband. The problem would not be different had she been alive and had refused to reconvey. Can the innocently motivated husband obtain a reconveyance of the property in equity in fulfillment of an oral trust?

In construing section 94 Judge Cardozo could have said that the section has absolutely put an end to the rule that a purchase money resulting trust arises by virtue of the fact of payment or he could have said that the statute should bar the creation of the trust only where a guilty motive is found. He took the former course and unequivocally held that the statute has put an end to the common law rule that a trust inevitably results by the force of mere payment.

II. THE CONSTRUCTIVE TRUST

However, he did not leave the plaintiff without a remedy. He held that the statute has no effect on trusts *constructively imposed* as a

[4] Notes to 1 N. Y. REV. STAT., p. 722.

Another reason offered for this legislation is that this type of transaction marred the land records recording system by causing off-the-record titles. This objection can hardly be considered as substantial in view of the basic proposition that a trustee, the holder of legal title, always has the power to convey good title to a bona fide purchaser for value without notice, even though the right to do so was lacking, and thereby cut off the beneficial interest of the beneficiary.

[5] In Siemon v. Schurck, 29 N. Y. 598 (1864), where B paid the purchase price for realty and took title in the name of C for the benefit of D, the court held that a valid trust results in favor of D, the statute not applying, since its purpose was to shut off a trust in favor of B.

[6] 251 N. Y. 237, 167 N. E. 428 (1929).

consequence not of payment alone, but of payment combined with other equities. By the convenient equitable device of the constructive trust Judge Cardozo apparently created an easy form of relief in these cases, and this without direct assault upon the prohibition of section 94. "Nothing in the statute as to the implication of resulting trusts is at war with this conclusion."[7]

Under this technique title promptly will go to the beneficiary, payor, since the constructive trust like the resulting trust, is passive and legal title shoots through the trustee, grantee, into the beneficiary.[8] New York is not a vesting state, however, so that the decree is not sufficient to pass title. The grantee would under the threat of contempt, have to convey to the payor, or under New York's appointive statute,[9] a court officer would make the conveyance.

Now that the constructive trust has been made available as a remedy, we must determine when equity will apply this form of relief. It must be remembered that the constructive trust is quite a different species than the express trust that we normally think of when the word trust is used. It has been aptly said that "constructive trusts are no more trusts than quasi-contracts are contracts. . . ."[10] A better orientation will result if one thinks of the application of this remedy in terms of restitution rather than trusts. Under the prevailing American view both constructive and resulting trusts have been defined as implied trusts as distinguished from the express trust, both private and charitable, which depend for their existence on the intent of a property owner directly and expressly stated.[11] The term resulting trust has traditionally been used to cover the case where equity is obliged to decree that a legal owner of property is a trustee thereof because it has found or inferred an actual or presumed intent that he be so classified. Thus where a settlor conveys property in trust to a trustee under an express trust and the trust can not be consummated, the court will hold that a trust results in favor of the settlor or his estate on the theory that that must be what the settlor intended. On the other hand the constructive trust is not based on any intent, it being an involuntary trust imposed by the court to prevent fraud or unjust

[7] *Ibid.*
[8] BOGERT, HANDBOOK, TRUSTS, 201 (3d ed., St. Paul, 1952).
[9] New York Civil Practice Act § 979.
[10] NEWMAN, TRUSTS, 201 (2d ed., New York, 1955).
[11] BOGERT, *op. cit. supra* note 8, § 71.

enrichment. Such a trust would be categorized as a "fraud-rectifying" trust by a learned writer on the subject.[12]

The rationale of the New York common law rule of *Garfield* v. *Hatmaker*[13] concerning the purchase money resulting trust is easy to understand. Where P pays for realty with his own funds, but takes title in the name of T, nothing more appearing, a trust thereby results in P's favor, because the court infers that that is what P must have intended. However section 94 has shut off the power of equity to imply any resulting trusts by inferring the intention of the payor. Justice Cardozo, however, seized upon the concept of the constructive trust which requires no intention to be inferred. As we have seen, the constructive trust is involuntary and is "fraud-rectifying."

Once we accept Cardozo's proposition that section 94 bars only the resulting trust and not the constructive trust, the rationale of his decision should be simple and easy to apply. He decided that a constructive trust could be imposed in consequence of payment in combination with other or extrinsic equities. In the subject case the payor's equities were reinforced by a promise to reconvey, the relation of husband and wife, and by unequivocal acts of confirmation and performance. He made it quite clear that to allow the grantee to retain the property under these circumstances would be to sanction unjust enrichment.

