Resulting and Constructive Trusts in Kentucky

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RESULTING AND CONSTRUCTIVE TRUSTS IN KENTUCKY

The English Statute of Frauds required all declarations or creations of trusts in land to be manifested in writing. If, however, upon any conveyance of land a trust should arise or result by the implication or construction of law, etc., a writing was not essential. It seems important to fingerprint as far as possible resulting and constructive trusts in Kentucky. The Court of Appeals has usually made the distinction clear.¹

I. RESULTING TRUSTS

At common law before the Statute of Uses it has been pointed out² that a resulting use would or might arise in any of the three situations: (a) Where A enfeoffed B and his heirs, B paying no consideration. (It is also to be assumed that B was not a close blood relative and there was no declared disposal of the use.) (b) Where A paid the purchase price for a conveyance by X and title was taken in B's name. (c) Where a feoffment did not dispose of the whole beneficial interest or was made on a use which for some reason failed and the feoffee paid no consideration. The theory was that to raise a use for the benefit of the feoffor carried out the intention of the parties and it was said that a use resulted to him.

The first type of resulting use did not come down to the law of trusts. If A bargains and sells Blackacre to B without consideration but without intending to benefit B, still no trust is presumed. If B made an oral promise to hold for A the promise would not be enforceable in the great majority of jurisdictions because they have adopted the provisions of the English statute. B, however, is unjustly enriched at the expense of A if he is allowed to keep Blackacre and the English courts raise a constructive trust under the eighth section of the Statute of Frauds to avoid the unjust benefit to B, thus restoring the status quo. While this reaches the same result as the enforcement the oral promise would reach, it is still allowable if it can be brought under the eighth section.

¹See for example Foushee v. Foushee, 163 Ky. 524 (1915), and Molley v. Tabor, 208 Ky. 702 (1925), but cf. Williams v. McLanahan, 60 Ky. 379 (1861); Webb v. Webb, 200 Ky. 488 (1923); Hoge v. Kentucky River Corp., 216 Ky. 51 (1926).
by virtue of some recognized principle, though enforcement of
the promise would not be allowable under the seventh section.
This topic will be further pursued subsequently.

The other types of resulting uses did descend to the law of
trusts so that resulting trusts arise (a) where an express trust
fails in whole or in part and no other disposition is made of the
property; (b) where the purchase money is paid in whole or in
part by one person and title is taken in the name of another;
and (c) where an express trust does not exhaust the entire trust
property transferred to the trustee. 3

a. Where an Express Trust Fails in Whole or in Part.

This type of resulting trust in Kentucky has been
illustrated almost exclusively in cases where an intended
charitable trust failed. 4 If one person conveys land for a school
and others contribute the funds with which a building is built
thereon, and the object fails, the premises must be sold and
the proceeds pro-rated. 5 So if the donor is himself the trustee
and the trust fails he is relieved of his obligation as trustee. 6

Kentucky holds, however, that if there is some business
arrangement made by the contributor whereby he receives some
consideration for the contribution, no trust will result even
though there is something left. 7 In Morrow v. Slaughter 8
premises were sold for a small consideration and the terms of
the conveyance provided that the profits from the property con-
veyed should be applied first to repay the purchase price bor-
rowed by the trustees and thereafter be applied for the benefit
of the local church, but if the church should be dissolved then to
be used as the Synod should direct. On dissolution of the local
church the grantors brought a bill in equity for the retransfer

3 Perhaps an illustration of this type is Smith v. Cornett, 26
K. L. R. 265 (1904). The heirs of A had conveyed all their interests in
the estate of A to B. A considerable tract of land, however, was owned
by A of which none of the parties had knowledge. As to this addi-
tional tract B was held to be a trustee. He had found among A's
papers a bond for title to the land executed by one D and he did not
know the conveyance had been made to A though such was the fact.
B sued the heirs of D and title to the whole tract was adjudged to him.
4 Grundy v. Neal, 147 Ky. 739 (1912).
5 Taylor v. Rogers, 130 Ky. 112 (1908).
6 Cf. McDaniel v. Watson, 67 Ky. 234 (1898); Trustees v. Alexander,
20 K. L. R. 391 (1898).
7 Gibson v. Armstrong, 46 Ky. 481 (1847).
8 68 Ky. 330 (1868).
of the premises. It was held that having received consideration they could not recover. The court refused to decide where the proceeds would go in the event there should be no Synod to direct the distribution.

The Kentucky court is firmly committed to the proposition that if some business arrangement has been made so that the contributor receives something which may be called consideration for his contribution, nothing beyond what he expressly bargained for can come to him. No respect is held for the argument that to the extent that there is something left over, to that extent the contributor has not received full consideration. The leading case is *Easum v. Bohon.*9 The Shaker colony was made up of members who had conveyed their property to the society. It was expressly agreed that there should never be any return of the property. On the final dissolution of the society a considerable property was left and certain heirs of X claimed a proportionate share of the contributions of their ancestor. In return for the contribution of members it had been covenanted that the property contributed should be used by the society, and that it should support, maintain, and care for its members throughout their lives. But the members did provide the property and on dissolution the property must go somewhere. It is not sufficient to say no resulting trust was intended, because the dissolution was neither intended nor expected.

Support for the Kentucky view may be found in *Cunnack v. Edwards,* an English case.10 The court held that where a business arrangement had been made by a society for the benefit of its members the distributees of the deceased members could make no claim to the 1,200 pounds that remained after the society had come to an end. In a more recent case,11 however, funds had been contributed by certain persons in accordance with rules which they had set up, to be used for the benefit of the contributors for the time being. The need for the service had ended, and there was a surplus remaining. It was held that the funds should be prorated among the contributors. Of course, the intention of the contributors should be given effect in accord-

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9 *Easum v. Bohon*, 9 Ky. 451 (1918). [In *Gass v. Wilhite*, 32 Ky. 170 (1834), it was held that certain “Shakers” could not secede and thereby have the right to withdraw their contributions.]

10 *Cunnack v. Edwards*, 2 Ch. 679 (1896).

11 *In re Customs and Excise Officers Fund* (1917), 2 Ch. 18.
Once with the agreement made, but the agreement is silent with respect to the situation that has arisen and it is pure fiction to say that no return was contemplated. Just what was to be done with the funds in the Kentucky case the court did not say. In Cunnack v. Edwards the property went to the Crown. In other cases charitable trusts have failed because of the indefiniteness of the object, and resulting trusts arise. Thus a gift of a sum of money which testator authorizes the executor to give to the poor fails because the "object is too indefinite or is unascertainable".

b. Purchase Price Paid by One Person and Title Taken in the Name of Another.

Kentucky is one of five states which by statute have sought to abolish this important type of resulting trusts. The statute does not apply to those cases where title was taken by the grantee without the consent of the one who furnished the consideration, nor where the grantee has violated some trust. Neither does it apply to cases involving personal property, nor will it control where the trust arose before the statute was enacted and the enforcement of it was sought thereafter. The typical illustration within the statute is the case where

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12 It had already been held in Adams v. Bohon, 176 Ky. 66 (1917), that the property did not go to the common school fund under section 323 of the statutes.

13 Various other associated problems are found in Fuquay v. Trustees, 22 K. L. R. 744 (1900); Lutes v. L. & N. Ry. Co., 158 Ky. 259 (1914); McElroy v. Pope, 153 Ky. 108 (1913).

14 Spaulding v. St. Joseph's Industrial School, 21 K. L. R. 1107 (1899) ("for charitable objects to be expended for said objects in this Diocese of Louisville according to the trustees' discretion"); Thompson v. Brown, 24 K. L. R. 1066 (1902). But cf. Moore v. Moore, 34 Ky. 354 (1836) (fund for educating some poor orphans in this county to be selected by the County Court. It was held that here was a naked power and that the trustees might exercise it and the bill of the heirs was dismissed); Atty. Gen. v. Wallace, 46 Ky. 611 (1847) ("For such charitable and benevolent institutions as may appear most useful for disseminating the Gospel at home and abroad." Held valid); Graham v. English, 160 Ky., 375 (1914) ("to be devoted to such benevolent objects as they, the trustees, may select." Held valid).

15 See Carroll's Kentucky Statutes, 1930, Sec. 2353; Scott, Resulting Trusts Upon the Purchase of Land, 40 Harv. L. Rev. 669 (1927).

