PURCHASER AT SHERIFF'S SALE: WHEN A TRUSTEE.

ORAL PROMISE BY PURCHASER OF REAL ESTATE AT SHERIFF'S SALE TO HOLD FOR THE BENEFIT OF THE EXECUTION DEBTOR OR OTHER PERSON HAVING AN INTEREST IN THE ESTATE: WHEN ENFORCEABLE IN PENNSYLVANIA.

In Hill, "On Trustees," Bispham's Edition, page 222, it is said that a court of equity will interfere in cases of fraud, to administer justice in favor of innocent persons who have suffered by it without any fault on their side, and further, that the court has never ventured to lay down any rule as to what shall constitute fraud, for if it were to do so, the jurisdiction would be cramped by new schemes which the fertility of man's invention would contrive.

There are, however, a number of different classes of cases which have arisen frequently enough in practice to furnish material for a more careful analysis of the exact nature and extent of the jurisdiction exercised.

It is the purpose of this paper to discuss the principles involved in the class of cases outlined in the title, and to ascertain how far the statute of frauds is available as a defence to a purchaser who declines to fulfill the terms of his promise.

In this discussion, for the sake of brevity, the letter A will represent the person having an interest as execution debtor, or otherwise, in the property about to be sold, and the letter B will indicate the purchaser at the sale.

The facts in the case of *Pebbles* v. *Reading*, 8 S. & R. 484 (1822), furnish a convenient text upon which to hinge the discussion. In that case, the land of A, being about to be sold, B, a stranger, orally agreed with him to buy the property at the sale, and reconvey upon payment of the purchase money and interest. At the sale B bought for $170 land worth $750. Soon after the sale

A moved out, and B moved in, and then B sold the property to X, against whom A brought an action of ejectment. It did not appear in the case whether anyone was deterred from bidding at the sale because of B's presence, or what reliance, if any, A placed on B's promise. The verdict was for A in the court below, and on appeal it was said that the declaration of B was an oral trust which A was entitled to prove, and upon which he could maintain his action of ejectment. The case went off on the ground that X was a purchaser for value without notice, and on the question of the plaintiff's laches. It is true that the Act of 1856 was not then in force, and that the Supreme Court had abandoned its former doctrine,— that the Act of March 21, 1772, 1 Sm. L. 389, Sec. 1, applied to oral trusts. The case is useful, however, as illustrating the real relation of the parties, of which the Supreme Court somewhat lost sight when it came to consider the effect of the Act of 1856. It is believed, however, that this case represents the law in Pennsylvania to-day, with one qualification hereafter to be noted; that is, that A must have relied in some way on B's promise.

A brief analysis of the relation of the parties will not be out of order. It is to the interest of A that the property bring its full value, as any overplus, after satisfying all claims, will belong to him, according to the nature of his interest, and if no overplus, he will be benefited in so far as the proceeds are sufficient partially to satisfy the claims.

B promises A that if he should buy the property in he will hold it for him, and allow him to redeem upon the terms stated. It is submitted that this promise is nothing more or less, although not so recognized in terms by the Supreme Court, than an imperfect declaration of trust, a promise to hold property to be acquired in the future for the benefit of the promisee; such a declaration as equity, entirely apart from the Statute of Frauds, never enforces in favor of a volunteer. A, however, is not a volunteer. He has suffered loss; his property has been

sold for less than its value, and if he suffered his loss because of his reliance on B's promise, he is in a position to ask the chancellor to enforce a trust in his favor. His remedy at law is inadequate, for he cannot bring an action of contract, there being no consideration. (*Bennett* v. *The Bank*, 87 Pa. 382, 1878.) He cannot bring an action of deceit because the promise of the defendant is not as to any existing fact, but is to do something in the future.

