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PURCHASE MONEY RESULTING TRUSTS IN NORTH CAROLINA

J. GLENN EDWARDS* AND M. T. VAN HECKE**

THE GENERAL DOCTRINE

Where one person pays the consideration for the transfer of property and title is taken in the name of another, the former is presumptively the beneficiary of a resulting trust.¹ The rule has been stated in the following language by Chief Justice Shepherd:

"It is a well established principle that where, upon the purchase of property, the legal title is taken in the name of one person while the consideration is given or paid by another, at the same time or previously, and as a part of the same transaction, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds."²

This principle has been followed in a long line of decisions in North Carolina.³

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¹ For an excellent recent treatment of the whole doctrine, see Scott, *Resulting Trusts Arising Upon the Purchase of Land* (1927) 40 HARV. L. REV. 669.

As to origin, development, and nature of resulting trusts, see AMES, *LECTURES ON LEGAL HISTORY* (1913) 431-434, also printed in (1907) 20 HARV. L. REV. 549, 555-557; Costigan, *The Classification of Trusts as Express, Resulting, and Constructive* (1914) 27 HARV. L. REV. 437, 439-448, 455-459; Note (1927) 21 ILL. L. REV. 621.

See also, BOGERT, *TRUSTS* (1921) §33; 1 PERRY, *TRUSTS AND TRUSTEES* (6th ed. 1911) §§126-130; 1 LEWIN, *TRUSTS* (8th ed. 1888) 163-170; 1 TIFFANY, *REAL PROPERTY* (2nd ed. 1920) §107 (c); 3 THOMPSON, *REAL PROPERTY* (1924) §§2295, 2297-2299; 3 POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1918) §§1037-1038; BISPHAM, *PRINCIPLES OF EQUITY* (10th ed. 1925) §§80-81.

² *Summers v. Moore*, 113 N. C. 394, 18 S. E. 712 (1893).

³ *Keaton v. Cobb*, 16 N. C. 439 (1830); *Shelton v. Shelton*, 58 N. C. 292 (1859); *King v. Weeks*, 70 N. C. 372 (1874); *Lyon v. Akin*, 78 N. C. 372 (1878); *Cunningham v. Bell*, 83 N. C. 328 (1880); *Beam v. Bridgers*, 108 N. C. 276, 13 S. E. 312 (1891); *Brisco v. Norris*, 112 N. C. 671, 16 S. E. 850 (1893); *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684 (1895) (also an express trust involved); *Houck v. Somers*, 118 N. C. 607, 24 S. E. 429 (1896); *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85 (1897); *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24 (1898); *McWhirter v. McWhirter*, 155 N. C. 145, 71 S. E. 59 (1911); *Deese v. Deese*, 176 N. C. 527, 97 S. E. 475 (1917); *Harris v. Harris*, 178 N. C. 7, 100 S. E. 125 (1919); *Greensboro Bank v. Scott*, 184 N. C. 312, 114 S. E. 475 (1922); *Tyndall v. Tyndall*, 186 N. C. 272, 119 S. E. 354 (1923); *Tire Co. v. Lester*, 190 N. C. 411, 130 S. E. 45 (1925); *Nissen v. Baker*, 198 N. C. 433, 152 S. E. 34 (1930).

The rule has its foundation in the supposed purpose back of the payment of the consideration by a person other than the person to whom the transfer or conveyance is made. The natural presumption is that the person who supplies the consideration intends the purchase for his own benefit, and that the conveyance of the legal title to another is a matter of convenience and arrangement between them.⁴ For this reason, it has been suggested by eminent authority that resulting trusts should be classified as "intent-enforcing" and that they are in this sense analogous to express trusts.⁵ The intention of the parties is gathered from the facts and circumstances of the transaction, rather than from any express agreement of the parties, and it is from this that the habit of referring to resulting trusts as created by "operation of law" has arisen.⁶ It would, of course, be more accurate to say that they are created by implication of fact.