16 Aynesworth v. Haldeman, 63 Ky. 565 (1866).

17 Martin v. Martin, 68 Ky. 47 (1863); Ewing v. Bibb, 70 Ky. 654 (1870). In Browning v. Coppage, 6 Ky. 37 (1813), the prospective spouses made an antenuptial agreement that in the absence of issue, her property should descend to her heirs. Slaves bought by the husband with the wife's money were held to pass under her will.
title has been taken in the name of another at the express instance or at least with the knowledge and consent of the owner of the funds. These are largely cases where husband or wife has furnished the consideration and title was taken in the name of the other spouse. The result is, of course, the same where one spouse furnishes the consideration and title is taken in the names of both. There is, on the other hand, a large number of Kentucky cases which come within the first exception to the statutory rule.

The parties A and B may contribute to the purchase of certain premises in unequal amounts, each to have a beneficial interest though title is taken in the name of B, but they may also validly agree by oral agreement that A shall have a particular portion of the land so purchased. Thus in Brothers v. Porter A had assigned his interest under an oral agreement with B and C for the purchase of certain premises, to X and X executed his note for A's share of the purchase price. X sought to escape liability on the note on the ground that the assignor was to have a particular tract of the land purchased and since the agreement was oral it could not be enforced and the consideration for the note had failed. He was held liable and collection of the judgment on the note could not be enjoined.

This statute has not always found favor with the court. For example, in one case where the grantee made a parol agreement to hold for the one who paid the consideration it was held that the result was not controlled by the statute, that the statute applied only to the naked fact where title was taken in

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20 Masters v. Masters, 222 Ky. 427 (1927); Skidmore v. Harris, 157 Ky. 766 (1914).
21 Mallory v. Mallory, 68 Ky. 464 (1869); Miller v. Edwards, 70 Ky. 394 (1870); Bedford v. Graves, 8 K. L. R. 262 (1886); Harlan v. Bilke, 100 Ky. 642 (1897) (Emancipated minor employed as jockey sent his earnings to his father who invested them in land); Combs v. Combs, 30 K. L. R. 573 (1897) (Father and son each contribute and title taken in name of son); Patrick v. Prater, 144 Ky. 771 (1911); Neel v. Noland, 166 Ky. 456 (1915); Deboe v. Brown, 196 Ky. 275 (1923); Phillips v. Bowles, 209 Ky. 580 (1928); Huff v. Byers, 209 Ky. 375 (1925) (Husband and wife cases).
22 45 Ky. 106 (1845).
23 Smith v. Smith, 121 S. W. 1002 (Ky. 1909).
the name of another without any agreement between the parties. In still other cases the court has enforced a trust and has failed to note any bearing that this statute might have. In Lindsay v. Williams the court seems to have added a qualification to those provided by the statute. A husband, to secure the loan, executed a mortgage to his wife's father. The mortgage did not disclose so far as appears, the daughter's interest. The father foreclosed the mortgage and appropriated the proceeds. On his death his will charged the daughter with an advancement of $3,000. It was held that this statute did not apply to debts, and securities for payment of them but to absolute deeds only and that the father was trustee for the daughter of the proceeds of the foreclosure. In Row v. Johnson, A foreclosed his vendor's lien in the name of his son-in-law, B, to whom he had gratuitously assigned his interest for the purpose of the suit but not intending to benefit B. After foreclosure title was taken in the name of B, all without the knowledge of B. The court correctly raised a constructive trust against B but it failed to note the possible bearing of Section 2353.

Various cases of hardship have arisen by virtue of the statute. Such, for example, was the case of Isaacs v. Isaacs where A bought land and took title in the name of himself and his brother B to enable the latter to be A's surety. In Grant v. Grant plaintiff furnished the funds for the construction of a house upon a lot the title to which he knew to be in his son's wife. In many cases, however, the hardship is decreased by

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24 Sweet v. Stevens, 23 K. L. R. 407 (1901) (Brother and sister agreed to buy land jointly, he to pay two-thirds and she one-third of the price and title to be taken in her name. She was held to be a trustee as to a two-thirds interest); Noel v. Fitzpatrick, 124 Ky. 787 (1907) (Wife bid in land and furnished the consideration to her husband who by the agreement took title in his own name. He was held to be trustee).

25 63 Ky. 475 (1866).


27 206 Ky. 540 (1925).

28 12 Ky. O. 60 (1883).

29 So in Bybee v. Wilson, 196 Ky. 644 (1922) (A stepson furnished funds to his stepfather and the latter left the land to his second wife). See also Russell v. Russell, 11 K. L. R. 547 (1888) (The heirs released their sister's interest in their father's estate to the sister's husband with her consent. A child of this marriage claimed to have a resulting trust set up, after the death of the sister, against the children of the second marriage of their father since their mother had paid the consideration. Held no trust because the mother had consented).
the holding that the one who furnished the consideration may recover the amount of it from the title-holder.30

There are many interesting variations of the problem. Thus, in Deposit Bank v. Rose31 the wife, having abandoned her husband so that he had a cause of action for divorce, conveyed to the husband's mother a portion of her land in consideration of the procurement of a divorce by the husband. He accordingly, obtained a divorce and the conveyance was made. It was held that the consideration for the land was paid by the husband and that the mother should be made a resulting trustee of it so as to protect the husband's creditors. His consent that title be taken in his mother would not prevent his creditors from claiming the benefit of the transaction. In another case32 a wife released dower at the solicitation of her husband, the consideration being his agreement to buy certain other land for their daughter. The husband bought the land but took title in his own name. It was held that he was a resulting trustee, and that the case came within the exceptions to the statute. It seems, however, better to argue that the statute did not apply to this case. A resulting trust requires the conveyance by a third person to one who did not furnish the consideration. Here the wife conveyed to the husband (that is, released her claim of dower). It is not, therefore, a case where A buys from X and takes title in the name of B, but rather a case where A conveys to B on B's promise to do some other act. This case amounts to the specific performance of a promise.33 Since the consideration did not proceed from the daughter a trust could not result to her. Perhaps it might be said that a constructive trust should be imposed upon the husband to avoid unjust enrichment at the expense of the wife. Other courts have, however, seen their way clear to reach a similar result34 but it would seem that there is no ade-

30 Graves v. Graves, 60 Ky. 167 (1860); Lindsay v. Williams, 63 Ky. 475 (1866); Martin v. Martin, 68 Ky. 47 (1868); Mannen v. Bradberry, 81 Ky. 153 (1883); Stroud v. Ross, 118 Ky. 630 (1904); Brooks v. Brooks, 31 K. L. R. 969 (1907); Wilson v. Mullins, 119 S. W. 1180 (Ky. 1909); Smith v. Smith, 121 S. W. 1002 (Ky. 1909); Martin v. Franklin, 159 Ky. 816 (1914).
31 113 Ky. 946 (1902).
32 Faris v. Dunn, 70 Ky. 276 (1870).
33 See 40 Harv. L. R. 669, 685.
34 In re Davis, 112 Fed. 129 (U. S. D. C. of Mass., 1901) A in fact bought from X and took title in B for C, so that we have the first part of the formula, A buys from X and takes title in B, but the last of it is lacking for in order to create a resulting trust the parties must have
quate basis for it. If the consent of both mother and daughter had been obtained no resulting trust could have been declared. Where A and B make a joint purchase each furnishing a part of the funds and title is taken in the name of A without the consent of B it would seem after the passage of the statute as well as before that a resulting trust should be raised.

The Kentucky court has on occasion failed to create a resulting trust pro tanto in favor of one who furnished only a small fraction of the purchase price. In Benge v. Benge plaintiff alleged that he contributed $50 and defendant $650 toward the purchase of the land but no trust pro tanto was declared.

This situation is, of course, to be distinguished from the case where the intended beneficiary of the purchase had no share in the original transaction as where a father-in-law buys land and makes the first payment and takes title, but at the same time makes an oral agreement with his son-in-law that the latter shall make the second payment and shall have the land. There is no resulting trust for the son-in-law even though he takes possession under the oral agreement as he made no contribution to the original purchase price nor incurred any obligation therefor. The beneficiary of a resulting trust must have paid all or a part of the purchase price or if the purchase was on credit, must have incurred an obligation for the purchase price either to the seller or to the one who made him the purchase money loan.

A father-in-law may convey land to his son-in-law, reciting in the conveyance a consideration and that a part of it is an advancement to his daughter. If it is to be considered that she furnished the consideration, still it cannot be argued that title was taken in her husband's name without her consent. In

intended the purchase to be for the benefit of A whereas it is confessedly for C. If a trust is imposed for A to avoid the enrichment of B it is contrary to the intention of the parties and so is constructive. If a trust is imposed for C the Statute of Frauds is to be taken into account.

