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Doctrine of Constructive Trusts Where the Grantee Refuses to Carry Out an Oral Trust Although he Solicited the Conveyance and Stood in a Confidential Relation to the Grantor

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DOCTRINE OF CONSTRUCTIVE TRUSTS WHERE THE GRANTEE REFUSES TO CARRY OUT AN ORAL TRUST ALTHOUGH HE SOLICITED THE CONVEYANCE AND STOOD IN A CONFIDENTIAL RELATION TO THE GRANTOR

Under the provisions of the statute of Frauds in England and under similar statutes in this country, an oral trust in land is held to be unenforceable.[1] Both the English and American statutes provide that such an oral trust shall be "void" and of none effect" but the courts have universally held that such trusts are not void inspite of the explicit language of the statute.[2] Thus if the trustee carries out the oral trust and pays over the income to the beneficiary, personal creditors of the trustee cannot recover the money so paid. These oral trusts are voidable, not void; if they are voluntarily carried our by the parties, the courts will recognize their validity. If, however, the trustee under such oral trust refuses to carry out his oral agreement, the courts in this country have generally held that the statute of frauds not only prevents the enforcement of the express oral trust but prevents any recovery of the property under a doctrine of constructive trust. In England and in a few jurisdictions in this country, however, the courts have taken the broad ground that where it would result in unjust enrichment for the trustee in an oral trust to keep the property himself, a court of equity will raise a constructive trust.[3]

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1. "VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June (1677) all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinfore contained to the contrary notwithstanding." Statute of Frauds 29 Chas. 2 c. 3 (1676).

"Express trusts created in writing—1.No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing." Sec. 4012 Burns' Ann. Indiana Statutes (1914).

2. *Jenkins v. Eldredge* Fed. Cases No.7266, 3 Story 181 (Where the English cases are collected).

Mohn v. Mohn 112 Indiana 285, 13 N. E. 859. *Thomas v. Merry* 113 Ind. 85, 15 N. E. 244.

3. *Davies v. Otty* 35 Beav. 208 (Chan. 1865); *Schuerman v. Schuerman* 7 Alberta 380;*Peacock v. Nelson* 50 Mo. 256; *Cook v. Doggett* 2 Allen (Mass.) 439; *Herrick v. Newell* 49 Min. 198, 51 N. W. 819; *Ellis v. Carry* 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55.

In favor of this doctrine it is alleged that such a judicial interpretation does not do violence to the statute of frauds since the court is not enforcing the express oral trust itself; the court is raising a constructive trust upon the failure of the express trust in order to prevent unjust enrichment. The cases rest on the doctrine that if the statute of frauds prevents the enforcement of the express oral trust of land, a court of equity will make the grantee constructive trustee since "it is not honest for him to keep the land."[4] On principle this seems to be in keeping with the whole basis of recovery in quasi contract at law. Thus if a sale of personal property cannot be enforced because under the statute of frauds it was required to be in writing, the vendee who has received and consumed the goods under the oral sale may still be required to pay their fair value in an action in general assumpsit on the common counts. The theory of these courts is that they are doing no more violence to the statute of frauds by preventing unjust enrichment through the doctrine of constructive trusts in equity than a court of law does violence to the statute of frauds in allowing recovery in quasi contract where the statute of frauds requires a writing in the sale of goods.

The Indiana decisions however, are in keeping with the decisions in most American states to the effect that unjust enrichment alone is not ground for a constructive trust.[6] There must be some kind of fraud which vitiates the original transfer before the courts will raise a constructive trust.[7] There is a general tendency, however, asserted by writers on trusts from their analysis of the decisions and indeed stated by the courts themselves that while there must be fraud to raise a constructive trust, the courts will make a special effort to give full weight to any evidence of fraud in order to work out justice in a case which otherwise would result in unjust enrichment.[8] In general the American courts have held that where there is fraud which goes to the essence of the original transfer of the property upon an oral trust, the courts will raise a constructive trust. The fact that the transferee fails to carry out the oral trust is not the fraud; the fraud lies in the original scheme by which the transferor is fraudulently prevailed upon to make the transfer. Hence the courts say that any agreement which is vitiated by fraud is unenforceable; by the same doctrine a fraudulent transfer on an oral trust is unenforceable and the transferee is made a constructive trustee as a convenient means to secure the interests of the parties.[9]

