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## THE WISCONSIN DOCTRINE OF IMPLIED TRUSTS, RESULTING TRUSTS, AND CONSTRUCTIVE TRUSTS

BY PROF. JOHN McDILL FOX, A.B., LL.B.

Is there in Wisconsin anything apart from Statute other than express trusts, and what at common law were defined as constructive trusts? If so, what, other than an express trust will be enforced in Equity in Wisconsin and what are the minimum requirements prerequisite to enforcement; in behalf of whom may such trusts be enforced and against whom will equity so decree?

A trust will be implied by law in one of two ways. First, either to carry out the presumed intention of the parties; or second, in spite of the intention, of at least one of the parties, to prevent fraud.

Under the first type falls the old Common Law resulting use which was the fore-runner of the resulting trust. That was, merely, the Equitable doctrine which provided where property was conveyed by one to another and there was no consideration (in the absence of family relationship either by blood or marriage), the grantee was presumed to hold for the benefit of the grantor. Then the doctrine was extended to the analogous case where property was conveyed to one other than the payer of the consideration, in which case again equity presumed the grantee to be holding for the one who paid. Then the cases of an Express trust failing, wholly or partially; where the entire property transferred to a trustee was not exhausted by the express trust, and, finally, where an intended trust was not expressly or properly declared.

In these cases at Common Law a trust resulted either to the settler or his heir on the theory of carrying out the presumed intention of the parties.

Because out of the same apparent set of facts two different situations might arise, the misapplication of the term "resulting" trust has sometimes come about. For example: A conveyance may be made to A, the consideration being paid by B. A trust may be implied in opposite ways, (in the absence of family relationship). A true resulting trust may be implied for the benefit of B because he paid the consideration, and the equitable presumption, if not rebutted, would be—that the intention of the parties was that A should hold it for B. If, however, A was B's

agent or attorney and had to do with the details of arranging the transaction and safe-keeping papers or the like, and B paid the money and did not know that the conveyance was taken in A's name, the law would imply a trust on entirely different grounds. In this latter situation, due to the fraud practiced on B by A, equity would decree that A could not make an unconscionable use of his legal title and a trust in favor of B would arise *ex maleficio*.

This is not the only type of a constructive trust. Wherever at common law there was fraud either in acquiring property, or in preventing the normal acquisition of property by others, a foundation for implying a constructive trust for the benefit of the defrauded party was laid. How far will the courts in Wisconsin go to do this?

In Wisconsin the term implied trust seems to be used to embrace a trust created by fraud and a common law resulting trust.

"If a person purchased land with money of a partnership given him to buy land for the members to hold as tenants in common, taking title in his own name by previous consent, or subsequent acquiescence the partners cannot claim it on a resultant trust.

"The rule above stated is because of the abrogation of resulting trusts. Sec. 2071, Stats. (1898).

"If a person deposit money with another to buy land for such person or to hold upon a charitable trust for a class, and such other invests the money, taking title in form as owner, involving a breach of good faith, an implied trust is created in favor of such person or such class according to the facts.

"In the circumstances last stated, if the purposes of the deposit is for the depositee to invest the money in property to be held for a class, and a breach of faith committed by not having the deed show the facts, be waived by the depositor, that does not affect the title; as to him, in case of the breach being against the depositor it changes the implied trust into the common law field of resulting trusts, leaving the depositor no remedy but to recover back the money, because there is no implied trust, strictly so called, without breach of faith and no enforceable resulting trust." (Headnote to *Richtman v. Watson*, 150 Wis., 385).

We have then Express Trusts and Implied Trusts. Express created by the will of the settlor and Implied Trusts embracing Resulting and Constructive. By statute we abolish all true resulting trusts.

“Abolished in part. Sec. 2071. Uses and trusts, except as authorized and modified in this chapter, are abolished; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided in these statutes.”

Implied Trusts, etc., Sec. 2076. “The preceding sections of this chapter shall not extend to trusts arising or resulting by implication of law, nor be construed to prevent or affect the creation of such express trusts as are hereinafter authorized and defined.”

Resulting trusts. Sec. 2077. “When a grant for a valuable consideration shall be made to one person and the consideration therefore shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.”

Fraud against creditors. Sec. 2078. “Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration, and when a fraudulent intent is not disproved a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands.”