The trust must result, if at all, at the time of the transmission of the legal estate and as a part of the same transaction.⁷ The payment of the consideration after the deed or conveyance has been executed and delivered to the grantee comes too late.⁸ This holding in North Carolina was placed upon the ground that a parol trust could not be created in land subsequently to the passage of the legal title.⁹ However, one case has held that where one under an inchoate obligation to pay money, purchased property in his own name which was to be turned over to the creditor in lieu of cash, a resulting trust was created.¹⁰ This result has been criticized,¹¹ and it seems open to

⁴ *Summers v. Moore*, *supra* note 2; *Gorrell v. Alspaugh*; *Harris v. Harris*; *Tyndall v. Tyndall*, all *supra* note 3. The justification of the presumed intention seems to be founded upon: (1) The ancient equitable principle that the beneficial interest is drawn to the person paying the consideration. *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460 (1890); *Holden v. Strickland*, *supra* note 3; 3 POMEROY, *op. cit. supra* note 1, §1037. (2) The experience of the courts in a multitude of litigated cases. *Scott, op. cit. supra* note 1, at 670.

⁵ *Costigan, op. cit. supra* note 1, at 462.

⁶ See *Thurber v. La Roque, supra* note 4; *Holden v. Strickland*; *Houck v. Somers*, both *supra* note 3; *Scott, op. cit. supra* note 1, at 672.

⁷ See *Summers v. Moore, supra* note 2; *Harris v. Harris*; *Tyndall v. Tyndall*, both *supra* note 3.

⁸ *Greensboro Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333 (1895).

⁹ Parol trusts in land may not be created subsequently to the passage of the legal title in North Carolina. See Lord and Van Hecke, *Parol Trusts in North Carolina* (1929) 8 N. C. L. Rev. 152 and cases cited in note 3.

¹⁰ *Greensboro Bank v. Scott, supra* note 3 (one judge dissented on the ground that this was an oral contract to convey land and void under the contract statute of frauds, C. S. 988).

¹¹ The case was criticized on the ground that at the time of the purchase the alleged beneficiary's performance had three years to run under the contract. It is highly doubtful that the same result would have been reached if the beneficiary had not, at the time of the suit, lived up to the terms of the

doubt whether the alleged beneficiary owned the consideration at the time of the conveyance of the property. While the usual situation is one where the consideration has been paid in money, it is settled that the payment of the consideration in any form is sufficient. Thus, where the consideration furnished was a horse,¹² credit,¹³ or a contractual right,¹⁴ a trust properly resulted. An early case held that where the person paying the consideration and taking title in himself had obtained the money wrongfully, no trust, resulting or constructive, could be imposed in favor of the person from whom the consideration was so taken.¹⁵ Later cases, however, have imposed a constructive trust for his benefit.¹⁶

The resulting trust principle embraces personalty as well as realty.¹⁷ If a note, mortgage,¹⁸ stock,¹⁹ or other personal interest is purchased by one person in the name of another, a trust results in favor of the person paying the consideration.

EFFECT OF THE RELATIONSHIP OF THE PARTIES

(1) *Strangers*

Where the parties are strangers and the property is purchased in the name of one with the money of the other, a resulting trust arises in favor of the payor of the consideration.²⁰ Comparatively few North Carolina cases have arisen in this situation. This is probably due to the fact that usually it is possible to prove an oral agreement before the transfer to hold in trust for the payor of the consideration. Although Section VII of the English Statute of Frauds²¹ has never

original contract between him and the payor of the consideration, yet the strict doctrine of resulting trust would have demanded that the same result be reached. It seems that the court enforced a parol trust and called it a purchase money resulting trust. See (1923) 32 YALE L. J. 509; see also (1923) 9 VA. L. REV. 311; COSTIGAN, CASES ON TRUSTS (1925) 156 note.

¹² Norton v. McDevit, *supra* note 3.

¹³ King v. Weeks, *supra* note 3.

¹⁴ Greensboro Bank v. Scott, *supra* note 3.

¹⁵ Campbell v. Drake, 39 N. C. 94 (1845) (clerk pilfered money from his employers store and used it to purchase land).

¹⁶ Edwards v. Culberson, 111 N. C. 342, 16 S. E. 233 (1892) (constructive trust imposed where purchase money was fraudulently obtained); Bank v. Crowder, 194 N. C. 312, 139 S. E. 601 (1927) (purchase money wrongfully taken from bank by cashier).

¹⁷ 1 PERRY, *op. cit.* *supra* note 1, §130.

¹⁸ Houck v. Somers, *supra* note 3.

¹⁹ Barnard v. Hawks, 111 N. C. 333, 16 S. E. 329 (1892) (written agreement supporting the presumption).

²⁰ Barnard v. Hawks, *supra* note 19; Holden v. Strickland; Gorrell v. Alspaugh; Nissen v. Baker, all *supra* note 3; see Henderson v. Hoke, 21 N. C. 119, 149 (1835); Mosely v. Mosely, 87 N. C. 69, 71 (1882).

