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**EFFECT OF PERFORMANCE OF PAROL TRUST OF
LAND UPON CREDITORS OF TRUSTEE**

*Jacobs v. Schwartz, et al.*¹

By deed dated June 6, 1927, A, a widower, conveyed two lots in fee to B, who immediately reconveyed to A for life with remainder to A's five children, C, D, E, F and G, who orally agreed that they would reconvey their interests to A at his request. In 1929, A advised C, D, E, F, and G that he needed money, and they joined with him in a mortgage for \$5,000, all of which went to him; and, on September 17, 1932, they reconveyed the properties to A, as alleged "at his request". By a series of subsequent conveyances,² the title in fee came to the present plaintiff who, in October 1939, agreed in writing to sell one of the properties to X. It then was discovered that on December 17, 1930, while the title to a one-fifth interest in remainder was in C, a decree *in personam*, on a mortgage foreclosure of another property, had been obtained by the Y Building Association against C, which decree, about the same time, was entered to the use of the present defendant, S, for consideration paid by him. On January 16, 1940, the defendant caused an execution to be issued and levied on the two properties in question. The plaintiff brought the present bill against defendant, S, and the sheriff, to enjoin the sale and quiet the title, which bill after answer and hearing was dismissed. The plaintiff appealed. The Court of Appeals affirmed the lower court.

In a very brief opinion, the Court of Appeals states the contention of the plaintiff to be that "while the deed of 1927 is absolute in form, subject to the life estate of Louis Jacobs,³ it was really in trust because it was under-

¹ 179 Md. 605, 20 A. (2d) 489 (1941).

² On September 26, 1932, A again conveyed through a straw man to himself for life with remainder in a group of six, only one of whom (G) was in the former group. On February 19, 1938, A died. On September 5, 1939, the grantees of the deed of September 26, 1932, conveyed the lots in question to the present plaintiff.

³ Louis Jacobs corresponds to "A" in this note's condensation of the facts.

stood and agreed between the grantees and their father that, if and when requested by him, they would reconvey the property to him, and that, therefore, an after acquired judgment would not be a lien on the property in his lifetime".⁴ After acknowledging the existence in fact of such oral agreement, its recognition by the parties in the 1929 mortgage, and its subsequent performance by the reconveyance of September 17, 1932, the opinion emphasizes that there was neither a resulting trust nor constructive trust present. (This position would seem to have been too clear for argument under the earlier Maryland cases and general law elsewhere, but likewise does not seem very material to the decision of the instant case where the alleged express trust was clearly admitted and subsequently performed prior to any reliance on rights under it.⁵) The opinion next states: "There are decisions to the effect that a parol trust becomes valid when confessed by the trustee . . .".⁶ (This principle, clearly established as against a judgment creditor of the trustee by the first Pennsylvania case cited by the opinion,⁷ should have determined the

* This position of the plaintiff would be more clearly and completely stated if it drove home the point that the judgment would not be a lien taking precedence over the rights of the beneficiary of the oral agreement if that oral agreement is performed by the trustee (as was the case here) or if it becomes enforceable by being subsequently reduced to writing.

⁵ However, certain constructive trust cases could be relevant by analogy. If, as seems to be law, the Court would be willing to recognize that the beneficiary of the average constructive or resulting trust prevails over personal creditors of the trustee of such trust, there is little reason why the cestui of a subsequently performed parol trust should not prevail over creditors of the trustee of such trust, except where they issued credits in express reliance on the trustee's absolute ownership under conditions raising an estoppel in their favor. The cases generally have treated the two types of cestuis as being in the same position. See *infra*, notes 7, 11, 12. To the extent this is accepted as valid, Maryland cases cited *infra*, n. 17, would be contrary to the result of the instant case.

⁶ Citing *Kaufman v. Kaufman*, 266 Pa. 270, 109 A. 640 (1920); *Metzger v. Metzger*, 338 Pa. 564, 14 A. (2d) 285, 129 A. L. R. 683 (1940).