Section 2077, not to apply, when. Sec. 2079. “Section 2077 shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person.”

Bona fide purchases. Sec. 2080. “No implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser, for a valuable consideration and without notice of such trust.”

Reversion in grantor. Sec. 2088. “Whenever an express trust is created every estate and interest not embraced in the trust and not otherwise disposed of shall remain in, or revert to the person creating the trust or his heirs as a legal estate.”

It therefore seems apparent that except for statutory enactment (Section 2088), all trusts which at common law would be classified as resulting trusts are absolutely abolished. The effect when obtained, is obtained not by virtue of the law, but solely by virtue of the statute and therefore if a case fall not within the

statute no Equitable results will follow, except as upon a failure of consideration.

Now as to the three apparent exceptions, are these resulting trusts. It would seem evident from the mere statement of the statute that they are not, as all involve fraud. They are merely a type of case which according to a slight shift of emphasis on the facts might be either resulting or constructive at common law. If really constructive they are saved, if merely resulting they fail; (See *Richtman v. Watson*, 150 Wis. 385 supra.)

If this is so; namely, that trusts implied by law are salvaged, but that, except by particular Statute provision (Section 2088), only those implied trusts which were denominated constructive trusts at common law are included in the term, does it follow that all common law constructive trusts come within the class?

There are two types of Constructive Trust that may be adopted for generalization. One type, really an express trust, that fails because improperly declared, on account of fraud, and the other type arising wholly from fraud and not being declared at all. Here again we have a set of facts out of which two situations may arise which at common law would lead to either a constructive or a resulting trust. Insofar as it is a resulting trust it is abolished in Wisconsin. How far is it abolished if at all if a constructive trust?

Section 2302, provides no trust concerning lands shall be created, "unless by operation of law or by deed or instrument in writing," etc. In the early case of *Koch v. Williams* (82 Wis. 186), the Court speaking of section 2304 of the Statute of Frauds says, "The statute must be complied with as long as it is in force. It is no hardship to put such a contract in writing—etc." Yet where a trust has been annexed by parole to a deed, if the trustee wishes to execute the trust, he may do so, (See *Schumacher v. Draeger*, 137 Wis. 618), and if the trustee once makes an election it relates back as of the original date of the attempt to create the trust, and takes priority over any interest derived by one other than a purchaser for value, and without notice from the trustee." (See *Blaha v. Borgman*, 142 Wis. 43.)

A man may orally declare himself a trustee of land for another, or he may transfer it to a third person by deed, or devise to hold in trust for one other than the transferee,<sup>1</sup> and if he orally declare himself trustee of land B, if it is a pure gift, then the Statute of Frauds is a complete bar. If however, he does so

pursuant to some obligation or consideration of money or services or something of value, what then? The express trust fails because of the Statute but under the principle of *restitutio in integrum* the other party has a right to receive back what he gave (*Thomas v. Sowards*, 25 Wis. 631; *Kessler's Estate*, 87 Wis. 660; *Laughlin v. Estate of Laughlin*, 165 Wis. 348, *semble*).

If an owner convey to another on an oral trust for himself what then if the grantee refuse to recognize the trust? Obviously the Statute invalidates the express trust. Should not the owner be able to enforce a constructive trust, not, as Ames expresses it, "a specific enforcement of the 'Express Trust,'" but "a restitution of the status quo"? While under the provisions of Section 2081, such a situation is permissible, namely the conveyance to another to be held in trust for the grantor; the case of *Illinois Steel Co. v. Konkell*, 146 Wis. 556, clearly holds that the trust must be expressed in writing.