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4. *Davies v. Otty* 35 Beav. 208.
5. Bogert on Trusts 128; *Erben v. Lorillard* 19 N. Y. 299.
6. *Ransdel v. Moore* 153 Ind. 393; 53 N. E. 767, 53 L. R. A. 753; *Richards v. Wilson* 185 Ind. 335, 112 N. E. 780.
7. *Westphal v. Hevkman* et al 185 Ind. 88. See other cases collected in 39 Cyc. 172.
8. Bogert on Trusts 129.
9. Perry on Trusts and Trustees, Sec. 209, 210.

The case of *Betsner v. Betsner* (decided by the Appellate Court of Indiana, March 31, 1926) [10] involved the following facts. The intestate had been married twice and he had had children both by his former wife and by his then present wife. He was about to buy some land with his own money and his wife exhorted him to have the title to the property run in joint tenancy to her and himself so that if he should predecease her, his children by the former marriage, inheriting the property, would not be able to sell their interest and turn her out of the home. On the other hand she represented that she was anxious that all of intestate's children should share equally in the property on her death, and she orally agreed that if the title were taken in joint tenancy in this way, she would, by deed or will, before her death give the property in equal shares to all the children whether by the former marriage or the present marriage. Led on by these requests of his wife and relying on her representations that she would see that all the children received equal shares on her death, the intestate had this property and some later property conveyed in joint tenancy to him and his wife. The wife survived her husband and deeded the property to her own children in violation of her agreement. This action was brought by the children of the first marriage to have a trust declared of a proportionate part of the realty thus deed in joint tenancy. The court held that an oral trust of land was unenfrceable and that since the lower court failed to find that the original transfer was fraudulent, there could be no constructive trust unless this finding of the lower court were not sustainable on the evidence.

At common law a proceeding in equity in the trial court when appealed to the upper court for review resulted in a reconsideration of the whole case in which the upper court passed upon both the facts and the law anew.[11] Under the code in Indiana, however, the old form of appeal in equity has been abolished and appellate procedure in equity cases is the same as in law cases.[12] Thus this case though involving equitable doctrine is considered like an actoin at law so that if the holding on the facts of the lower court was not so clearly wrong that a jury finding the same way would have had its verdict set aside, the lower courts finding of facts must stand. In this case the lower court found as a fact that there was no fraud in the transaction and since the appellate court did not consider this an unreasonable conclusion form the evidence, the decision of the lower court prevailed.

If, indeed, theree was no fraud, as fraud is understood in the doctrine of constructive trusts in Indiana, then there could be no constructive trust here. It seems unfortunate, however, that the court did not consider the evidence presented in the case from the point

10. *Betsner v. Betsner* 151 N. E. 343.
11. Shipman on Common Law Pleading (Ballantine's Ed.) 11.
12. Sec. 341 Burns' Ann. Statutes, 1914.

of view of whether or not it showed fraud sufficient to raise a constructive trust. What facts are sufficient to constitute fraud as a basis for a constructive trust is a question of law and fact and it may well be that the lower court reached its conclusion that there was no fraud not because of insufficient facts but because the lower court was in error in determining the legal significance of these facts. It is of course not infrequent for courts to affirm a decision on the facts without discussing their significance in law; but this is unusual where the question of law involved is difficult and important. We are dependent upon the court's discussion of the legal significance of facts in order to build up legal principles,[13] and in order that the public may be guided in future cases by past decisions. In the *Betsner case* the court does discuss the facts quite fully in connection with the question of whether an oral trust is enforceable or not, but it does not discuss these facts in relation to the question of fraud. The law on the former points is now well settled in Indiana;[14] it is the latter point that is the more doubtful and the more difficult.

