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## Trusts--Effect of Statute of Frauds

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the statute enforced. If they are not such offenses, and if the statute prohibits them, then it should be stricken from our code.

There would appear to be no case in which our Supreme Court has directly decided whether or not section 4 of chapter 151 prohibits card-playing in public places, in the absence of gambling. But the writer is informed that some of our Circuit Courts have held this to be unlawful. If this be true, it is submitted that the statute should be repealed, inasmuch as it is disregarded and is not in keeping with the *mores* of the times.

—R. G. K.

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TRUSTS—EFFECT OF STATUTE OF FRAUDS—Plaintiff filed a bill in equity to set up a parol trust in her favor and to have a deed set aside as a cloud upon her title. Plaintiff alleged that in 1909, she by deed reciting a consideration of one dollar cash in hand paid, and other valuable considerations, conveyed certain lands to the defendant, her daughter. It is further alleged that notwithstanding the consideration therein stated there was no consideration paid and that the conveyance was made with the distinct understanding and agreement that the grantee would hold the property in trust for plaintiff, the grantor, and would reconvey the same to her whenever so requested; that the plaintiff was in possession at the date of the deed and is still in possession, the defendant claiming no interest in the property until recently when plaintiff requested a reconveyance which defendant refused. Defendant's demurrer to the bill was sustained. Upon appeal, the order sustaining the demurrer was affirmed. *Held*, it is well settled by numerous decisions in this state, that the grantor of land cannot set up by way of a parol trust an interest in the land conveyed. To permit this would be to go in the face of the statute of frauds and the rule against the admission of parol evidence to contradict, vary or add to written contracts. The authorities make it impossible to so create an equitable title in land.—*Hawkinberry v. Metz*, 114 S. E. 240 (W. Va. 1922).

The review will attempt only to consider the status of the law in this state on the question to what extent, if any, the statute of frauds affects the creation of a trust by parol. In England before the enactment of the statute of frauds, under the common law no particular form of creation or declaration of a trust was required. It could be created by deed, or will, or writing not un-

der seal, or by mere word of mouth. Trusts were simply averred and proved like any other facts, and writing was not required. SANDERS, USES AND TRUSTS, 152; PERRY, TRUSTS, §75. In 1676 the English statute of frauds was enacted, the seventh section of which required all declarations or creations of trusts or confidence in any land, tenements or hereditaments to be proved by some writing signed by the party enabled to declare such trust, or by his last will in writing. Not being made expressly applicable to the Colonies, this statute was never in effect in Virginia. In 1787 Virginia enacted a statute of frauds, the same in many respects as that of England, but omitted the seventh and eight sections relating to declarations of trust. *Floyd v. Duffy*, 68 W. Va. 339, 69 S. E. 993; *Young v. Holland*, 117 Va. 433, 84 S. E. 637. This is the same statute that was re-enacted by West Virginia when it adopted the Virginia Code of 1860. W. VA. CODE, c. 98. Such, then, is the present status of our statute of frauds.

The question is, then, what is the effect of the omission of the seventh section of the English statute of frauds from our statute? In one line of cases our court has made a distinction between the English statute and our statute, and has held that since the seventh section of the English statute was not re-enacted in Virginia and West Virginia, express and constructive trusts may be set up by parol. *Waraven v. Lock*, 2 Pat. & H. 547 (Va.); *Nease v. Capehart*, 8 W. Va. 96; *Sieler v. Mohn*, 37 W. Va. 507, 16 S. E. 496; *Currence v. Ward*, 43, W. Va. 367, 27 S. E. 329; *Hamilton v. McKinney*, 52 W. Va. 317, 43 S. E. 82; *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166; *Floyd v. Duffy*, 68 W. Va. 339, 69 S. E. 993. Also the following cases contain dicta to the same effect: *Brost v. Nalle*, 28 Gratt. 435 (Va.); *Bank v. Carrington*, 7 Leigh 566. See also HOGG'S EQ. PRIN. §§553, 558 to the same effect.

On the other hand there is a line of cases in which the opposite rule is laid down, namely, that the statute of frauds prohibits a parol trust which does not arise by operation of law. *Zone v. Fink*, 18 W. Va. 693; *Pusey v. Gardner*, 21 W. Va. 469; *Poling v. Williams*, 55 W. Va. 69, 46 S. E. 704; *Richardson v. McConaughey*, 55 W. Va. 546, 47 S. E. 287; *Crawford v. Workman*, 64 W. Va. 19, 61 S. E. 322. There are dicta to the same effect in other cases, the leading one of which is *Troll v. Carter*, 15 W. Va. 567. The dictum as set out in Points 3 and 4 of the syllabus of that case has been cited and adopted almost verbatim in most of the cases cited above. HOGG'S EQ. PRIN. adopts this dictum also in §558, although

he had in §553 laid down the rule that "It is not necessary that a trust of any kind in this state, either in real or personal estate, be in writing. Its creation may be by mere verbal agreement."

Can these apparently contrary cases be reconciled, or explained, so that some semblance of a consistent policy toward the effect of the statute of frauds upon creation of trusts may be laid down as our law? The holdings in *Pusey v. Gardner, supra*, and *Zone v. Fink, supra*, are justified by the parol evidence rule, and the court's tacking on the prohibition of the statute of frauds is gratuitous and not necessary for the decision of these cases. The same is also true of *Poling v. Williams, supra*, and *Richardson v. McConaughey, supra*, in the latter of which cases Judge Poffenbarger concurs in the result, but dissents as to the grounds, and says that this case does not come within the prohibition of the statute of frauds. In *Crawford v. Workman, supra*, the court left plaintiff in the predicament into which he had gotten himself by conveying to defraud creditors, but not being content to rest the case there the court throws in for good measure the prohibition of the statute of frauds. These dicta and quasi-holdings seem to be outweighed both by principle and numerical weight of decisions, and it would seem that it can hardly be doubted that the law in West Virginia today is that trusts do not come within the prohibition of the statute of frauds.

—J. D. D.

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WEST VIRGINIA BAR ASSOCIATION NOTES:  
NEWS OF THE PROFESSION.

ANNUAL MEETING.—The annual meeting of the Association for 1923 will be held in Morgantown on Thursday, Friday and Saturday, November 15, 16 and 17. The program is not yet completed, but the addresses already arranged for will insure a meeting of unusual interest and benefit. The president's address, by General T. S. Riley of Wheeling, will maintain the high standard set by the presidents of former years. The annual address will be delivered on Thursday evening by Ex-Senator A. J. Beveridge of Indiana. The subject will be "The development of the American Constitution under John Marshall." Mr. Beveridge's book, "The