⁷ *Ibid.* In the *Kaufman* case, parents of an infant child bought land with the infant's money and took title in their own names, agreeing orally among themselves to hold for the child. Later, they were allowed to confess this oral trust in court to defeat the claims of one of their judgment creditors who was seeking to satisfy his *prima facie* lien. The Court said:

"The statute of frauds does not prevent a trustee from honestly carrying out his parol agreements; it merely avoids the trust as his option . . .; and if he choose not to avoid it, his judgment creditor has no standing to complain . . .

"Such creditor is not protected by the recording acts, and his lien attaches merely to the defendant's interest in the land, and where, as here, the latter is a trustee with no beneficial interest, the land of the cestui que trust is not bound by the judgment."

The Court did notice the existence of a resulting trust also, but relied mainly on the above quoted doctrines of express parol trusts in avoiding a portion of Pennsylvania statute law which might have entered had reliance been placed solely on the resulting trust.

result of the instant case correctly in favor of the plaintiff-appellant.) However, without further discussion, the Court concluded its opinion with: "In our opinion the evidence here is of an express trust, proved only by oral testimony, not evidenced by writing in accordance with Section VII of the *Statute of Frauds*, 2 *Coe's Alexander's British Statutes* 690 and 695, and the decree appealed from should be affirmed."

This decision seems to be contrary to the general common law as well as to the strong inference of prior Maryland decisions, without having any reasoning directed to the point on which the divergence occurs.

The issue raised by the facts would seem to be as to whether a parol trust of land, unenforceable between the parties at its inception because of the statute of frauds, but later acknowledged properly, or performed (as was the case here) by the parol trustee, will be recognized in equity so as to defeat the rights of an intervening judgment creditor of the trustee. The development of the law has been very strong toward allowing the subsequent acknowledgment, or execution, of such parol trusts to stand against all intervening claimants resting on personal claims against the trustee, unless such claimants can show the elements of an estoppel in their reliance on the trustee's apparent ownership. As early as 1825, the English courts allowed acknowledgment of an oral trust by the trustee subsequent to an act of bankruptcy to protect the cestui against claims of the assignee in bankruptcy.⁸ The Restatement of Trusts,⁹ leading commentators,¹⁰ and apparently the majority of American cases,¹¹ refuse to allow intervening creditors of the trustee to claim against his performance or acknowledgment of his oral trust in the absence of an estoppel working in their favor. This doctrine

⁸ *Gardner v. Rowe*, 2 Sim. & St. 346, 57 Eng. Rep. 378 (1825), aff'd 5 Russ. 258 (1828). To same effect, see: *In re Holland*, 2 Ch. 360 (1902); *In re Davies*, 3 K. B. 628 (1921); *Bryant v. Klatt*, 2 Fed. (2d) 167 (S. D. N. Y. 1924). Compare the provision inserted in the Bankruptcy Act 1938, Sec. 70c, 11 U. S. C. A., Sec. 110c.

⁹ Sec. 41d, 42g, 43, 308c. And see Maryland Annotations thereto.

¹⁰ I SCOTT ON TRUSTS (1939) 240-245; BOGERT, HORNBOOK ON TRUSTS (2nd Ed. 1942) 85; I BOGERT ON TRUSTS (1935) Sec. 69.

¹¹ *Morgan v. Morgan*, 252 Fed. 719 (C. C. A. 2d, 1918); *Kingsbury v. Christy*, 21 Ariz. 559, 192 Pac. 1114 (1920); *Smith v. Ellison*, 80 Ark. 447, 97 S. W. 666 (1906); *Brown v. Lunt*, 37 Me. 423 (1854); *Bailey v. Wood*, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913 A. 950 (1912); *Ferguson v. Winchester Trust Co.*, 267 Mass. 397, 166 N. E. 709, 64 A. L. R. 573 (1929); and others, see note (1929) 64 A. L. R. 576, also, n. 11, *infra*.

