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## Constructive Trusts Arising Out of Sheriffs' Sales

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which I cannot behold, I have no reverence. I hold an honest, sensible construction of the statute, according to its true intent, to be practical wisdom, and that the spirit of justice, befitting the wants of the age, is the soundest philosophy in a system of law. I regard it as a humiliating admission of intellectual decline, and worse than weak superstition, to assume that all wisdom existed in the former common law of England, or that laws suited to the condition of a free government could only be framed by the ancient inhabitants of Britain . . . nor do I believe that it is only in the annals of past ages that we shall look for the wisdom necessary to guide us in our own. As changes are wrought in the circumstances of a people, or country, it is necessary not only that their laws themselves, but also the spirit of the laws should be accommodated."

The way to liberal statutory construction has been pointed out through the medium of reasoning by analogy from statute. It is to be hoped that it will not be ignored in the future.

ROBERT I. SHADLE

#### CONSTRUCTIVE TRUSTS ARISING OUT OF SHERIFFS' SALES

"All declarations or creations of trusts or confidences of any lands, . . ., and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, . . ., or else to be void: Provided, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law, then and in every such case such trust or confidence shall be of the like force and effect as if this act had not been passed."<sup>1</sup>

Considering judicial sale cases with reference to the prevailing general rule in Pennsylvania as to repudiation of oral express trusts of, and oral agreements to convey,<sup>2</sup> land, one would expect little relief from equity where a purchaser at a sheriff's sale agrees orally to hold in trust for, or convey to, the defendant in the execution or some third person, and then later violates his agreement. But, in any case, if it be determined that a constructive trust should be set up for the benefit of the promisee, the decision should be the same whether the Act of 1856 or the Act of 1772 be regarded as applicable to the situation.<sup>3</sup> Should a trust arise by construction or implication of law in these public sale cases? If so, what dif-

<sup>1</sup>Act of 1856, April 22, P. L. 532, section 4.

<sup>2</sup>As developed from construction of the Act of 1772, 1 Sm. L. 389, section 1 in conjunction with the fact that Pennsylvania has had, since 1857, no Statute of Frauds requiring contracts for the sale of land to be in writing.

<sup>3</sup>See Bogert: Trusts & Trustees, Vol. 3, Section 494.

ferentiates them from the ordinary breach of contract or breach of trust cases? To answer these questions is the purpose of this note.

Naturally, if the oral promise is later reduced to writing, no problem is involved. And it has been indicated that a trust will be established where the oral agreement was to be put in writing, followed by a refusal on the part of the holder of the legal title to do so.<sup>4</sup>

#### GENERAL RULE AS TO PAROL AGREEMENTS

The general rule applicable to these sheriff's sale cases may be stated comprehensively as follows. In the absence of the payment of part of the purchase money by the debtor, or some new consideration moving from him, or fraud, a mere verbal agreement by the purchaser of land at sheriff's sale to hold for the debtor's benefit, or to reconvey to him or to a member of his family, upon repayment of the purchaser's advances, is within the Statute of Frauds, raises no trust in favor of the debtor, and is unenforceable. Courts are invoked to declare the existence of a trust against a person only when he refuses to perform or recognize it; and it is evident that no case will be without the exception "if a trust, which has no legal existence under the statute, can be brought into being as within the exception, simply because such person breaks his promise to perform."<sup>5</sup>

A very recent case<sup>6</sup> illustrating the general rule involved a petition<sup>7</sup> for possession by a purchaser at sheriff's sale. The respondent averred that there was a verbal agreement with petitioner's attorney to permit the realty to be sold at sheriff's sale and to be purchased by the petitioner, with the understanding that the respondent would apply for a loan in an amount sufficient to pay the taxes, certain funeral expenses, costs, and the petitioner's judgment; whereupon, after the debts were paid, the property was to be conveyed to the respondent. There was no allegation by respondent that she actually paid any part of the purchase price, or any part of the judgment debt for which the land was sold; nor did she allege fraud in obtaining the title; nor was there any evidence tending to show that the realty was procured at a sum below its real value "by deception to covinously profit." In a not too lengthy opinion, the court adopted as its holding that of a very early case,<sup>8</sup> thereby indicating that the law of Pennsylvania on this point has been settled for many years, as follows:

"When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subse-

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<sup>4</sup>Kraft and Kimmel v. Smith, 117 Pa. 183 (but the evidence must be clear as to the provisions of the agreement).

