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CONSTRUCTIVE TRUSTS IN CASES OF AGENCY TO
BUY REAL ESTATE

By L. W. FEEZER*

Assisted by ALEX RENTTO†

AMONG the welter of cases through which the courts are groping for the light of justice are a number in which are met as contending principles the statute of frauds and the constructive or resulting trust concept.

It is provided in the statute of frauds, as originally enacted in the time of Charles II, that interests in land will not be recognized and enforced through the courts without a writing, except for short term leases.¹ At the same time the chancellors, by the use of the trust concept, had long been giving protection to the interests of persons who had not acquired the complete legal title to an estate in land, but who in justice and equity were entitled to the beneficial interest in particular real property. Without repeating anything of the many able expositions of the history and theory of trusts arising by operation of law, which may be found in various texts and periodicals,² it is enough for the present purpose to say that the trust concept reduced to its simplest terms is that equity jurisprudence will recognize and protect the

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¹29 Charles II, ch. 3 (1677) "All leases, estates, interests of freehold or terms of years or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seizin only or by parole, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parole leases or estates or any former law or usage to the contrary notwithstanding."

Section 2 "Except nevertheless leases not exceeding three years from the making thereof" etc.

²Stone, Resulting Trusts and the Statute of Frauds, (1906) 6 Col. L. Rev. 326; Scott, The Trust as an Instrument of Law Reform, (1922) 31 Yale L. J. 457; Scott, Conveyances upon Trusts Not Properly Declared, (1924) 37 Harv. L. Rev. 653; Scott, Purchase Money Trusts, (1927) 40 Harv. L. Rev. 669; Ames, Origin of Uses and Trusts, (1908) 21 Harv. L. Rev. 261; Costigan, The Classification of Trusts as Express, Resulting and Constructive, (1914) 27 Harv. L. Rev. 437; Costigan, Trusts Based on Oral Promises, (1914) 12 Mich. L. Rev. 427, 515.

party in a situation wherein a legal title to property is vested in one person who, however, is not entitled to the benefits incident to the ownership of such title, but who holds it on behalf of another to whom he is obliged to account for any benefits connected with the property. This concept is the basis for the rationalization of so many and so varied legal relations that its origin in the ancient feoffments to uses may easily be forgotten.³

The express trust may perhaps be regarded as the natural or basic situation. The idea of separation of legal or technical from beneficial or equitable ownership having been worked out in connection with express trusts, it was not a radical or unnatural step for the chancellors to find a trust in a case where the essential fact set-up of a trust was shown to exist, even though the intention expressly to create that type of legal relationship was not proved. These non-express or implied trusts in the course of time reached a high degree of development, and a complex body of rules applicable to them came into being. As a preliminary to considering the specific situation which it is the purpose of this paper to discuss, it is perhaps worth while to mention the two well recognized classifications of implied trusts. The type of implied trust earliest recognized is the resulting trust.⁴ This type of trust had been developed out of the resulting use in a vast number of instances before the power and scope of its companion concept, the constructive trust, was fully realized. The distinction is put by Mr. Bogert as follows:

"Implied trusts are trusts declared to exist by courts of equity, either for the purpose of carrying out the presumed intent of the parties or to rectify fraud and prevent unjust enrichment. They are of two cases, namely: resulting trusts, which are declared by equity to exist because of a presumed intent that they shall exist; and constructive trusts, which are created by equity as a convenient means of rectifying fraud and preventing unjust enrichment."⁵

The story of the history of these implied trusts is extensively told in an article by Mr. Scott.⁶ Its greatest development was in connection with the purchase of land with one person's money,

³See Scott, *The Trust as an Instrument of Law Reform*, (1922) 31 *Yale L. J.* 457.

⁴See articles cited in note 2 *supra*.

⁵Bogert, *Trusts* 92. For an interesting recent case going at some length into the distinction between constructive and resulting trusts, see *Krzysko v. Gaudynski*, (1932) 207 *Wis.* 608, 242 *N. W.* 186.

⁶Scott, *The Trust as an Instrument of Law Reform*, (1922) 31 *Yale L. J.* 457.

but in the name of another. Constructive trusts, being predicated upon such uncertain and undefined concepts as "fraud" and "unjust enrichment," probably included a greater variety of situations than the resulting trust classification.

Section seven of the statute of frauds provided in general that trusts in real estate shall be established by a writing.⁷ Section eight, however, exempts from the application of section seven those trusts which arise by operation of law; that is to say, both resulting and constructive trusts.⁸ Therefore, many of the conflicts between parties asserting and denying the existence of a certain interest in land not covered by any written document may be resolved by settling the question whether the facts of the situation bring it within one or the other of these implied trust categories. Much has been written about the statute of frauds and resulting trusts, but there seems to have been but little comment upon at least one type of situation in connection with which the constructive trust concept is often invoked. A skeleton fact situation will best indicate the problem and the group of cases which this paper will endeavor to present.

P, desiring to purchase real estate, makes some advances to another individual A, with regard to having A represent him as agent for the purpose of making this purchase. It is orally agreed between them that A will negotiate the purchase on behalf of P and procure for P such interests as he desires to acquire. A undertakes the negotiations, but instead of carrying out the transactions as P intended he should, A purchases the property with his own money and procures the conveyance either to himself or to some straw man for A's benefit. When P offers A the amount of the purchase price, together with expenses and any compensation which may have been agreed upon, A refuses to convey to P

⁷28 Charles II, ch. 3 (1677), sec. VII. "And be it further enacted by the authority aforesaid, That from and after said four and twentieth day of June 1677 all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

⁸Section VIII of the statute of frauds reads, "Provided always, that where any conveyances shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

and suggests the statute of frauds as sufficient reason why he cannot be compelled to perform his agreement with P. If P seeks legal advice, his counsel will undoubtedly consider the problem from the viewpoint of implied trusts.⁹

If P has furnished the money with which the vendor was paid for the property, the situation will undoubtedly be recognized in almost any jurisdiction as constituting a purchase money resulting trust, and equity will compel a conveyance to P. The present discussion, however, is to deal with the cases where P did not furnish the purchase money. If it was understood that A was to advance the purchase price temporarily, or upon P's note or under any sort of an understanding which can properly be interpreted as a loan by the Agent to P, there is less difficulty than when this factor is absent. In such a case it is the usual thing to find that the loan or advance of the purchase price by A is regarded as making P the debtor of A, and the money used, A's money. This, of course, brings us back into the comfortable fold of purchase money resulting trusts.¹⁰

⁹See the articles above cited for exhaustive lists of cases and comments and also references to exceptions to the general rule. Bogert, *Trusts* 101 et seq. "It is everywhere held that a resulting trust may be proved by parol evidences." Bogert, *Trusts* 95.

