Devise upon Oral Trust for Illegal Object

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NOTES

DEVISE UPON ORAL TRUST FOR ILLEGAL OBJECT

Before considering the case of a devise upon an oral trust for an illegal object let us review briefly the status of the primary case where the object is legal. A devises land to B who orally agrees to convey to C. B later refuses to convey. There is no question of fraud, undue influence, or duress but merely one of the breach of the oral promise. By the weight of authority in both England and America, C is entitled to recover the property by virtue of a constructive trust imposed upon B.

Professor Scott has pointed out that such a result is violative of both the Statute of Frauds and the Wills Act. Such a result is inconsistent with the result reached by the court in cases where the transfer is inter vivos. In those cases it allows B to keep and refuses to raise a constructive trust for either the grantor or the beneficiary. The supposed reason for the American rule is the paramount policy of the Statute of Frauds. But in the will case where the policy is at least doubly strong an exactly opposite result is reached.

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1 If there is actual fraud there is no question but that C may force B to convey the property. Thynn v. Thynn (1874), 41 Conn. 197.
2 Undue influence and duress stand on an equal footing with fraud. Dixon v. Ollius (1877), 1 Cox Eq. 414; Bulkley v. Wilford (1834), 2 C. & F. 102. In these cases B is guilty of a tort to C, and equity may properly give specific reparation for the tort by compelling B to convey to C. 37 Harvard Law Review 653, 670. The application of the tort-specific reparation doctrine to cases other than the above as Costigan advocates in 12 Michigan Law Review 515, overlooks the fundamental distinction between acts of misfeasance and acts of non-feasance, between tort and passive breach of contract. 20 Harvard Law Review 549, 554.
3 Oldham v. Litchfield (1705), 2 Vern. 506, 3 Ves. 39.
4 Caldwell v. Caldwell (1871), 7 Bush (Ky.) 515.
5 37 Harvard Law Review 653, 673, note 58. The possibility of spelling out a contract between A and B is of little aid "for the only consideration for B's agreement is the devolution of the property, which does not take place until A is dead, and there can be no mutual assent at that time by A and B. Id. 674.
7 Tillman v. Kifer (1910), 166 Ala. 403, 52 So. 309.
8 37 Harvard Law Review 653, 659.
9 Both the Statute of Frauds and the Wills Act are involved. And the policy behind the Wills Act would appear even stronger than that behind the Statute of Frauds.
10 The practical considerations arising from the fact that A is dead in the will case, whereas he is alive in the inter vivos case, have quite probably influenced the courts. 20 Harvard Law Review 549, 555.
vivos and will cases alike is to raise a constructive trust for the grantor or his heirs to prevent an unjust enrichment. As in analogous cases the equitable machinery of restoring the status quo is applied. The policy behind both the Statute of Frauds and the Wills Act prevents us from going forward but does not prevent us from going backward.

This leads to the problem of this note, namely, what if the beneficiary of the oral trust is an illegal object? The courts give the property back to the heirs of the testator.

And as far as we can find this result has escaped criticism. Indeed Professor Scott says: "Obviously these decisions are correct."

But upon what reasoning do the courts reach the result? With a single exception they do so by an analogy to the case first discussed above where the object is legal. Every one of the cases noted above in note 13 reaches the result by this pro-

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a. Deed absolute on its face may be shown by oral agreement to be debt security.

b. If one piece of land is conveyed in consideration of an oral promise to convey another piece of land, the former may be recovered in equity.

c. If owner of mortgaged land which is about to be foreclosed is induced to refrain from preventing the sale by an oral promise of another to buy in the property and later reconvey, the former owner may force a reconveyance upon payment.

d. If money is paid in consideration of an oral agreement to transfer land, there is a quasi-contractual obligation to restore the money.