The excerpts from the testimony which the court gives in the course of its opinion show that Mrs. Betsner solicited the conveyance in joint tenancy on the ground that she did not wish her stepchildren to inherit the land on her husband's death and thus be able to drive her from her home.[15] The facts themselves show that as husband and wife there was a confidential relationship between the grantor and the grantee of the property. It is quite usual for courts to raise constructive trusts on the ground of fraud where there is a confidential relationship and solicitation by the grantee. The theories upon which these trusts are raised however, are somewhat divergent; and whether a particular court will hold that certain facts justify the

13. Roscoe Pound, Spirit of the Common Law; 2 Wisc. Law Review, 321; Carr, Delegated Legislation.

14. As pointed out in *Westphal v. Heckman,* the decisions involving oral trusts were in much conflict in Indiana during the early years. It is stated in Bogert on Trusts, page 127, that Indiana is one of the few American states that will raise a constructive trust where he failure to carry out an oral trust would result in unjust enrichment. In support of this statement the following cases are given: *Tinkler v. Swaynie* 71 Ind. 562; *Myers v. Jackson* 135 Ind. 136, 34 N. E. 810. It is submitted, however, that these cases do not decide that unjust enrichment alone is ever sufficient basis for an oral trust in Indiana. Since the later decisions have made this clear as the court points out in *Westphal v. Heckman,* there seems to be no occasion for a detailed discussion of the same question again. Roscoe Pound, *The Progress of the Law—Equity,* 33 Harvard Law Review 420.

15. "You needn't be afraid of that. Igave you my promise that I would hold the property as long as I lived with the understanding that Johnny and Lizzie (appellants) would not be able to throw me out of my home.I gave you my promise that there would be an equal division at the end of my life. I gave you that promise and intend to keep that promise." *Betsner v. Betsner* VEV N. E. 345 at 345.

raising of a constructive trust will depend in large measure upon its particular theory of constructive trusts in this situation. Some courts have held that while usually the burden of showing that a conveyance was obtained by fraud is on the party attacking the conveyance, nevertheless this burden of proof shifts where there is a family relationship of confidence between the grantor and the grantee and no consideration was paid for the property.[16] As the court points out, however, in *Westphal v. Heckman,* there is no presumption of actual fraud in a family relationship except as against the so-called dominant party. Thus in the case of an alleged oral trust there is no shifting of the burden of proof unless it be raised against the dominant party to the family relationship. The burden of proof would shift if a father were trying to take land free from an oral trust when conveyed by his son; but, visa versa, even though the father be old and feeble and greatly dependent on the son who may be a shrewd and active business man the burden of proof does not shift and the conveyance is presumed to be free from fraud unless the contrary is affirmatively shown.

The court makes it clear, however, in *Westphal v. Heckman* that this rule covers a presumption of fraud or undue influence from the relationship itself and has nothing to do with surrounding circumstances. Thus in *Westphal v. Heckman* the court held that there was no presumption of undue influence or fraud where the conveyance was without consideration from a father to a son and the court concluded from the specific finding of facts from the lower court that there was no actual proof of fraud.

Contrary to the rule in Indiana there are some courts that hold that any conveyance without consideration by the parties to a family relationship of a confidential nature such as husabnd and wife or father and child will be presumed to involve undue influence or fraud in so far that the grantee of the property will be required to prove affirmatively that the transaction was valid.[17] It seems that this rule goes too far in holding that the burden of proof shifts since it might be very difficult for a grantee to show affirmatively that there was no fraud even though in fact the entire transaction was entirely free from any importunity whatever.

On the other hand there is a middle ground between these views. A court might well hold that the burden should be on the grantee of a gratuitious conveyance to show that it was free from fraud where (1) there was proof of importunity by the grantee in securing the conveyance from the grantor, (2) where there was an intimate family relationship involving confidence, such as husband and wife, fa-

16. *Keys v. McDowell* 54 Ind. App. 263, 100 N. E. 385; *Teegarden v. v. Lewis* 145 Ind. 98, 40 N. E. 1057; 2 Pomeroy, Equity Jurisprudence, Sec. 962; 1 Bigelow, Law of Fraud 537.