The Act of April 22, 1856, Section 2, Pamphlet Laws 532, in effect provides that all declarations of trust of lands shall be manifested by writing, except in the case of trusts arising by implication or construction of law. Since the statute requires all trusts to be manifested by writing, it does not make the trust void, but simply prescribes the manner of proof, and it can only be set up by the party to be charged. The only question, therefore, is how far is the statute available as a defence to B, and it is inaccurate and misleading to say that the trust is void because of the statute.

It was laid down by Lord Hardwicke, in the case of *Reach* v. *Kennegate*, 1 Vesey, 125—

"that the Statute of Frauds should never be understood to protect fraud, and therefore wherever a case is infected with fraud, the court will not suffer the statute to protect it so as that anyone should run away with a benefit not intended."

In *Boynton* v. *Housler*, 73 Pa. 453 (1873), where the real estate of a decedent being about to be sold in execution, B promised the widow, who resided on the ground, that he would buy the land and give her the privilege of taking eighteen acres, if the widow and her friends would not bid against him. They refrained from bidding in consequence. The court enforced the agreement in an action of ejectment by B against the widow.

In the case of *Wolford* v. *Herrington*, 86 Pa. 39 (1877), Mr. Justice Sharswood laid down the law, as follows: "Where anyone having any interest (*except the defendant in the execution*)[1] is induced to confide in the verbal

[1] The clause in italics is not the law, as the other cases cited show. The learned judge cited *Boynton* v. *Housler*, 73 Pa. 453; *Beegle* v. *Wentz*, 55 Pa. 369,—neither in point.

promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee ex-maleficio." In that case, the land of A, the judgment debtor, on which he resided, was about to be sold at sheriff's sale, and B agreed with A's wife, who held an unrecorded deed to the land, that he would buy the property in at the sheriff's sale and give her two years in which to redeem, and that he would give a writing to that effect before the property was struck off. He bought the property in at less than the market value, repudiated the agreement, and brought an ejectment on the sheriff's deed. Held that the agreement was valid, and should be enforced.[a]

It must then follow that when the promise is made to one who has no interest in the property, there is no unjust enrichment, for the promisee has suffered no loss by the sale of the property at less than its value; consequently, in the case of *Shaffner* v. *Shaffner*, 145 Pa. 163 (1891), where there was a sheriff's sale of the interest of one of two co-tenants of certain real estate, of which the plaintiff was in possession, and B promised the plaintiff, who was the owner of the other interest, before the sale, that if he, B, bought that interest he would hold for the benefit of plaintiff's daughter, and plaintiff filed a bill against B to enforce the trust, a demurrer to the bill was sustained. The court seemed to base the decision on the ground that there was no fraud at the sale.

In the case of *Martin* v. *Baird*, 175 Pa. 540 (1896), the principle that the fraud depends on A's loss and B's gain is illustrated very plainly. In that case the defendant, who was about to purchase a hotel property in which the plaintiff had a one-fourth interest, agreed with the plaintiff before the sale, in writing, that he would transfer

[a] Accord. *Cook* v. *Cook*, 69 Pa. 443 (1871); *Blaylock's Appeal*, 73 Pa. 146 (1873); *Heath's Appeal*, 100 Pa. 1 (1882); *Cowperthwaite* v. *The Bank*, 102 Pa. 397 (1883); *Gaines* v. *Brockerhoff*, 136 Pa. 175 (1890).

to the plaintiff a one-fourth interest in a property and admit him to a partnership to be formed. It appeared that the price received for the property by the plaintiff and his co-owners was the full market price. Held, the plaintiff could not, on defendant's refusal after the purchase to carry out the agreement, enforce a trust against him. The trust here was in writing; was an imperfect declaration of trust. The plaintiff, however, had received full value for his property; the defendant was not unjustly enriched, but had paid what the property was worth.

There may, however, be a valid binding contract between A and B, as in the case of *Beegle* v. *Wentz*, 55 Pa. 369 (1867), where A agreed to withdraw his claim for exemption if B would buy in and convey fifteen acres to A. Held, that the agreement constituted B a trustee for A as to the fifteen acres. The court regarded this as a resulting trust, on the ground that as A had relinquished a valuable right, he was in the same position as if he had advanced part of the purchase money. This, it is believed, is error, and the true ground of decision was that B was a trustee within the principle hereinbefore stated. In this case, however, A could have brought suit on the contract, instead of proceeding to enforce the trust. Query: Whether he had any remedy in equity at all here, the remedy at law being adequate.

