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## The Status of the Law in Montana Where Realty Is Gratuitously Conveyed Upon an Oral Trust

If A gratuitously conveys land to B, who is not in confidential or fiduciary relation with A, upon an oral agreement that B is to hold the land in trust for A, or for C, and B, thereafter relying upon the Statute of Frauds, repudiates the agreement in a transaction in which there is no actual fraud, has A any remedy when the agreement is to hold the land for him, and has A, or C, a remedy when the agreement is to hold the land for C?

Prior to 1947, and the case of *Bell-Holt-McCall Co. v. Caplice et al.* (1947), . . . Mont. . . ., 175 P. (2d) 416, there was no decision in Montana on the question of whether or not a trust by operation of law would arise from a gratuitous conveyance upon parol trust, for either the grantor or a third person, in the absence of breach of confidential relationship or actual fraud in the procurement of the conveyance. And the doctrine followed in that case leaves in doubt whether the question was actually decided. There a partner, a few hours before his death, conveyed an interest in firm realty to a co-partner upon an oral agreement, ". . . as long as it is understood that Ted takes care of Viola (the grantor's wife) and the children." After the death of the grantor the co-partner deeded the interest to the wife, but she returned the deed and joined with the surviving partners in a conveyance to the plaintiff. In an action to quiet title by the plaintiff the court declared a "resulting" trust in favor of the wife and children to the extent of the interest of the deceased, stating:

"A resulting trust may arise where a conveyance is made without consideration . . . and there is no enforceable contract or agreement but it appears from the circumstances that the grantee was not intended to take beneficially . . . since a resulting trust arises by operation of law . . . oral evidence of the acts, declarations and surrounding circumstances are admissible to show that the deed absolute on its face was intended as a trust."

The statement that facts including a gratuitous conveyance and breach of a confidential relationship are circumstances giving rise to a presumption of a resulting trust is an adoption of a minority authority

that blurs the established distinction between resulting and constructive trusts, and failing clearly to decide, leaves in doubt the result that might be reached in the case of a bona fide transfer upon oral trust where the parties are not in confidential relation. For accurate consideration of the import of this line of authority, a reference to the majority English and American law on gratuitous conveyances is necessary.

In Montana, and other jurisdictions where the Statute of Frauds requires trusts to be created or evidenced by a writing, the courts hold that an oral trust in respect to land shall not be enforced as an "express" trust.<sup>1</sup> Admitting this requirement of the statute, it would appear, nevertheless, that the classical distinguishment between categories of trusts should lead to both an equitable and sound result. A trust by operation of law is provable by parol so both the resulting and constructive trusts apparently stand available as remedy.<sup>2</sup> By the weight of authority in the United States, however, where the parties do not stand in confidential relationship and the grantee repudiates the oral agreement in a transaction in which there is no actual fraud, there is no trust remedy for transferee or a third person and the transferee may keep the property for himself.<sup>3</sup> This result, and the unnecessary hardship it creates, has its explanation in history.

As pointed out by modern text-writers,<sup>4</sup> during the period prior the Statute of Uses, the use presumed on a gratuitous conveyance was the most common one resulting in form; the device of enfeoffing land to another in avoidance of the burdensome incidents of feudalism was only too well known in the law. This commonly recognized motive, then, provided sound predicate on which to base a presumption that the grantor intended a resulting use, rather than a gift, and under the then existing law, the grantor, on proof of a conveyance without consideration, estab-

<sup>1</sup>Hunton v. Lloyd (1888) 7 Mont. 365, 16 P. 573; Chowen v. Phelps 1902) 26 Mont. 524, 69 P. 54; Goodell v. Sanford (1904) 31 Mont. 163, 77 P. 522; Lynch v. Herrig (1905) 32 Mont. 267, 80 P. 240; McLaughlin v. Corcoran (1937) 104 Mont. 590, 69 P. (2d) 597.

<sup>2</sup>R.C.M. 1935, §6784; Eisenberg v. Goldsmith (1911) 42 Mont. 563, 113 P. 1127; Wilson v. Wilson (1922) 64 Mont. 533, 210 P. 896; Feeley v. Feeley (1924) 72 Mont. 84, 231 P. 908; First State Bank of Philipsburg v. Mussigbrod (1928) 83 Mont. 68, 271 P. 695; Stauffacher v. Great Falls Public Service Co. (1935) 99 Mont. 342, 43 P. (2d) 647; State ex rel. Gallatin County High School v. Brandenburg (1938) 107 Mont. 199, 82 P. (2d) 593; Bell-Holt-McCall Co. v. Caplice et al. (1947) .....Mont....., 175 P. (2d) 416.