The scope of purchase money resulting trusts has been limited by statute in a number of states. For example the New York statute (*Real Property Law*, sec. 94) provides: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands, but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either, 1, Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or, 2, in violation of some trust, purchases the property so conveyed with money or property belonging to another." There are similar statutes in Kentucky, Michigan, Minnesota and Wisconsin.

In Indiana and Kansas a third exception is added: "Where it shall be made to appear that, by agreement and without fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof."

¹⁰See *Herliny v. Coney*, (1905) 99 Me. 469, 59 Atl. 952 and footnotes in Scott, *Cases on Trusts*, 2nd ed., p. 432.

As to resulting trusts by way of mortgage where the payer borrows the purchase price from the grantee to whom the conveyance was made by way of mortgage see: Scott, *Purchase Money Trusts*, (1927) 40 Harv. L. Rev. 669, 680-682, 685-688; also the following typical cases; *Campbell v. Freeman*, (1893) 99 Cal. 546, 34 Pac. 113; *Reeve v. Strawn*, (1852) 14 Ill. 94; *Wilson v. Hoffman*, (1913) 104 Miss. 743, 61 So. 699; *Barrow v. Barrow*, (1904) 34 Wash. 684, 76 Pac. 305. The very complete annotation in 42 A. L. R. 10-125 also includes authorities on this point.

The real problem arises when there are not present such circumstances as have been regarded adequate to spell out a resulting trust. Then the possibility of working out a rationale for compelling a conveyance to P may have to be sought in the field of constructive trusts. The scope of this concept is perhaps not even yet fully appreciated by the courts which would welcome an authoritative basis for granting relief in such a case.¹¹ This thought is suggested because so many cases have dismissed the plaintiff in actions of this sort with no more satisfying reason than that such facts do not constitute a resulting trust.

When we come to consider the possible application of the constructive trust idea, we are faced with the fact that the generalizations about constructive trust call for fraud or unjust enrichment. All the legal concepts which go by the name of "constructive" depend in their application and operation upon at least one variable. Fraud and unjust enrichment supply that element in the case of constructive trust. Therefore, in cases where one has to consider whether this theory can be invoked, it is necessary to examine the cases in order to determine what the courts are calling fraud, or more accurately what are they treating as fraud in point of the effect they give to it. If one may assume that courts mean *what* they say, *when* they say that a constructive trust must be predicated upon fraud or unjust enrichment, then, in a case which has been disposed of as a constructive trust, one or both of these factors must be present. Further, is it necessary to find both fraud and unjust enrichment or is the latter alone enough? And, where the courts say both must be present, will they imply the fraud from the conduct resulting in unjust enrichment?¹² Un-

¹¹Mr. Bogert has apparently suggested that a purchase money trust in which the payer did not consent to the title being taken in the name of the grantee should be regarded as a constructive rather than a resulting trust, since the taking of the title in the name of another than the payer of the price was not the intention of the parties when the real purchaser parted with the purchase money. Hence it may be said that this is a fraud rectifying use of the trust device. Bogert, Trusts 101.

¹²The definitions of course are not sufficiently complete or final to answer questions like the one here raised, which must be answered for a particular jurisdiction, in so far as they can be answered at all, by a study of its decisions.

The following definitions are suggestive:

Cardozo, The Nature of the Judicial Process 42: "A constructive trust is nothing but the formula through which the conscience of equity finds expression." This is the best definition, but the following are enlightening as efforts of the courts to ease *legal* conscience, so to speak, from the sin of having decided cases upon the basis of *moral* conscience.

Maltbie v. Olds, (1914) 88 Conn. 633, 92 Atl. 403, "Fraud, actual or

fortunately, so many of the opinions are silent or very indefinite about just what is meant by fraud in these situations that, after all, we can only determine from the action taken by the court what was the process of rationalization.

To return to the specific problem. The type of fact set-up which has been outlined as the subject of this inquiry will be referred to for convenience as a "strict agency case." In actual experience with the reported decisions it is found that most of them involve complicating factors. Those in which it seems to the writer that these other factors have not affected the judgment, and may properly be regarded as immaterial, may be treated for the present purpose as "strict agency cases." Specifically then the present question is: *In a "strict agency case, will a court of equity compel A to make a conveyance to P?"* If such relief is granted, it is immaterial to the parties whether the court calls the situation a resulting trust, or a constructive trust or fails to label it. Whether courts decide cases by deduction from legal concepts, or by means of hunches, and whatever factors do affect the process of passing judgment, the truth remains that most of them do employ categories and concepts with somewhat familiar outlines and do reason by a system which passes for deduction, when they write their opinions. Therefore, we may with profit endeavor to set down some of the limitations of these categories which we have here to consider. On the other hand, one may not expect to find any rule of mathematical certainty for determining whether, in a particular case, a constructive trust will be raised. In the

constructive is the foundation upon which the law raises a constructive trust."

May v. May, (1914) 161 Ky. 114, 170 S. W. 537, "Where a trust is raised by equity in behalf of one who has been imposed on by another, it is enforced to work out justice and in spite of the intention of the parties."

Quinn v. Phipps, (1927) 93 Fla. 805, 113 So. 419, "A constructive trust is one raised by equity in respect of property which has been acquired by fraud, or where though acquired originally without fraud, it is against equity that it should be retained by him who holds it. Constructive trusts arise purely by construction of equity, independently of an actual or presumed intention of the parties to create a trust, and are generally thrust on the trustee for the purpose of working out the remedy. They are said to arise from actual fraud, constructive fraud and from some equitable principle independent of the existence of any fraud."

A typical statutory definition as found in the states having the "Field Code," S. D. Code 1919, sec. 1194: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

first place, the discretionary power of a court of equity leaves each case to be determined largely upon its individual facts as they impress the particular chancellor. Moreover, in so far as the opinion purports to solve the problem in a given case by the application of well formed rules, there is still the uncertain meaning content of the word symbols making up the rules. These are so variously interpreted that even such rules as have been attempted to be stated are but one factor and not necessarily the controlling factor in any case.

There is the uncertainty as to whether the resulting trust idea or the constructive trust notion applies. In a surprising number of the "strict agency cases" the bill is dismissed because the court says it finds no resulting trust in that P did not furnish any of the purchase price.¹³ Sometimes the matter is dismissed with hardly more than this statement. Again a court may find itself moved to a discussion leading to the conclusion, so commonly put, that "on principle and authority the plaintiff is entitled to no relief," and "to allow a conveyance in this case would be to overturn the statute."¹⁴ This type of opinion makes no reference to the possibility of applying the constructive trust theory. So far as the opinion reveals in many of these cases the court may never have heard of the notion that there can be any other kind of implied trust than a resulting trust.