In *Rasdall's Administrators v. Rasdall*, 9 Wis. 379, and in *Pavey v. The American Insurance Co.*, 56 Wis. 221, this same question was earlier held. The court first laying down the principle that a deed absolute on its face could not be shown by parole to be a trust. These cases were as between grantor and grantee. True enough the court says "in the absence of fraud or mistake." The court in the Pavey case says: "Considering the decision of this court in *Rasdall's Adm'r v. Rasdall*, 9 Wis. 379, in which it was held that, in the absence of fraud or mistake, parole evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor; considering, also, the provisions of the statute of frauds (R.S., 654 sec. 2302), to the effect that no trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered, or declared unless by act of operation of law, or by deed or conveyance in writing, etc.; and considering, further, that resulting trusts are abolished by statute (RS., 618, sec. 2077), as well as all other uses and trusts not authorized by statute (sec. 2071), and that a parole trust like that here asserted is not so authorized, we think it would be difficult to demonstrate that the judge ruled incorrectly. Council claim that this alleged trust is authorized by sec. 2090. That section recognizes the existence of an express trust, which is not contained or declared in the conveyance to the trustees, but it comes far short of providing that a man may convey his land by a deed absolute on its face,

and then be heard to allege a parol agreement that the grantee should hold the land in trust for him. Obviously the express trust recognized in sec. 2090 is one created or declared by some instrument in writing executed as the statute requires. Counsel also claim that the conveyance of the eighty acres to plaintiff is like a conveyance absolute on its face, but which is given only as security or indemnity. Parol evidence is admissible to show that such conveyance is a mortgage, and it is said that the same rule should apply here.

"In the *Rasdall* Case, the late Mr. Justice Paine said that he saw no distinction between the two cases, in principle, and he thought if parol evidence were admitted to show that a conveyance absolute on its face was but a mortgage, the same kind of evidence should be received to prove that conveyance in like form was in fact executed upon an express trust for the benefit of the grantor. Afterward, however, the court held, in *Plato v. Roe*, 14 Wis. 453 (the same learned justice writing the opinion), that parol evidence is admissible to prove that a deed absolute in form was given as security or indemnity, and is, therefore, a mortgage. The judgment is placed entirely upon the ground that the rule, or exception rather, had become too firmly established and too generally recognized to be disturbed by judicial decision. But the rule in *Rasdall's* case, as applied to alleged parol trusts, has not been shaken in this state." This it is submitted is highly erroneous<sup>2</sup> and works out manifest injustice but when applied further, to cases where the grantor transfers to a third person, on an oral trust for another becomes unwarrantably severe.

If A conveys land to B upon an oral trust for C, and B refuses to perform the trust, what are the rights of the parties? First as to C. In Wisconsin under the doctrine of a contract for the benefit of a third party one would expect almost anything would be possible. But it is held even where the oral trust was in pursuance of a contract by which services were rendered that C, the beneficiary cannot enforce it. (*Felz vs. Estate of Felz*, 170 Wis. 550), though if the agreement were proven, a recovery in quasi contract for the reasonable value of services could be had. (*Laughman vs. Estate of Laughman*, 165 Wis. 348). As to A the grantor, the language of the court in the case of *Borchert v. Borchert*, 132 Wis. 593, and the reasoning apply with equal force to this sort of a situation. The court there says, "It may be stated generally that when the property of a person is wrongfully

obtained by another and retained by him wrongfully either in specie or in its converted form, or to his enrichment, a cause of action to redress the wrong accrues to such person against such other, which is assignable and which survives by the rule of the common law.

A mere fraud or cheat by which one sustains a pecuniary loss is not a deprivation of the property of one to the enrichment of another and so does not give rise to a cause of action which survives by the rule of the common law, or by our statutory extension thereof, to causes of action for "damages . . . to personal estate," but a right to recover in some form on account of property wrongfully obtained and detained, or converted, survives to the personal representative of the wronged person by the rule of the common law. *Wood v. Howell*, 17 Ga., 495. That is extended to the ordinary remedies by our statute. Sec. 4253, Stats. (1898)." Though there the res was personal property. So it would seem that even here A cannot recover the land, especially if there was a voluntary conveyance.

Where, however, A devises to B upon oral trust for C—the situation is different, the devises happen either by inducing the devise or inducing the testator to refrain from changing a devise already made. (*Taylor v. Stitt*, 132 Wis. 656—128 R.A. N. S., 1087.) The element here is that the testator relies on the promise. (*Brooks v. Chappell*, 34 Wis. 405.) Here again the situation is different. In explaining this situation almost all of the courts use the same explanation suggested by Dean Ames. "It is quite possible that the Courts in giving C the benefit of the trust in cases of devises by A to B upon an oral trust for C and in refusing him any relief in cases of similar conveyances *inter vivos* were influenced by the practical consideration that in later cases the grantor, recovering his property by the principle of restitution would still be in a position to accomplish his purpose, whereas in the case of the devise the accomplishment of his purpose would depend wholly upon the will of his heir."

