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Constructive Trusts--Duty of Agent to Reconvey Land Purchased for Principal--Statute of Frauds

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dissents¹⁷ so that, despite suggestions of broadened principles of interpretation, there is still some prospect of success for the states in continuing to rely primarily on claims for strict interpretation of statutes. The powers of congress as presently conceived¹⁸ make it much more unlikely that the Court will hold an act unconstitutional than that it may in a specific case apply a rule of "express application," under which congress would be called on for express and unequivocal reference. A settled practice of that tenor on the part of congress would in any case be desirable as relieving the Court of consideration of matters of policy not properly within its domain.¹⁹ D. C. C., JR.

CASE COMMENTS

CONSTRUCTIVE TRUSTS—DUTY OF AGENT TO RECONVEY LAND PURCHASED FOR PRINCIPAL—STATUTE OF FRAUDS.—Plaintiff seeks to recover realty, formerly belonging to him, which he alleges defendant, his brother, had bought at a judicial sale, on an oral agreement to reconvey to plaintiff at such time as plaintiff should be financially able to redeem it on payment of the purchase price plus interest. Both parties attempted to suppress bidding before the sale in order that defendant might purchase. Defendant took possession and held the property for approximately ten years after which he refused to reconvey on tender of the purchase price. The circuit court entered a decree for redemption of the realty upon payment of a sum to be fixed by an accounting. *Held*, that such oral agreement was unenforceable (1) as an oral contract for the sale of land within the Statute of Frauds, W. VA. REV. CODE (Michie, 1943) c. 36, art. 1, §3, (2) as an oral declaration of trust within the Statute of Frauds, W. VA. REV. CODE (Michie, 1943) c. 36, art. 1, §4, (3) as not being within the permissible provisions of the statute allowing an

¹⁷ See the dissents of Mr. Justice Murphy in *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U. S. 285, 303, 63 S. Ct. 628, 634, 87 L. ed. 761, 771 (1942), and Mr. Justice Roberts in *California v. United States*, 320 U. S. 577, 586, 64 S. Ct. 352, 357, 88 L. ed. 322, 331 (1943).

¹⁸ See *z. g.*, *Stewart Machine Co. v. Davis*, 301 U. S. 548, 57 S. Ct. 883, 81 L. ed. 1279 (1937); *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. ed. 122 (1942); CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (8th ed. 1946) 42, 143.

¹⁹ See *Penn Dairies v. Milk Control Comm.*, 318 U. S. 261, 275, 63 S. Ct. 617, 623, 87 L. ed. 748, 757 (1942) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous . . . Court should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make"); *Davis Warehouse Co. v. Bowles*, 321 U. S. 144, 152, 64 S. Ct. 474, 479, 88 L. ed. 635, 641 (1944) ("Where Congress has not clearly indicated a purpose to precipitate conflict (between state and federal governments) we should be reluctant to do so by decision").

oral express trust, *ibid.*, and (4) under an invocation of the "clean hands" doctrine, both parties having participated in the suppression of bidding. Decree reversed and bill dismissed. *Dye v. Dye*, 39 S. E. (2d) 98 (W. Va. 1946).