<sup>5</sup>McCloskey v. McCloskey, 205 Pa. 491, 495.

<sup>6</sup>Irwin Savings & Trust Company v. Sanner, 123 Pa. Super. 70.

<sup>7</sup>Under the Act of April 20, 1905 P. L. 239.

<sup>8</sup>Kellum et al. v. Smith, 33 Pa. 158, 164.

quent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement."<sup>9</sup>

In other words, we gather from the above decision that in order to have a constructive trust decreed, there must be shown in addition to a verbal agreement either (1) payment of part of the purchase money, (2) fraud in obtaining title, or (3) a purchase at less than the real value by deception.

#### PAYMENT OF PART OF COSTS OR PURCHASE MONEY

The principle is well settled that equity will decree the purchaser of any realty, at a sheriff's sale or otherwise, a trustee for the use of the person who paid the purchase money; in such a case the legal title is in one, the equitable title in another, and to prevent a fraud, the fact of payment may be established by parol evidence, thereby setting up a resulting trust which arises from implication of law.<sup>10</sup> And it has been indicated in several cases that if the defendant in the execution paid *part* of the costs or expenses of the sale, this would give him an enforceable interest in the purchase of the land under a verbal promise by the purchaser to allow him to redeem on reimbursement.<sup>11</sup>

#### FRAUD IN GENERAL

"One who acquires land or other property by fraud, misrepresentation, imposition or concealment, or under any other such circumstances as to render it inequitable for him to retain the property, is in equity to be regarded as a trustee *ex maleficio* thereof for a person who suffers by reason of the fraud or other wrong, and who is equitably entitled to the property.<sup>12</sup> But the evidence necessary to establish a trust in land by fraud must be clear, explicit and unequivocal.<sup>13</sup>

<sup>9</sup>To the same effect, see: *Jackman v. Ringland*, 4 W. & S. 149, 150 (must be something more than is implied from the violation of a parol agreement); *Barnet v. Dougherty*, 32 Pa. 371; *McCloskey v. McCloskey*, 205 Pa. 491 (mere broken promise insufficient to create a trust by implication within the exception of the Act of 1856); *Bryan v. Douds*, 213 Pa. 221 (there being no fraud at the time of the purchase of the lands by defendant at sheriff's sale, his parol agreement to hold same for plaintiffs until sold, and give them the residue, was clearly a *nudum pactum*); *Lancaster Trust Company v. Long*, 220 Pa. 499 (to constitute a purchaser a trustee *ex maleficio*, the promisee must have had an interest in the land sold, or have paid the whole or a part of the purchase money; a promise so made to the defendant in the execution would not be sufficient in itself to raise a constructive trust; the initiate right of curtesy or dower is not a sufficient interest to give the husband or wife the benefit of the rule); *Jourdan v. Andrews, Trustee*, 258 Pa. 347 (evidence in support of a "trust or confidence" as to land must be clear, precise and convincing, and a mere refusal to perform an oral promise is not sufficient to raise such a status).

<sup>10</sup>*Jackman v. Ringland*, 4 W. & S. 149; *McCloskey v. McCloskey*, 205 Pa. 491; *Carson v. Painter*, 69 Pa. Super. 490; *Johnson & Johnson v. Shrawder*, 80 Pa. Super. 125; *Watkins & Miller v. Watkins et ux.*, 101 Pa. Super. 426.

<sup>11</sup>*Heath's Appeal*, 100 Pa. 1; *Kraft & Kimmel v. Smith*, 117 Pa. 183.

