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Trusts - Breach of Contract of Agency or Employment - Imposition of Constructive Trusts Where Statutes Make Oral Contracts of Agency Void

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the law of the place where the act or omission occurred.”²⁴ The act also provided that the Federal Rules of Civil Procedure should control the practice and procedure of the suit under the Act.²⁵ These rules require the suit be brought by the real party in interest,²⁶ and permit necessary²⁷ and permissive²⁸ joinder of parties. Under modern statutes, valid tort claims are transferable by assignment if they pass the test of survival²⁹ and the assignee may sue in his own name as the real party in interest.³⁰ The fact that the assignor was joined as party defendant raises the constitutional right to a jury trial by the assignee.³¹ But the Federal Rules of Civil Procedure are sufficiently elastic to try government issues to the court and private issues to the jury.³² Yet the possibility that the Federal Tort Claims Act may be an exception to the Anti-Assignment Act by implication was not considered by the Supreme Court in the instant case.

Although the reasons for enforcing the Anti-Assignment Act are absent from the instant case, the majority felt that recognizing the assignment as valid when all parties are before the court would in effect, repeal the statute by mere judicial construction in plain disregard of the unequivocal language of the act.

JOHN G. MUTCHLER.

TRUSTS — BREACH OF CONTRACT OF AGENCY OR EMPLOYMENT — IMPOSITION OF CONSTRUCTIVE TRUSTS WHERE STATUTES MAKE ORAL CONTRACTS OF AGENCY VOID. — The plaintiff orally employed defendant, a real estate agent, to purchase certain land for him, but advanced no money. Defendant purchased the property but took title to the land in his own name. Plaintiff sued to impose a constructive trust on the property, contending that defendant had taken title to the property in fraudulent breach of their purchase agreement. Defendant's motion to dismiss was granted on the basis of a specific statute covering oral contracts with real estate brokers to purchase property and making such contracts void unless in writing.¹ Upon appeal, it was *held*, that the agreement created a relationship of trust and confidence between the parties to which the statute did not apply and that

24. 28 U.S.C. §1346 (b).

25. 60 Stat. 844 (1946).

26. Fed. R. Civ. P. 17 (a).

27. Fed. R. Civ. P. 19 (a).

28. Fed. R. Civ. P. 20 (a).

29. Clark, Code Pleading p. 164 (2d ed. 1947).

30. Clark, *op. cit. supra* at 165.

31. See 59 Yale L.J. 1515 (1950).

32. See note 30 *supra*.

1. N.M. Ann. Stat. §75-143 (Supp. 1951): “§1. Any agreement entered into subsequent to the first day of July, 1949, authorizing or employing an agent or broker to purchase or sell lands, tenements, or hereditaments or any interest in or concerning them, for a commission or other compensation, shall be void unless the agreement, or some memorandum thereof shall be in writing and signed by the person to be charged therewith, or some other person thereunto by him lawfully authorized. No such agreement or employment shall be considered exclusive unless specifically so stated therein.” Also see N.D. Rev. Code §9-0604 (1943): “The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent . . . 4. An agreement . . . for the sale of real property, or of an interest therein . . .”

a constructive trust should be imposed on the property. *Harris v. Dunn*, 234 P.2d 821 (N.M. 1951).

Where an agent purchases land in his own name in violation of an oral contract, the majority of cases construing a general Statute of Frauds have imposed a constructive or resulting trust as did the court in the *Harris* case.² A distinction is sometimes drawn between instances where the agent uses his own money and those where he uses money of his principal³ but this would seem to be the minority view⁴ and the trend is away from such a distinction.⁵ The view of the cases supporting the instant case is that the breach of confidential or fiduciary relationship is sufficient reason for the imposition of a constructive trust. A fiduciary relationship has been held to exist where the parties are members of the same family;⁶ where a prior course of dealings has resulted in the placing of confidence in one person by another;⁷ where the agent has used the principal's money to make part payment on the property;⁸ or where a person has relied on the promise to convey by the other and has thereby failed to take action which he would otherwise have taken to his resulting detriment.⁹

While the language of the statute involved in the *Harris* case might seem to preclude a holding in favor of the principal, the court is not alone in determining that a constructive trust will arise from the fiduciary relationship of the parties even though the contract itself is rendered void by statute.¹⁰ The essential ingredient for the imposition of a constructive trust appears to be unjust enrichment and if this is present, generally the lack of an express contract is no bar to the action.¹¹

Since the result is not based upon a finding that a contract existed in the *Harris* case, it is submitted that the result reached there is sound. While it is true that the purchaser, in similar situations, may protect himself by reducing the agreement to writing, it should be considered that the real estate agent, whose whole business is concerned with such or similar transactions, has a practical advantage over the less-worldly purchaser. A slight tip of the scales of justice to the favor of the inexperienced purchaser would seem to be an injustice to no one.

FRANCIS J. SMITH

2. *Havner Land Co. v. MacGregor*, 169 Iowa 5, 149 N.W. 617 (1914); *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554 (1886); *Lamb v. Sandall*, 135 Neb. 300, 281 N.W. 37 (1938); *Harrop v. Cole*, 85 N.J. Eq. 32, 95 Atl. 378 (1915). Also see *Kaplan v. Meyer*, 271 App. Div. 837, 65 N.Y.S.2d 765, 766 (1946). *Contra*, *Bauman v. Wuest*, 32 Cal. App. 217, 162 Pac. 434 (1916); *Kimmons v. Barnes & Metcalfe*, 205 Ky. 502, 266 S.W. 891 (1924); *Nagengast v. Alz*, 93 Md. 522, 49 Atl. 333 (1901); *Dougan v. Bemis*, 95 Minn. 220, 103 N.W. 882 (1905).

3. *Dougan v. Bemis*, 95 Minn. 220, 103 N.W. 882 (1905).

4. See 24 Minn. L. Rev. 718 (1940).

5. See *Harris v. Dunn*, 234 P. 2d 821, 822 (N.M. 1951).

6. *Windle v. Kelly*, 135 Neb. 143, 280 N.W. 445 (1938); *Kersey v. Kersey*, 76 W. Va. 70, 85 S.E. 22 (1915).

7. *Hoge v. Kentucky River Coal Corp.*, 216 Ky. 51, 287 S.W. 226 (1926); *Whitten v. Wright*, 206 Minn. 423, 289 N.W. 509 (1939). Also see 24 Minn. L. Rev. 718 (1940).

8. *Rice v. First Nat. Bank in Albuquerque*, 50 N.M. 99, 171 P.2d 318 (1946); *Banks v. Morse*, 17 Wash.2d 18, 134 P.2d 952 (1943).

9. *Lucas v. Associacao P. Uniao M. do Estado da California*, 61 Cal. App. 2d 344, 143 P.2d 53 (1943). Cf. *Holman v. Kirby*, 198 Ark. 326, 128 S.W.2d 357 (1939). *But cf.* *Mays v. Ferry*, 196 Ga. 729, 27 S.E.2d 698 (1943).

10. *Krzyzsko v. Gaudynski*, 207 Wis. 608, 242 N.W. 186 (1932). *Contra*, *Carkonen v. Alberts*, 196 Wash. 575, 83 P.2d 899 (1938).

11. For a discussion on this point, see *Feezer, Constructive Trusts in Cases of Agency to Buy Real Estate*, 17 Minn. L. Rev. 734 (1933).