²¹ (1676) 29 CAR. II, c. 3.

been adopted in North Carolina, such an agreement is not enforceable as an express parol trust, but sometimes forms the basis of a constructive trust.²² The Court has not always determined whether the trust enforced is express, resulting or constructive.²³ This has confused the precedents and, in consequence, constructive trust cases are sometimes cited as authority for the application of the resulting trust principle.²⁴

(2) *Partners in Business*

Where a partner purchases property with partnership funds and takes title in himself, a resulting trust arises in favor of the firm.²⁵ But if the funds so taken and used are charged against the individual partner on the firm books, with the knowledge of the other partners, then the relationship of debtor and creditor is created between the partner and the firm and there can be no resulting trust.²⁶ Since a partner occupies a fiduciary relationship to the firm, it would not seem necessary to resort to the doctrine of resulting trusts in this situation, because a constructive trust could always be imposed for the breach of the duty owed the firm by the individual partner.²⁷ The position of a partner in this situation is strongly analogous to that of an agent who applies the funds of his principal to a purchase in his own name,²⁸ or of a cashier of a bank who so uses the money of the bank.²⁹ In these cases, constructive trusts have been imposed, and it is believed that the same rule should be applied to partners.

(3) *Husband and Wife*

Where the consideration is furnished by the wife and the title is taken in the name of the husband, there is a resulting trust in favor of the wife.³⁰ In a few states, the presumption of a gift is indulged

²² Lord and Van Hecke, *op. cit. supra* note 9.

²³ Hargrave v. King, 40 N. C. 430 (1848) (principles confused); Leggett v. Leggett, 88 N. C. 108 (1883) (not clear as to whether resulting or constructive).

²⁴ For example, see Greensboro Bank v. Scott, *supra* note 3.

²⁵ King v. Weeks, *supra* note 3.

²⁶ Lassiter v. Stainback, 119 N. C. 103, 25 S. E. 726 (1896).

²⁷ 3 POMEROY, *op. cit. supra* note 1, §1049. But see Bogert, *op. cit. supra* note 1, §34.

²⁸ Rush v. McPherson, 176 N. C. 572, 97 S. E. 613 (1918).

²⁹ Bank v. Crowder, *supra* note 16.

³⁰ Lyon v. Akin; Cunningham v. Bell; Beam v. Bridgers, all *supra* note 3; Ross v. Hendrix, 110 N. C. 403, 30 S. E. 24 (1892); Brisco v. Norris; Houck v. Somers, both *supra* note 3; Hendren v. Hendren, 153 N. C. 505, 69 S. E. 506 (1910); McWhirter v. McWhirter; Deese v. Deese; Tyndall v. Tyndall; Tire Co. v. Lester, all *supra* note 3; cf. Faggart v. Bost, 122 N. C. 517, 29 S. E.

in this situation;³¹ but in North Carolina, the presumption of a gift is based upon the duty to support rather than love and affection.³² As the Constitution of 1868 changed, in some respects, the capacity of married women to hold property, it is necessary to consider here the law before and after that date.³³

Prior to the Constitution of 1868, the personal property of the wife became the property of the husband *jure mariti* upon being reduced to possession by him. Consequently, where funds derived from the sale of the wife's realty came into the hands of her husband, such funds became his property and there was no occasion for the application of the principle of resulting trusts to any land bought with them—for the obvious reason that the consideration had belonged to him *jure mariti*.³⁴ However, the husband might agree to treat such funds, or funds coming to the wife by inheritance, as her own. As such an agreement was enforceable, and as a married woman could hold land despite her husband,³⁵ the resulting trust principle was applicable to property purchased therewith.³⁶ Again, where the wife was an infant and her realty was sold under order of court, the proceeds were hers and could be used to create a resulting trust.³⁷ But if the husband came into possession of the personalty of his wife after 1868, even though the marriage took place prior to that date, the property did not become his *jure mariti*.³⁸ It thus becomes evident that the rule relating to resulting trusts was not, in itself, affected, but that the only question of importance in this connection was whether the consideration was the property of the wife.

After the Constitution of 1868, when the rights of the husband *jure mariti* had been abolished, the situation where the wife paid the

833 (1898) (constructive trust imposed on facts that would support a resulting trust).

³¹ COSTIGAN, CASES ON TRUSTS (1925) 779; (1924) 8 MINN. L. REV. 553.

³² North Carolina is in accord with the weight of authority in this. See BOGERT, TRUSTS 111.