Some cases do protect creditors on grounds of estoppel: *Bryant v. Klatt*, 2 F. (2d) 167 (1924); *Pierce v. Hower*, 142 Ind. 626, 42 N. E. 223 (1895); 2 SCOTT ON TRUSTS (1939) 1704.

has worked against judgment creditors as well as general creditors of the trustee.¹²

Maryland law, prior to the decision of this case, could be said to have pointed toward a result in accord with this weight of authority. The case of *Wilmer v. Dunn*¹³ has been cited by leading commentators as in accord with the weight of authority on the exact point here involved. In that case two sons had paid for leasehold property through a building association and had had the deed put in their mother's name. The mother told the father that she was going to convey the property to him, and that he was to deed it over to his two sons, as they had paid for it, giving as a reason that if she left it away from her husband, people might think that friction had existed between them. The wife's deed to her husband was executed on January 8th. The wife died on January 9th, a Sunday. Her conveyance was put on record January 10th. And, on January 11th, the father's conveyance to the sons was put on record. Under the circumstances the court dismissed a bill filed by certain of the father's judgment creditors to have the deed to the sons set aside. On its facts, this case has present the aspects of a resulting purchase money trust for the sons as well as the oral promise of the father and mother to hold for the sons.¹⁴ Accordingly, it is not exact authority on the point of the instant decision. However, the opinion in *Wilmer v. Dunn* does not emphasize the purchase money aspect as much as that of the fully executed parol trust, relying heavily on language from the earlier case of *Collins v. Collins*,¹⁵ which language clearly recognized the validity of a parol trust subsequently performed by the trustee.

In the *Collins* case, on a bill brought by a widow to have a deed set aside as being in fraud of her marital rights, the Court refused to sustain a deed made by her husband, Michael, on the eve of their marriage which he claimed to have made in pursuance of a prior oral understanding with his grantor. The Court said: "We will con-

¹² *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386 (1885); *Hurt v. Drew*, 122 Kan. 357, 252 Pac. 249 (1927); *Groff v. State Bank*, 50 Minn. 234, 52 N. W. 651, 36 Am. St. Rep. 640 (1892); *Siemon v. Schurek*, 29 N. Y. 598 (1864), affg. 33 Bart. 9 (1859); *Arnston v. First National Bank of Sheldon*, 36 N. D. 408, 167 N. W. 760, L. R. A. 1918F 1038 (1918); and others (see footnotes to *SCOTT* and to *BOGERT op. cit. supra*, n. 9; also, *SCOTT, CASES ON TRUSTS* (2d Ed. 1931) 186. *Contra*, *Connor v. Follansbee*, 59 N. H. 124 (1879); *Dewey v. Dewey*, 35 Vt. 555, 560 (1863).

¹³ 133 Md. 354, 105 A. 319 (1918).

¹⁴ *Cf. Kaufman v. Kaufman, supra*, n. 6.

¹⁵ 98 Md. 473, 57 A. 579 (1904).

sider first therefore what interest Michael had in this property. It may be conceded that if Michael accepted this conveyance from his brother upon the verbal understanding above set forth, then the conveyance by him to the appellants would be regarded as made in performance of such agreement, and would be upheld in equity as not affected by the statute of frauds.¹⁶ . . . But such a trust must be clearly established and the proof in this case falls far short of what is required."

While the facts of *Wilmer v. Dunn* and the language of *Collins v. Collins* do not parallel exactly the situation of the instant case, they (along with other Maryland cases)¹⁷ point toward a decision of the instant case in accord with the accepted weight of authority elsewhere. Accordingly, the instant opinion would have been more helpful had it explained the general law on the exact point involved and offered argument as to why it arrives at a result contrary thereto.

¹⁶ Italics supplied.

¹⁷ Many other earlier Maryland cases contain language supporting the right of the cestui que trust of a secret trust (even of a parol trust subsequently performed or properly acknowledged by the trustee) to prevail over intervening judgment creditors of the trustee. See: *Hartsock v. Russell*, 52 Md. 619 (1879) and cases cited therein. While there were aspects of constructive or resulting trusts present on the facts of some of the cases, cestuis of such trusts would seem to be in no better position than the cestuis of the completely performed oral trust in the instant case (see *supra*, n. 5). For other Maryland law implying decision in favor of the cestui and against the judgment creditor on the facts of the instant case, compare the defective mortgage cases culminating in *Jackson v. Trust Co.*, 176 Md. 505, 6 A. (2d) 380 (1939).