On all four grounds the case is soundly decided. But a dictum in the case reaffirms a questionable West Virginia doctrine that, in case of an oral agency for the purchase of land, the agent, who, with his own money, in violation of his agency, purchases land in his own name, cannot be compelled to convey the land to his principal "as that would be in violation of the statute of frauds." *Nash v. Jones*, 41 W. Va. 769, 24 S. E. 592 (1896). Starting from the proposition that one who has been an agent for another in pre-existing transactions to buy land cannot purchase realty for himself in violation of his agency, a constructive trust arising upon breach of the fiduciary relationship which exists between such an agent and his principal, the same problem arises when one orally designated as agent for one particular transaction purchases realty with his own funds for himself. On the question of whether such an oral contract of agency is enforceable, there is a division of authority. Some jurisdictions, like West Virginia, have adhered to a strict enforcement of the Statute of Frauds. Thus the early English view, since overruled, *Bartlett v. Pickersgill*, 1 Eden 515, 1 Cox 15, 4 East 577n. (1759), overruled by *Heard v. Pilley*, L. R. 4 Ch. App. 548 (1869), and *Rochefoucauld v. Boustead*, 1 Ch. 196 (1897), followed by a minority of the states; *Nash v. Jones*, 41 W. Va. 769, 24 S. E. 592 (1896); *Douglas v. Bemis*, 95 Minn. 220, 103 N. W. 882 (1905); *Partridge v. Cummings*, 99 N. J. Eq. 14, 131 Atl. 683 (1926). But see *Miller v. Kyle*, 107 Kan. 368, 191 Pac. 492 (1920), has refused to enforce such oral agreements, declaring them to violate the statute which requires written contracts for the sale of land. The agency problem is ignored, or at most, failure to enforce is held to result in mere breach of contract. *Mays v. Perry*, 196 Ga. 729, 27 S. E. (2d) 698 (1943); *Rose v. Fall River Five Cents Savings Bank*, 165 Mass. 273, 43 N. E. 93 (1896); *Gates Hotel Co. v. Davis Real Estate Co.*, 331 Mo. 94, 52 S. W. (2d) 1011 (1932). Stress is placed on the notion that enforcement would virtually abrogate the Statute of Frauds. The majority view does not allow the Statute of Frauds to bar establishment of a constructive trust enforceable in a court of equity, *Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (1914), *aff'd*, 86 N. J. Eq. 25, 98 Atl. 1085 (1916); *Krzyzsko v. Gaudynski*, 207 Wis. 308, 242 N. W. 186 (1932); 3 SCOTT, TRUSTS (1939) §499, reasoning that when one assumes to act as agent for another who reposes confidence in him, a fiduciary relationship arises and that the agent's violation of fiduciary duty gives rise to a construc-

tive trust. *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (1927); 3 SCOTT, TRUSTS §499. Other grounds defeating strict application of the Statute of Frauds have been constructive trusts based on a special confidential relationship between the parties involved, *Kersey v. Kersey*, 76 W. Va. 70, 85 S. E. 22 (1915) (brother); *Harras v. Harras*, 60 Wash. 258, 110 Pac. 105 (1910) (same); *Jackson v. Strader*, 61 W. Va. 161, 56 S. E. 177 (1907) (attorney); *Broder v. Conklin*, 78 Cal. 330, 19 Pac. 513 (1888) (same); *Raines v. Raines*, 96 W. Va. 65, 122 S. E. 437 (1924) (parent and child); *Pope v. Depray*, 176 Ill. 478, 52 N. E. 58 (1898) (same); *Sinclair v. Purdy*, 235 N. Y. 245, 139 N. E. 255 (1923) (brother and sister); *Fisher v. Grady*, 131 Fla. 1, 178 So. 852 (1937) (nephew), characterizing the purchaser a trustee *ex maleficio*, 4 WILLISTON, CONTRACTS (Rev. ed. 1936) §1024; cf. *Gates Hotel Co. v. Davis Real Estate Co.*, 331 Mo. 94, 52 S. W. (2d) 1011 (1932); *Kellum v. Smith*, 33 Pa. 158 (1859), or invoking the equities involved in cases of suppressed bidding. *Holman v. Kirby*, 198 Ark. 326, 128 S. W. 357 (1939); *Hartzell v. Whitmore*, 271 Pa. 575, 115 Atl. 840 (1922); *Walraven v. Lock*, 2 Pat. & H. 547 (Va. 1857). The result seems to depend on whether the court is more impressed by the transaction as being one involving real estate, a traditional concern of the Statute of Frauds, or by the agency elements, leading it to recognize that breach of the duty imposed by the oral agency violates the fiduciary relationship and creates a constructive trust which arises by operation of law; and as such is expressly excepted from the operation of the statute. W. VA. REV. CODE (Michie, 1943) c. 36, art. 1, §4 ("Provided, however, that trusts arising by construction or operation of law shall not be subject to the provisions of this section.") Such a trust is independent of and unaffected by the problem of the oral agreement of such an agent to convey, which violates the Statute of Frauds. *Matney v. Yates*, 121 Va. 506, 93 S. E. 694 (1917); 4 WILLISTON, CONTRACTS §1024. To the argument against existence of a constructive trust that the agent is guilty of a mere breach of contract, it may be answered that the very breach reveals a fraudulent intent to obtain the property for himself. The trend of more recent American cases toward enforcing a constructive trust against the agent, *Stromerson v. Averill*, 22 Cal. (2d) 808, 141 P. (2d) 732 (1943); *Stephenson v. Golden*, 279 Mich. 710, 276 N. W. 849 (1937); *Harrop v. Cole*, 85 N. J. Eq. 32, 95 Atl. 378 (1914), *aff'd*, 86 N. J. Eq. 25, 98 Atl. 1085 (1916), the growing opposition to allowing the Statute of Frauds to operate as a shield for the perpetration of fraud, 3 SCOTT, TRUSTS §499; 4 WILLISTON, CONTRACTS §1024; Feezer, *Constructive Trusts in Cases of Agency to Buy Real Estate* (1933) 17 MINN. L. REV. 755, and the