Now this principle is strongly open to question. The conveyance to another as well as the devise to another may be made either voluntarily upon a promise not later kept, or on a promise inducing the grantor or devisor in reliance thereon to act. It is only in the latter case that the intended beneficiary in the devise<sup>8</sup> can obtain it. In *Brooks v. Chappell*, the court says (quoting Gibson J. with approval), "Undoubtedly every part of a will must



be in writing, and a naked parol declaration of trust, in respect of land devised, is void. The trust insisted on here, however, owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee, to get at him; and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise. In *Dixon v. Olmius*, Cox's Chan. Ca, 414, a devisee who had been guilty of several acts of fraud and violence, particularly in preventing an attorney, sent for by the testator to alter his will, the party intended to have been benefited by the alteration. The question has been as to the circumstances of a decree. A mere refusal to perform the trust is undoubtedly not enough; else the statute which requires a will of land to be in writing, would be altogether inoperative; and it seems to be requisite that there should appear to have been an agency, active or passive, on the part of the devisee in procuring the devise."

Dean Ames here suggests that a distinction should be taken between non-feasance and misfeasance. He says "But the courts seem to have lost sight of the distinction between a misfeasance and a non-feasance, between a tort and a passive breach of contract. If a devisee fraudulently induces the devise to himself, intending to keep the property in disregard of his promise to the testator to convey it or to hold it for the benefit of a third person, and then refuses to recognize the claims of the third person, he is guilty of a tort, and equity may and does compel the devisee to make specific reparation for the tort by a conveyance to the intended beneficiary. If, on the other hand, the devisee has acquired the property with the intention of fulfilling his promise, but afterwards decides to break it, relying on the statutes as a defense, he commits no tort, but a purely passive breach of contract. Equity should not compel the performance of this contract at the suit of the beneficiary, because the statute forbids. But, notwithstanding this honest acquisition of the land, the devisee cannot honestly retain it, and equity should compel him to surrender it to the heir as the representative of the testator." (*Ames' lectures on Legal History*, Page 430.) In the statutory so called resulting trusts which it is submitted with deference are really constructive trusts if the title of the land is taken with knowledge of the party whose money pays the consideration there

is no relief. To summarize then, the law in Wisconsin would seem to be (excluding personal property), that where a conveyance is made to another, under a promise to hold in trust,

1. A foolish man—no relief.
2. Title taken with knowledge—no relief. (See *Frederick vs. Hoff*, 155 Wis. 196. *Richtman vs. Watson*, 150 Wis. 385.)
3. Title taken without knowledge—relief (statutory).
4. By fraud subsequent not in keeping a promise—no relief.
5. By fraud in inducing—relief (i. e. by cancellation or rescission on the part of the grantor if alive, if dead *and a devise*, a constructive trust for the benefit of intended cesty).

It is submitted that in all these cases relief should be granted by either constructive trusts where misfeasance occurs or by application of a principle of restitution in integrum where it has been non-feasance.

<sup>1</sup> See in this connection Dean Ames' article. It will be observed that his third classification does not here come in, being dealt with by Statute.

<sup>2</sup> See authorities in England, the grantor is allowed to recover on a theory of restitution *in integrum* (*Davies v. Otty*, 35 Beav. 208—*Haig v. Kaye*, L. R. 7ch. 469—*Marlborough v. Whitehead* (1894) 2ch. 133—*Dela Rochefoucauld c. Bonstead* (1897 1ch. 196)). In Canada this was allowed in (*Clark v. Eby*, 13 Grant Chan. (U. C.)). And see in Missouri the case of *Peacock v. Peacock*, 50 Mo. 256 at 261. In Massachusetts the Value of the Land is allowed to be recovered (*Cromwell v. Norton*, 193 Mass. 291—79 N. E. Rep., 433). See for a criticism of the English doctrine, *Sovett v. Taylor*, 54 N. J. Eq. 311.

<sup>3</sup> See *Brooks v. Chappell*, 34 Wis. 405 and *Tyler v. Stitt*, 132 Wis. 656.