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Trusts--Effect of the Statute of Frauds

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fendant was driving a truck and saw the plaintiff approaching the street at some distance away. Defendant estimated that he could "get by" since she was walking slowly. Just as he reached her, however, she quickened her pace and he struck her. The court allowed a recovery under the doctrine of last chance.

Fourth. Where the plaintiff's negligence continues up to the time of the accident; defendant is not aware of the plaintiff's danger, but by the exercise of due care could have discovered it in time to have avoided the injury and fails to do so.

Missouri has probably gone further than any other state in allowing a recovery in such cases where there is a duty on the part of the defendant to discover the plaintiff. It would seem in such cases, however, that the parties at the most, have an equal opportunity of averting the accident, and the negligence is concurrent. West Virginia in the dictum laid down in *McLeod* v. *Laundry Company, supra,* would seem to allow a recovery. The rule, however, being dictum, may not be followed to this extent.

By way of summary, then, we find that the West Virginia court applies the doctrine of last chance; first, where defendant has knowledge of plaintiff's peril, either when the plaintiff's negligence has terminated or is still active; and second, where the defendant does not know of the plaintiff's peril but by the exercise of due care could have discovered it in time to have avoided the accident, when the plaintiff's negligence has ceased; and, according to the dictum in *McLeod* v. *Charleston Laundry Company,* even when the negligence is still active.

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TRUSTS—EFFECT OF THE STATUTE OF FRAUDS.—In a recent West Virginia case, *Carter* v. *Carter,*[1] the court held that express trusts are not subject to the statute of frauds in this state. This again raises the question as to what is the law in West Virginia in regard to the seventh section of the English statute of frauds which states that all declarations or creations of trusts or confidences in any land, tenements or hereditaments to be proved in some writing signed by the party, enabled to declare such trust, or by his last will in writing.[2] The eighth section of said statute states that implied trusts shall be of the like force and effect as

1 148 S. E. 378 (W. Va. 1929).
2 29 Charles 11, C. 3 (1676).

the same would have been if this statute had not been made. True it is, that the legislature has never ingrafted said seventh section into our law[3] but that does not state what effect the courts have given this omission.

It is maintained by a few authorities that there are two lines of cases in this state;[4] one holding that it is necessary for the express trust to be in writing in order to be effective and the other holding otherwise. Such a generalization may be substantiated from the general statements found in the decided cases in this State but do the facts in each individual case justify such a classification? Thus the purpose of this note is to determine (1), whether there is any real contradiction in the West Virginia cases, and, (2), whether West Virginia really holds differently from other states which have the seventh section.

Before noticing the facts of the various cases in attempting to answer the above questions, it will be useful to point out the verbal distinctions in express, resulting, and constructive trusts usually employed by courts.

The eminent jurist, Judge Story, in speaking of an express trust, says: "Three things are indispensable to constitute a valid trust; first, sufficient words to raise it, secondly, a definite subject, and thirdly, a certain or ascertained object."[5] While on the other hand, resulting trusts are implied by the courts, because the parties involved are presumed to have intended them. They are based on the fundamental notion that one is presumed not to give away his property. Constructive trusts are created by the courts, for the purpose of preventing the unjust enrichment of the holder of a trust, usually the legal title; as for example, in cases of meditated fraud, imposition, notice of an adverse equity, violation of a special confidential relation, and solicitation.[6] Keeping in mind the above distinctions as a back ground to the cases on this subject, we shall discuss whether or not the seventh section of the statute of frauds has been read into our law.

The following are facts of cases which held that express trusts are not subject to the statute of frauds:

In the Carter Case A conveyed her house and lot to B, her son. B conveyed it without a monetary consideration to C, another son of A's. C sold the property and this suit is brought to compel C to account to A. These facts establish a constructive trust, resulting from the violation of a fiduciary relationship

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[3] BARNES W. Va. CODE, 1923, Ch. 98, §1.
[4] 31 W. VA. L. QUAR. 166.
[5] STORY, EQUITY JURISPRUDENCE, §964 (12th ed).
[6] BOGERT ON TRUSTS, 43.

based on the close relationship of the parties which alone would justify the result reached in jurisdictions where the statute of frauds does not operate.[7] Then, too, there is not anything in the case to constitute an express trust.

In *Tanner* v. *McCreary*,[8] A and B orally agreed to purchase certain lots. Each paid his share of the purchase price. A took legal title to said lots. *Hamilton* v. *McKinney*[9] is a similar case. There C sold certain land to A. A orally agreed with B that they would purchase it together. Thereby B paid two-thirds of the purchase price. In both cases the decrees gave to each an interest in proportion to what he had paid. In each case, the facts establish resulting trusts since each paid his part of the purchase price. Thus entirely apart from the statute of frauds the same result would have been reached. This is true in states where the seventh section exists.[10]

In *Bennett* v. *Bennett*,[11] A owned a half interest in land which had to be sold for debts; B, brother of A's husband, made a written contract with A to buy it at the sale and when said land was resold, she was to get half of the profits. The written agreement here took care of any requirement that an express trust must be in writing in order to be effective. Therefore this case would have been upheld in states where the statute operates.