It would thus appear that the equitable policy against unjust enrichment outweighs the public policy prohibition announced in section 94. It is clear that equity's policy against fraud outweighs its policy against unjust enrichment because in cases where a fraudulent motive caused the title to go into another's name, equity will grant no relief to the payor, but will leave the parties as it found them, notwithstanding the fact that the grantee is thereby left with the property.[14]

We are concerned here, however, with equity's action when the motive is innocent. The rule is well established in New York that equitable relief is set in motion under cover of a confidential relationship.[15] It is apparent then that the first step in applying Cardozo's formula in the *Foreman* case is to find the confidential relationship.

12 Costigan, *The Classification of Trusts as Express, Resulting and Constructive,* 27 HARV. L. REV. 437 (1914).

13 15 N. Y. 475 (1857).

14 Pattison v. Pattison, 301 N. Y. 65, 92 N. E. 2d 890 (1950).

15 Sinclair v. Purdy, 235 N. Y. 245, 139 N. E. 255 (1923).

He specifically stated there that the payor's equity was reinforced by the relation of man and wife. He further acknowledged its presence in the case when he quoted the New York rule that the Statute of Frauds does not obstruct the recognition of a constructive trust effecting an interest in land where there has been abuse of a confidential relationship.[16]

III. The Confidential Relationship

While most of these cases take place within the area of the close family relationship, where there is little problem in finding the confidential relationship, we must nevertheless examine the limits of that vital requisite. Shortly after *Foreman*, a case[17] arose which surprisingly enough turned on the question of whether a confidential relationship existed. The majority opinion stated as follows:

"We disclaim any purpose of holding that the requisite confidential relationship must be one found within the confines of a family. We conceive that it might exist between lawyer and client, doctor and patient, priest and parishioner, and many other sets of persons, between whom there are bonds of intimacy and trust."

From the dissenting opinion of the same case:

" . . . we have never attempted to limit or define the nature of the confidential relationship which may set a court of equity in motion. Perhaps no such definition can be formulated which would cover all cases." "Myriad are the circumstances which may give rise to such relationship. The parties may be united by blood, family affection, close friendship or business relations."

Although the two opinions seem to talk liberally and similarly, they reached different conclusions, the majority finding no confidential relationship between the payor and the grantee. The facts were that the Normar Corporation paid for the realty but took title in the name of Malex Corporation, which grantee executed a purchase money bond and mortgage. Both corporations were owned and controlled by the same parties, two brothers, and they had in a similar fashion purchased and taken title to several parcels of realty.

In October of 1929 Malex conveyed title to all but one of the parcels to Normar, admittedly for no consideration. In May of 1930 a deficiency judgment was entered against Malex after a mortgage

[16] This is also the prevailing American view. See Costigan, *Trusts Based on Oral Promises*, 12 Mich. L. Rev. 515 (1914).

[17] Fraw Realty Co. v. Natanson, 261 N. Y. 396, 185 N. E. 679 (1933).

foreclosure caused by a default in May of 1929. Thus Malex was left with one property, which went in foreclosure. The mortgagee now seeks to set aside the conveyances to Normar on the ground that they were in fraud of creditors.

The defense of Normar was that Malex held only naked legal title and that these conveyances were made to Normar as the true owner. Normar contended that if Malex did not convey to Normar, equity could impose a constructive trust and force Malex to convey. Normar contended that it acted toward Malex as the husband acted toward the wife in the recent *Foreman* case; that it collected all the rents payable to Malex and used them as its own; that it paid all the costs of maintenance; that the trust relationship rested on the basis of an original understanding between the two owners.

The majority, as was pointed out, found no confidential relationship between the two corporations, and buttressed its holding by stating that the corporate entity of Malex, must be disregarded where such an entity is used as a clock or cover for fraud or illegality.

The dissent brushes away the argument against the confidential relationship and finds that the relation is clearly present and further holds that the use of Malex as a corporate entity is not fraudulent, in fact corporate existence is endowed by the state largely for such use as took place here. As far as the promise to reconvey is concerned, the dissent finds that there need be no actual, express promise and that the same was implicit in the acts of the parties.

In view of the fact that both opinions support the doctrine of the *Foreman* case, it is submitted that the dissent is the better reasoned one. The weakness of the majority is the unexplained holding that a confidential relationship is lacking. One could not argue with it if it placed its holding on the ground of guilty motive and thereby confined the holding to those facts.

It is interesting to note that the dissenting opinion, written by Judge Lehman, was concurred in by Judge Pound. Judge Cardozo had already left the Court. Judge Pound is one of those legal scholars who emphasize the restitutionary aspect of the constructive trust.[18] It is the feeling of this writer that the *Fraw* case is a step backwards in the application of the constructive trust as a restitutionary device in the purchase money resulting trust pattern.