³³ A valuable treatment of this phase of the law of resulting trusts in North Carolina is found in 1 MORDECAI, LAW LECTURES (1916) 312-316.

³⁴ Temple v. Williams, 39 N. C. 39 (1845); Hackett v. Shuford, 86 N. C. 144 (1882); Giles v. Hunter, 103 N. C. 194, 9 S. E. 549 (1889); Benbow v. Moore, 114 N. C. 263, 19 S. E. 156 (1894).

³⁵ Woodruff v. Bowles, 104 N. C. 197, 10 S. E. 482 (1889); see Rouse v. Lee, 59 N. C. 352 (1863); 1 MORDECAI, *op. cit. supra* note 33, at 313.

³⁶ Cunningham v. Bell, *supra* note 3; *cf.* Dula v. Young, 70 N. C. 450 (1874) (constructive trust imposed on account of the confidential relation of the parties).

³⁷ Lyon v. Akin, *supra* note 3.

³⁸ Kirkpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037 (1891); Beam v. Bridgers, *supra* note 3.

consideration and title was taken in the name of the husband became substantially equivalent to the situation where the parties were strangers.³⁹ Even so, there remain certain distinctive features. Where a wife paid the purchase money and took title in the names of herself and her husband, intending to make a gift to him of an undivided interest, but the deed was not executed in the manner required by the statute⁴⁰ relating to conveyances by married women, the husband held his record interest upon resulting trust for her.⁴¹ Even if the husband is a resulting trustee in favor of his wife he still has, in proper instances, a right of curtesy in the land.⁴² But if the wife is a resulting trustee in favor of another, he does not have a right of curtesy in the land.⁴³ Most of the resulting trust litigation in North Carolina has related to married women. Aside from the obvious financial incidents of the relationship, this may be due, in part, to the fact that a married woman cannot create a trust in land by parol,⁴⁴ and that where an express oral agreement might otherwise be relied upon, resort has been had to the resulting trust principle to obtain a recovery in her favor.

Where the husband furnishes the consideration and title is taken in the name of the wife, there is no resulting trust in favor of the husband but a presumption of a gift or provision on the part of the husband for the wife's benefit.⁴⁵ This presumption arises out of the relationship of the parties and is based upon the legal and moral obli-

³⁹ Cases cited *supra* note 3 and note 30.

⁴⁰ N. C. CODE ANN. (Michie, 1927) §2515.

⁴¹ *Deese v. Deese*, *supra* note 3. It is difficult to conceive of the deed being a nullity as to the husband's interest and of his holding anything on trust. But the resulting trust device here became a substitute for the removal of a cloud on title subject to the husband's right of curtesy. The statute relating to conveyances by married women seems inapplicable.

⁴² *Lyon v. Akin*, *supra* note 3; *Kirkpatrick v. Holmes*, 108 N. C. 206, 12 S. E. 1037 (1891); *Norcum v. Savage*, 140 N. C. 472, 53 S. E. 289 (1906); *Deese v. Deese*; *Tyndall v. Tyndall*, both *supra* note 3.

⁴³ *Norton v. McDevit*, *supra* note 3.

⁴⁴ N. C. CODE ANN. (Michie, 1927) §2515; *Ricks v. Wilson*, 154 N. C. 284, 70 S. E. 476 (1911) (wife cannot create a trust by parol, or otherwise except, by embodying it in a written instrument, to which her privy examination must be taken in accordance with the statute); *Deese v. Deese*, *supra* note 3 (gift of realty to husband invalid unless executed in accordance with the statute).

⁴⁵ *Arrington v. Arrington*, 114 N. C. 116, 19 S. E. 278 (1894); *Evans v. Cullens*, 122 N. C. 55, 28 S. E. 961 (1898); *Ricks v. Wilson*, *supra* note 44; *Maxton Realty Co. v. Carter*, 170 N. C. 5, 86 S. E. 714 (1915); see *Whitten v. Peace*, 188 N. C. 298, 302, 124 S. E. 571 (1924); *BOGERT, TRUSTS* 109-110; *Scott, op. cit. supra* note 1, 682-683.