In *Hudkins* v. *Crim*,[12] A gave two deeds of trust on a certain tract of land to secure two debts due to B. Before said property was sold, A and B. orally agreed that B. would buy the land for A and hold it for him until A paid him the purchase price. Also in *Swick* v. *Rease*[13] a commissioner was appointed to sell certain land of one H to satisfy a former judgment. Before the sale, A became the owner of the land in question, assumed and has since held possession thereof. The commissioner advised sale of said land and before sale, he had B orally promise to buy said land for A at the judicial sale for a nominal sum and convey it to A when he became able to pay. In these two cases, the facts

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[7] Cyrus *v.* Holbrook, 32 Ky. 466, 106 S. W. 300 (1907); Hanson *v.* Svarverud, 18 N. D. 550, 120 N. W. 550 (1909); Meek *v.* Meek, 79 Ore. 579, 156 Pac. 250 (1916).

[8] 88 W. Va. 658, 107 S. E. 405 (1921).

[9] 52 W. Va. 317, 43 S. E. 82 (1902).

[10] Gaume *v.* Sheets, 181 Cal. 119, 183 Pac. 525 (1919); Crawford *v.* Hurst 299 Ill. 503, 132 N. E. 521 (1921): Lowell *v.* Lowell, 185 Ia. 508, 170 N. W. 811 (1919); Shrader *v.* Shrader, 119 Miss. 526, 81 So. 227 (1919); Ahrens *v.* Simon, 101 Neb. 739, 164 N. W. 1051 (1917).

[11] 92 W. Va. 391, 115 S. E. 436 (1922).

[12] 64 W. Va. 225, 61 S. E. 166 (1908).

[13] 62 W. Va. 557, 58 S. E. 510 (1907).

show the existence of pre-existing equities which are suffiicient to justify the conclusion reached in each. Such has been held in states wher the seventh section operates.[14]

In *Floyd* v. *Duffy*[15] A and B orally agreed to buy certain lots from C. The title to said lots was to be taken in A's name. Neither was to pay anything to C until the lots were resold. Here the court emphasized the existence of an independent equity and also the presence of a partnership either of which would remove the bar of the statute of frauds in States where the statute exists.[16]

In *Boggs* v. *Yates*,[17] A was old and feeble and shortly before his death he wanted to transfer his lots to B, his wife. Upon C, his daughter, orally agreeing to reconvey the lots to B, A conveyed them to C. Here was present a confidential relationship, the breach of which constituted a constructive trust and at the same time A was not on equal ground with C, being old and feeble.[18] Thus, the same conclusions would have been reached in each of the above instances in jurisdictions which require express trusts to be in writing.

Before drawing any further conclusions as to the soundness of the court's reasoning, the facts of the cases which held that the statute of frauds does operate as to express trusts will be set forth; they are as follows:

In *Troll* v. *Carter*,[19] A conveyed land to B, his father, in trust for A for life; then to the heirs of A.

In *Pusey* v. *Gardner*,[20] A conveyed certain realty to B, her

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14 Straser *v.* Carroll, 125 Ark. 34, 187 S. W. 1058 (1916); Jones *v.* Luffman, 148 Ga. 770, 98 S. E. 262 (1919); Arnold *v.* Cord, 16 Ind. 177 (1877); Doom *v.* Brown, 171 Ky. 469, 188 S. W. 475 (1916); Grumley *v.* Webb, 44 Mo. 444 (1869); Moore *v.* De Bernardi, 47 Nev. 33, 213 Pac. 1041 (1923); Peppard Realty Co. *v.* Enden, 241 N. Y. 588, 150 N. E. 566 (1925); Day *v.* Devitt, 79 N. J. Eq. 342, 81 Atl. 368 (1911); Harras *v.* Harras, 60 Wash. 258, 110 Pac. 1085 (1910).

15 68 W. Va. 339, 69 S. E. 993 (1911).

16 Koyer *v.* Millmon, 150 Cal. 785, 90 P. 135 (1908); Roley *v.* Calehour, 135 Ill. 300, 25 N. E. 777 (1890); Hodge *v.* Twitchell, 33 Minn. 389 23 N. W. 547 (1885); Merchant *v.* Smith, 91 Ore. 442, 178 Pac. 939 (1919); Weirich *v.* Dodge, 101 Wis. 621, 77 N. W. 906 (1899); Turner *v.* Sawyer, 150 U. S. 578 (1893).

17 101 W. Va. 407, 132 S. E. 876 (1926).

18 Crabtree *v.* Potter, 150 Cal. 710, 89 Pac. 971 (1907); Jenkins *v.* Lane, 154 Ga. 454, 115 S. E. 126 (1922); Hughes *v.* Fargo Loan Agency, 46 N. D. 26, 178 N. W. 993 (1920); Walters *v.* Walters, 26 N. M. 22, 188 Pac. 1105 (1920).