preference for the constructive trust analysis by the American Law Institute, RESTATEMENT, AGENCY (1933) §414(2); RESTATEMENT, RESTITUTION (1937) §194(2), unite in opposing the use of the Statute of Frauds by a dishonest agent to secure for himself land purchased under an orally created agency. It is submitted that the constructive trust approach is the sounder in this situation.

M. S. K.

EQUITY—REMOVAL OF CLOUD ON TITLE—RIGHT TO BRING SUIT WHEN DEFENDANT HAS POSSESSION.—Plaintiff corporation sued in equity to remove cloud on title to a tract of which defendants were in actual possession. Defendants had gone into possession as tenants of plaintiff's grantor, and defended under a claim of hostile possession under unrecorded instruments, the nature of which was unknown to plaintiff. Decree for plaintiff. *Held*, that under the governing statute, equity has jurisdiction to remove a cloud on title even though defendant is in actual possession of the property. *United Thacker Coal Co. v. Newsome*, 38 S. E. (2d) 660 (W. Va. 1946).

Independently of statute, a bill to remove cloud on title to real estate could be maintained only by one in actual possession. *Jones v. McKenzie*, 122 Fed. 390 (C. C. A. 8th, 1903); *Hansford v. Rust*, 107 W. Va. 624, 150 S. E. 223 (1929); *Jackson v. Cook*, 71 W. Va. 210, 76 S. E. 443 (1912). *But cf.* HOGG, EQUITY PLEADING & PRACTICE (Carlin's ed. 1929) §122 (exceptions in cases involving suits to cancel tax deeds, estates in remainder, or where equitable title only is asserted). It did not lie when neither party was in possession. *Sansom v. Blankenship*, 53 W. Va. 411, 44 S. E. 408 (1903). At law, ejectment is the proper remedy when defendant is in actual possession or claims title thereto or some interest therein. W. VA. CODE (Michie, 1943) c. 55, art. 4, §5. In West Virginia, by statute, questions of cloud on title to real property may be determined "without allegation or proof of actual possession of the same." *Id.* at c. 51, art. 2, §2. Italics supplied. (The statute was adopted in 1929.) The effect of the statute has been considered in three cases. The decision in *Flynn Coal & Lumber Co. v. White Lumber Corp.*, 110 W. Va. 262, 157 S. E. 588 (1931), was based on plaintiff's actual possession, but the court said, by way of dictum, that, under the statute, such possession would not be necessary. In *Pocahontas Coal & Coke Co. v. Bower*, 111 W. Va. 712, 163 S. E. 421 (1932), neither party was in actual possession and plaintiff was allowed to maintain an action to remove cloud; the court, basing its decision squarely on the statute, said that it "merely declares in effect, that whereas, formerly a suit to remove cloud could be maintained