The same rule is applicable where the conveyance is directly from husband to wife. *Singleton v. Cherry*, 168 N. C. 402, 84 S. E. 698 (1915).

gation of the husband to support his wife.⁴⁶ The rule is the same where the husband has placed improvements on the land of his wife,⁴⁷ where he paid owelty money for his wife in partition proceedings,⁴⁸ and where he paid only a part of the purchase money.⁴⁹ The rule is also applicable where the husband deposits money in a bank in his wife's name, which is subsequently used for the purchase of realty by the wife in her own name.⁵⁰

(4) *Parent and Child*

Where the consideration is furnished by a parent and the title is placed in the name of a child, there is a presumption of an advancement to the child.⁵¹ This, like the presumption of a gift from husband to wife, seems to have been based upon the legal duty to support, rather than upon love and affection. This presumption would probably be extended to one *in loco parentis*.⁵² But where a child furnishes the consideration and title is made to one of the parents, there is a presumption of a resulting trust.⁵³

(5) *Other Relations*

Where the relation between the payor and grantee is that of brothers,⁵⁴ sisters,⁵⁵ uncle and nephew,⁵⁶ or any other except that of husband and wife and parent and child, there is the normal presumption of a resulting trust because of the absence of a legal duty of support.

⁴⁶ *Ricks v. Wilson*, *supra* note 44; see *Thurber v. La Roque*, *supra* note 4. Scott, *loc. cit. supra* note 45, says that the test is whether the grantee is the natural object of the payor's bounty, and this is a more realistic test than that expressed by the North Carolina authorities.

⁴⁷ *Nelson v. Nelson*, 176 N. C. 191, 96 S. E. 906 (1918); *Anderson v. Anderson*, 177 N. C. 401, 97 S. E. 212 (1919); *cf. Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747 (1911) (materialman's lien disallowed).

⁴⁸ *Sprinkle v. Spainhour*, 149 N. C. 223, 62 S. E. 910 (1908).

⁴⁹ See *Thurber v. La Roque*, *supra* note 4.

⁵⁰ *Flanner v. Butler*, 131 N. C. 151, 42 S. E. 557 (1902).

⁵¹ *Ricks v. Wilson*, *supra* note 44; *cf. Edgerton v. Jones*, 107 N. C. 284, 12 S. E. 434 (1890). As to advancements generally, see *Nobles v. Davenport*, 183 N. C. 207, 111 S. E. 180 (1922), 26 A. L. R. 1086 (1923); Note (1923) 26 A. L. R. 1089.

⁵² It has been so held in other states. *Harris v. Elliot*, 45 W. Va. 245, 32 S. E. 176 (1898); Scott, *op. cit. supra* note 1, 682 and note 51. North Carolina has sustained a covenant to stand seized where grantor was *in loco parentis* to grantee. *Pickett v. Garrard*, 131 N. C. 195, 42 S. E. 579 (1902); *cf. Blount v. Blount*, 4 N. C. 389 (1816) (same situation except grantor was not *in loco parentis*).

⁵³ *Norton v. McDevit*, *supra* note 3.

⁵⁴ *Harris v. Harris*, *supra* note 3.

⁵⁵ *Keaton v. Cobb*, *supra* note 3.

⁵⁶ *Summers v. Moore*, *supra* note 2; *Greensboro Bank v. Scott*, *supra* note 3.

LEGAL TITLE TAKEN AS SECURITY

(1) *Resulting Trust Cases*

A mere loan of money from A to B is not sufficient to raise a resulting trust in favor of A in property purchased by B with the money loaned. The only effect of such a transaction is to create the relation of creditor and debtor between A and B.⁵⁷ But if B borrows money from A with which to buy land and has the land conveyed to A as security, a resulting trust will arise in favor of B, subject to A's security interest, for it is really B's money that has been paid for the land.⁵⁸

(2) *Express Oral Agreements*

Certain cases beyond the scope of the resulting trust principle seem pertinent here because they grow out of oral agreements to buy and hold land subject to the right of another to repay the purchase price and demand a conveyance of the property. These cases fall principally into the following groups: (1) Where A purchases B's land at a judicial sale under an oral agreement to do so and to hold for B until B repays the purchase money;⁵⁹ (2) Where A purchases property on which B has an option under an agreement to do so and to hold for B until B repays him;⁶⁰ (3) Where A and B have agreed to purchase jointly and A surreptitiously purchases the property in his own name and for his own benefit;⁶¹ (4) Where A, as B's agent under an agreement, purchases property in his own name in breach of his agreement and fiduciary relation.⁶² Relief has been given in all of these situations, either by way of a constructive trust or by en-

⁵⁷ *Lassiter v. Stainback*, *supra* note 26; *In re Gorham*, 173 N. C. 372, 91 S. E. 950 (1917).