There is another type of opinion in these cases which recognizes constructive trust but will not raise such a trust without a showing of "positive fraud."¹⁵ A reading of cases in which this

¹³It is an extremely common experience to find a case thus disposed of, viz: Alabama: *Butts v. Cooper*, (1907) 152 Ala. 375, 44 So. 616; *Watkins v. Carter*, (1909) 164 Ala. 456, 51 So. 318; California: *Bauman v. West*, (1916) 32 Cal. App. 217, 162 Pac. 434; Indiana: *Gilbert v. Carter*, (1857) 10 Ind. 16; Illinois: *Furber v. Page*, (1892) 143 Ill. 622, 32 N. E. 144; Iowa: *Burden v. Sheridan*, (1872) 36 Ia. 125, 14 Am. Rep. 505; Kentucky: *Kimmons v. Barnes*, (1924) 205 Ky. 502, 266 S. W. 891, 42 A. L. R. 1; Maryland: *Nagengast v. Alz*, (1901) 93 Md. 522, 49 Atl. 333; Massachusetts: *Southwick v. Spevak*, (1925) 252 Mass. 354, 147 N. E. 885; New York: *Canda v. Totten*, (1895) 87 Hun (N.Y.) 72, 33 N. Y. S. 962; Washington: *Cushing v. Heuston*, (1909) 53 Wash. 370, 102 Pac. 29.

¹⁴*Bartlett v. Pickersgill*, (1760) 1 Eden 515, 1 Cox Eq. Cas. 15, 4 East 578 (note).

¹⁵*Hunter v. Field*, (1914) 114 Ark. 128, 169 S. W. 813. Where the court refused to raise a trust because there was no "positive fraud." In the present case that expression was used to mean that a mere unfulfilled promise did not constitute fraud. Then too, we often find references to "actual fraud," as meaning something more definite than constructive fraud. Possibly the courts using these terms of emphasis have in mind the kind of fraud which will support a tort action at law, an action on the case for deceit, as for example where the defendant had a fraudulent intention at

expression appears indicates that it is merely another way of saying that a mere refusal to perform an oral promise alone is not fraud.¹⁶ Perhaps "positive fraud" means there must be present all the elements necessary to constitute a cause of action in tort for deceit. But has not equity distinguished between an action on the case for deceit, and the kind of fraud necessary for a cancellation, or as a defense against specific performance?

Some judges denying relief to plaintiffs in these cases evidently recognize the inherent justice of the plaintiffs' position and refer to the moral turpitude of a defendant who will take advantage of the Statute of Frauds in order to avoid his moral obligation.¹⁷ But, where the justice of the plaintiff's position outweighs in the judge's mind his reverence for the sanctity of the statute, he is very likely to point out that "the statute is for the prevention of fraud and cannot be used as an instrument of fraud."¹⁸ And again we come back to the word fraud. After all it comes down to just this, if an equity judge, not restrained by local precedent, is required to pass judgment in one of these "strict agency cases" and decide whether or not he will order a conveyance by an agent who had bought for himself that which he orally agreed to buy for his principal, he will first decide for himself, "Fraud or no fraud" and upon that will depend the result.¹⁹

Similarly there are certain characteristic rationalizations employed in the cases in which a trust is raised and a conveyance ordered to P. These may appear singly or in combination in any one case. It is inevitable that the statute of frauds must be faced, and faced down, if P is to get relief. A common explanation of the reason for granting the relief asked is that the contract upon

the time he made the promise upon which the plaintiff is relying. See Bogert's statement of this reason as applied to cases of an oral promise by a grantee to hold land in trusts. Bogert, *Trusts* 129.

¹⁶That the mere refusal to perform an oral promise is not fraud see: *Watkins v. Carter*, (1909) 164 Ala. 456, 51 So. 318; *Worthen v. Vogler*, (1920) 145 Ark. 161, 224 S. W. 622; *Hackney v. Butts*, (1883) 41 Ark. 493; *Parramore v. Hampton*, (1908) 55 Fla. 672, 45 So. 992, but in so far as it might be regarded as authority against the raising of a trust in a strict agency case it should be considered as overruled by *Quinn v. Phipps*, (1927) 93 Fla. 805, 113 So. 419; *Kimmons v. Barnes*, (1924) 205 Ky. 502, 266 S. W. 891; *Largey v. Leggat*, (1904) 30 Mont. 148, 75 Pac. 950.

¹⁷*Lincoln v. Chamberlain*, (1923) 61 Cal. App. 399, 214 Pac. 1013.

¹⁸This expression will be found in very many of the cases cited in these footnotes running back to *Heard v. Pilley*, (1869) 4 Ch. App. 548, 552, 38 L. J. Ch. 718, 21 L. T. 68.

¹⁹A moral argument of much vigor in favor of raising a trust in these cases is found in the opinion of Terrell, J. in *Quinn v. Phipps*, (1927) 93 Fla. 805, 113 So. 419.

which the plaintiff relies being merely a contract of agency is not a contract for the creation of an interest in land and hence is not covered by the statute of frauds.²⁰ This basis of rationalization is sometimes employed without reference to the prevention of fraud, and upon this approach the primary problem is that of granting specific performance and of considering whether or not damages would not be an adequate remedy. Probably more common is the type of opinion which approaches the problem as one of taking the case out of the statute of frauds because of the fraud of the agent in that he has acted in violation of a fiduciary relation.²¹ If the breach of a fiduciary to his principal is a fraud, the question may be raised as to whether a mere oral agency to buy land for another raises such a fiduciary relation as to impose this duty. It is noticeable that even in jurisdictions which will not grant P relief in the "strict agency cases" a general fiduciary, such as a general trustee, an officer of a corporation, a partner, a guardian or the like, who purchases for himself in competition with the interests of the trust estate or other beneficiary of his fiduciary duty, will hold the res so acquired as trustee for such beneficiary.²²

²⁰That a contract of agency is not a contract for the creation of an interest in land and hence not within the statute of frauds is a formula which has been repeated in many opinions of which the following are but offered as samples: *Quinn v. Phipps*, (1927) 93 Fla. 805, 113 So. 419; *Schmidt v. Beiseker*, (1905) 14 N. D. 587, 105 N. W. 1102; *Schrager v. Cool*, (1908) 221 Pa. St. 622, 70 Atl. 889. This is the main reliance of the court in the leading case of *Johnson v. Hayward*, (1905) 74 Neb. 157, 103 N. W. 1058. This reason is also mentioned in cases wherein an agent to purchase was to receive his commission in the form of a share of the profits when the land should be resold. *Carr v. Leavitt*, (1884) 54 Mich. 540, 20 N. W. 576; *Snyder v. Wolford*, (1885) 33 Minn. 175, 22 N. W. 254.