36 Letcher v. Letcher, 27 Ky. 590 (1830).
37 15 K. L. R. 514, 23 S. W. 668 (1893); cf. 40 Harv. L. Rev. 669, 687.
39 See Scott, Resulting Trusts on the Purchase of Land, 40 Harv. L. R. 589, 706-7 (1927).
40 Herlihy v. Coney, 99 Me. 469 (1905).
resulting trusts it is the presumed intention of the one furnishing the consideration that is carried out when a trust is declared. In this case, however, the person who alone had an effective intent was the grantor. He should have added a statement in the instrument that the conveyance was made for her sole use and benefit to the extent of the advancement.

The failure to take title in the name of the party furnishing the consideration may arise from fraud of the grantee, from mistake or from mere breach of agreement. The fact that title is taken in the wrong person by mistake should not prevent a resulting trust from arising although it may be possible also to work out on the same facts a constructive trust. Perhaps the same reasoning should apply where land descends to a minor and on sale of it, the administrator buys it in for her with estate funds and promises to convey it to her when she reaches her majority. The minor could not effectively consent to the transaction. At any rate, a constructive trust could have been raised against the administrator as a fiduciary.

A problem has arisen as to the rights of a wife where a resulting trust would normally have been enforced against the husband but creditors of the trustee make a claim to the property against the equitable owner (the wife), as purchasers for value. In Miller v. Mclin the husband bought land with his wife's money and wrongfully took title in his own name. The court said: "When a wife gives her husband money and he invests it in his own name, her claim will be subordinated to the rights of creditors of the husband who are attempting to subject the land to the payment of debts created while the title was in the husband without knowledge of the equity of the wife." If the wife has knowledge of the state of the title and makes no effort to correct it, she is probably estopped to claim the protection of her interest as to subsequent creditors without notice. That is presumably the fact in this case though it does not appear in the opinion. In Campbell v. Campbell title to prop-

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4Ewing v. Ribb, 70 Ky. 654 (1870).
879 Ky. 395 (1881); cf. Miller v. Edwards, 70 Ky. 394 (1870) (husband had sold the land and had taken note for the purchase price payable to himself, for her use. Creditors cannot attack transaction); Phillips v. Bowles, 209 Ky. 580 (1925); Darnaby v. Darnaby, 77 Ky. 485 (1879); Sims v. Spaulding, 63 Ky. 121 (1865).
erty for which the wife paid the consideration was made to the husband. On discovering the facts she complained and the husband thereafter transferred the title to their son in trust for her. Such transfer was sustained against the claims of a creditor of the husband who sought to impeach the transfer. Even though creditors of the husband (at a time when his common law rights in her property prevail) may claim her property so taken, the wife may be entitled to an equity of settlement and if the husband in carrying out a trust obligation gives her no more than she could get under her equity to a settlement, the transfer will be sustained.47 In a number of cases the wife's claim has been sustained as against prior creditors.48

**GRANTEE PAYS THE PURCHASE PRICE AS A LOAN**

Professor Scott assumes that a loan may be spelled out just the same when B pays the purchase price to X in behalf of A for conveyance made to himself, as where he hands over the money to A and A takes title in B by way of security, if he meant to lend the purchase price to A and A was obligated to repay the same. The money paid over was never actually A's money but otherwise there is no substantial difference between the single transaction and two separate transactions,49 since in the former case the money was paid to the vendor at the borrower's request. In Kentucky three types of situations have arisen: (a) where A borrows the money from B and himself pays it over,50 (b) where B buys the land at the request of A and takes A's obligation to repay51 and (c) where A makes the bargain for the land with X but B, the lender, actually pays the money to X.52

Of course, if, in the first situation, there is no obligation on the part of A to repay B there could be no loan and no trust.53

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49 *Harv. L. Rev.* 669, 685.
52 *Erdman v. Kenney*, 159 Ky. 509 (1914). The court speaks of the constructive fraud of B.
would be declared. In *Payne v. McClure Lodge* a officer of
the lodge agreed to buy certain premises for the lodge and
furnished the funds therefor. It appears that the parties con-
templated that the rents would be used to repay the purchase
price. After sufficient rents had been collected for this purpose a
demand for conveyance was made, but the officer refused to con-
vey. An action was brought and a trust was declared evidently
upon the theory that the funds paid as the purchase price were
loaned and title was taken in defendant as security, and thus
resulting trust arose. The court failed to observe the possible
bearing of 2353 upon the case and of the cases cited in support,
two were constructive trusts, and in the other no trust was
declared. Yet it is believed that the case may be sound and
that the statute was not intended to apply to an absolute con-
veyance by a third person intended to secure a loan made by
the grantee to the borrower. Yet there was no clear evidence
of an obligation by the lodge to pay the money if the rents should
not suffice. At one time an absolute conveyance to secure a loan
was not declared to be a mortgage in Kentucky. Later, however,
the intervening cases were expressly overruled and the present
rule was established. In *Harper v. Harper* it was held where A
does B, to pay a debt A owes B, with an agreement that
B should re-convey when the debt should be otherwise repaid,
that there was no relief for A if B refused. This result is prob-
ably to be accounted for by the analogy of the cases now over-
ruled.

In another case A made an arrangement with B whereby
B bought land near Chicago from X, advancing all the purchase
price, under an agreement in writing that "when the said land
is sold said B is to have his $6,000 so advanced with 10% and
the profits are to be equally divided between the parties. If the
property is not sold within eighteen months, A is to pay one-
half of the sum advanced with interest or B is to be the sole
owner of the same". The land was not sold within eighteen

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*115 S W. 764 (Ky. 1909).*

*It was early held that an absolute conveyance given as security
for a debt would be treated in equity as a loan, Skinner v. Miller, 15
Ky. 84 (1824).*

*Hobbs v. Rowland, 136 Ky. 197 (1909); see also Ryan v. Bank,
132 Ky. 625 (1909).*

*68 Ky. 176 (1888).*

*Honore v. Hutchings, 71 Ky. 687 (1871).*
months but it was sold later for a hundred thousand dollars. A claimed his interest though he had not paid one-half the price within the time agreed upon. Here it is clear that there was a loan, that A was under obligation to repay it and that title was taken in B as security, hence there was a resulting trust and the statute should not apply where title is taken as security for a loan.

If A has already purchased the land on installments and subsequently borrows the money from B to make the later payments, and B takes title, the question is not shall a resulting trust be raised but rather shall equity regard an absolute title as a mortgage. If the borrower violates his agreement and takes title in his own name a lien may be declared on the premises in favor of the lender.

The line is not always easy to draw between the situation where B agrees to buy with his own money for A or for himself and A, a mere agency, and the case where A agrees to furnish the money as a loan and buy either for A or for both. In Fischli v. Dumaresly the court indicates that the allegation that the purchase was made for both under an oral agreement that plaintiff was to repay one-half the price and until repayment he was to pay interest on it, was proved. But it refused to spell out a loan to A. "The whole purchase price is admitted to have been paid by B." This case, however, can scarcely be distinguished from Payne v. McClure Lodge save that in the latter case the whole of the purchase price rather than one-half of it was loaned by the title holder.

II. CONSTRUCTIVE TRUSTS

Dean Pound refers to the constructive trust as a purely remedial expedient. Kentucky is one of several American jurisdictions, which did not import the trust sections of the Statute of Frauds. The use of the constructive trust may, therefore, be even wider than that in jurisdictions where that section is in force. We do, however, have the wills act. An examination of the decisions in various jurisdictions shows the

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60 Neel v. Moore, 19 K. L. R. 918 (1897).
61 10 Ky. 23 (1820).
62 115 S. W. 764 (Ky. 1909).
6 Supra, n. 3.
following situations where the constructive trust has been employed in order to accomplish a better remedy for the injured party than can be obtained in a common law action.\(^6^4\)

A. Where the trust is not expressly or is improperly declared. In such cases where the disposition is *inter vivos* and even though we have no seventh section we have to consider the fourth section of the Statute of Frauds, dealing with contracts concerning land\(^6^5\) and the parol evidence rule should not be forgotten. If the disposition is by will, the Wills Statute is to be considered.

B. Where a person acquires an interest in property in regard to which by reason of his fiduciary character he owes a duty to another.

