WALKER *v.* BIDDLE.

5-792 284 S. W. 2d 840

Opinion delivered December 5, 1955.

[Rehearing denied January 9, 1956.]

1. CANCELLATION OF INSTRUMENTS — WEIGHT AND SUFFICIENCY OF EVIDENCE.—Evidence held sufficiently clear and convincing to sustain trial court's finding that deeds in question were made in reliance on appellant's promise to hold the land for himself and his sisters.
2. STATUTE OF FRAUDS—INAPPLICABLE TO CONSTRUCTIVE TRUSTS.—The statute of frauds does not apply to a constructive trust.
3. TRUSTS, CONSTRUCTIVE — RELATIONSHIP BETWEEN BROTHER AND SISTER.—The relation between brother and sister *held,* in the absence of estrangement or other unusual circumstances, to be one of confidence for which a constructive trust would be imposed upon grantee's repudiation of his parol promise to hold for his sisters.
4. LIMITATION OF ACTIONS—CONSTRUCTIVE TRUSTS.—Since it is the transferee's repudiation of his oral promise that brings a constructive trust into being, the seven-year statute of limitations in favor of the constructive trustee runs only from the date of the repudiation.

Appeal from Columbia Chancery Court, Second Division: *W. A. Speer,* Chancellor: affirmed.

McKay, Anderson & Crumpler, for appellant.

Spencer & Spencer, for appellee.

GEORGE ROSE SMITH, J. In 1943 and 1944 the appellant, Dee Walker, obtained from his sisters, Addie Biddle and Mary Walker, quitclaim deeds to 320 acres of land

that had been held by the Walker family for many years. This suit to cancel those deeds was brought by Addie Biddle and by some of Mary Walker's heirs, the others being named as defendants. The plaintiffs successfully contended below that when the deeds were executed the two sisters were tenants in common with their brother and placed the title in his name merely to enable him to act for all three in the execution of oil-and-gas leases and deeds. Dee contends that the land was already his, that he had put the title in the names of his wife and two sisters for the purpose of defrauding a judgment creditor, and that after the judgment claim had been settled the sisters simply reconveyed the title to him.

Since we have concluded that all issues of fact must be determined adversely to the appellant by reason of a letter he wrote to Addie Biddle a few months before this suit was filed, we pass quickly over the background facts. The Walker children inherited the land from their father in 1907 but lost it by foreclosure in 1927. Title was regained in 1931 when Henry Stevens executed a deed to Dee's wife and the two sisters. Dee says that he alone arranged to repurchase the land from Stevens in 1927, that he made payments until the debt was satisfied in 1931, and that Stevens, who was Dee's attorney, made the deed to Dee's wife and sisters in order to protect the title from an unsatisfied judgment against Dee. The testimony on the other side is that the brother and two sisters all lived on the land, worked the crops together, and by their joint efforts regained the land as tenants in common.

Title remained in the three women until Addie and Mary gave Dee a quitclaim deed to 160 acres in 1943 and a similar deed to the other 160 acres in 1944. These are the deeds now in controversy; we have mentioned the conflicting reasons that are given by the parties for the execution of these conveyances.

The brother and sisters continued to live on the property until Mary died in 1947. According to Addie's testimony, in 1950 and thereafter she tried to persuade Dee

to divide the land, but Dee wanted to postpone the division until he could "get shed" of his second wife. On June 26, 1952, Dee wrote his sister this letter, which we consider to be decisive:

"Hello Addie how are you find I hope this leave al well hope this will find you al the same I got your letter was glad to here from you But sorry that you think I am made with you for what listen Addie you is got land her just like I am dont want your land and aint trying to take it from you listen I have married the laward [lawyer] told me let that land stay like it is if I dont my wife can get a part of it that why I wont vied [divide] it if it stay like it is she can not get any thing that why I dont want to vied it yet a while that why I diden want you to talk with me before her that night listen when you come down here I will tell you al a bout it when I see you a gen I dont want you land so with love

Dee Walker"

Confronted with this letter Walker was unable to explain why he had written that his sister had land just as he had, why he had assured her that he was not trying to take it from her, or why he had thought is necessary to give a reason for not dividing the land. When this letter is considered with the other testimony we conclude that the appellees have met the burden of showing by clear and convincing proof that the deeds in question were made in reliance upon Walker's promise to hold the land for himself and his sisters.

Aside from this question of fact the appellant urges two issues of law. First, it is argued that the statute of frauds prevents the enforcement of Dee's oral promise to hold the title for his sisters. This is true, but the statute by its terms does not apply to a constructive trust. Ark. Stats. 1947, § 38-107. That type of trust is involved here. When the grantee's oral promise to hold for the grantor is fraudulently made, or when such a promise is given by a grantee who stands in a confidential relation to the grantor, equity will impose a constructive trust

upon the grantee's refusal to perform his promise. *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; Rest., Restitution, § 182; Rest., Trusts, § 44. The relation between brother and sister is, in the absence of estrangement or other unusual circumstances, one of confidence; they are not regarded as dealing with each other at arm's length. *Gillespie* v. *Holland,* 40 Ark. 28, 48 Am. Rep. 1; *Reeder* v. *Meredith,* 78 Ark. 111, 93 S. W. 558, 115 Am. St. Rep. 22.

Second, it is contended that since the statute of limitations, in the absence of concealment, runs in favor of the trustee of a constructive trust, *Matthews* v. *Simmons,* 49 Ark. 468, 5 S. W. 797, this suit is barred by the seven-year statute. The answer is that the constructive trust did not arise at the moment the deeds were executed. It is the transferee's repudiation of his promise that brings the trust into being. The evidence indicates that Walker did not claim the land as his own until after his sister Mary's death in 1947; so the bar of the statute had not fallen when this suit was brought in 1952.

Affirmed.