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Trusts--Corporation as Beneficiary Under Constructive Trust of Outstanding Corporate Bonds

practical invitation to foreign corporations to lend money in West Virginia.

The question really resolves itself into one of practicality. From that standpoint, the instant case results in an unwholesome extension of the doctrine of *Swift v. Tyson* by disputing West Virginia's public policy with our Supreme Court of Appeals.

TRUSTS — CORPORATION AS BENEFICIARY UNDER CONSTRUCTIVE TRUST OF OUTSTANDING CORPORATE BONDS. — The Wayne United Gas Company contracted to sell its entire output to the Owens-Illinois Glass Company and the Libby-Owens Sheet Glass Company. Subsequently, the gas company issued first mortgage bonds secured by its entire property. The only source of revenue of the gas company was the contract proceeds, which, if paid, would have been sufficient to meet all of its indebtedness. In 1932, due to business conditions, the glass companies broke the contract, whereupon the gas company was forced to default on its obligations. The glass companies immediately bought up ninety-two per cent. of the mortgage bonds at depressed prices, and threatened to foreclose on their security. The petitioners, a minority stockholder, and an unsecured creditor, now seek the appointment of a receiver who will take over the assets of the gas company, including any rights resulting from the breach of contract, and pay off outstanding claims, the glass companies being limited in their claim to the amount actually paid for the bonds, on the theory that a constructive trust devolved upon them as to the bonds. *Held,* that no fraud having been alleged, and no fiduciary relationship having been shown, there are no grounds for a constructive trust.[1] *Bell v. Wayne United Gas Company.*[2]

A constructive trust is a remedial device by which courts of equity restore property to the true owner, where legal ownership has been obtained by the constructive trustee in some unconscionable fashion.[3] The petitioners in the present case can show no

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[1] Maxwell, J., dissented on the ground that the facts disclosed a fiduciary relationship. Woods, J., concurred.

[2] 181 S. E. 609 (W. Va. 1935).

[3] Carleton Mining & Power Co. v. West Virginia Northern Ry. Co., 113 W. Va. 20, 166 S. E. 536 (1932); Floyd v. Duffy, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N.S.) 883 (1910); Davis v. Settle, 43 W. Va. 17, 26 S. E. 557 (1896); 1 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 166; 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 1044, 1053.

facts as basis of a claim, either on their own behalf or on behalf of the gas company, whereby ownership of the bonds may be questioned. Neither a corporation nor its stockholders have any property rights in outstanding bonds, the bonds being representative of a liability, the very antithesis of a property right.

Those persons from whom the glass companies purchased the bonds at depreciated prices are alone in a position to petition the court to decree a constructive trust as to the bonds, for if the glass companies' purchase is in any way colorable, the former owners alone are entitled to set up a property interest which has been violated.

That a constructive trust in favor of the gas company would reach an inequitable result seems clear from the fact that the relief sought would have enabled the gas company to repudiate a substantial proportion of their indebtedness created by a transaction in no way impeachable and in which a complete consideration had changed hands.

It would seem therefor that the gas companies' remedy is on the original gas contract,[4] in the meantime having a possible defense at law on an action on the bonds on the ground of prevention of performance,[5] and being protected against foreclosure by equitable intervention to restrain the unconscionable exercise of a legal right.[6]

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[4] Besides the assumpsit remedy, it is possible that the gas company might have had specific performance under Hall v. Philadelphia Co., 72 W. Va. 573, 78 S. E. 755 (1915), or a remedy in tort under the theory of Rich v. N. Y. C. and H. Riv. Ry. Co., 87 N. Y. 382 (1882).

[5] Where the promisee has prevented performance, he has no right of action for non-performance. *In re* People by Phillips, 250 N. Y. 410, 165 N. E. 829 (1929); Mitchell v. Davis, 73 W. Va. 352, 80 S. E. 491 (1913); WILLISTON, CONTRACTS (1920) § 677.

[6] It would seem to be an unconscionable exercise of a right to foreclosure, where the default has been caused by the mortgagee. A party may not ordinarily take advantage of a delay that he himself has caused. Gray v. Currier, 252 Mass. 78, 147 N. E. 567 (1925); Szanto v. Pagel, 47 S. W. (2d) 632 (Tex. Civ. App. 1932); WILLISTON, CONTRACTS § 789. But see Commonwealth Title Ins. & Trust Co. v. N. J. Line Co., 86 N. J. Eq. 450, 100 Atl. 92 (1916).