²¹*Quinn v. Phipps*, (1927) 93 Fla. 805, 113 So. 419; *Harrop v. Cole*, (1916) 85 N. J. Eq. 32, 95 Atl. 378, "A constructive trust is predicated upon a betrayal of confidence or the violation of duties arising out of a fiduciary relation . . . assuming to act as agent establishes a fiduciary relation." *Avery v. Stewart*, (1904) 136 N. C. 426, 48 S. E. 775; *Trice v. Comstock*, (C.C.A. 8th Cir. 1903) 121 Fed. 620.

²²*Partners v. Elliott*, (1907) 3 Alaska 352; *Morey v. Herrick*, (1851) 18 Pa. St. 123. *Corporation Officers*: *Church v. Sterling*, (1844) 16 Conn. 388; *Halsell v. Wise Coal Co.*, (1898) 19 Tex. Civ. App. 564, 47 S. W. 1017. *Officers of Voluntary Associations*: *Payne v. McClure Lodge*, (Ky. Ct. of App. 1909) 115 S. W. 764. *Employee*: *Horn Pond Ice Co. v. Pearson*, (1929) 267 Mass. 256, 166 N. E. 640. *Attorney*: *Home Investment Co. v. Strange*, (1917) 109 Tex. 342, 195 S. W. 849; *Bath Hardwood Lumber Co. v. Back Creek Co.*, (1924) 140 Va. 280, 125 S. E. 213.

SITUATIONS INVOLVING FACTORS NOT PRESENT IN STRICT
AGENCY CASES²³

Before undertaking a discussion of particular cases or jurisdictions as to the recognition of implied trust in agency cases, certain other situations, which are common enough to be classified into characteristic groups, should be distinguished.

1. *Where the Principal Furnishes the Money.*—This is of course the typical purchase-money-resulting-trust case and in the absence of statute the principal will be permitted to establish a trust and compel a conveyance from the agent or from a purchaser from the agent or on his behalf who was not a bona fide purchaser for value.

2. *Where the Purchase Price is a Loan.*—Where it has been agreed in advance that the agent is to advance the purchase price or part of it as a loan to the principal. This again contains the elements of a purchase money resulting trust and is usually disposed of on that basis. Some cases there are, which, without clear evidence of an agreement in advance that the agent should supply the purchase money as a loan, will nevertheless presume any payment by the agent to have been intended as a loan in view of the other facts, and thus bring the case around into the category of resulting trusts. Clear judicial expressions as to this sort of situation are so meager as to leave one in doubt as to when and in what jurisdictions this sort of reasoning may be relied upon as a basis for predicting the outcome in any undecided cases.

3. *Where there has been Part Performance of the Agreement.*—For example P has entered into possession (especially when he was without knowledge that A had taken the title in his own name), or he has made improvements. The cases in which this factor has been considered as playing a part are extremely confusing from the standpoint of classifying and involve so many factors tending to vary the simple agency situation that they will not be considered herein. In some jurisdictions strictly addicted to a technical construction of the statute of frauds, even a part

²³Cases dealing with all of these situations will be found in the long annotation in 42 A. L. R. 10-125. This note undertakes to collect authorities on all types of cases wherein one person has promised orally to buy property for another. Lists of cases will also be found in texts such as Perry on Trusts, Bogert on Trusts and in the footnotes in the leading case books.

payment or the making of improvements will not be enough to secure the plaintiff relief.

4. *Where Plaintiff had a Prior Interest.*—If the plaintiff as principal already had some interest in the property in question and the defendant was engaged as agent to assist him in protecting that interest or in perfecting his title or enlarging his estate in the res, it is almost universally agreed that the plaintiff is entitled to relief on the trust theory notwithstanding that the agreement with the agent was oral. The most frequent sort of case in this group is where the agent is employed to bid in at a judicial sale property in which the plaintiff has an interest, which is to be sold on an execution, foreclosure or the like. In this sort of case the principal can usually secure a conveyance against the agent who orally agreed to bid it in on his behalf and hold to reconvey upon tender of his outlay or such sum as was agreed upon.

5. *Where there was a pre-existing Fiduciary Relationship.*²⁴—If the agent who buys in competition with his principal is one who was under some other general and prior fiduciary obligation to the principal as a beneficiary, he will be treated as trustee of what he has acquired in derogation of the interests of the beneficiary of the trust obligation which he owes.

6. *Where the Agreement is to Purchase and Resell.*—Where the agreement between A and P was that A should acquire the land in his own name and with his own funds and resell to P upon request or upon the performance of some condition, A is not chargeable as a constructive trustee. This type of an agreement is obviously an agreement to create an interest in land and is everywhere regarded as within the Statute of Frauds. About the only thing which can save the rights of the principal in such a case is to show that the agent's advance of the purchase price was a loan. This means that a present obligation by way of debt on the part of the principal arose as soon as the agent paid out the purchase price. If this can be established, as has already been explained, the way is open to work out a purchase money resulting trust.

7. *Where a purchase by A for the joint interest of himself and P was intended.*—There are numerous cases in which land is purchased by one person for the joint interest of himself and

²⁴A number of cases involving this type of situation will be found collected in note 22 *supra*.

other members of a partnership or joint venture, and in particular is the question of the acquisition of an interest in land by one member of a mining partnership on behalf of the person taking the title and others who are his partners under an oral agreement a frequent one. It is not here proposed to go into the question of partnership interests as defined either by the principles of common law or the uniform partnership act. Suffice it to say that a partnership agreement is not one which under the statute of frauds is required to be in writing, and it seems to be well understood as a rule of partnership law that where the acquisition of interests in land is an incident to the purposes of a partnership rights of copartners as tenants in partnership, in land acquired by one partner and treated and used as partnership property, are not precluded by the absence of a writing.

SELECTED ILLUSTRATIVE CASES

It is perhaps worth while in connection with the present discussion to relate some of the history of the case law on our problem and to follow that up with a presentation of some illustrative cases and some attempt at an analysis of the opinions that appear in them.

Apparently the first case on this problem which has been noticed and the one to which most of the decisions unfavorable to the raising of a trust hark back is *Bartlett v. Pickersgill*, an English case of 1760.²⁵ The facts as stated in the brief note by which the case is reported are as follows:

"The defendant bought an estate for the plaintiff, but there was no written agreement between them, nor was any part of the purchase money paid by the plaintiff. The defendant articulated for the estate in his own name, and refused to convey to the plaintiff; so this bill was brought to compel a conveyance. There being no written evidence, the question was whether the plaintiff might give parol evidence. Lord Keeper Henley dismissed the bill without even hearing the defendant's counsel. He said in part, 'To allow it in this case would be to overturn the statute. . . . If I were to allow the evidence in the present case, I do not know a case where the statute would take place.'"