⁵⁸ *Gorrell v. Alspaugh*, *supra* note 3 (resulting trust distinguished from a mortgage).

⁵⁹ *Neely v. Torian*, 21 N. C. 410 (1836); *Tankard v. Tankard*, 84 N. C. 286 (1881); *Cheek v. Watson*, 85 N. C. 195 (1881); *Coble v. Branson*, 98 N. C. 160, 3 S. E. 715 (1887); *McNair v. Pope*, 100 N. C. 404, 6 S. E. 234 (1888); *Hinton v. Pritchard*, 107 N. C. 128, 12 S. E. 242, 10 L. R. A. 201 (1890); *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241 (1895); *Owen v. Williams*, 130 N. C. 165, 41 S. E. 93 (1902); *Lutz v. Hoyle*, 167 N. C. 632, 83 S. E. 749 (1914); *Wilson v. Jones*, 176 N. C. 205, 97 S. E. 18 (1918); *McNinch v. American Trust Co.*, 183 N. C. 33, 110 S. E. 663 (1922); *Cunningham v. Long*, 186 N. C. 526, 120 S. E. 116 (1923).

⁶⁰ *Sykes v. Boone*, 132 N. C. 199, 43 S. E. 645 (1903); *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775 (1904); *Russel v. Wade*, 146 N. C. 116, 59 S. E. 345 (1907); *Anderson v. Harrington*, 163 N. C. 140, 79 S. E. 426 (1913); *Allen v. Gooding*, 173 N. C. 93, 91 S. E. 694 (1917).

⁶¹ *Brogden v. Gibson*, 165 N. C. 16, 80 S. E. 966 (1914); *Lefkowitz v. Silver*, 182 N. C. 339, 109 S. E. 56, 23 A. L. R. 1491 (1921).

⁶² *Pegues v. Pegues*, 40 N. C. 418 (1848); *Rush v. McPerson*, *supra* note 28.

forcement of the oral agreement, notwithstanding the contract Statute of Frauds.⁶⁸

PAYMENT OF A PART OF THE CONSIDERATION

Where the claimant of a resulting trust has paid only a part of the consideration, it is held in North Carolina that if the amount paid is certain and definite a trust will result in proportion to the amount of the consideration furnished, or, to use the language of the court, "to the extent of the purchase money furnished."⁶⁴ This is the proportionate or *pro tanto* rule as distinguished from that interpretation of the so-called "aliquot part rule" which has caused some courts to require the proportion of the consideration furnished to be an exact fraction of the whole with nothing left over.⁶⁵ Where a husband and wife have contributed equally in the payment of the consideration and the deed is made to husband and wife, a tenancy by the entirety is created,⁶⁶ unless a contrary intention of creating a tenancy in common appears.⁶⁷

THE STATUTE OF LIMITATIONS

In North Carolina an action to have a party declared a trustee is barred by the lapse of ten years after the cause of action accrues.⁶⁸

⁶⁴ N. C. CODE ANN. (Michie, 1927) §988. See Lord and Van Hecke, *op. cit. supra* note 9; Costigan, *Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantees* (1914) 12 MICH. L. REV. 423, 425-429, 444-446; Note (1926) 42 A. L. R. 10.

Costigan (*ibid.*) would impose a constructive trust, if anything, in these cases. But this would seem unnecessary in North Carolina because such oral agreements made contemporaneously or prior to the purchase may create valid express parol trusts. It seems fair to say that North Carolina, due to the fact just stated, has not with any consistency classified these cases as parol or constructive. What appears to be the situation is that these trusts have been enforced as parol with the court resorting to theories of constructive trusts to bolster up the doctrine.

⁶⁵ Keaton v. Cobb; Norton v. McDevit; Harris v. Harris, all *supra* note 3; see Cunningham v. Bell ("to extent of purchase money furnished"); Holden v. Strickland (same); McWhirter v. McWhirter (same), all *supra* note 3.

⁶⁶ Scott, *op. cit. supra* note 1, 692-702 (an excellent discussion); BOGERT, TRUSTS 105-109; COSTIGAN, CASES ON TRUSTS (1925) 790.

Scott (*ibid.*) says: "Strictly speaking, of course, an aliquot part is one which is exactly contained in the whole without a remainder, that is, a part which can be expressed by a fraction which when reduced to its lowest terms has unity for its numerator. . . . It has been explained, however, that it is not intended that the term should be taken in its strict mathematical sense in that it was intended to mean a particular fraction of the whole as distinguished from a general contribution to the purchase money."