C. Where property is acquired by one person by the wrongful use of the property of another.

\[A. \text{ The Trust is not Expressly or is Improperly Declared.}\]

1. A conveys to B *inter vivos* on an oral or intended trust for A. B refuses to re-convey though his only fault may be a breach of his promise. There is the possibility, however, that he may also be guilty of having obtained the conveyance by fraud or by breach of confidential relations.

2. A conveys to B *inter vivos* on an oral or intended trust for C. If B refuses to hold for C his only fault may again be that of breach of promise, or there may be fraud or breach of confidential relations.

3. A gives property to B by will absolutely so far as appears on the face of the will:

   a. There may be an oral promise by B to hold for C and a disclosure of the identity of C.

   b. The gift may be absolute and the fact of the intention to create a trust, as well as the identity of C may not be disclosed prior to the death of the testator.

   c. B may know by oral disclosure of A that he was to be a trustee but he is not told who C is until after the death of A, which disclosure is made by oral communication from someone or by a writing signed by A that cannot be incorporated into the will.

4. A gives property to B by will, *in trust*, the will showing that B was to be a trustee but the beneficiary is not disclosed in

\(^\text{64}\) See Scott's Cases on Trusts (2nd ed., 1931), pp. 368-412, 440-516.

\(^\text{65}\) Carroll's Ky. Statutes, 1930, Sec. 470, par. 6.
the will. The beneficiary may be orally disclosed or disclosed by an instrument which cannot be incorporated into the will, or never disclosed at all. (In this latter event the trust fails and the gift results back to the heirs.)

1. A Conveys to B Inter Vivos on an Oral or Intended Trust for A.

With this outline of the situations where an intended trust is not expressly or is improperly declared let us examine the decisions. It is to be recalled that the resulting use arising where A enfeoffed B, a stranger, without consideration and without mention of the use, did not descend to the law of trusts and become a resulting trust. If any remedy is to be afforded it must be on a different theory.

In type 1, if B simply refuses to perform his promise to hold for A, or, if having made no promise, he claims the right to keep though there was no intention on the part of the grantor to benefit him, he is unjustly enriched at A’s expense. In a jurisdiction that has the seventh section of the English Statute of Frauds, the express promise cannot be enforced but this fact should not prevent the court from raising a constructive trust and restore the status quo to prevent the unjust enrichment. The case would then be governed by the eighth section and a constructive trust should be raised to prevent unjust enrichment. In a jurisdiction which does not have the seventh section, it might perhaps be possible to carry out the express promise and the court may for one reason and another find itself not bound by the contracts section of the Statute nor by the parol evidence rule. The English courts have raised a constructive trust solely on the ground of unjust enrichment. Most American jurisdictions allow B to keep the property unless there was present fraud or breach of confidential relations in which events a constructive trust is raised. The following Kentucky cases illustrate the problem here:

In Vizard Inv. Co. v. York a son-in-law, A, conveyed with-

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60 Davies v. Otty, 35 Beav. 208, Ch. 1865.
67 See Scott in 37 Harv. L. Rev. 663 (1924).
66 167 Ky. 634 (1916). See also Holbrook v. Fyffe, 164 Ky. 435 (1915) where it was held that a transfer of land by A to B on an oral trust for B did not give B a beneficial interest. "Holbrook's claim to having an interest in the land is perfectly idle"; Noonan v. Noonan, 206 Ky. 769 (1925) (Property to be reconveyed on demand).
out, consideration to his father-in-law, B, his interest in a certain tract of land in order to enable B to carry out certain option contracts which B had executed, the reason for the conveyance being that he was about to leave the state and it was believed that B could deal with the contracts more expeditiously. The options, however, expired and thereafter B contracted to convey the premises to a purchaser, X, to which conveyance A objected. X had full knowledge of all the facts before he made the purchase. The conveyance to X was canceled on the theory that B was a constructive trustee for A. The court spoke of the confidential relations existing between A and B but it is evident that apart from that fact a trust would have been declared. This result seems sound. To allow B to deal with the property as if it were his own is to give him an unjust benefit.

The same principle seems applicable to another case. A was being sued by his wife, C, for divorce. B induced him to convey his land to himself, B, partly in order to embarrass the wife in securing alimony. On A's death his personal representative continued the suit which A had instituted for recovering the land and he joined C in the action. B was declared trustee as he was the moving force in the fraud on the wife, and the parties were not regarded as being in pari delicto. Otherwise, there would have been an unjust benefit to B.

Although the result may occasionally be the same whether or not, a resulting or a constructive trust is raised still it is believed that the observance of the distinction will often avoid

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*Anderson v. Meredith, 82 Ky. 564 (1883). See Bates v. Bates, 182 Ky. 566 (1918) (Children had conveyed their interests in certain land to their father, B, without consideration and with the understanding that as to the land conveyed he would die intestate. Thereafter, he gratuitously conveyed the land to his second wife. The court said that B meant to cheat the children but the evidence is merely that he broke his promise). See also Vanderpool v. Vanderpool, 163 Ky. 742 (1915) where a father, A, conveyed his land to his son B, with the understanding that the latter should pay the grantor's debts and reconvey as soon as he was repaid. B was declared a trustee at the suit of A's heirs. This is rather similar to the absolute conveyance which the court treats as a mortgage.*

*In White v. White, 229 Ky. 666 (1929) A, the father, transferred to B, his son, certain stocks without consideration taking the certificates in B's name on an oral understanding that B would hold them for A. B was declared trustee for A, but since A never delivered the certificates to B it might well have been held that title never passed for failure of delivery. If they had been delivered, it is clear that B would still have been declared a constructive trustee.*
confusion and occasionally it will avoid an improper result. If the trust be resulting then it is always necessary to consider whether section 2353 applies. In Meadors v. Meadors, A had conveyed certain premises to B on an oral trust for A. By direction of A the premises were sold and other premises were purchased from X and title again taken in the name of B. If the latter part of the transaction alone is regarded it looks like a resulting trust at which the above statutory provision is aimed, for A consented. Looked at as a whole, a constructive trust, A to B for A, was created, and A may now follow the proceeds into its changed form, not a resulting trust. The court held in this case that the statute did not apply because of the express oral agreement. Thus the court in order to do justice adds to the section an exception which the legislature did not make, nor in all probability intend. The statute should not apply at all. The cases cited by the court are of the type represented by the formula, where B buys from X with A’s money and takes title in his own name, and so are properly within the statute. The formulas are confused.

In another case it is believed that a wrong result was reached by a similar confusion. The husband, A, beneficiary of a life insurance policy on the life of his father, the premiums on which he was paying, had his wife substituted as a beneficiary. On the death of the father the proceeds were invested in land by the wife. Thereafter the spouses were divorced. The Court of Appeals speaking through Mr. Justice Sampson, held that since the husband’s money went into the land she should be a resulting trustee of the title. With deference, it is believed that this view is doubly erroneous. The money was not the husband’s and never had been as he had validly made her the beneficiary of the policy by way of gift of his interest therein. Even if it had been the husband’s money still he consented to the taking of title by her and the statute would apply. Neither is there ground here for raising a constructive trust. The formula is A conveys to B on an oral trust for A, but there was no oral understanding that the wife should hold the proceeds of the

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192 Ky. 457 (1921).
Towles v. Towles, 176 Ky. 225 (1917).
policy in trust for the husband and a gift cannot be properly
turned into a trust contrary to the intention of the parties.\(^7\)

The Kentucky cases seem clearly right in restoring the
*status quo* where A conveys to B not intending B to keep. This
is analogous to the case where A conveys to B absolutely but in
fact as security for a loan. The court will treat the conveyance
as a mortgage.\(^4\)

**Purchases at Judicial Sale**

Analogous to the cases where A conveys to B intending that
B shall hold for A is a group of cases where A's property is
about to be sold for taxes or at judicial sale on execution against
A and he makes an oral agreement with B that B shall buy in
the premises and hold them for A and permit A, after repay-
ment of the price, to receive a reconveyance. Kentucky denies
that there is sufficient fiduciary relations between the parties to
create a constructive trust where B simply agrees to act as
agent to buy for A on a particular occasion, and in breach of
the promise buys for himself. Here, however, it seems that the
fact that A gives up something, namely, his interest in the prop-
erty sold and his right to protect it, in reliance upon the prom-
ise of B, creates the basis of the trust, that of relieving against
unjust enrichment, perhaps accompanied by an estoppel based
upon A's change of position. In many cases there is no fraud
by B but merely a breach of his promise.