The Lord Keeper distinguished purchase money trusts, even where there had been only part payment by the plaintiff, as being covered by the exception of section VIII in favor of trusts arising by operation of law.

²⁵(1760) 1 Eden 515, 1 Cox Eq. Cas. 15, 4 East 578, note.

The idea of fraud and constructive trust seems not even to have been considered by the court although the point must have been suggested. Subsequent happenings would seem so to indicate. The plaintiff secured the defendant's conviction for perjury for having denied upon oath that he had purchased for the plaintiff. Following this conviction the plaintiff again applied to the court of equity to be reheard upon a supplemental bill, but was again denied.

Following this initial case, the status of this problem in England has been rather uncertain. In 1838 in *Taylor v. Salmon*,²⁶ Lord Cottenham granted specific performance of a lease to the plaintiffs which one of the defendants as their agent had been employed to secure for them from the other party named as defendant in the bill. The court did not develop the point as to wherein the fraud, if any, in this case consisted. It is not definitely stated whether there was a writing between the parties or not, and it is pointed out that the defendant did not at the time he agreed to procure the interest in question for the plaintiff, have the fraudulent intent of keeping the lease for himself. This case refers neither to *Bartlett v. Pickersgill* nor to any other earlier case as authority. Apparently the next case of significance is *Heard v. Pilley*,²⁷ in which it was clearly held that a contract for the purchase of land by an agent will be enforced against the agent, although he was appointed by parol. It does not appear in this case that the agent had actually taken a conveyance of the title, but he had secured from the vendor a written contract to convey to himself. The court referred to the bill here as one "alleging a contract entered into in writing with the agent of the plaintiff, and praying specific performance against the agent and the person with whom he has entered into the contract."

The court says that this is a very ordinary bill and that it is a startling suggestion that it cannot be sustained unless the agent was appointed in writing. It should be noted that this case was like *Taylor v. Salmon*,²⁸ in that the conveyance had not yet been made to the agent by the vendor, and it is on this ground that *Bartlett v. Pickersgill* is distinguished. However Lord Justice Selwyn goes on in his opinion to suggest that when an agent goes to the principal and says,

²⁶(1838) 4 My. & Cr. 134.

²⁷(1869) 4 Ch. App. 548, 38 L. J. Ch. 718, 21 L. T. 68.

²⁸(1838) 4 My. & Cr. 134.

"I will buy an estate for you" and then buys it for himself and denies the agency, it is fraud. He says that to allow the defendant's plea would be to make the statute of frauds an instrument of fraud. The concurring opinion of Gifford L. J. is even stronger, where he says as regards *Bartlett v. Pickersgill*, that, "it seems to be inconsistent with all the authorities of this court which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud."

It would seem that while *Bartlett v. Pickersgill* has not been expressly overruled in England, its authority has been greatly weakened by subsequent dicta. In the effort to classify all the jurisdictions whose decisions have been examined in the effort to determine whether, in a "strict agency case" they would go "trust," or "no trust," England remains in the doubtful group.

STATE OF AMERICAN AUTHORITY

As might be expected, this question is the subject of much difference of opinion in the numerous American jurisdictions. A review of the cases in a long annotation²⁹ summarizes the cases by listing two groups of states with about 22 as "trust" and about 14 as "no trust." The annotation mentioned undertakes to deal with the entire topic of oral promises to buy land for another and includes one subdivision which is evidently intended to include the sort of situations which have been herein referred to as "strict agency cases," and which is entitled "Agreements to Negotiate Purchase as Agent." Under this topic there is an attempt to classify the various American jurisdictions as for and against the raising of a trust. However, after reading the cases cited in that list, it seems impossible categorically to assign many of the states either to the one group or the other. In some of the states the cases have not been "*strict agency cases*" and only from dicta or analogy can they be interpreted as justifying a prediction as to the outcome when the situation is a pure agency one. In others, the decisions appear to be irreconcilable; dicta in later cases have thrown doubt upon earlier ones without having clearly overruled them. The statements in textbooks and encyclopedias are quite as unsatisfactory as those in connection with the annotations. Mr. Bogert in his excellent little Hornbook text, writing as late as 1921 says,³⁰

²⁹42 A. L. R. 10-125.

³⁰Bogert, Trusts 125.

"Where A contracts with B that he, A, will buy real property with the funds of B and in the name of B, and in violation of such promise, A buys the real property in his own name and with his own funds, equity does not find fraud on which to base a constructive trust."

He cites a preponderance of cases for this proposition and a much smaller number as being contra. Inasmuch as there were at the time this text was written many cases in favor of raising a trust under such circumstances which were not cited, perhaps one may conclude that the statement in the text expresses the author's view.

The last edition of Perry on Trusts in a discussion dealing generally with resulting trusts³¹ indicates that no trust will be raised in the type of case we are considering, but in the chapter on constructive trusts,³² the opposite impression is given. No attempt is made to reconcile these somewhat conflicting statements or to indicate that there is a division of authority.

Mechem on Agency at one point says,³³

"An agent instructed to purchase property for his principal and relied upon to buy it in the principal's name and for his direct account, will not be permitted, without the principal's knowledge and consent, to become the purchaser of the same property for himself. If the property be land and is purchased with the principal's money, the agent will clearly be a trustee; and even though he purchased with his own money, he will, nevertheless, be considered as holding the property in trust for his principal, and the latter upon repaying or tendering him the amount of the purchase price and his reasonable compensation, may by proper proceeding in equity compel a conveyance to himself."

However, two sections later Mechem says:³⁴

"In order to establish a trust in real estate, as against the agent, if the trust be denied, it has been said to be the settled rule that the evidence of it must, to satisfy the statute of frauds, be in writing, or the principal must have paid or furnished the purchase money."

Among the various statements, more or less irreconcilable, to be found at various places in the encyclopedias, the clearest exposition of the whole situation is found in the article upon Trusts in *Ruling Case Law* as follows:³⁵

"There is a conflict among the authorities as to the right of a

³¹Perry, Trusts, 7th ed., sec. 134, 135.

³²Perry, Trusts 7th ed., sec. 206.

³³Mechem, Agency, 2nd ed., sec. 1192.

³⁴Mechem, Agency, 2nd ed., sec. 1194.