19 15 W. Va. 567 (1879).

20 21 W. Va. 469 (1883).

father, to hold in trust for A.

In *Poling* v. *Williams*,[21] A agreed to sell B certain land and to have set aside a deed made by a conveying the said land to C, A's brother. A had, before the above agreement, conveyed the land to C, in oral trust for A. B sued A for specific performance.

In *Hawkinberry* v. *Metz*,[22] A by deed conveyed land to B, her daughter in trust for A. No consideration was paid by B.

And in *Crawford* v. *Workman*,[23] A conveyed a tract of land to B, his son, in trust for A. At time of said conveyance, B paid $168 consideration.

In the first four cases above, the court held that the parol agreement would violate the general rule of law, that parol evidence cannot be admitted to vary, add to or contradict a written contract, in addition t osaying that it would violate the statute of frauds. Such reasoning is unsound and may be dispensed with by stating that there is no real inconsistency between the deed and the parol agreement, and that the parol evidence rule has nothing to do with the case.[24]

In comparing the above two lines of cases we find that there is no real contradiction in the West Virginia cases; and that West Virginia does not actually hold differently from other states which have the seventh section. The reason why West Virginia and other states reach the same conclusion is that each state is afraid of oral evidence. It is true that West Virginia must talk differently from the other states because of the absence of a statute. Thus after our court has reached a conclusion, it will often refer to the absence of the seventh section of the section of frauds. This, however, only amounts to obiter dicta and as a practical matter the court has read into our law the said section.

There is an exception to the above conclusion: this is where A conveys land to B without B giving any consideration, in oral trust for C. Dicta to that effect are found in *Troll* v. *Carter*,[25] and *Carter* v. *Workman*.[26] However, it could be argued that in such a case the West Virginia court is applying the rule relat-

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[21] 55 W. Va. 69, 46 S. E. 704 (1904).
[22] 91 W. Va. 637, 114 S. E. 240 (1922).
[23] 64 W. Va. 19, 61 S. E. 322 (1908).
[24] *In re.* Fisk, 81 Conn. 433, 71 Atl. 559 (1908); Strain *v.* Hinds, 277 Ill. 598, 115 N. E. 563 (1917); Richards *v.* Wilson, 185 Ind. 335, 112 N. E. 780 (1816); Backmann *v.* Huett, 26 Wyo. 332, 184 Pac. 709 (1919); Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974 (1890).
[25] *Supra* n. 19.
[26] *Supra* n. 23.

ing to the statute of wills which gives rise to a constructive trust resulting from the mere breach of promise.[27] Such would be a reasonable view to take and thereby renders the exception inoperative.

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THE STOP, LOOK AND LISTEN RULE.—Plaintiff's decedent was killed by one of defendant's passenger trains at a country road crossing. The train was backing to the crossing. Some of the gas lights in the two rear passenger coaches were lit, two red signal light markers on the rear of the train were burning and there was a lantern back a foot within the vestibule of the rear coach. Decedent was familiar with the crossing and his nineteen-year old daughter was driving. The night was dark and foggy. The view of the track was partly obstructed by buildings. The automobile did not stop at the crossing. Fifty feet from the track vision was uninterrupted for 999 feet, and twenty feet from the crossing vision was uninterrupted for 3200 feet. Held, one approaching a crossing is under no duty to look and listen for approaching trains, if to do so would avail him nothing as a warning, and as to whether it would have so availed him, is a question for the jury. *Morris' Administrator* v. *Baltimore and Ohio Railroad,* 148 S. E. 547 (W. Va., 1929.)

There are three generally recognized classes of decisions in regard to the duty of the motorist to stop, look and listen before crossing a railroad track. 29 WEST VIRGINIA LAW QUARTERLY 274.

The first is the so-called Pennsylvania Rule, by which one who fails to stop, look and listen before crossing a railroad track is guilty of contributory negligence as a matter of law. *Serfas* v. *Lehigh and New England Railroad,* 270 Pa. 306, 113 Atl. 370. *Benner* v. *Philadelphia and Reading Railway,* 262 Pa. 307, 105 Atl. 283. Under the second rule a failure to look and listen is negligence per se, but it is not absolutely necessary to stop. *Little Rock Railroad Company* v. *Blewitt,* 65 Ark, 235, 45 S. W. 548; *Castle* v. *Director General of Railroads,* 232 N. Y. 430, 134 N. E. 334.

The third rule requires only such care as is exercised by a person of ordinary prudence under the same or similar circumstances.

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[27] Hillyer *v.* Hynes, 33 Cal. App. 506, 165 Pac. 718 (1917); Brooks *v.* Gretz, 313 Ill. 290, 145 N. E. 96 (1924); Rudd *v.* Gates, 191 Ky. 456, 230 S. E. 906 (1921). Crinkley *v.* Rogers, 100 Neb. 647, 160 N. W. 974 (1916).