If B buys A's land with his own money at judicial sale
under the agreement described the court has found no particular
difficulty in declaring a trust.\(^5\) Sometimes reasons are given

\(^7\) Of course, without regard to the question whether B is a trustee
for A, where A conveys to B not intending him to take beneficially, it
is always true that such a conveyance will not prevent the creditors of
A from following the property. See *Rucker v. Abell*, 47 Ky. 566 (1848).

\(^4\) *Parker v. Catron*, 120 Ky. 145 (1906); *Ryan v. Bank*, 132 Ky. 625
(1909). It was formerly held that the intention could not be shown
*Harper v. Harper*, 65 Ky. 176 (1868), unless there was proof of fraud
or mistake. See *Crutcher v. Mutr*, 50 Ky. 142 (1890). In *Ramey v.
Slone*, 23 K. L. R. 301 (1901), A had assigned certain title bonds to B
and B therefor had promised to convey certain other premises to A.
On A's death B refused to convey the other premises. It was held that
A's heirs might have a reconveyance of the land procured by B with
the title bonds.

K. L. R. 690 (1887); *Miller v. Brady*, 13 K. L. R. 682 (1892); *Carter v.
1139 (1892).
for the results which are based on circumstances which are in fact immaterial, such as constructive fraud, breach of confidential relations, very small sums which B paid, collusion, and the like but it is finally admitted that neither fraud nor these other circumstances need be present. Of course, if in addition to buying A’s land he also uses funds furnished in whole or in part by A there would be ground for raising a resulting as well as a constructive trust. But even where B uses his own money he becomes a trustee and though the court sometimes spells out a loan (which would create a resulting trust) yet proof of a loan in terms is not required.

It has been held that the fact that A remained in possession many years after the sale without any claim, by B, of an interest in the premises, is prima facie proof that B bought for A, but the fact that after the sale A did not pay rent to B is not sufficient itself to prove such an agreement. The fact that A permitted title to remain in B for a long period of years will not defeat his right to have B declared a trustee. If such an agreement was made and later B leased to A under a further oral promise not to hold A for rent, the principle that a lessee may not deny his landlord’s title cannot be invoked against A when he seeks to enforce the trust.

In a number of cases B has represented himself as buying for A or for the heirs of A without having made any agreement with the interested parties in advance. In such cases having induced other bidders not to bid by having the notices of the sale removed, and by obtaining the premises at a much lower price than they would otherwise have sold for, sometimes at

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**Notes:**

1. Green v. Ball, 67 Ky. 586 (1868); Butler v. Prewitt, 21 K. L. R. 813 (1899); Ware v. Bennett, 143 Ky. 743 (1911).
3. Hopkins v. Tarlton, 7 Ky. 500 (1817); Graves v. Dugan, 36 Ky. 331 (1833); Turley v. Couchman, 7 Ky. Op. 54 (1873).
4. Griffin v. Goffey, 48 Ky. 452 (1849); Fishback v. Green, 87 Ky. 107 (1888); Parker v. Catron, 120 Ky. 145 (1905); McKibben v. Dilts, 138 Ky. 684 (1910); Stone v. Middleton, 144 Ky. 284 (1911); Koehler v. Almy, 161 Ky. 428 (1914).
a very small price, he has effectually estopped himself from denying that such an agreement was made by him.\textsuperscript{64}

It seems that the real basis for holding B a trustee for A is that B is unjustly enriched at the expense of A, and that A, by reliance on the promise has changed his position and has lost something thereby. If A had no interest in the premises he would have suffered no loss by the breach of B’s promise, save perhaps prospective profits. It will be worth while, therefore, to examine the nature of A’s interest.

Sometimes it is only a part interest,\textsuperscript{65} or a dower interest that is protected,\textsuperscript{66} or the interests of heirs,\textsuperscript{67} or devisees.\textsuperscript{68} A joint owner may agree to buy for all at a foreclosure sale.\textsuperscript{69} On the other hand, it has been held that a second lienor,\textsuperscript{70} a stockholder in a corporation,\textsuperscript{71} a mere surety of the execution debtor who had not paid the debt\textsuperscript{72} have no such interest as to warrant the court in declaring a constructive trust for their benefit based upon an oral promise to purchase for such person. The agreement to hold for A need not cover the entire interest of A that is purchased and the trust will be declared only with respect to the interest agreed upon.\textsuperscript{73}

There are interesting Kentucky cases, which involve both a resulting and a constructive trust. Thus, in \textit{Farris v. Farris}\textsuperscript{84} B agreed with A and other co-devisees to buy in the premises for all. B, thereafter, went to P and induced P to lend him the purchase price and hold the title for A under a collusive agreement with P to defraud A’s co-devisees. Before the time for redemp-

\begin{itemize}
\item \textit{Holtzclaw v. Wells}, 166 Ky. 353 (1915).
\item \textit{Griffin v. Coffey}, 48 Ky. 452 (1849); \textit{Davis v. Spicer}, 128 S. W. 294 (1910).
\item \textit{Butler v. Prewitt}, 53 S. W. 20 (Ky. 1899).
\item \textit{Griffin v. Schlenk}, 139 Ky. 523 (1907); cf. \textit{Dodd v. Story}, 4 Ky. Op. 87 (1870) (One of the patentees of land took patent to whole of the land).
\item \textit{Fields v. Hoskins}, 182 Ky. 446 (1918).
\item \textit{Willis v. Lam}, 158 Ky. 777 (1914).
\item \textit{Doom v. Brown}, 171 Ky. 469 (1916).
\item \textit{Miller v. Antle}, 65 Ky. 408 (1867).
\item 16 K. L. R. 729 (1895).
\end{itemize}
tion had expired, the other co-heirs tendered their shares of the redemption price. P refused to receive less than the whole amount due and refused to convey a part only. After the time for redemption had expired B paid P the amount of the loan and took a reconveyance of the entire tract. It was held that B was trustee for his co-devisees.\textsuperscript{9}

It is not always clear whether the agreement between the parties was made before or after the purchase. In an early case the court disapproved of such an agreement made before the sale as though it were a fraud upon bidders. If the agreement were made afterwards it was said that there was no consideration for the promise made by B.\textsuperscript{9} It does not seem difficult to spell out a contract based upon sufficient consideration in such cases but there would be no basis for raising a trust, no change of position by A and no unjust enrichment of B. Later, the court looked upon the agreement made subsequently as a conditional sale and would not enforce it unless it were in writing.\textsuperscript{97}

In Wilson v. Wilson\textsuperscript{96} B bought a certain tract of land, part of an estate, at judicial sale at about one-tenth of its value. Two of the nine heirs were adult at the time and B had agreed with them to pay each of the adults the actual value of their interests but no such arrangement was made on behalf of the infants. There can scarcely be said to have been any fraud practiced upon the infants but B was unjustly enriched at their expense and was declared a trustee for the sum received by him on resale. In Oakes v. Oakes\textsuperscript{99} it appears that B and his brother, A, attended a judicial sale of land. A had no existing interest in the premises at the time but the court reached the same result as it would have reached if he had had an interest. No specific

\textsuperscript{9}The other cases are: Butler v. Prewitt, 21 K. L. R. 813 (1899) (B bought for A but borrowed the money from P who took title in himself in preference to becoming a surety for B with mortgage as protection); Koechler v. Almy, 161 Ky. 423 (1914) (B bought for the owner but took title in the name of his son, X).

\textsuperscript{96}Kenney v. Marsh, 9 Ky. 46 (1819).

\textsuperscript{97}Edington v. Harper, 26 Ky. 353 (1830). But in Brey v. Barbour, 14 K. L. R. 655 (1893) the oral promise was not to reconvey but to pay the market value of their interests if the promisees would allow B to take an absolute conveyance and would not redeem. To this agreement the Statute of Frauds applies. In Butler v. Stark, 25 K. L. R. 1386 (1904), however, a trust in land was declared on a similar promise that seems to have been made subsequent to the sale.

\textsuperscript{98}48 Ky. 274 (1948).

\textsuperscript{100}204 Ky. 238 (1924).
agreement between A and B was established. So far as appears, B bought the land with his own money and took title. A and his family moved onto the premises and lived there for many years. B said he bought it for A and A improved it. B had been the business man for his brothers and sisters attending to nearly all matters of business for all of them. After the death of A, B brought an action to recover possession of the premises. The court, however, held that he was a trustee for A. The reason is not clear. Under the rule of Fischli v. Dumaresly an agent, under an oral agreement to buy land with his own money for another is not a trustee if he buys for himself. Breach of confidential relations was not specifically mentioned by the court, nor was there any proof of a loan by B to A nor of any repayment by A to B. It does not appear, however, that the court intended to overrule Fischli v. Dumaresly and the other cases following it. All we can say is that the rule on that point is now unsettled; viz.: if B orally promises to buy land for A at a judicial sale (in which land A has no existing interest) but instead buys it in his own name, it is not so clear now whether he is a trustee or not. He is perhaps if there is also a breach of confidential relations.

