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PAROL EXTINGUISHMENT OF EXPRESS TRUSTS IN LAND IN PENNSYLVANIA

A *cestui* whose interest under the trust is transferable may extinguish the trust by transferring (surrendering) his interest to the trustee. In the absence of statutory provision this surrender may be by parol.

It would seem that neither the provisions of the Act of 1772¹ regarding conveyances of legal estates in land nor the Act of 1856,² which requires a writing for trust creation and conveyance of equitable interests but which makes no reference to surrender of the *cestui's* interest, would require that extinction by way of surrender from *cestui* to trustee should be formal. The policy of the statutes, however, would seem to be as much applicable to surrenders as to creations and transfers of legal or equitable interests and the question which arises is that of the applicability of these statutes as interpreted by our courts to a surrender of the *cestui's* interest.³

Views of Other Jurisdictions

A brief examination of the general thought on this issue will serve as an introduction to the Pennsylvania treatment. The attitude of the writers who have considered this question and that of the majority of jurisdictions is that, if an express trust of land is once validly created, the Statute of Frauds prevents its extinguishment by oral surrender by the *cestui que trust* to the trustee.⁴ The reasoning which gives rise to the rule takes several forms.

Perhaps the explanation most generally used is that a surrender, although technically operating to extinguish the equitable interest rather than to give the trustee an equitable interest, is in substance equivalent to an assignment by the *cestui* of his interest and clauses relating to assignment of the equitable interest are applicable.⁵ The Restatement of Trusts takes this position in the following language:

"To the extent that a conveyance of his interest by a beneficiary to a third person would not be effective because of failure to comply with the

¹ Act of March 21, 1772, 1 Sm. L. 389, Pa. Stat. Ann. (Purdon, 1930) tit. 33, Sec. 1. "All leases, estates, interests of free-hold or term of years, or any uncertain interest of, made or created by livery and seisen only, or in parol, and not put in writing shall have the force and effect of leases or estates at will only. . . . and moreover, that no leases, estates or interests, either in freehold or terms of years, or any uncertain interest shall be assigned, granted or surrendered, unless it be in writing."

² Act of April 22, 1856, PL 532, §4, Pa. Stat. Ann. tit. 33, Sec 2. "All declarations or creations of trusts or confidences of any lands and all grants and assignments thereof, shall be manifested by a writing. . . . Provided that where any conveyances shall be made of any lands or tenements by which a trust or confidence shall arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of like force and effect as if this act had not been passed."

³ See 4 Bogert, TRUSTS AND TRUSTEES, §1001 p. 488 (1935).

⁴ See Scott, "Parol Extinguishment of Trusts in Land", 42 Harv. L. Rev. 849. (1929); 106 A.L.R. 1313. "Applicability of Statute of Frauds to Contracts to Surrender, Rescind or Abandon Trusts."

⁵ Darling v. Butler, 45 Fed. 332 (1891), Tynan v. Warren, 53 N. J. Eq. 313, 31 A. 596 (1895).

requirements of the Statute of Frauds, a conveyance by the beneficiary to the trustee is likewise ineffective. Thus, if by statute it is provided that all grants and assignments of any trust of land shall be in writing signed by parties or assigning the same, an oral conveyance by the beneficiary of his beneficial interest to the trustee is ineffective.⁶

Another view is that in a statute not expressly providing that a surrender should be in writing, a section which expressly dispenses with the necessity for a writing where a trust of land is extinguished by operation of law implies that a trust of land cannot be extinguished by the act of the *cestui* without a writing.⁷ Other courts briefly state that since the beneficiary's equitable title rested upon a written instrument, to hold that it could be destroyed by a parol agreement would do violence to the spirit and letter of the Statute of Frauds.⁸ Whatever the reasoning may be, there is little doubt as to the rule.

Pennsylvania Cases

An examination of the Pennsylvania cases reveals an infrequent treatment of the question. If there is no disagreement with the holdings of other jurisdictions, *supra*, there is certainly a lack of clear authority. It should be pointed out that all the cases dealt with arose where the relief sought was enforcement of the trust by the beneficiary and proof of the oral surrender was interposed as a defense. It is important to keep this in mind in deciding what the cases reflect as the Pennsylvania attitude toward the validity of an oral surrender generally. It must also be noted here that no attempt is made to discuss those cases where the interest of the *cestui* arises other than under an express trust⁹.

In *Dayton v. Newman*,¹⁰ land was conveyed to be held for the benefit of three sisters of the grantee. In an action of ejectment brought by the *cestuis*, the court held that it was competent for the trustee to prove by parol that the girls had elected to accept stipulated sums of money instead of the land and that the agreements had been executed. The court said:

"An equity under written articles may be released by parol: *Boyce v. McCulloch*, 3 W & S 429. If, after being educated and supported by the proceeds of the land until they were married, they then chose to take a sum of money of their brother's instead of compelling him to convey their portion of the land, *and the arrangement was consummated*, it extinguished their equities and left them without an iota of interest in the land. And such an election may be proved by parol." (Italics added.)

⁶ Restatement, Trusts §343 j.

⁷ See 3 Scott, Trusts, §343.1 p. 1887.