³⁵26 R. C. L. 1246: see also 39 Cyc. 171.

person who employs another by parol to purchase an estate for him as his agent, the title to be taken in the name of the principal, to compel the enforcement of the contract, where the agent, in violation of his agreement, purchases the land for himself. Where the oral contract of agency contemplates that the agent shall take the title in his own name, but hold it for the benefit of his principal, it is evident that the contract is clearly within the statute, and cannot be enforced by the principal, where the agent pays for the property with his own money. But some cases draw a distinction between a contract contemplating a purchase by one party in his own name but for the benefit of another, and a contract which contemplates not only that the purchase shall be made by one party for the benefit of another, but also that it shall be in the name of such other. In the latter case, it is argued that the contract cannot be deemed to be within the spirit of the statute, since the contract is merely an agreement by one party to act as the agent of another in conducting the negotiations for a transfer of property from a third party to the principal, and contemplates no transfer of land as between the two parties to the contract. The fact that the contract contemplates a conveyance of the property as between the principal and a third party is said to be a mere incident, and not sufficient to bring the contract of agency within the statute. And these cases hold that it is immaterial who pays the purchase price, since, whether paid by the principal or the agent, a trust in favor of the principal will result from the agent's breach of confidence in purchasing the property in violation of his agreement."

DISCUSSION OF TYPE CASES REPRESENTING THE TWO VIEWS

A recent case refusing to raise a trust in a case which may fairly be classified as a "strict agency case" is *Kimmons v. Barnes*, a Kentucky case of 1924.³⁶ It was here orally agreed that Kimmons would negotiate the purchase of a store building for Barnes and others composing a partnership. Kimmons bought the premises in question, paid with his own money and then allowed the plaintiffs to take possession and spend several thousand dollars in making alterations and improvements. There was conflicting testimony as to whether Kimmons did buy for the plaintiff or as an investment for his wife. The Kentucky court, however, did not trouble itself with the conflict in the evidence or consider it important and said that even taking the plaintiffs' view of the facts they were not entitled to relief. The court said:

"In this jurisdiction, where an agent goes out to purchase property for a principal, if, in violation of the contract he pur-

³⁶(1924) 205 Ky. 502, 266 S. W. 891.

chases the property, pays the purchase price himself from his own funds and takes the title to himself, the principal cannot compel the agent to convey the property to him, unless the contract between them was in writing and signed by the parties."

The plaintiffs here sought to show circumstances of peculiar hardship to them (in that the defendant had acquiesced in the expenditure for improvements) in an effort to induce the court to distinguish this case from its former decisions. This, however, was not allowed to control the judgment, and the court relied for its reasons upon the authority of its own former decision in *Day v. Amburgey*.³⁷ In the latter case the court had said,

"If a person obtains the legal title to property by such arts or acts of circumvention, imposition or fraud, or if he obtains it by virtue of a confidential relation and influence and under such circumstances that he ought not in good conscience and equity to enjoy the benefit, then courts of equity will raise a trust."

All this is quoted from Pomeroy on Equity.³⁸ Then the court proceeds to add that when the right depends upon an oral contract for the sale of land it is within the Statute of Frauds. Nowhere in this opinion are we told whether the court regards the situation as in the nature of resulting trust or as being more like the conception of constructive trusts, but just following the argument already referred to, we are told that the principal in such a case can prevail against the agent only where he has shown a purchase money trust, and no mention is made of the exemption of implied trusts from the requirement of a writing, as provided by section VIII of the statute of frauds itself. The Kentucky court finally clinches the argument with a quotation from Sugden on Vendors and Purchasers which even into its 15th edition had continued to repeat a statement based on *Bartlett v. Pickersgill* without any apparent recognition of the doubt which had been thrown upon that case by later decisions.³⁹

As a matter of fact, not a few of the cases by which some of the state courts first accepted the position that no trust could be raised in the "strict agency case" relied as their sole authority upon Sugden, Story and other text authors who wrote long prior to the modern appreciation of the power and scope of the constructive trust.

Among the best known of the cases holding that an agent who buys land for himself instead of for his principal is trustee are

³⁷(1912) 147 Ky. 123, 143 S. W. 1033.

³⁸Pomeroy, *Equity Jurisprudence*, 4th ed., sec. 1044.

³⁹See notes 26 and 27 *supra*.

Rose v. Hayden,⁴⁰ a Kansas case, and *Johnson v. Hayward*,⁴¹ decided in Nebraska. The Kansas case after reviewing the authorities both ways from the days of *Bartlett v. Pickersgill* to current times and after distinguishing the situation where the principal furnishes the purchase money, says,

"A contract which has for its object the *actual sale* of real estate and the *transfer of the title* thereto by the terms of the contract itself, is of course within the statute of frauds. . . . In such a case, the payment of the purchase money does not seem to count for much. Something else must be done in order to take the contract out of the statute. And we do not think that the payment or non-payment of the purchase-money in this case should count for much. We think the trust nevertheless *resulted*.⁴² The controlling question in this case is not whether the principal advanced the purchase-money or not, but it is whether in equity and good conscience the agent who in fact purchased the property with his own money in his own name, in violation of his agreement with his principal and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy."

One notes that in the course of this passage the court says the trust "results." It is impossible to be sure whether the word "results" is being used in the sense of the legal idiom or not. The writer of a note in the American and English Annotated cases seems to indicate that the word is so used for he points out that:

"In *Rose v. Hayden* . . . the court speaks of the trust created as a *resulting trust*, but it is held that the trust arises out of the abuse of the confidential relations arising out of the contract of agency; in other words the element of fraud seems to be the determining factor. In this view, the trust arising is perhaps not a resulting trust but a constructive trust impressed upon the transaction from reasons of equity and justice."⁴³

The Kansas court, after laboring mightily to give the reasons why, in a strict agency case, there will be a trust, remarks that the plaintiff had a prior interest existing before the defendant, as agent, came into the picture. If this is the situation, it would seem that the court need not have gone further to develop the rule that a mere agent to purchase land in which neither party was previously interested will be subjected to a trust. Practically all the authorities will raise a trust in behalf of a principal who merely employs an agent to assist him in clearing his title or increasing the quantum of his estate.

⁴⁰(1886) 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145.

⁴¹(1905) 74 Neb. 157, 103 N. W. 1058, 5 L. R. A. (N.S.) 112.

⁴²*Italics* are the writer's.

⁴³12 Ann. Cas. 805.

No state has been more emphatic or consistent in raising a trust in what has been here designated as a strict agency case than South Dakota. There are three South Dakota cases, all strict agency situations, in which the trust is recognized. The first of these cases was an action to compel the defendant agent to convey the land in controversy to the principal.⁴⁴ The court relied largely on the authority of *Rose v. Hayden* and granted the plaintiff the relief asked for on the theory that the defendant should be treated as a trustee. Whether the trust so raised was to be regarded as a resulting or a constructive trust is not specifically stated, although the general trend of the language used in the opinion sounds in terms of constructive trust. This is a strong case in favor of the raising of a trust against the agent, because the agent was unable to purchase the land for the price originally authorized by the principal and in buying it on his own account was obliged to pay more. Another strong position, indicated by the opinion in this case, is the court's statement that under the agreement it might even have been proper for the agent to take title in his own name, but that he would still have been a trustee.