If the promise was not made before the sale, A could have no opportunity of relying on it, consequently, as in the case of *Fox* v. *Heffner*, 1 W. & S. 372 (1841), where the promise was made by B to A after the sale, it was held that A was not in the position to complain. It is true that that case was decided when the Supreme Court was holding the erroneous doctrine that parol trusts were within the Act of 1772. On the facts, however, the case was rightly decided, and is, under the reasoning of the court, so far as the present law is concerned, just as good an authority as if decided since the Act of 1856. So also in the case of *Haines* v. *O'Conner*, 10 Watts, 313 (1840), where B acquired the property at the sale at an under-

valuation, but made the promise at or after the time of the purchase. The court instructing the jury said:

"You are therefore instructed that if B purchased this property with his own money, expressing an intention to let the plaintiff have it by reimbursing him his own money after he bought it fairly at sheriff's sale as the highest and best bidder, and afterwards frequently declared his willingness to give it him on the conditions which were not accepted by the plaintiff or his friends, then the case is not a trust ex-maleficio, but is within the Statute of Frauds."[3]

It is clear that A must have acted in some manner on B's promise, for if it never was communicated to him he could not afterwards take advantage of it, and if, being communicated, he had not acted on it, he could not say that he had changed his position in consequence, and as in either of these cases he would have done whatever he was going to do to protect his interest had the promise not been made, the loss, if it occurred, would be because of his own conduct, and the law could afford him no relief. It is plain then on principle that A must have relied on the promise. What must A have done in reliance on the promise? The case of *Kellum* v. *Smith*, 33 Pa. 158 (1859), decided that mere acquiescence is not a sufficient reliance. In that case the court below permitted A to testify to the arrangement between himself and B before the sale, and that in consequence of B's promise he made no effort to protect his interest or obtain the property at the sale. The case was sent back for a new trial because of this error. Strong J., in delivering the opinion of the court, said:

"It may be that if, at the instance of the promisor, the promisee is induced to incur some expense, which he otherwise would not have done, the former shall be estopped from denying the trust. But however this may be, mere acquiescence or omission to take other

[3] *Mellerio* v. *Freeman*, 211 Pa. 202 (1905); s. c., *Freeman* v. *Lafferty*, 207 Pa. 32 (1903). In this case, the syllabus is misleading, as it gives the impression that the case went on the ground of the Statute of Limitations. The remarks of the learned judge on that point were mere dicta. The promise was made after the sale. Therefore A suffered no loss because of the promise, and B acquired no unjust enrichment because of his failure to carry out the promise. Consequently, the declaration being oral, the Statute of Frauds was always available as a defence. The discussion as to the question of limitation, therefore, was not in point. The limitation clause does not apply until a case arises which could have been enforced within the five years.

steps to obtain the property, though induced by faith in the promise, is not available for such purpose."

Now, in the case of *Wolford* v. *Herrington*, 86 Pa. 39 (1877), and *Cowperthwaite* v. *The Bank*, 102 Pa. 397 (1882), it was in evidence that A refrained from bidding in reliance on B's promise, and although the point was not discussed in either of these cases, it is suggested that they represent the law, and that Mr. Justice Strong misapprehended the situation. The question, what is reliance on the promise in cases of this kind, is always to be considered with reference to the circumstances surrounding the parties, and as the only way A can protect himself is by going to the sale and bidding the property up, or have some one do it for him, it is difficult to see how he can show any greater reliance on B's promise than by acquiescing in the arrangement and refraining from bidding.

Where, however, B proclaims at the sale that he is bidding for A, having made no previous arrangement with him, and by so doing deters others from bidding, and acquires the property at undervaluation, the case depends on different principles.