⁸ *Coleman v. Coleman*, 48 Ariz. 337, 61 P. 2d 441 (1936).

⁹ See, *Hatcher c. Hatcher*, 264 Pa. 105, 107 A. 660 (1919) (oral surrender by *cestui* of constructive trust); *Boyce v. McCulloch*, 3 Watts and S. (Pa.) 429, 39 Am. Dec. 35, (1842) (oral rescission of contract for sale of land); *Kline's Appeal*, 39 Pa. 463 (1861) (surrender by *cestui* of resulting trust).

¹⁰ 19 Pa. 194 (1852).

It must be observed that this case was decided prior to the enactment of the Act of 1856 requiring creations and assignments of trusts to be in writing. Despite the absence of reference, it is reasonable to assume that Chief Justice Gibson's holding in *Murphy v. Hubert*¹¹ that a trust estate may be created by parol may have influenced this court in its decision that a trust estate could be extinguished in a like manner. Attention is also called, for the purposes of subsequent discussion, to the emphasis given in the case to the fact that the purchase price had been paid and the agreement consummated.

An opposite conclusion was reached in *Spencer and Newbold's Appeal*.¹² Here land was devised to Spencer and Newbold to hold in undivided twelfths for the use and benefit of themselves and others. A *cestui*, one Smith, sold his share to Newbold who paid purchase money, but Smith never gave a deed. In a subsequent action by the heirs of Smith, it was held that the sale was invalid. The language used indicated that the court did not distinguish between surrender by the *cestui* of his equitable interest and the conveyance of a legal interest, but held that the Statute of Frauds was applicable to both. And payment of the purchase price alone was held not sufficient to take the case out of the statute.

The decision of the court in *Magen v. Neiman*¹³ is the most recent treatment of the question by our courts. Here Neiman executed a written declaration of trust for the benefit of Magen, in realty purchased with partnership funds. Subsequently with full knowledge of a deed of the land by Neiman to an innocent purchaser, which he had passively permitted, Magen orally surrendered his interest to Neiman for a fixed consideration, part of which was paid. The court held that the land was partnership assets and therefore personalty and that the oral surrender was effective to deprive the *cestui* of any interest in the land or its proceeds in the hands of the partner-grantor.

Although holding that the decision would not have been different had the interest been in realty instead of personalty, the court gave an unequivocal statement of the general rule. The language of Sadler, J. is as follows:

"Assuming that we are dealing with realty, rather than a personal interest in a partnership, we are still of the opinion that the waiver and surrender of Magen's claim was properly proven. It may be conceded that equitable interests in land can be conveyed only in writing; *Murphy v. Hubert*, 7 Pa. 420, (1847) but they may be given up if some unequivocal act, showing such purpose appears, as by performance in whole or in part: *Brownfield Ex'rs v. Brownfield*, 151 Pa. 565 (1892). The power to surrender has been recognized where executory contracts to convey are involved; *Boyce v. McCulloch*, 3 W & S 429 (1842), and the same position has been reached where no possession had been taken by the one acquiring an equitable interest: *Dayton v. Newman*, 19 Pa. 194 (1851); *Garver v. McNulty*, 39 Pa. 473.

¹¹ 7 Pa. 420 (1847).

¹² 80 Pa. 317 (1876).

¹³ 301 Pa. 164, 151 A. 796 (1930).

Appellant suggests that the rights of Magen could have been released had the original writing been returned but this naturally would not have occurred until the balance had been paid. Here, testimony showed an agreement to release, two payments on account, the known sale of the property to an innocent third party without claim of any right therein, and no assertion of any interest until more than a year thereafter. As said in *Brownfield's Ex'rs v. Brownfield*,¹⁴ "Where a contract may be surrendered by parol, the conduct of the parties may be quite as significant of their intentions as any words they might use." *A distinction is to be drawn between a waiver and discharge of an interest in land, shown by a contract of sale, or, as in this case, a holding of an interest therein for another, and a repurchase. In the latter case a writing is required to satisfy the Statute of Frauds.* Where, however, the cestui has never had possession and accepted, in whole or in part, the consideration for a surrender of his rights, he cannot thereafter claim specific performance of his agreement, as here attempted: *Grove v. Donaldson*, 15 Pa. 128."

Conclusion

It is the opinion of this writer that this survey reveals that Pennsylvania is in accord with the general proposition that a surrender of his interest by the *cestui* of an express trust in land must be in writing and in further accord with the general qualification that where has been some performance by the trustee regarding the oral surrender, or where his position has been changed as a result of it, the surrender is effective irrespective of the requirements of the Statute of Frauds. Paraphrasing the words of Lord Hardwicke in *Bell v. Howard*; 19 Mod. 362, it is suggested that the attitude of the Pennsylvania courts is that although such an interest cannot be parted with or waived by naked parol, without a writing, the conduct of the *cestui* may be such, or the trustee may so act in reliance upon the surrender, that if the *cestui* comes into equity to enforce the trust, the parol waiver would rebut the equity which he before had and prevent his relief.

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¹⁴ 151 Pa. 565, 25 A. 92 (1892).