Kentucky, along with a few other states, holds that the entire assignment of a life insurance policy to a creditor, however honest, is valid only to the extent of the assignee's outlay and as to any remainder he is a trustee for the assignee. In one case the assignee bought at judicial sale the interest of the beneficiary after the latter's petition to be permitted to sell the same had been granted. The outlay was $731. The proceeds amounted to $2,500. Perhaps the court regards the assignee as unjustly enriched at the expense of the assignor.

In another case the ground for holding B to be a trustee is not clear. B, the father, had executed a gratuitous conveyance to A, his son, and put the latter in possession. He neither delivered nor recorded the conveyance. A died and his children continued in possession and the premises were managed by their guardian. Later B sold the premises to C but refused to convey and C sued for specific performance. It was held that B

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10 Ky. 23 (1820).
11 Ibid.
13 Cyrus v. Holbrook, 32 Ky. L. R. 468 (1907).
was trustee for the heirs of A, and C could not obtain specific performance of the contract.

**Breach of Confidential Relations.** Just what is required to constitute confidential relations cannot easily be indicated. The situation must be such that one person imposes an unusual trust and confidence in another, relying on that other for advice. For example, a father is regarded as being in a confidential relation to his minor children but he is not so necessarily toward his major children. Special confidence may be imposed where there is no legal relationship and between strangers as well as between close relations and, of course, often does arise between brothers and sisters and between persons betrothed.\(^1\)

A breach of confidential relations whereby B obtains A's property and uses it for his own benefit is sufficient to cause B to be regarded as a constructive trustee for A. So in *Graham v. King*\(^2\) a mother-in-law entrusted her money to her son-in-law to invest in real estate for her. He did so invest the money intrusted to him, but took title not in the name of the mother-in-law but in the name of his wife. It seems that the wife was not an original party to the wrong, hence it would be fair to say that there was no such breach on her part. The court rightly held her to be a constructive trustee. She was unjustly enriched by the tort of her husband.\(^3\) This does not seem to be a resulting trust and section 2353 should not be held applicable nor is either exception applicable. There is the same result where a nephew takes advantage of the confidential relations he enjoys and induces a feeble uncle after he has sustained a paralytic stroke to convey all his estate to the former in consideration of care and support to be furnished by the former to the latter during the remainder of his life.\(^4\)

\(^1\)*See 13 Calif. L. Rev. 174, 176 (1925).*

\(^2\)*96 Ky. 339 (1884).*

\(^3\)*For a contrary result see *Dye v. Parker*, 108 Kan. 304, 195 Pac. 599 (1921).*

\(^4\)*McDowell v. Edwards*, 156 Ky. 475 (1913). *See many other cases there cited. See also *Middleton v. Beasley*, 186 Ky. 252 (1919) where husband and wife each had children by a prior marriage. They bought certain land under an agreement that the spouses and both sets of children should combine their efforts and pay for it and share it proportionally. Before title was fully acquired the wife died and the husband perfected title in his own name. By this breach of confidential relations it was held that he was *pro tanto* trustee for the wife's children.*
RESULTING AND CONSTRUCTIVE TRUSTS IN KENTUCKY

2. A Conveys to B Inter Vivos on an Oral or Intended Trust for C.

If A conveys land to B **inter vivos** on an oral trust for C it seems that in most jurisdictions B can be compelled to hold for C even though there is a statute corresponding to the seventh section of the Statute of Frauds.\(^{108}\) Naturally, in Kentucky where there is no such statute it has not been difficult to raise a trust for C.\(^{109}\) In **Becker v. Newrath**\(^{110}\) the husband had conveyed property to his second wife absolutely. She orally promised to use it for life and at her death leave it to his children. If she should leave no will the land would descend to her sister. It was held that a constructive trust could be established and that fraud was not necessary, but merely the failure to carry out the agreement was sufficient. The promise was made by her after the conveyance was executed. In this case it further appears that the conveyance was made in contemplation of death. It is sometimes thought that that fact distinguishes this type of case from the ordinary **inter vivos** conveyance on oral trust because of the difficulty of restoring the *status quo* prior to the death of A. There would usually be no breach of the promise till after the grantor was dead.

3. Absolute Gift by Will on Oral Trust for Third Person.

The gift is absolute so far as appears from the will. There may, however, be three situations.

(a) B may promise the testator, A, to hold for C who is clearly identified. In **Caldwell v. Caldwell**\(^{111}\) it was held if B failed to keep his oral promise to hold for C, that a constructive trust would be imposed upon him for the benefit of C, the court observing that this refusal would amount to constructive fraud. The court did not decide upon whom the fraud was practiced, whether upon A or upon C, nor did it find in fact any more serious misconduct upon the part of B than a breach of his

\(^{108}\) 37 Harv. L. Rev. 653, 664.

\(^{109}\) **Taylor v. Fox**, 162 Ky. 804 (1915); cf. **Chapman v. Chapman**, 152 Ky. 344 (1913) (Father and son executed simultaneous wills by oral contract. After death of son and after the father had profited by the son's will he attempted to repudiate his will. He was declared a trustee of the land he had agreed to dispose of by will).

\(^{110}\) 149 Ky. 421 (1912).

\(^{111}\) 70 Ky. 515 (1871).
promise. If there was any fraud it must have been practiced upon A and not upon C, but there wasn't any. There was an unjust enrichment, however, at the expense of the testator which should be remedied for the benefit of the testator's heirs. Furthermore, the Wills Act seems to stand absolutely in the way of giving any interest under a will to C that is not made either by a holographic will or by one attested and subscribed. The Caldwell rule, however, is well settled in Kentucky\textsuperscript{112} and in many other jurisdictions. This flying in the face of the statute is, of course, because of sympathy for C. B should not keep the property in any event. But that result may be avoided by restoring the \textit{status quo} as nearly as possible. The restoration of the \textit{status quo} would take the property from B and would give it back to the estate as undisposed of, that is, the purpose of A in giving the property to B, having failed of accomplishment the estate should go back to the giver. The fact, however, that B may be one of the heirs and so might take as much as C of the undisposed land, in addition to what he received by the devise to himself, makes a case of much hardship upon C, but statutes should not be bent at pleasure to suit individual cases.

If B should wrongfully interfere to prevent a gift being made to C and should induce the making of the gift to himself which C would inevitably have received but for the act of B, in such case it may well be that B's conduct amounts to a tort to C's expectancy and should be compensated for specifically by a court of equity. In such case, B would be properly declared a trustee for C.\textsuperscript{113} So where B is already beneficiary of a will and by duress prevents the alteration of it, which alteration would have benefitted C, a constructive trust may be raised against B for the benefit of C.\textsuperscript{114}

(b) Where A makes an \textit{absolute gift by will} to B intending that B shall hold for C but B is not informed before the death of the testator that a trust is intended and no disclosure of the identity of the beneficiary is made it has been held that

\begin{footnotes}
\item[112] Chapman \textit{v.} Chapman, 152 Ky. 344 (1913); Taylor \textit{v.} Fox, 162 Ky. 804 (1915); Rudd \textit{v.} Gates, 191 Ky. 456 (1921), 230 S. W. 906.
\item[113] See Stout \textit{v.} Stout, 165 Ia. 552, 146 N. W. 474 (1914); Reardon \textit{v.} Reardon, 219 Mass. 594, 107 N. E. 522 (1914).
\item[114] Gains \textit{v.} Gains, 9 Ky. 190 (1822) (It was held that where the beneficiary of a will forceably prevented revocation of it, still the will must be probated, but the fraudulent devisee may by proper action be made a trustee for the party entitled to the estate).
\end{footnotes}
B may keep the property so received. There is no unconscionable conduct which requires him to surrender the property to the intended beneficiary nor to the heirs. He is like any other devisee or legatee.115

(c) Where there is an absolute testamentary gift by A to B on an oral trust but the beneficiary, C, is not disclosed during the life of A, the better view is that the trust fails and that B must hold for the heirs.116 This would be as near as possible to a restoration of the status quo. Any other result conflicts with the Wills Statute. This result does not necessarily conflict with the Caldwell v. Caldwell rule because there the beneficiary, it will be remembered, was orally disclosed. There is nothing to prevent the adoption of the view in this jurisdiction that the trust fails.