⁶⁷ Ray v. Long, 132 N. C. 891, 44 S. E. 652 (1903), s. c. 128 N. C. 90, 38 S. E. 291 (1901); Murchison v. Fogleman, 165 N. C. 397, 81 S. E. 627 (1914).

⁶⁸ Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210 (1904).

⁶⁹ N. C. CODE ANN. (Michie, 1927) §445 provides that actions not otherwise provided for must be commenced within ten years after the cause of action

In the case of an express trust, the statute of limitations does not begin to run until the relation of trustee and beneficiary has ceased, or has been repudiated by the trustee to the knowledge of the beneficiary.⁶⁹ The same rule has been applied in North Carolina in actions to declare a party a resulting trustee.⁷⁰ In *Faggart v. Bost*,⁷¹ Furches, J., said that in constructive trusts a different rule was applicable and that the "statute was emphatically one of repose" and began to run from the date of the fraud for which the constructive trust was imposed; but this distinction seems to have been forgotten in the maze of subsequent decisions. Aside from the statute of limitations, a party seeking to have another declared a resulting trustee may be estopped, in certain instances, to assert the trust.⁷²

EVIDENCE

(1) *Presumptions*

A resulting trust arises from a presumption which has as its logical basis the supposed intention of the parties.⁷³ Where it appears from the facts that the consideration was paid by one person and the title was taken in the name of a stranger, a presumption arises supplying an intention on the part of the payor to benefit himself and not to make a gift to one whom he is under no obligation to support.⁷⁴ However, this presumption does not arise where the payor is under a legal duty to support the grantee. If the grantee is the wife of the payor, a presumption of a gift is indulged;⁷⁵ if a child, then a pre-

accrues. This has been held applicable to actions to declare a party a trustee. *Phillips v. Lumber Co.*, 151 N. C. 519, 66 S. E. 603 (1909).

⁶⁹ *Fowle Memorial Hospital v. Nicholson*, 190 N. C. 119, 129 S. E. 149 (1925); *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) 131; 2 *TIFFANY*, *op. cit. supra* note 1, 2002-2006.

⁷⁰ *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172 (1923).

The statute does not commence to run where the beneficiary has been in continuous possession. *Norton v. McDevit*, *supra* note 3 (possession of a part held sufficient); *Flanner v. Butler*, 131 N. C. 155, 42 S. E. 547 (1902) (constructive possession).

⁷¹ *Faggart v. Bost*, *supra* note 30.

⁷² *Marshall v. Hammock*, 195 N. C. 498, 140 S. E. 216 (1928).

⁷³ *Summers v. Moore*, *supra* note 2; *Harris v. Harris*; *Tyndall v. Tyndall*; *Tire Co. v. Lester*, all *supra* note 3. But *cf.* *Houck v. Summers*, *supra* note 3. 3 *JONES*, COMMENTARIES ON EVIDENCE (2nd ed. 1926) §§1444-1447.

See generally on presumptions, 5 *WIGMORE*, EVIDENCE (2nd ed. 1923) §§2490-2496; *McCormick*, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291.

The presumption of a resulting trust is a legal descendant of the old presumption of a resulting use. *Costigan*, *op. cit. supra* note 1, 446.

⁷⁴ *Summers v. Moore*, *supra* note 2; cases cited *supra* note 3.

⁷⁵ *Supra* note 45.

sumption of an advancement arises.⁷⁶ It is to be noted that the presumption of a resulting trust and the presumption of a gift or of an advancement are opposite and contrary in their operation and effect. The presumption of a resulting trust operates in favor of the payor, whereas the presumption of a gift or of an advancement operates in favor of the title-holder.

There is a substantial difference in the intensity of the proof necessary in establishing the facts from which these presumptions arise. In North Carolina, the facts from which the presumption of a resulting trust arises must be established by proof that is "clear, strong, and convincing."⁷⁷ Whether the proof measures up to this test is a question that must be determined by the jury.⁷⁸ Thus, the party in whose favor the presumption of a resulting trust operates is handicapped by an extraordinary burden of persuasion.⁷⁹

(2) *Rebutting the Presumption*

The presumptions discussed above are all rebuttable. Since they are based on the supposed intention of the parties, when they are repelled by proof of an actual intention to the contrary they lose their force and efficacy. Generally speaking, they may be rebutted by proof of an intention contrary to that which the law would supply.⁸⁰ In North Carolina, this presumption has been rebutted by an agreement showing a contrary intention,⁸¹ and by showing that a loan was intended.⁸² Again, where it has been shown that the equitable interest of the alleged beneficiary had been lost by acquiescence amounting to estoppel, this was held sufficient to rebut.⁸³ The presumption of

⁷⁶ *Supra* note 51; Note (1923) 26 A. L. R. 1106.