American cases: Kendrick v. Cole (1876), 61 Mo. 572; Schultz's Appeal (1876), 30 Pa. 396 (dicta only); O'Hara v. Dudley (1884), 95 N. Y. 403; O'Reilly's Appeal (1893), 154 Pa. 485, 26 Atl. 623 (dicta only); Amherst College 1. Ritch (1897), 151 N. Y. 232, 45 N. E. 876; Edson v. Bartel (1897), 154 N. Y. 199, 48 N. E. 541; Stirks's Estate (1911), 232 Pa. 98, 81 Atl. 187; Casey v. Casey (1914), 161 App. Div., 146 N. Y. S. 348.

cess. There is a single exception furnished in an old English case which will be discussed later. The variations of the method employed group themselves into three classes. In the first class are those courts which take the following steps in the process of reasoning: (1) Raise a constructive trust for C, the illegal object; (2) Declare a resulting trust for A's heirs because of the failure of the gift due to illegality of object. Some of the courts as the one which decided the leading case of Sweeting v. Sweeting think aloud and expressly declare that this is the procedure. Still others, as patently though not as expressly, follow the same method. In the second class are those cases in which the courts say they raise a constructive trust for the testator's heirs because of the illegality of the object. In the third class are those cases in which the courts declare the devise void because of the illegality of the object. In each and all of the three classes the mental process is essentially the same. All such cases really confront the court with the alternative of declaring the gift ineffectual for one of two reasons, the Statute of Frauds or the Wills Act on the one hand, the illegality of the object on the other. Whenever the latter reason is chosen, and with a single exception it has been chosen, the court is falling into the same faulty reasoning as in the cases where the object is legal.

Why then have such cases escaped criticism? The answer is that the same result is reached as if the sounder process were followed. Suppose we apply Professor Scott's procedure. Then the intended trust would fail because within the prohibitions of the Statute of Frauds or the Wills Act on the one hand, the illegality of the object on the other. Whenever the latter reason is chosen, and with a single exception it has been chosen, the court is falling into the same faulty reasoning as in the cases where the object is legal.

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15 Supra note 13. "Here, if it was not for the Statute of Mortmain, as in the simple case put (where the object was legal), the charity would be entitled to come into this court and obtain a conveyance to itself from the devisee. . . . But since the Statute of Mortmain is in force and the secret trust was "for the benefit of a charity, which charity cannot hold the lands, this court considers that there is a resulting trust in favor of the heir-at-law. There would be a resulting trust in favor of the charity, except that the law says there shall be no secret trust for a charitable purpose." See also Amherst College v. Ritch, supra note 13.

**16** Casey v. Casey, supra note 13.

reached. There would be the single step of raising a constructive trust for A’s heirs to prevent an unjust enrichment. A single case has adopted this reasoning. Even this case did not go the whole route. In the case of *Rex v. Portington*, decided in 1693, there was an absolute devise and the question arose as to whether or not such a devise could be a trust for superstitious uses, and the court held that no averment could be admitted of such a trust under the Statute of Frauds. For reasons that are not of importance here there was never a final adjudication as to what should be done with the land under this decision. Probably the devisee would have been allowed to keep at that early date. But had there been a constructive trust raised for the heirs-at-law of the testator to prevent an unjust enrichment, the case would be in strict accord with Professor Scott’s view both as to method and as to result.

Since the same result is reached by either method the distinction may appear rather technical. But it is not wholly so. As is usual where an illogical method is followed inconsistencies arise. The inconsistencies which the process the courts actually follow may lead to are aptly illustrated by the case of *Sweeting v. Sweeting*, supra. In that case the illegal object was a charity to which gifts by will were forbidden by the laws of mortmain. In that case the court was forced to hold:

1. That the disposition was not testamentary in so far as to require it to be evidenced by a duly attested will;
2. That the disposition was testamentary in so far as the laws of mortmain were concerned.

It has been noted that this and similar inconsistencies have arisen from the decisions which are declared to be correct. But it has not been noted that these inconsistencies, or at least a part of them, have arisen from the method employed in reaching the decisions rather than from the decisions themselves. All of these inconsistencies could be avoided if the process Professor Scott advises were followed throughout.

As the law is at present the courts reach a correct result when there is a devise upon an oral trust for an illegal object. But the courts reach this correct result by a process of reason-
ing which is as inherently weak as is the process which has been so severely and justly criticised when applied to cases where there is a devise upon oral trust for a legal object.

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