[18] Pound, *Progress of the Law*, 33 HARV. L. REV. 420 (1920).

IV. The Promise to Reconvey

The requirement of the confidential relationship has not proved to be the chief stumbling block in the application of equitable relief in this area; that honor must fall to the element of the promise to reconvey. The chief culprit in this area seems to be the case of *Weigert* v. *Schlesinger*.[19] This is a pre-*Foreman* case with similar facts, except here there was no express promise to reconvey. The plaintiff husband seeks specific performance of an alleged oral agreement on the part of his deceased wife that if he took title in her name, she would hold the property in trust for him and reconvey to him at his request.

The plaintiff was unable to establish any express agreement. The facts were that when wife learned that husband was about to purchase and take title in wife's name, she was puzzled and opposed to the plan. Husband's business partner explained to wife that such things are frequently done by business people because of the uncertainties of business and "Then, of course, anytime he needs the money and should sell the house, you convey it to him or to anybody that he wants to sell it to." Wife then replied, "Well, if you think that is the right way, we will do it that way."[20]

The majority of the Court in the Appellate Division places its affirmance of a dismissal of the complaint on the ground that there was no agreement on the part of the wife to hold the property in trust and therefore there can be no violation of any trust. The Court cited section 94 and stated that there was no proof that the wife took the conveyance without the knowledge or consent of husband.

It will be remembered that under the exceptions in section 94 a trust would *result* in favor of husband if that latter condition existed. There is no doubt that section 94 would prevent a trust from *resulting* in the subject fact pattern. But what about the constructive trust? The majority gave no answer other than that it would grant no relief because there was no agreement, no promise to reconvey.

There was a very vigorous dissent by Rich, J. to the effect that the evidence clearly established an understanding between the parties that the wife would convey the property at the husband's request, and that this negatives any intention of a gift on the part of the husband.

[19] 150 App. Div. 765, 135 N. Y. S. 335 (2d Dep't 1912), aff'd 210 N. Y. 573, 104 N. E. 1143 (1914).

[20] *Ibid.*

This pre-*Foreman* case is important because it has been cited since the *Foreman* case as being distinguishable therefrom on the ground that there was no promise to reconvey.

In 1949 in an action to impress a trust, for the benefit of plaintiff, on certain realty in the name of defendant[21] we find a most startling application of the *Weigert* case. In dismissing the complaint the court held that where there is no allegation in the complaint that the defendant took title to the property without the consent or knowledge of the plaintiff, who paid the consideration, or that the defendant purchased the property with money belonging to plaintiff in violation of some trust, the property was in legal effect, a gift to defendant. The sole authority for this proposition given by the Court is the *Weigert* case and section 94.

The court in effect said that unless the two exceptions to section 94 are present it cannot impress a trust. This in 1949, twenty years after the *Foreman* case. It seems never to have heard of the constructive trust but only of the *Weigert* case, which in 1912 had the foresight to look for a promise to reconvey. We are never informed in the instant case whether a confidential relationship was abused by the breach of a promise, express or implied, to reconvey. This case is more than just a step backwards in the area of restitutionary relief.

In 1956 we find a case[22] where a husband seeks a judgment declaring that he is the owner of a residential house and lot which he paid for but took title in his wife's name because, as a physician, he might be subject to some future malpractice judgments which exceeded his insurance protection. This was not in contemplation of any specific suit or claim but was merely a general precaution. For about four years, husband and wife occupied the house as their home and after they separated because of marital difficulties, this action began.

This court announces that under the *Foreman* case it is fundamental in New York that equity will enforce a constructive trust, where one in a confidential relationship to the payor takes title to realty under an oral promise to reconvey it. It adds that it is inherent in each such situation that there be a promise or an agreement breached. It concludes therefore that without such promise or agree-

21 Brandes v. Agnew, 275 App. Div. 843, 88 N. Y. S. 2d 553 (2d Dep't 1949).

22 Ayers v. Ayers, Vol. No. 135, N. Y. L. J. 13, Col. 5 (March 23, 1956), Supreme Court, Westchester County, DOSCHER, J.

ment there can be no violation of a trust even though there be a confidential relationship and a purchase with money belonging to the one claiming the trust. The authority for the conclusion is the *Weigert* case. It finds as a fact here that there was no promise to hold the property for plaintiff's benefit or to convey to him as some future time, and that he is therefore not entitled to equitable relief.

