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## Trusts--Necessity of a Trust Res.

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him. As a matter of policy courts are deterred from disinheriting the murderer by the fear of forfeiture and corruption of blood. But here the decision would affect the wrongdoer personally, and it is therefore submitted that since the common law on the subject is unsatisfactory, a statute regulating these cases would probably be beneficial.

C. A. P., JR.

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TRUSTS — NECESSITY OF A TRUST *Res.* — The *A* company organized the *B* insurance association for its employees. All employees contributed to the insurance fund, weekly deductions being made from their wages. The money deducted was turned over to *B* for investment. For some months prior to insolvency, *A* made the usual deductions from the payroll, paying *B* simply by crediting the aggregate amount deducted to *B*'s account on *A*'s books. Upon *A*'s bankruptcy, *B* claimed a preference to the extent of its credit on *A*'s books on the theory that *A* was a trustee. The district court's denial of the preference was reversed by the circuit court of appeals on the ground that *A* was a constructive trustee.<sup>1</sup> This in turn was reversed by the Supreme Court. *Held*, that the mere failure to pay a debt will not give rise to a constructive trust. *McKey v. Paradise*.<sup>2</sup>

On strict trust principles, no other result could have been reached. It is axiomatic that there can be no trust without a trust *res*,<sup>3</sup> that a debt is not a trust.<sup>4</sup> What makes the case of interest, therefore, is the fact that an appeal to the Supreme Court was necessary for the reiteration of these settled principles.

In 1894 this statement was made by a New York court: "In no case has it ever been held as yet that a party may by transferring his property from one pocket to another make himself a trustee."<sup>5</sup> Courts today do not admit that he can. If troubled by the rule

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<sup>1</sup> *In re* Grigsby-Grunow, *Paradise v. McKey*, 80 F. (2d) 478 (C. C. A. 7th, 1935).

<sup>2</sup> 57 S. Ct. 124 (1936).

<sup>3</sup> "Trusts are not declared in vacuo because of a trust relationship. They must be predicated of particular property." *Edisto Nat. Bank of Orangeburg, S. C. v. Bryant*, 72 F. (2d) 917, 919 (C. C. A. 4th, 1934); *Marble v. Marble Estate*, 304 Ill. 229, 240, 136 N. E. 589, 594 (1922); *Govin v. De Miranda*, 27 N. Y. S. 1049, 1052 (1894); 1 BOGERT, TRUSTS (1935) 81; RESTATEMENT, TRUSTS (1935) § 74.

<sup>4</sup> RESTATEMENT, TRUSTS § 12.

<sup>5</sup> *Govin v. DeMiranda*, 27 N. Y. S. 1049, 1052 (1894).

that a trust *res* is necessary they say that the party, when he transferred money from one account to another on his own books did so as a convenient short cut to drawing out the money and then tortiously commingling it with his own funds. Therefore, the court looks to the actual transaction and not to mere evidence of it.<sup>6</sup> Some courts completely forget the necessary elements of a trust, and finding one or more of these elements, declare a trust.<sup>7</sup> From this repeated misuse of the trust concept, one commentator draws the conclusion that a trust device is but a stereotyped reason for a result a court wants to reach.<sup>8</sup> Thus when a bank has collected commercial paper merely by debiting the drawer's account, but has failed to remit before insolvency, it has been held because of commercial convenience that the bank was a trustee.<sup>9</sup> Might not these same courts hold that there was a trust in the principal case because it would be socially desirable to protect the savings of the laborer? In effect that is what the circuit court of appeals did.<sup>10</sup>

Basing his opinion entirely on *Central Trust Co. v. Bank of Mullens*,<sup>11</sup> Arnold, in his criticism of the Restatement of the Law

<sup>6</sup> *Adams v. Champion*, 294 U. S. 231, 238, 55 S. Ct. 399 (1935) (applied to constructive trust). *Northwest Lumber Co. v. Scandinavian-American Bank*, 130 Wash. 33, 225 Pac. 825 (1924); SCOTT, CASES ON TRUSTS (2d ed. 1924) 49.

<sup>7</sup> *Paradise v. McKey*, 80 F. (2d) 478 (C. C. A. 7th, 1935); *Central Trust Co. v. Bank of Mullens*, 108 W. Va. 12, 150 S. E. 137 (1929); *Central Trust Co. v. Bank of Mullens*, 109 W. Va. 119, 153 S. E. 145 (1930); *In re Leigh's Estate*, 186 Iowa 931, 173 N. W. 743 (1919); *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256 (1891); SCOTT, CASES ON TRUSTS 27; *M'Fadden v. Jenkyns*, 1 Phill. Ch. 153 (1842); SCOTT, CASES ON TRUSTS 36.

<sup>8</sup> Arnold, *Restatement of the Law of Trusts* (1931) 31 COL. L. REV. 800, 818. But see *Swan v. Children's Home Soc. of W. Va.*, 67 F. (2d) 84, 88 (C. C. A. 4th, 1933). The court, though much in favor of P's cause, refused to torture the transaction into a trust.

Note especially the English courts' use of the device to give effect to third party beneficiary contracts. *M'Fadden v. Jenkyns*, 1 Phill. Ch. 153 (1842); *Gandy v. Gandy*, 30 Ch. Div. 57 (1883); *Harding v. Harding*, 17 Q. B. Div. (1886) (to give effect to unexecuted gift); WILLISTON, CASES ON CONTRACTS (3d ed. 1930) 384.

<sup>9</sup> *Central Trust Co. v. Bank of Mullens*, 108 W. Va. 12, 150 S. E. 137 (1929); *Bank of Poplar Bluff v. Millspaugh*, 313 Mo. 412, 281 S. W. 733 (1926), 47 A. L. R. 754 (1927); *Federal Reserve Bank v. Peters*, 139 Va. 45, 123 S. E. 379 (1924), 42 A. L. R. 742 (1926). *Contra*: *Commercial Bank v. Armstrong*, 148 U. S. 50, 13 S. Ct. 533 (1893); *Hecker-Jones-Jewel Mill Co. v. Cosmopolitan Trust Co.*, 242 Mass. 181, 136 N. E. 333 (1922), 24 A. L. R. 1148 (1923); *Citizens' Bank v. Bradley*, 136 S. C. 511, 134 S. E. 510 (1926).

<sup>10</sup> The circuit court of appeals found a constructive trust by reason of A's breach of obligation to make proper disposal of the payroll deductions. The court emphasized the fact that in order to keep their jobs the employees had to contribute to the association. That fact makes their position even stronger than it would have been had their contributions been wholly voluntary.

<sup>11</sup> *Supra* n. 7.

of Trusts, makes the bald statement that West Virginia does not strictly adhere to the doctrine that there must be a definite trust *res*.<sup>12</sup> Perhaps the statement is too strong; this nontechnical use of the trust principle has generally been limited to cases involving the banking business.<sup>13</sup> However, in *Sullivan v. Madeleine Smokeless Coal Co.*,<sup>14</sup> on fact almost identical with those of *McKey v. Paradise*, the court did not question the finding of the receiver that there was a trust, but limited its consideration to the question of tracing.

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<sup>12</sup> *Supra* n. 8.

<sup>13</sup> See cases *supra* n. 9.

<sup>14</sup> 115 W. Va. 115, 175 S. E. 521 (1934).

<sup>15</sup> Since the fund in this case was kept in the same account as the company's general account, it is to be presumed that no money was taken from that account and returned to it. If money was actually set aside as a fund and then redeposited, the fund would not lose its character of a specific trust *res* by mingling. The facts on this point are not clear from the printed report or lawyers' briefs.