<sup>3</sup>35 A.L.R. 280, (1925); Mont. & P. Dig. §96.

<sup>4</sup>1 SCOTT, TRUSTS (1st ed. 1939) §64, p. 246; 2 BOGERT, TRUSTS (1st ed. 1935) §453, p. 1351.

lished a prima facie resulting use in his favor. The Statute of Uses, in 1535, by executing the use and transforming it into a vested legal estate in the feoffor, rendered nugatory such enfeoffment and eliminated the factual basis for the presumption. Nevertheless, the presumption persisted in the English law. Even after the enactment of the Statute of Frauds in 1676, since uses arising by the implication or construction of law were expressly excepted from the required writing, parol evidence was admissible to show that the conveyance was gratuitous and a resulting use presumptively arose. The rule was not, however, carried over into the American law. Though the English law of equity found its way here during colonial times, the American courts, recognizing that the reason upon which the presumption was based had ceased to exist, never applied the doctrine. Conversely, the modern American rule is that a gratuitous conveyance gives rise to a presumption of gift, in that a recital of consideration in the deed is sufficient to rebut the presumption of a resulting trust.<sup>5</sup> If the conveyance is accompanied by an oral agreement to hold the property in trust, the Statute of Frauds prevents enforcement of the agreement as an express trust.

So, too, by the weight of authority, when the grantee who repudiates the agreement does not stand in confidential relation to the grantor, there is no remedy by way of a constructive trust.<sup>6</sup> A constructive trust will arise where property is acquired through fraud, duress, undue influence or mistake, wrongful disposition of another's property, and violation of a confidential relationship or fiduciary duty.<sup>7</sup> But the American majority limits the grounds for a constructive trust to these established situations. So, if in any of these circumstances an interest in land is involved, evidence of parol agreements is admissible, notwithstanding the Statute of Frauds, to show that the land was so acquired; the law, thereon, basing a constructive trust. But in the absence of any of the above enumerated circumstances, no basis for a constructive trust is deemed to exist, and the Statute of Frauds prevents enforcement of the oral agreement as an express trust.

By the English majority view the constructive trust arising on breach of the oral agreement gives the grantor a right to restitution, and the

<sup>5</sup>35 A.L.R. 280, (1925); Mont. & P. Dig. §§63, 88.

<sup>6</sup>Eisenberg v. Goldsmith (1911) 42 Mont. 563, 113 P. 1127; Roecher v. Story (1931) 91 Mont. 28, 5 P. (2d) 205.

<sup>7</sup>Huffine v. Lincoln (1916) 52 Mont. 585, 160 P. 820; Lewis v. Lindley (1897) 19 Mont. 422, 48 P. 765; Golden Rod Mining Co. v. Bukvich (1939) 108 Mont. 569, 92 P. (2d) 316.

principle of restitution is applied where the agreement is to hold the land for a third party as well as for the grantor. The fundamental basis for raising a constructive trust is prevention of unjust enrichment to the grantee, and parol evidence is admitted to show unjust enrichment independent of circumstances respecting the procurement of the conveyance or the relationship of the parties. If, therefore, a grantee, relying upon the Statute of Frauds repudiates a promise to hold the land for either the grantor or a third party, though the statute prevents carrying out the intention of the parties as such, the grantee may be compelled to restore the property to the grantor, parol proof of unjust enrichment being admissible even if the parties to the conveyance do not stand in confidential relation.<sup>8</sup>