4. Testamentary Gift in Trust but the Will does not Disclose the Beneficiary.

Suppose the gift is expressly made in trust on the face of the will but the beneficiary is not therein indicated, but is, however, orally disclosed. There are two views whether or not the intended beneficiary may take the property. Massachusetts117 and a good many other jurisdictions hold that the beneficiary cannot take the gift. The Wills Act stands squarely in the way. The problem is presented in Hughes v. Bent.118 The testatrix left certain property to her daughter "as a sacred trust knowing that she will faithfully carry out my wishes regarding it". The wishes were communicated to B and were written out on a separate paper signed by testatrix, this paper and the will having been prepared at the same time. Presumably the separate paper could not be incorporated by reference into the will as there was no reference at all to such paper. The usual rules as to incorporation by reference119 are (a) the incorporated paper must be in existence at the time the will is executed; (b) it must be referred to as being in existence and (c) in such terms as make it identifiable. That was not the case here. The court

115 Schultz's Appeal, 50 Pa. St. 396 (1876); 37 Harv. L. Rev. 653, 679.
116 In re Boyes, 26 Ch. Div. 531 (1884), 37 Harv. L. R. 677.
118 118 Ky. 609 (1904).
said that there was no doubt about the identity of the beneficiaries or of their interest in the estate "and (the identification of the paper) makes it proper to treat the paper as a part of the will and to seek its aid in construing the instrument". It appears, therefore, that if the identity of the beneficiary is in any way communicated to the trustee, the gift will be carried out in Kentucky. Some other jurisdictions have reached the same result.

B. FIDUCIARY RELATIONS

If A orally employs B as his agent for the special purpose of negotiating the purchase of Blackacre for A, and B, in violation of his agreement, buys Blackacre for himself, some courts have held that this was such a violation of a fiduciary relationship as to warrant making B a constructive trustee for A. Kentucky, however, ever since the problem was first brought before its highest court has held that a trust could not be set up. This special agency is not regarded as sufficient to make B a fiduciary.


121 Havnor Land Co. v. MacGregor, 169 Ia. 5, 149 N. W. 617 (1914); Harrop v. Cola, 86 N. J. Eq. 32, 86 N. J. Eq. 250 (1914); Rush v. MacPherson, 176 N. C. 552, 97 S. E. 613 (1918); Kern v. Smith, 290 Pa. 566, 139 Atl. 450 (1927).

122 Parker v. Bodley, 7 Ky. 102 (1815) (A was to buy for himself and B and B was to advance one-half of the price); Fischli v. Dumaresy, 10 Ky. 23 (1820) (A was to advance all of the funds, one-half by way of a loan to B); Fowke v. Slaughter, 10 Ky. 56 (1820) (A bought the land from X at $6.00 per acre and resold it to B and C at $8.00 per acre. He bought the land for B and C could not be proved); Dehaven v. Sterritt, 26 Ky. 27 (1829) (Son-in-law bought up claims against his father-in-law's land with his own money); Estes v. Estes, 142 Ky. 261 (1911) (Semble); Wiedemann v. Crawford, 143 Ky. 303 (1911) (A was to furnish all the money); Day v. Amburgey, 147 Ky. 123 (1812) (Semble. Court cites decisions contra in other states but declares they represent the minority view); Burns v. Eastham, 12 Ky. Op. 52 (1833) (B was about to enter certain land under a land warrant. A told B that he would enter it for C and B gave way. A, however, entered the land in his own name); Doom v. Brown, 171 Ky. 469 (1916) (Mortgagee promised the surety of the mortgagor to buy in the mortgagor's land at judicial sale for the benefit of the surety); Sherley v. Sherley, 97 Ky. 512 (1885) (Semble). In accord with the Kentucky rule are Bibb v. Hunter, 79 Ala. 351 (1885); Farnham v. Clements, 51 Me. 426 (1868); Emerson v. Galloupe, 158 Mass. 146, 32 N. E. 1118 (1883).
In *Kimmons v. Barnes*\(^{123}\) B had requested his intimate friend, A, to buy certain premises for him, B. A bought the premises with his wife's money and took title in his wife's name. It was held that neither the breach of confidence nor the special agency relation, nor the two factors together would suffice to make A a constructive trustee. A special agent, however, who is supplied with funds by the principal will be made trustee if he takes title to himself. It is probable that the reason is not that he a fiduciary but rather that there arises a resulting trust in favor of the one who furnished the funds.

A general agent or trusted manager is a fiduciary and cannot keep property which he has acquired in breach of his obligation.\(^{124}\) So a person in any fiduciary position (other than a special agent for a particular occasion) such as a partner cannot acquire property for his own benefit when he owes a duty to another with respect to the property.\(^{125}\)

There are certain so-called partnership cases which are not readily harmonized with the position stated above. Relying upon an earlier case which does not in fact raise our present problem\(^{126}\) the court held that in cases of oral agreements between A and B looking toward a joint adventure in the purchase of a particular tract of land, if A, in violation of the agreement bought the premises for himself, he should be made a constructive trustee even though B had neither as yet furnished a part of the consideration nor had agreed upon a loan from A, nor had any previous interest in the premises so purchased. So in *Goodwin v. Smith*\(^{127}\) A and B made an agreement that B should lease a certain gas and oil field for the benefit of both. They had not been partners previously. It was declared that B held the leasehold interest for the benefit of the partners. This, however, was a mere incident in the case. It is not clear that the partnership was formed before B made the lease nor is it clear whose money was used. In *Mallon v. Buster*\(^{128}\) A

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\(^{123}\) 205 Ky. 502 (1924).


\(^{126}\) *Garth v. Davis*, 120 Ky. 106 (1905).

\(^{127}\) 144 Ky. 41 (1911).

\(^{128}\) 121 Ky. 379 (1905) (Disapproved in *Ewing v. Clore*, 219 Ky. 329 (1927); cf. *Stewart v. Stovall*, 191 Ky. 508 (1921) (Parties had agreed that they would operate the farm jointly).
and B had each bid for certain lands being offered at auction sale. Thereupon they entered an oral agreement that B should make the purchase for both and thereafter they would divide the premises. B accordingly made the purchase with his own funds and took title in his own name. This does not seem to constitute a partnership nor is it even a joint adventure yet B was made a constructive trustee for A. The only ground would seem to be that he is a fiduciary. Yet even if he were to be regarded as a partner for the occasion he is no more a fiduciary than any other special agent. This case was later disapproved. In *Stewart v. Stovall* A and B each desired certain premises which were to be sold at judicial sale and to avoid bidding against each other they orally agreed that A should bid in the premises and that thereafter a division would be made. This was called a partnership agreement and was enforced.

In *Ewing v. Clore* a partnership was alleged in order to make B, who had bought with his own funds, a trustee but the allegation that the parties were to buy and divide was held not sufficient. The court said that there was but a *single purchase*, and no expectation of *joint* ownership of any part of the land but each was to be the sole holder of a designated portion of it, a mere agency. Again in *Conant v. Mason* it was held that where an agreement was made by A and B for a specific undertaking, that being the purchase of Blackacre for both, by B, and the parties were not general partners, it is not presumed that the joint adventure is to continue indefinitely and so prevent individual action for all time. It was held that the partnership so-called was dissolved by the death of one of the members and that thereafter the purchase by the other member would not constitute him a partner. It is, therefore, believed that there is not much left in Kentucky of the proposition that parties may form a partnership for the purpose of purchasing a certain tract of land and that if one does purchase after such an agreement with his own money and take title in his own name, he is a trustee.