"If, by the artifice of the purchaser declaring that he was to buy for the owner, others were prevented from bidding, and the land was sold at a great undervaluation, this would make him a trustee." Duncan J., in *Pebbles* v. *Reading*, 8 S. & R. 484 (1822); Accord. Dictum in *Christy* v. *Sill*, 95 Pa. 380 (1880).

In the case of *Brown* v. *Dysinger*, 1 Rawle, 408 (1829), B declared at the sale that he was buying for A, who was a lessee merely, not a defendant in the execution. It appeared that others stopped bidding in consequence of the declaration. There was evidence of a previous understanding between A and B. The court held that B was a trustee because of his declarations, using the following significant language:

"Such conduct (declarations) would, in the language of the Chief Justice, stop his mouth forever after from asserting anything contrary to what he declared at and after the sale."[4]

[4] In the case of *Brown* v. *Dysinger*, the court seemed to consider the case under the mistaken notion that it came within the Statute of Frauds of 1772, so that the case was rightly decided at that time.

Is not this an estoppel? B proclaims that he is buying for A, when he is not, and made no such previous declaration to A. Now if B acquires the land at less than its value, A is damaged, and can enforce a trust against B, which he is now estopped to deny. B, however, is not damaged unless he has an interest in the property. If he is in that position, any sale at less than value diminishes the fund coming to him from the sheriff, and when the parties stand in that relation, the case is plain. Where, however, A is, as in the case of *Brown* v. *Dysinger*, a mere lessee, with no interest whatever in the fund, it is hard to see how he is damaged by the property being sold at less than its value, and if he is not damaged, how can he enforce the estoppel against B?

The principle involved in this line of cases is neatly illustrated by the case of *Feely* v. *Hoover*, 130 Pa. 107 (1889). There, the attorney for B, the judgment creditor, at the sale procured the property at an undervaluation, and induced a competing bidder to withdraw. He had, however, no previous arrangement with A, and made no statement at the sale that he was going to hold for A, and acted, and said he was acting, solely in the interests of his client. It was held that there was no trust.

Mr. Justice Strong, in the case of *Kellum* v. *Smith*, 33 Pa., 158(1859), said:

> "But the fraud which will convert the purchaser at a sheriff's sale into a trust ex-maleficio of the debtor must have been fraud at the time of the sale. Subsequent covin will not answer any more than subsequent payment of the purchase money will convert an absolute purchase into a naked trust. When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, but in the promise and its subsequent breach."

In this, it is believed, the learned judge overlooked the distinction between fraud on the part of a purchaser at sheriff's sale, as to which any party interested could complain, and fraud as between A and B. The sale may

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The dissent of Todd J. was chiefly on the ground that the proof offered was not sufficiently clear and precise to take the case to the jury. See *McCaskey* v. *Graff*, 23 Pa. 321 (1854); *Dick* v. *Cooper*, 24 Pa. 217 (1854); *Seylar* v. *Carson*, 69 Pa. 81 (1871).

be perfectly fair, and yet B will not be permitted to avail himself of the Statute of Frauds.[5]

The fraud as between A and B consists in this, that B had made a promise to A on the faith of which A has permitted B to enrich himself at A's expense, expecting B to fulfill the promise on the strength of the enrichment. B has acquired an increment to his estate which he then seeks to retain by pleading the statute. A plainer case of running away with a benefit not intended can hardly be imagined.

Where, however, the purchaser declares at the time of the sale, or subsequently, that he is buying for some one else, there is no trust where that other person has no interest in the property at the time, whether there is a previous arrangement between them or not, for it is a necessary element in this class of trusts that the party seeking to enforce the trust must show that the defendant has acquired a particular res, in which the plaintiff has an interest prior to the promise, and that that res was acquired at less than its value subsequent to the promise, expressly or by inference because of the plaintiff's reliance on the faith of the promise. Thus, in the case of *Kisler* v. *Kisler*, 2 Watts, 323 (1834), where a guardian purchased some land at a public sale, which he declared at the time of the sale he was buying for the use of his ward, and the ward had no interest in the property sold. Held, to be an ordinary parol agreement to reconvey or be reimbursed the price, which is clearly within the Statute of Frauds. Accord. Dictum of Gibson C. J. in *Sidle* v. *Walters*, 5 Watts, 389 (1836).