<sup>12</sup>65 C. J. 462; *Christy v. Sill et al.*, 95 Pa. 380.

<sup>13</sup>*Modern Baking Co. v. Orringer et al.*, 271 Pa. 152.

It is difficult from the decisions to explain the bases for the constructive trust arising in these cases, unless each case be considered on its particular facts. Once having determined what the facts are, the courts are satisfied with the statement that the purchaser's conduct amounts to a "fraud," he should be constituted a "trustee ex maleficio," or that he should be "estopped" to deny the enforceability of his promise. The conscience of the court must be moved, not to the end that the express oral agreement, if any, be specifically enforced, but rather that a fraud be prevented. The fact that the ultimate practical result may be the same in either case is a "purely accidental coincidence."<sup>14</sup> However, there are several features which we can point to upon which the courts have relied in a large number of instances as justifying a constructive trust, viz., chilling of bidding by third persons, resulting in an acquisition of the property by the promisor at a grossly inadequate price; bad faith at the time of the making of the promise; confidential or principal-agent relationship; interest other than that of the defendant in the execution, and estopped.

#### DISSUADING BIDDERS — INADEQUATE PRICE

The chilling of bidding by third persons, and the purchaser acquiring the realty at a sum below its real value, appear to be in themselves sufficient ground for setting up a trust ex maleficio. In a very early case<sup>15</sup> it was stated:

"If by artifice of the purchaser declaring he was to buy for the owner, others were prevented from bidding, and the land was sold at a great undervalue, this would make the purchaser a trustee; and parol evidence of the declaration of the purchaser is admissible; yet it should be received with great caution."

In a much later decision,<sup>16</sup> where several different factors were present making it "inequitable" for the purchaser to retain the property, the court chose to rely mainly on the chilling of bidding and the inadequacy of the price paid as the bases for a constructive trust. Part of the opinion reads:

"Under these facts, it would be manifestly unjust and inequitable to permit defendants, by deception, through which they procured plaintiff's property at a sum far below its real value, to covinously profit. They must now make good their undertaking to return it upon being paid their debt and interest. . . . So long ago as 1829<sup>17</sup> . . . the rule was laid down that 'parol evidence of declarations, made by a pur-

<sup>14</sup>Cf. *Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land*, 20 *Harvard L. R.* 549 (recognizing the fundamental difference between specific performance of an express agreement and compulsory restitution of the consideration for the agreement).

<sup>15</sup>*Peebles v. Reading*, 8 S. & R. 483 (1822).

<sup>16</sup>*Hartzell v. Whitmore et al.*, 271 Pa. 575 (1922).

<sup>17</sup>*Brown v. Dysinger*, 1 *Rawle* 407.

chaser at a sheriff's sale, that he was bidding for another, is admissible to establish a trust for the person for whom the purchaser declared he was bidding,' . . . 'To . . . allow him to hold the land under such circumstances would be supporting a breach of trust and a fraud in law'.<sup>18</sup>

#### BAD FAITH

Where transactions in relation to the purchase of land at a judicial sale have been carried on *mala fide*, a constructive trust arises by operation of law.<sup>19</sup> Although there seems to be no decision which squarely holds that a person who makes a promise not intended to be performed will be charged a trustee *ex maleficio* on the basis of this fact alone, one case clearly indicates such will be the result.<sup>20</sup> And it should be the result, under the rule that one who misrepresents the condition of his mind makes a false statement of fact and is guilty of fraud, acquiring property thereby.<sup>21</sup>

#### CONFIDENTIAL OR PRINCIPAL-AGENT RELATIONSHIP

As a general rule we can say that where one procures a title which he could not have obtained except by a confidence reposed in him and he abuses such confidence, he becomes a constructive trustee. But this is not tantamount to saying that mere acquiescence by the promisee, or omission to take other steps to obtain the property, though induced by faith in the promise, will estop the promisor from denying the trust; for it is undoubtedly true that in the case of every verbal contract, when a promise is made to buy or to hold for another, confidence is invited and more or less reposed. Any other result would reduce the Statute of Frauds to worse than waste paper.<sup>22</sup> Constructive trusts frequently grow out of confidential relationships, as the authorities indicate, although they are not essential to a trust *ex maleficio*.<sup>23</sup>