A year later the same rule was applied in *Morris v. Riegel*⁴⁵ in which the court referred to the previous case as containing a sufficient discussion of the principles involved. When the question arose again in 1922⁴⁶ the problem was merely that of determining that the facts were such as to bring the case within the rule already laid down.

New Jersey formerly presented a confused and curious group of cases which left one in uncertainty as to whether a trust would be raised in a strict agency case or not.⁴⁷ However in 1914 *Harrop v. Cole*,⁴⁸ a strict agency case, expressly overruled the earlier cases which refused to treat an agent as a trustee. This case is important for the careful distinction which is made between con-

⁴⁴*Brookings Land and Trust Co. v. Bertness*, (1903) 17 S. D. 293, 96 N. W. 97.

⁴⁵*Morris v. Riegel*, (1904) 19 S. D. 26, 101 N. W. 1086.

⁴⁶*Bailey v. Colombe*, (1922) 45 S. D. 443, 188 N. W. 203.

⁴⁷*Wallace v. Brown*, (1855) 10 N. J. Eq. 308, a strict agency case; *Nestal v. Schmidt*, (1878) 29 N. J. Eq. 458, not a strict agency case and no trust raised. On the other hand, *Seacoast Ry. v. Wood*, (1903) 65 N. J. Eq. 530, 56 Atl. 337 where an agent who, as an officer of a corporation for which he was authorized to buy land, purchased it in his own name was held to be a trustee. Then in 1909 in *Rogers v. Genung*, 76 N. J. Eq. 306, 74 Atl. 473 the old rule was apparently repudiated but not clearly so as the case was not a pure "agency to buy land" situation.

⁴⁸(1914) 85 N. J. Eq. 32, 95 Atl. 378.

structive and resulting trusts. It is pointed out that this type case is one of constructive trust. The court says,

"A constructive trust is predicated upon betrayal of confidence or the violation of duties arising out of a fiduciary relation. A fiduciary relation may be established in numerous ways. *It is a mere incident that it happens in a particular case to arise out of a verbal agreement. Equity will not tolerate a betrayal of confidence and it makes no difference how this confidence has been obtained.*"⁴⁹

Minnesota is one of the states which, superficially at least, seems to take the position that the statute of frauds stands in the way of giving the principal the right to enforce a contract of agency to buy land as against an agent who has acquired it for himself with his own money.

Dougan v. Bemis,⁵⁰ decided in 1905, was apparently relied on by the compiler of the note in American Law Reports as a basis for including Minnesota among the "non-trust" states. In this case plaintiff and defendant owned lots on either side of a vacant lot. Taking the somewhat conflicting evidence as favoring the plaintiff's point of view, it was orally agreed that the defendant would negotiate for the purchase of the lot in question for their joint benefit. The defendant, however, purchased the lot alone and refused to convey any part of it to the plaintiff. The court refused to compel a conveyance, saying:

"The most favorable inference for the plaintiff is that the relation of principal and agent existed between the parties, whereby the defendant, Mrs. Bemis, agreed as agent of the plaintiff to purchase for her one-half of the lot; and that the defendant in violation of such agency secured a conveyance of the whole lot for her own use and refused to convey any portion thereof to the plaintiff. . . . The question, then, in its last analysis, is whether, from these facts a trust *resulted* in favor of the plaintiff in half of the lot which equity will enforce. The rule of law applicable to this question is well settled on principle and authority. It is thus: If an agent to purchase real estate for another with money furnished by him takes the title thereto in his own name without the assent of his principal, he will hold the legal title as trustee for his principal. But if the agent in such a case buys with his own money, and the principal advances no part of the purchase price, and the rights of the principal rest upon a verbal agreement which is denied, no *resulting* trust will arise, and the case will fall within the statute of frauds."⁵¹

⁴⁹Italics the writer's.

⁵⁰(1905) 95 Minn. 220, 103 N. W. 882.

⁵¹Italics the writer's.

It is submitted that this case should not be regarded as finally settling the rule in Minnesota for certain reasons to be pointed out.

In the first place, it does not appear clearly whether the understanding was that the defendant was to acquire the entire lot and then convey a part of it or an undivided interest therein to the plaintiff, or, whether, on the other hand, she was intended to act as an agent to negotiate for its sale by the former owner and procure separate conveyances to herself and the plaintiff. Secondly, the court seems to put this decision entirely on the *resulting* trust concept, entirely ignoring the existence of the doctrine of constructive trust. Lewis, J., in concurring that there should be a new trial, said he did not wish to be understood as holding that the evidence would not justify a holding that the defendant was a trustee *ex maleficio*. Moreover, the court here was too sure that the law on this point was well settled. The only authorities cited for this position were texts. The opinion goes on to admit that there are contrary cases, citing *Rose v. Hayden* as an example.

In *Sieger v. Sieger* in 1925⁵² the Minnesota court seems to be more conscious of the breadth of the doctrine of constructive trusts and effectively uses it to take a purchase money trust out of the Minnesota statute which was intended to eliminate purchase money resulting trusts in those cases where the person supplying the purchase price deliberately consented and arranged to have the title taken in the name of the party acting as agent to make the purchase.

The Minnesota situation is typical of that in many jurisdictions in which the only cases to be found upon the specific type of situation in mind here are dismissed upon the ground that they are not *resulting* trusts and without the slightest indication in the opinion that the court is at all aware of the doctrine of *constructive* trusts.⁵³

⁵²(1925) 162 Minn. 332, 202 N. W. 742.

⁵³*Wentworth v. Wentworth*, (1858) 2 Minn. 238. The plaintiff located on government land and improved it. He allowed his brother, the defendant, to enter it in his own name on an oral agreement to convey it to plaintiff upon payment of the purchase price. Action for specific performance. Held for defendant. The contract is within the statute of frauds. Mere possession and the making of improvements are not such part performance as will take it out of the statute of frauds. The court says "The defendant has incurred the odium of a violator of a sacred trust and we reluctantly confess our inability under the law to aid the plaintiff."

SUMMARY

Is it desirable that the judicial process should lend itself to aiding the intending purchaser of real estate who makes an oral agreement with an agent to act for him in negotiating the deal? This is the value judgment which must precede fact judgments in particular cases. It is obviously impossible and probably undesirable to expect courts to react identically on this point. To some the sacro-sanctity of the statute of frauds will be paramount. The point of view of others may be, as shown by the expressions so often used, to the effect that equity will not allow the statute of frauds be used as an instrument of fraud, or that the agent may not profit by his perfidy in violating the confidence reposed in him in his fiduciary relationship.