Proceeding without inquiry into the merits of the foregoing authorities, what is the position of *Bell-Holt-McCall Co. v. Caplice, et al.* and the cases it cites?<sup>9</sup> The doctrine, briefly stated, is that a gratuitous conveyance upon an oral trust are facts and circumstances giving rise to a presumption of a resulting trust, and it comprises the bulk of authority normally considered as American minority in accord with the English rule.<sup>10</sup> But is this the position in fact? An examination of the decisions leads rather to a theoretical dilemma. To begin with, although the cases place no particular reliance upon the fact, a confidential relationship is found in all of them. The decisions do not, therefore, extend the remedy of a constructive trust to a situation in the absence of a confidential relationship, which, from the standpoint of constructive trusts at least, is significant of the English view. On the other hand, in addition to statements in terms of the resulting trust doctrine, there is other language in the cases indicating that the courts intended a resulting trust.<sup>11</sup> So, in reliance on the language generally, argument could be made that the cases raise a resulting trust. But, as against this argument, immediate contention must be made that the courts could not have meant that a presumption of resulting trust might in some way arise from a gratuitous conveyance—a doctrine non-existent since the Statute of Uses. A more accurate state-

<sup>8</sup>*Davies v. Otty* (1865) 35 Beav. 208; *In re Duke of Marlborough* (1894) 2 Ch. 133; *Clark v. Eby* (1867) Grant Ch. 371.

<sup>9</sup>*Gray et al. v. Beard* (1913) 66 Or. 59, 133 P. 791; *Tolon v. Johnson* (1924) 104 Okla. 201, 230 P. 865.

<sup>10</sup> SCOTT, TRUSTS (1st ed. 1939) §44, p. 248. ". . . a number of American cases which seem to follow the English view."

<sup>11</sup>*Tolon v. Johnson* (1924) 104 Okla. 201, 230 P. 865. ". . . But we cannot agree with counsel that because plaintiffs pleaded the confidential relations of the parties and an oral agreement . . . would prevent the creation of a resulting trust."

ment would therefore seem to be that the decisions stated the resulting trust doctrine, but only in respect to facts that should have given rise to a constructive trust, and granted relief only where the majority would by way of a constructive trust, and intended nothing more than a trust by operation of law.

Particularly in regard to the *Caplice* case would this appear to be true. The court in declaring a trust for the wife and children extended the remedy to third persons, a holding in juxtaposition with the English cases where the property is restored to the grantor. It was the dissenting opinion, rather, in contending the partnership interest should be restored to the deceased estate and distributed under the Montana statute on intestate succession, that was in accord with the English view. Furthermore, the court in no way purported that a new question was there presented for decision, because the fiduciary duty of partners has been recognized in Montana<sup>12</sup> and in earlier Montana cases involving the breach of a confidential relationship the majority constructive trust theory was applied.<sup>13</sup>

It is therefore submitted that whether or not a breach of the oral agreement will raise a constructive trust, in absence of a confidential relationship, remains an undecided question in Montana. But the doctrine of the *Caplice* case, for the reason that it places no emphasis upon the presence of such a relationship, provides indication that the court will, on being presented the question, raise a constructive trust for the grantor, or for a third person, dependent upon the intention expressed in the agreement.

In raising a trust for a third person, where that is the agreement, the majority opinion in the *Caplice* case seems unsound. And so far as the case may indicate that the Montana court will hold similarly in a case without a confidential relationship the same can be said. Although there is case authority and text opinion supporting both the English doctrine of restoration,<sup>14</sup> and the result in the *Caplice* case,<sup>15</sup> to raise a trust by operation of law for a third party seems a clear violation of the Statute of Frauds. The third person, due to the statute, could not enforce the agreement at the time it was made. And having given nothing there would

<sup>12</sup>Wilson v. Wilson (1922) 64 Mont. 533, 210 P. 896.

<sup>13</sup>Hufine v. Lincoln (1916) 52 Mont. 585, 160 P. 820.

<sup>14</sup>AMES, LECTURES ON LEGAL HISTORY (1913) p. 429; Peacock v. Nelson (1872) 50 Mo. 256, .....P.....