Where the purchaser at the time of the sheriff's sale is acting as general agent or as attorney for his principal or client, whether such principal or client be

<sup>18</sup>To the same effect, see: *Broad & Erie Building & Loan Association v. Bernhard et ux.*, 124 Pa. Super. 345 (citing *Hartzell v. Whitmore et al.*, supra); *Cook et al. v. Cook*, 69 Pa. 443; *Boynton v. Housler*, 73 Pa. 453; *Christy v. Sill et al.*, 95 Pa. 380, 387; *Heath's Appeal*, 100 Pa. 1; *Shaffner v. Shaffner*, 145 Pa. 163 (also on the point that evidence of the payment by the promisee of taxes subsequently assessed upon the property and for repairs, and improvements, subsequently made, tends only to establish the parol agreement as alleged, but not that there was such fraud when it was made as is requisite to create a trust *ex maleficio*).

<sup>19</sup>*Cameron v. Townsend*, 286 Pa. 393.

<sup>20</sup>*Beegle v. Wentz*, 55 Pa. 369 (the court here stated that equity will not permit one to deprive another of a title he actually has, "by such a promise not intended to be performed." Here the promisee was entitled to a \$300 exemption which he waived in consideration of the oral promise, the land apparently not being worth more than that amount).

<sup>21</sup>See *Bogert: Trusts & Trustees*, Vol. 3, Section 494; also *Restatement of the Law of Torts*, Section 530.

<sup>22</sup>*Kellum et al. v. Smith*, 33 Pa. 158, 165.

<sup>23</sup>*Christy v. Sill et al.*, 95 Pa. 380, 387.

the defendant in the execution or some third person, he will be constituted a trustee ex maleficio if he uses the confidential relationship existing to his own advantage and to the prejudice of the one whose interests should be his sole concern.<sup>24</sup>

INTEREST—OTHER THAN THAT OF THE DEFENDANT IN THE  
EXECUTION. ESTOPPEL.

The decisions make a distinction with reference to interest in the land sold between that interest possessed by the defendant in the execution, and interests held by persons other than the defendant. The rule, recognizing this distinction, is that "where one having any interest (except the defendant in the execution) is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter is such a fraud as will convert the purchaser into a trustee ex maleficio."<sup>25</sup> This rule applies where the promisee has a bona fide claim, whether valid or not, to the particular land in question.

In *Cowperthwaite et al. v. First National Bank of Carbondale*, 102 Pa. 397, the court, admitting that if the promisee had been a mere stranger to the title<sup>26</sup> no trust would have arisen, because of the Statute of Frauds, charged the promisor as a trustee ex maleficio on the basis that the promisee had an interest in the land sold, since she, as wife of the defendant in the execution, had paid a portion of the purchase money therefor. In addition, as is true in most of these cases, the considerations of chilling of bidding and purchase at an inadequate price were present.

Where the promisee having an interest is one other than the defendant in the execution, the governing rule, *supra*, according to the Pennsylvania decisions, seems to be an application of Section 90 of the Restatement of the Law of Contracts which provides as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is

<sup>24</sup>*Faust v. Haas*, 73 Pa. 295 (where an attorney for the debtor agrees to and does have property struck down to himself for the benefit of the debtor, and title is taken by another by direction of the purchaser, such person taking title holds under and subject to the agreement between the debtor and attorney to reconvey to the debtor upon reimbursement; "he stands in a confidential relation to the debtor, and is guilty of a breach of good faith in claiming to hold the property as his own."); *Gates v. Keichline*, 282 Pa. 584 (purchaser acting generally as agent for promisee's affairs); *Kennedy v. McCloskey*, 170 Pa. 354 (agreement among creditors whereby one refrains from bidding). See Restatement of the Law of Restitution, Section 194.