But what do these words mean? What is fraud? Is it a breach of confidence to refuse to perform an oral agreement? Is it fraud to refuse to perform an oral agreement, particularly when it cannot be shown that the promise was made with an intention of not performing it?

Once it appears that a court knows what a constructive trust is, and is willing to recognize that resulting trusts are not the only sort of implied trusts but that there is another variety even broader and more indefinite, then comes the problem of delimiting that field and determining whether the conduct of an agent, who decides to pick up a bargain for himself instead of letting his principal have the benefit of it, is fraud, or in some way so culpable that equity should exercise its power over the situation. What is there about the conduct of such an agent which smells so unsavory? Some of the courts which refuse relief in these premises admit that the defendant is a dastardly fellow and should be ashamed of himself. But they are afraid of the statute of frauds. Is it a breach of fiduciary duty to do something contrary to an oral agreement when the subject matter is the sort that the statute of frauds has something to say about? Or must we say that when parties are dealing with real estate oral promises don't count? Is an agency to buy real estate for another a contract to create an interest in real estate? All these are questions which the equity court must consider. The statute of frauds itself does not answer them. The court in each particular case must answer them to its own satisfaction. No statute can mean more than the judge who is applying it thinks it means in reference to the situation upon which he has the responsibility of passing judgment.

No statute has yet been drawn which is so self executing that it is not necessary for some human intelligence, acting as the agency of the state for its administration, to decide whether the rule of law expressed by the statute applies to the fact set-up at hand. The judicial process works identically, whether there is a statute involved or not. The question which the court must answer is simply this: Which (if any) of the rules of law invoked by the parties, or known to the court, extend their protection to the interests asserted by these parties?

There are certainly at least two lines of approach to this situation which will enable a court to give relief to the plaintiff without doing too great violence to the statute of frauds. The two lines of orthodox legal deduction which may be employed to rationalize a recognition of the interest of the plaintiff in this type of case have been repeatedly referred to and may be restated as brief rules.

1. An agency creates a fiduciary duty, and an agent who acquires property by conduct inconsistent with the duty arising out of that fiduciary relation will be deemed to hold such property in constructive trust for his principal.

2. A contract by which one agrees to act as an agent to purchase land from a third person in the name of his principal is not a contract to create an interest in land, but is purely a contract of agency and is not within the statute of frauds.

These rules have been cast in perfectly orthodox terminology and have probably been asserted in some connection or other by most courts. Of course they do not automatically decide cases, but neither does the statute of frauds. But if a court wants to give the plaintiff his relief, as even some of them in the "non-trust" states apparently wanted to do, and lacks the tools to do so in conformity with orthodox "legal reasoning," the above formulas should serve.⁵⁴ Either one may be used by itself, or they can be judiciously (or judicially) mixed and seasoned with other rules and doctrines to taste. In any event, the relief will be the same. Compel the agent who has taken the title in his own name to convey it to the principal upon tender of price paid plus expenses of the purchase and commission.⁵⁵

⁵⁴This lack of adequate tools is exactly what the Minnesota court refers to in the passage quoted in note 53 *supra*.

⁵⁵"A decree will be advised, establishing a constructive trust on behalf of the complainants, and directing the defendants to execute the trust by conveying the land to the complainants upon payment of the price." *Stevenson, V. C.*, in *Harrop v. Cole*, (1915) 85 N. J. Eq. 32, 95 Atl. 378.

It has merely happened that the trust device has been the word formula employed to compel the performance of various ethical duties which Anglo-Saxon jurisprudence has more or less intuitively sensed. When the ethical duty impressed the tribunal having the responsibility of passing judgment sufficiently, a suitable formula will be selected (or devised) and applied, and, whether or not the statute of frauds will be permitted to interfere, will depend upon the particular judge's conception of the policy and function of the statute of frauds. The probability that a judge will select the most adaptable formula for reaching and rationalizing an acceptable judgment in any case will depend upon what formulas he has in mind. Counsel for the parties if they are to serve the best interests of their clients must be diligent in bringing to the attention of the court the theories, rules and formulas which will best serve their respective purposes. In the type of case discussed in this paper this cannot be done unless counsel adequately appreciate the scope and application of the constructive and resulting trust concepts and the distinctions between them. From numerous references above it appears that in many cases the courts have used the term "resulting trust" in such a way as to indicate a failure fully to realize the distinction. It is perhaps not unreasonable to suspect that counsel may have been at fault in failing to point out this distinction in briefs and arguments.

It has not been the primary purpose in this discussion to deal with the question whether there is less danger of fraud in the "strict agency" cases than in other case of oral promise to convey land. It has been the purpose rather to show that in this type of case probably the weight of authority and the better value judgment is in favor of imposing a trust on the real estate agent who buys for himself instead of for his employer or principal. However, the question may well be raised whether there may not be less danger of perjured testimony than in cases where the title has been conveyed to the defendant by the plaintiff or taken by him with the plaintiff's knowledge upon his oral promise to convey to the plaintiff. It may also be asked whether the position of a real estate agent is not such as to raise a more clearly recognizable fiduciary duty than oral promises between parties not standing in that relation. The recent Wisconsin case of *Krzyzsko v. Gaudynski*⁵⁶ makes a special point of the status of a real estate agent to his client as imposing a fiduciary duty such as has been tradi-

⁵⁶(1932) 207 Wis. 608, 242 N. W. 186. See also note 5 supra.

tionally accepted as a basis for taking a case out of the statute of frauds. In this case the court says: "The ground of the decision in the *Spilmore Case*⁵⁷ was the confidential relationship of the defendant to the widow and children for whom he acted. Such a relationship exists between any agent and the principal for whom he acts." After distinguishing other Wisconsin cases in which no trust was imposed the court continues:

"In none of these cases did the defendant assume to act as real estate agent to negotiate for the purchase of lands. Such agents are now licensed, and their license is in a sense an invitation to the public to repose trust and confidence in them. Their relation to their principals is similar to that of one admitted to practice law to his client. . . . We see no reason why the obligation of faithfulness is not as strong in the one case as the other."

In times like the present when land values are decreasing it is not likely that we shall find the courts faced with the problem covered by this discussion. If any litigation on this point arises in the immediate future, it is more likely that it will be initiated by the agent who, having made a purchase for a principal who has not supplied him with funds in advance, finds himself with the title of real estate which he does not want and which is declining in price. Authority on this side of the picture seems to be almost totally lacking, and furthermore the discussion of the agent's rights and powers in such a situation involves considerations not pertinent to this paper.

⁵⁷*Roller v. Spilmore*, (1860) 13 Wis. 26. This was an early Wisconsin case holding an agent to purchase land who took title for himself was a trustee for his principal.