It is clear that this court understands the principle of the relief made available under the *Foreman* case, but it is not clear as to whether this court requires an express promise or agreement. It relies on the *Weigert* case, but in that case the evidence disclosed a very interesting situation, which could very well have been interpreted as an implied agreement to reconvey. There could be no argument with this case if the court said it found no agreement or promise, express or implied.

V. The Implied Promise to Reconvey

About one month after the *Ayers* case, a case on almost all fours arose in Nassau County.[23] The plaintiff husband has instituted an action to have equity impress a constructive trust. The court promptly announces that the relief sought is based on the doctrine of the *Foreman* case and it acknowledges the applicability of that case under the appropriate facts, but it notes a distinguishing feature between it and the case at bar, the promise to reconvey.

This court does *not* cite the *Weigert* case. Instead it correctly points out that a number of cases have held that a trust may be spelled out even where there is no express promise to reconvey where there has been an abuse of a confidential relationship. This elusive but obvious proposition was announced by our highest court in the leading case of *Sinclair* v. *Purdy*,[24] which had to do with impressing a trust on a conveyance of realty by a brother to his sister based on her oral promise to hold it for his benefit. Note the language of the court stated through Cardozo, J.:

"Even if we were to accept her statement that there was no distinct promise to hold it for his benefit, the exaction of such a promise, in view of the relation, might well have seemed to be superfluous." "Though a promise in words was lacking, the whole transaction, it might be found, was 'instinct with an obligation' imperfectly expressed."

[23] Mistretta v. Mistretta, Vol. No. 135, N. Y. L. J. 14, Col. 3 (April 30, 1956), Supreme Court, Nassau County, Hooley, J.

[24] 235 N. Y. 245, 139 N. E. 255 (1923).

Notwithstanding its recognition that the promise to reconvey may be implied, the court in the *Mistretta* case found no promise, express or implied and therefore denied relief.

However, on March 14, 1956, a case bearing facts and conversations closely resembling the *Weigert* case was decided in Queens County Supreme Court.[25] Here husband paid for property and took title in wife's name. Wife has not died but is in a mental institution and the marriage relation has been annulled.

Husband seeks to impress a constructive trust. On the issue of the promise to reconvey an adult child of the marriage testified that his mother had told him shortly before and shortly after the purchase of the property that the father had bought the house in her name and that he was going to pay all the bills and that the house was placed in her name only for business reasons and that the father could sell the house "like he bought it."

The court impressed a constructive trust on the authority of the *Foreman* case, the only case cited. This is obviously a recognition of the rule that the requisite promise to reconvey in *Foreman* may be express or implied from the circumstances.

We should now be ready to conclude with a statement that where one in a confidential relationship to another pays for realty but takes title in the name of the other, who now refuses to reconvey in breach of an express or implied promise to reconvey, equity will thereupon impose a constructive trust on the realty.

There still remains though the problem of the husband who effects the transaction and takes title in wife's name while she is on a vacation in Europe or more specifically the case of the uncle who paid for realty and takes title in the name of nephew who is in the army overseas, and who knows nothing about the deal. How can the grantee in such a case make a promise of any kind to reconvey? In the actual case,[26] when the nephew returned to New York after his military service, he refused to reconvey. Virtually the same Court which decided the strange *Brandes* case refused to grant the innocently motivated uncle equitable relief in the form of a constructive trust. In this case they knew of *Foreman,* but decided that the promise to reconvey required by that case was absent.

[25] Goodman v. Romano, Vol. No. 135, N. Y. L. J. 12, Col. 3 (March 14, 1956), Supreme Court, Queens County, SCILEPPI, J.

[26] Bascombe v. Sargent, 99 N. Y. S. 2d 857 (1950).

It is the opinion of this writer that this decision is contrary to the equitable policy against unjust enrichment. The relief in the cases where there is a promise to reconvey transcends the prohibition of section 94 in order to prevent unjust enrichment. The refusal of the Court to imply a promise here to reconvey has caused section 94 to effectively make this conveyance into a gift. On the other hand it might be argued by some that to grant relief in this case would be tantamount to a judicial repeal of section 94, except where the rights of creditors were involved.

This writer agrees that such a result might be accomplished but feels that it is consistent with the spirit of the *Foreman* and *Sinclair* holdings of our highest court and with the theory that the constructive trust is a restitutionary device. The language of the court in *Sinclair* v. *Purdy* and cited with approval in *Foreman* v. *Foreman* is appropriate in conclusion: "It is not the promise only, nor the breach only, but unjust enrichment under the cover of the relation of confidence, which puts the court in motion."