<sup>15</sup>Costigan, **Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantee**, 12 MICH. L. REV. 423 (1914); Stiefvater v. Stiefvater (1932) 246 Ky. 646, 53 S.W. (2d) 926.

be no enrichment at his expense if the grantee were allowed to keep the property. So, after a default by the grantee, to raise a trust for a third person seems but enforcing the oral agreement. The situation is different where the agreement is to hold for the grantor. The unjust enrichment, if the grantee were permitted to retain the property, is at the expense of the grantor, and a constructive trust can be raised on that basis, a ground separate and distinct from mere enforcement of the agreement.<sup>16</sup>

But to the extent that the doctrine of the *Caplice* case may provide argument for a constructive trust based on the English view, it represents a desirable development in the Montana law. Where the parties to the conveyance do not stand in confidential relation, the hardship created by the American majority rule is obvious. The basis of the constructive trust is unjust enrichment. It is not imposed because of the intention of the parties,<sup>17</sup> but for the purpose of preventing the unjust enrichment accruing to the grantee if he were permitted to retain the property.<sup>18</sup> And unjust enrichment is a constant factor, be it the reward of a rule of law or the fruit of confidence. The benefit, title to the grantor's land, is the same in both cases. Yet the weight of authority insists otherwise and the rule recognizes the unjust enrichment arising on disloyalty of an agent but ignores it on the breach of a promise by a friend or neighbor.

The root of the majority theory, of course, is the Statute of Frauds. It is considered that to accept proof of the parol trust in absence of any of the established grounds for a constructive trust would in effect be enforcing the agreement in violation of the statute. But when it is remembered that unjust enrichment is not dependent for its existence upon the relationship of the parties, the theory becomes mere verbal distinction. The leading text writers agree that unjust enrichment alone should be sufficient ground for a constructive trust.<sup>19</sup> And in substantiation of this proposition it can be illustrated that the cases under the American majority are inconsistent with the law in other analogous situations. Where a conveyance of land is made upon an oral agreement that the deed is to operate as security for a loan and the grantee is to reconvey on payment of the debt, parol evidence is admissible to show that the deed absolute on its face is in fact a mortgage, and upon a refusal to reconvey, equity

<sup>16</sup> SCOTTS, TRUSTS (1st ed. 1939) §45, p. 265.

<sup>17</sup>Meagher v. Harrington (1927) 78 Mont. 457, 254 P. 432.

<sup>18</sup>The American Law Institute in recognition of this proposition includes the constructive trust in the RESTATEMENT, RESTITUTION.

<sup>19</sup> SCOTT, TRUSTS (1st ed. 1939) §44, p. 251; 3 BOGERT, TRUSTS (1st ed. 1935) §497, p. 219.

will raise a constructive trust for the benefit of the grantor.<sup>20</sup> Also if B orally promises to protect A's property by buying it in at a foreclosure sale and to hold the property for A, and subsequent to judicial sale B refuses to perform, parol proof of the agreement is admissible for the purpose of raising a constructive trust.<sup>21</sup> Furthermore, from the standpoint of the Statute of Frauds, there should be greater objection to the proof of an oral mortgage or agreement in conjunction with a judicial sale than to proof of parol trust upon a gratuitous conveyance, for the unjust enrichment is greater in the case of a gratuitous conveyance than in either the oral mortgage or judicial sale. In the former, the grantee gives nothing in exchange for the land but a promise, but in the latter he pays out of pocket by way of loan or the sale price.

It would seem therefore that the English view is the correct one. And it is for this reason that the implication involved in *Bell-Holt-McCall Co. v. Caplice et al.* is here mentioned as a commendable one. To compel a grantee, who has given nothing but a promise of trusteeship, to restore the property to the rightful owner is in every sense justified. And if that step be taken, in Montana at least, the layman ignorant of the law but unsuspecting of his neighbor will be provided equitable rescue from the web of the Statute of Frauds.

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<sup>20</sup>*Gibson v. Morris State Bank* (1914) 49 Mont. 60, 140 P. 76; *Harrington v. Butte & Superior Copper Co.* (1916) 82 Mont. 263, 157 P. 181; *Nolan v. Benninghoff* (1922) 64 Mont. 68, 208 P. 905; *Johnson v. Opheim* (1923) 67 Mont. 126, 214 P. 951; *Welch v. Thomas* (1936) 102 Mont. 591, 61 P. (2d) 404; *Lewis v. Bowman* (1942) 113 Mont. 68, 121 P. (2d) 162; *In re Days Estate* (1947) .....Mont....., 177 P. (2d) 862.

<sup>21</sup>*Largey v. Leggatt* (1904) 30 Mont. 148, 75 P. 950; *Marcellus v. Wright* (1916) 51 Mont. 559, 154 P. 714; *McKenzie v. Evans* (1934) 96 Mont. 1, 29 P. (2d) 657.