17. *Cannon v. Gilmer,* 135 Ala. 302, 33 So. 659; Perry, Trusts, Sec. 210.

ther and child, (3) where the court could say that in addition to the situation in (1) and (2) *supra* there were also suspicious circumstances which would seem to show that an absolute conveyance in accordance wtih the face of the deed was not intended.[18] This is the theory adopted by the court in *Coburn v. Shillings*[19] in which the court held that there was a constructive trust where a niece prevailed upon her uncle to deposit money in a savings account under their names subject to an oral trust that the niece would hold the money for her uncle's favorite daughter. Here there were extraordinary circumstances that might involve fraud. The uncle was at his niece's home completely under her control, and he was in an exceedingly enfeebled and depressed state of mind. If we were to apply this doctrine to the *Betsner case,* the court might well find such suspicious surrounding circumstances as would cause the burden of proof to shift in the fact that there had been constant quarreling in this family, that it appeared Mrs. Betsner had a strong antipathy to her stepchild, and that she was more dominant than her husband in business affairs.

If it be said that this test of suspicious surrounding circumstances is too indefinite upon which to shift the burden of proof, it may be answered that many courts in a number of other situations apart from constructive trusts have held that the burden of proof does shift under such circumstances as the court deems to be suspicious.[20] The definite content of this term "suspicious circumstances" must be found in the cases where this rule is applied. So many cases have now been decided in accordance with it that it seems the term "suspicious circumstances" is now reasonably definite so that it can be applied with assurance in future cases.

In *Westphal v. Heckman* the court states:

> "This court has held that no presumption of fraud or undue influence arises in a case of a conveyance by a parent to a child on account of the mere existence of such relation."[21]

This seems to be clearly the Indiana rule and it is submitted that it is much preferable to the contrary rule that would raise a presumption of undue influence and fraud wherever there is a conveyance without consideration to a near relative upon his importunity. On the other hand there seems to be nothing in the Indiana decisions that would definitely preclude the court under the doctrine of *stare decisis* from adopting the middle ground that while there was no presumption of undue influence or fraud from the relationship itself in these cases, nevertheless, if in addition to the relationship there

18. 36 Harvard Law Review 105; 4 Wigmor, Evidence, Sec. 2503 and cases there cited; 39 Cyc. 187.

19. 138 Md. 177, 113 Atl. 761.

20. *Garrett v. Heflin* 98 Ala. 615, 13 So. 32.

21. 185 Ind. 88 at 94.

were added suspicious circumstances, then the burden of proof would shift.

It is submitted that such a doctrine is in keeping with the basic principles of the law generally as well as with the doctrine of constructive trusts. It makes the basis of constructive trusts definitely rest on fraud in accordance with the Indiana doctrine rather than upon unjust enrichment as in some jurisdictions. It is in keeping with giving full effect to the statute of frauds. On the other hand, its positive advantage lies in the fact that while protecting us against the dangers of litigation over oral trusts in land, it is a convenient rule in keeping with judicial authority to prevent fraud.

Even apart from its correctness in law and its advantage in working a closer approximation to justice in the particular case, it seems also to be the sounder rule as a matter of legal analysis. We have the arbitrary rule that where there is such a conveyance in favor of the dominant party to the family relation, the burden of proof automatically shifts regardless of whether or not in the particular case the one presumed to be dominant in law was dominant in fact. Thus to say that an old and feeble father who is ignorant of business affairs must be presumed to be the dominant party where he deeds his land on an oral confidence to a young and aggressive son who has taken the leadership in managing the family business is to have a legal presumption, which may not only be contrary to fact but which may work serious injustice in practice. On the other hand if a rule is adopted which causes the burden of proof to shift where there are suspicious circumstances regardless of the artificial legal presumption against the dominant party, then a workable rule is obtained which will take care of the many cases where in fact the one considered in law to be the dominant party is actually very much in the power of the other party. It may be fair to say that this presumption against the dominant party arose at common law at a time when the husband or father was far more dominant than he is today and that at best this rule of the common lw represents an arbitrary approximation which is often in conflict with the facts under present conditions.

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