<sup>25</sup>*Wolford et ux. v. Herrington*, 86 Pa. 39 (overruling a dictum in *Wolford v. Herrington*, 74 Pa. 311, that the promisor would have been a trustee for the wife of the defendant in the execution as promisee even if she had no interest. Note, however, that by reason of the verbal agreement in this case, certain persons refrained from bidding and the property was acquired at an undervalue.

<sup>26</sup>And this would be true in the case of a wife who had only a prospective dower interest in land of her husband, the latter being defendant in the execution.

binding if injustice can be avoided only by enforcement of the promise." In *Cameron v. Townsend*, 286 Pa. 393, it was held that where one promised another prior to a judicial sale that he would purchase the realty in question for the other's benefit, and such other was led thereby to refrain from attempting to protect his own interest, "and otherwise acted on the faith of the promise,"<sup>27</sup> the promisor was "estopped" from repudiating his obligation to hold the property for the benefit of the promisee.<sup>28</sup>

#### RESTATEMENT VIEW

"Where the owner of an interest in land which is about to be sold to satisfy a claim refrains from preventing the sale or otherwise protecting his interest, because of an oral promise of another to buy in the interest and reconvey it to the owner, and the agreement is unenforceable because of the Statute of Frauds, and the other buys in the interest and refuses to perform his promise, he holds it upon a constructive trust for the owner."<sup>29</sup>

It is submitted that Pennsylvania is not in accord with this view. Something more than is implied from the violation of an oral agreement is necessary for equity to decree the purchaser-promisor a trustee, to the end that the Statute of Frauds be not rendered worthless. The query has been raised whether the court will allow the mere breach of the oral promise to go to the jury as a circumstance from which fraud on the part of the purchaser-promisor, i. e., bad faith at the time of the making of the contract, may be inferred. It is the writer's opinion that such would not be permitted, for it is practically conceded that the jury would almost invariably find the necessary "fraud." "The question of fraud cannot be submitted to the jury where there is no sufficient evidence to justify them in finding fraud."<sup>30</sup>

#### "HE WHO SEEKS EQUITY MUST DO EQUITY"

When a plaintiff comes into equity asking that a constructive trust be set up for his benefit because of defendant's fraudulent conduct and refusal to convey, under an oral agreement, he must first "do equity" by either paying or tendering payment of the amount due the promisor as reimbursement.<sup>31</sup>

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<sup>27</sup>By waiving inquisition.

<sup>28</sup>See: *Fried v. Fisher et al.*, 328 Pa. 497 (recognizing that the doctrine has been applied to various situations in Pennsylvania, including verbal agreements to purchase and hold for another at sheriff's sale). See also 86 U. of Pa. L. R. 669 where it is concluded that Pennsylvania courts have been diligent not to apply loosely the doctrine of "promissory estoppel." Query: Is Section 90 of the Restatement of the Law of Contracts applicable to the situation under discussion? Does it not deal only with the problem of consideration?

<sup>29</sup>Restatement of the Law of Restitution, Section 181.

<sup>30</sup>*Morton v. Weaver*, 99 Pa. 47.

<sup>31</sup>*Phillips v. Hull*, 101 Pa. 567, 572; *Broad & Erie Building & Loan Association v. Bernhard et ux.*, 124 Pa. Super. 345, 349.

## STATUTE OF LIMITATIONS

Where there are wrongs, as in these cases, to be redressed, they should be redressed without unreasonable delay. People who have certain interests and desire them to be declared legal rights should take prompt measures to bring such interests before the proper tribunals. The recognition of possible uncertainties arising as to titles to land by reason of delay gave rise to a statutory provision that no action shall be maintained to enforce any implied or resulting trust as to realty except within five years after such trust or equity accrued, provided that as to anyone affected with a trust by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same.<sup>32</sup>

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<sup>32</sup>Act of April 22, 1856, P. L. 532, Section 6; *Johnson et al. v. Hobensack*, 318 Pa. 305.