There is another class of cases to be distinguished, and that is those where A merely constitutes B his agent to go and buy for him. B has made no promise or declaration, and cannot be considered a trustee[6] from any point of view, excepting only when A has given B the money

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[5] For an instance of fraud at the sale, see *Gilbert* v. *Hoffman*, 2 Watts 66 (1833); *Abbey* v. *Dewey*, 25 Pa. 413 (1855).

[6] *Barnet* v. *Dougherty*, 32 Pa. 371 (1859); See *Irwin* v. *Trego*, 22 Pa. 368 (1853), decided before the passage of the Act of 1856.

to buy with, in which circumstance the case depends on a different principle. The case closest to the line is *Sheriff* v. *Neal*, 6 Watts, 534 (1837), where B was constituted a trustee and the trust enforced.

It is believed, therefore, that the law in Pennsylvania is represented by the following proposition: If property in which A has an interest is about to be sold at sheriff's sale, and B by promising A before the sale to buy the property and hold for A's benefit induces A not to protect his interest, whereby B obtains the property for less than its value, B will be held to his promise, and if the subject-matter is real estate, the Statute of Frauds will not be available as a defence to B.

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NOTE.—When B's title is subsequently sold by the sheriff, notice of the trust must be given at the sale, otherwise the purchaser takes discharged. *Fillman* v. *Divers*, 31 Pa. 429, 1858; *Myers* v. *Leas*, 101 Pa. 172, 1882; *Lance* v. *Gorman*, 136 Pa. 200, 1890.

If no notice is given at the sale, the purchaser takes clear of the trust, and A can enforce his claim against the proceeds. *Rupp's Appeal*, 100 Pa. 531, 1882.

Notice of a trust which does not exist does not affect purchaser. *Kegerreis* v. *Lutz*, 187 Pa. 252, 1898.

In *Burr* v. *Kase*, 168 Pa. 81, 1895, the agreement was in writing but had been lost, and the court held that the evidence of the contents of the lost paper was not sufficient.

If A takes a lease from B after the sale, the question whether his acceptance of the lease amounts to a waiver and abandonment of the claim is a question for the jury. *Brown* v. *Dysinger*, 1 Rawle, 408 (1829); *Seylar* v. *Carson*, 69 Pa. 81, 1871.

The question may come before the court in several ways: Ejectment by A against B on the agreement. *Jackman* v. *Ringland*, 4 W. & S. 149, 1842. Ejectment by B against A, A setting up the agreement in defence. *Sheriff* v. *Neal*, 6 Watts, 534, 1837.

Bill on equity by A against B, to enforce the trust (*Kisler's Appeal*, 73 Pa. 393), 1873, in which case, if a responsive answer is filed, A is within the usual chancery rule as to overcoming the effect thereof. *Beckett* v. *Allison*, 188 Pa. 279, 1898.

By proceedings, B against A, under the Act of 1836, P. L. 780. *Cowperthwaite* v. *Bank*, 102 Pa. 397, 1883.

Trusts of this kind are within the five years limitation clause of the Act of April 22, 1856, Sec. 6, P. L. 532; *Christy* v. *Sill*, 95 Pa. 380, 1880.

But the statute does not run while the cestui que trust is in possession. *Beegle* v. *Wentz*, 55 Pa. 369, 1867.

Not necessary for A to make a tender. B is not entitled to reimbursement. *Gilbert* v. *Hoffman*, 2 Watts, 66, 1833; *McCaskey* v. *Graff*, 23 Pa. 321; *Seylar* v. *Carson*, 69 Pa. 81, 1871.