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129 Towles v. Towles, 176 Ky. 225 (1917).
131 219 Ky. 329 (1927).
132 212 Ky. 692 (1926).
Other illustrations of trusts arising from breach of fiduciary duty occur. Thus an attorney for an estate offered for sale cannot buy for himself at the sale;\textsuperscript{133} nor may the agent of a non-resident whose property is sold at a tax or other public sale and the same is true of a sale by a special commissioner.\textsuperscript{134} A guardian\textsuperscript{135} who buys in the ward's interest for himself is under a similar obligation; so is an executor or administrator.\textsuperscript{136} If the executor compounds a claim against the estate buying it in for less than par or if while acting as trustee of land in which he also owns a moiety beneficially, he surrenders a portion of the land in the process of settling with a claimant who has a superior title, he cannot keep the land, retained as his own and urge that the surrendered portion was the beneficiary's share.\textsuperscript{137} It seems to follow that trustees cannot buy from themselves at private sale with any better grace than they can buy at a judicial sale. Thus in Clay v. Thomas\textsuperscript{138} there were two brothers and two sisters, the two brothers and another person being trustees of two-fourths of certain premises for their sisters but the brothers were the beneficial owners of the remainder. They bought their sister's interests and then the brothers attempted to convey to each of themselves a one-fourth interest to be held individually and free from the trust. It was held that they were buying from themselves, not from their beneficiaries, and that such a sale could be made only on order of the court.\textsuperscript{139}

C. Property Acquired by the Wrongful Use of the Property of Another

If a life tenant with power to sell the remainder, does so


\textsuperscript{134} Titherington v. Hodge, 81 Ky. 286 (1883).

\textsuperscript{135} Lee v. Fox, 36 Ky. 171 (1838); cf. Scott v. Scott, 183 Ky. 604 (1909) (B falsely representing to A that he owned the fee in certain land when he had only a life estate, sold the land to A with covenants. He was made a constructive trustee for the remainderman of land bought with the purchase price to the extent of the value of the remainder).

\textsuperscript{136} Faucett v. Faucett, 64 Ky. 511 (1866).

\textsuperscript{137} McClanahan v. Henderson, 9 Ky. 338 (1820).

\textsuperscript{138} 178 Ky. 199 (1917).

\textsuperscript{139} The obligations of co-owners toward each other and under what circumstances one becomes a trustee for another in Kentucky are not here considered.
and invests the proceeds in other land and takes title thereto in her own name, the remaindermen may follow the proceeds into the land thus purchased. It was once the view in some jurisdictions that if B wrongfully converted the property of A and with it or its proceeds acquired other property, no trust would arise in the property so acquired in favor of A. It is now generally agreed, however, that the constructive trust is a remedial device rather than a substantive institution. It, therefore, appears that A may follow the property into its changed form until it reaches the hands of a bona fide purchaser for value. So where property reaches the hands of a purchaser with notice he may not prevail over the claim of the beneficiary. Where B obtains a land settlement certificate belonging to A (then deceased) and took out patent in the name of C who knew plaintiff was A's heir and owner of the certificate, C became a trustee for plaintiff. In the recent case Ringo v. McFarland a county employee embezzled county funds and used them in purchasing and improving certain real estate. When the embezzlement was discovered and he was arrested he employed attorneys to defend him and gave them a mortgage on the property thus acquired, in compensation for services to be rendered. The county was permitted to follow the funds into the property and it was decided that the attorneys were not purchasers for value having rendered no service at the time the mortgage was executed.

In another case A sold certain slaves to C for part cash, and for the remainder C gave his notes. B came from another state and by falsely claiming the slaves as his own, induced A

\[1\] McCormick v. McCormick, 121 S. W. 450 (Ky. 1909); cf. Farmers’ Bank v. Bailey, 221 Ky. 55 (1927); Motley v. Tabor, 208 Ky. 702 (1925).

\[2\] Campbell v. Drake, 4 Ired. Eq. 94 (N. C. 1844) (“plaintiff never trusted him”); see 37 Yale L. Jour. 654.

\[3\] Perry v. Head, 8 Ky. 46 (1817); Dean v. Allin, 5 Ky. Op. 642 (1871); Trevathan v. Dees, 221 Ky. 396 (1927) (Husband converted his deceased wife’s stocks and had certificates issued to himself); Skidmore v. Harris, 157 Ky. 756 (1914) (A had an unrecorded deed at his death which B destroyed and procured from the grantor by false representations a new conveyance to himself); Smith v. Cornett, 26 K. L. R. 265 (1904).

\[4\] Stratton v. Stratton, 149 Ky. 473 (1912).

\[5\] McNitt v. Logan, 16 Ky. 60 (1808); cf. Dixon v. Caldwell, 15 Oh. St. 412 (1864) where the certificate passed to a purchaser without notice.

\[6\] 232 Ky. 622 (1930).

\[7\] Jones v. Chappell, 21 Ky. 422 (1827).
to compromise with him whereby A surrendered the C notes to B. These notes were then canceled by B, and C executed similar notes to B. Later B sued on these notes and obtained judgment. Thereafter, A learned of the fraud of B and filed a bill praying that he be decreed the benefit of B's judgment against A and this relief was granted, B being a constructive trustee of the judgment for A.

If the wrongdoer wrongfully commingles another's funds with his own, it is generally held that the injured party may follow the funds or have a lien upon the commingled sum for the amount taken so long as there is anything left of the sum so commingled. But if the funds have been exhausted or if they cannot be traced at all, then such rights do not exist. Two Kentucky cases seem to hold that where an investment is made in bank stock out of the commingled fund, the beneficiary has no preference over the general creditors in the thing purchased.

"If the trust fund has consisted of money and has been commingled with other monies of the trustee in one mass, undivided and indistinguishable and the guardian has made investments generally from the money in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investment."

Professor Ames notes that the Kentucky cases are contra to the better view.

If trust funds are wrongfully commingled and the combined funds are used indiscriminately by a bank to pay debts and expenses of the bank and to pay the checks of general depositors, by the weight of authority no preference is given to the beneficiary just because the sums on hand may be larger than they would otherwise have been, if the obligations of the bank had been paid out of the bank's proper funds.

SUMMARY

A resulting trust arises (a) where an express trust fails in

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117 Woodhouse v. Crandall, 197 Ill. 104 (1902); In re Oatway (1903) 2 Ch. 356; see Scott—The Right to Follow Money Wrongfully Commingled, 27 Harv. L. Rev. 125 (1914).
120 Bevan v. Citizen's Bank, 19 K. L. R. 1261 (1897); Bright v. King, 20 K. L. R. 186 (1898).
121 Bevan v. Citizen's Bank, supra, N. 150, at page 1263.
122 19 Harv. L. Rev. 511, 519 n. 3.
123 Farmers' National Bank v. Cockrell, 106 Ky. 573 (1899).
whole or in part, (b) where an express trust does not exhaust the entire property transferred to the trustee, and (c) where the purchase money is paid by one person and the conveyance is taken in the name of another. It was with reference to this last class that section 2353 was enacted. The common law resulting use where A conveyed to B without consideration and without intending to benefit B or any other person, did not come down to the law of trusts. Hence, if B is made a trustee in such a case the trust must be regarded as a constructive trust. In Kentucky under (a) a trust does not result to the contributor if he has received any consideration for his contribution.

So constructive trusts may arise *inter vivos*, where the grantor conveys to the grantee with an oral understanding that the grantee shall hold for the grantor, or where the agreement is that the grantee shall hold for a third person. Kentucky seems to enforce the oral promise in both cases. *A fortiori* a trust would be enforced if fraud or duress or breach of confidential relations were practiced by the grantee. A constructive trust arises where B purchases A’s property sold at judicial sale if B has promised to buy for A and A has relied upon the promise and made no other effort to protect his interests.

If A conveys to B by will absolutely on an oral trust for C, the promise of B is carried out in spite of the Wills Act. If the devise is “*in trust*” on the face of the will but there is a written disclosure of the beneficiary which cannot be incorporated into the will, still the devise goes to C, again in spite of the Statute of Wills.

Property acquired by one with reference to which he owes a duty to another because of his fiduciary relations will be made the subject of a constructive trust. But a mere special agency to buy for another is not regarded as a fiduciary relation. However *Oakes v. Oakes* more or less upsets this rule and the Kentucky position is now not clear. A partner is a fiduciary. That a trustee can take no benefit from his position as trustee other than compensation for services is well established.

A trust may also arise as a purely remedial device where there are no fiduciary relations. If wrongfully B takes A’s property and receives something else in exchange for it, A may follow his property into the new acquisition. If there is a wrongfully

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204 Ky. 298 (1924).
commingling of funds, the injured party may either follow his own share into the combined account or he may have a lien on that account for his share. This rule ought to continue to apply where the wrongdoer has drawn out a part from the combined account and invested it, that is, the injured person should be able to fasten upon both the subject of the investment and upon anything that still remains. Two cases seem to hold, however, that he cannot assert his claim against the subject matter of the investment. It is held, however, that the mere swelling of funds will not give the injured party a preference if he cannot establish that any of his own share still remains in the combined funds.

Alvin E. Evans.