⁷⁷ *Clement v. Clement*, 54 N. C. 184 (1854); *Shelton v. Shelton*, *supra* note 3; *McWhirter v. McWhirter*, *supra* note 3; *Glenn v. Glenn*, 169 N. C. 729, 86 S. E. 622 (1915); *Harris v. Harris*; *Tire Co. v. Lester*, both *supra* note 3.

This is admittedly a judicial borrowing from the rule relating to the establishment of parol express trusts. *Cobb v. Edwards*, *supra* note 59; *Lefkowitz v. Silver*, *supra* note 61.

⁷⁸ *Cunningham v. Bell*; *McWhirter v. McWhirter*; *Tire Co. v. Lester*, all *supra* note 3. Rule again is the same as in parol trust cases. *Cobb v. Edwards*, *supra* note 59; *Lefkowitz v. Silver*, *supra* note 61.

⁷⁹ 5 WIGMORE, EVIDENCE §2498.

⁸⁰ *Scott, op. cit. supra* note 1, 679-681 (resulting trust), 683 and note 61 (gift); 3 JONES, COMMENTARIES ON EVIDENCE §1446.

⁸¹ *Foy v. Foy*, 3 N. C. 131 (1801); *Ferguson v. Haas*, 64 N. C. 772 (1870); *Rush v. McPerson*, *supra* note 26; see *Kirkpatrick v. Holmes*, *supra* note 38 ("in absence of agreement to the contrary"); *Ross v. Hendrix*, *supra* note 30 (same); *Tire Co. v. Lester*, *supra* note 3 ("unless a contrary intention prevents").

⁸² *Lassiter v. Stainback*, *supra* note 26; *In re Gorham*, *supra* note 57.

⁸³ *Marshall v. Hammock*, *supra* note 72.

a gift or an advancement may be rebutted by showing that title was put in the alleged beneficiary without the knowledge or consent of the person furnishing the consideration,⁸⁴ that the consideration did not belong to the person who paid it,⁸⁵ or that a gift would be a fraud upon creditors.⁸⁶ A husband may rebut the presumption of a gift of improvements placed on his wife's land by showing that they were so located under a *bona fide* mistake.⁸⁷ A declaration in a husband's will that his wife never paid any of the consideration for land held in her name has no rebutting force whatsoever since it does not indicate that the husband, though he furnished the money, did not intend a gift.⁸⁸ The mere fact of a subsequent divorce,⁸⁹ or of subsequent separation⁹⁰ is not sufficient to rebut the presumption of a gift from the husband to the wife.

CONCLUSION

North Carolina has, on the whole, applied the orthodox doctrine of purchase money resulting trusts. Although it has produced much litigation and perhaps some perjury, the device seems to have worked fairly well. It is believed that the adoption of statutes⁹¹ found in a number of other states would not only enhance the present difficulties but would also create new ones. They have abolished the purchase money resulting trust, except in a few instances, and have made unusual provisions for creditors. The anxiety of litigants to crowd their cases into these loopholes has produced as many cases as the system with which we are familiar. Probably the most that can be done in this field is that which this paper has been aimed at, namely, the ascertainment by the courts and lawyers of the precise limits of what can and of what cannot be accomplished by the device, legitimately used.

⁸⁴ Flanner v. Butler, 131 N. C. 155, 42 S. E. 547 (1902).

⁸⁵ Bank v. Crowder, *supra* note 16.

⁸⁶ A resulting trust is imposed in favor of creditors. Thurber v. La Roque, *supra* note 4. But the donor himself cannot impeach the transaction. Respass v. Jones, 102 N. C. 5, 8 S. E. 770 (1899); Flanner v. Butler, *supra* note 70; *cf.* Edgerton v. Jones, *supra* note 51. Nor can he have the benefit of a resulting trust where the title is made to a stranger. Turner v. Elford, 58 N. C. 106 (1859).

⁸⁷ Pritchard v. Williams, 176 N. C. 108, 96 S. E. 733 (1918), s. c. 175 N. C. 319, 95 S. E. 570 (1918); see Anderson v. Anderson, *supra* note 47.

⁸⁸ See Whitten v. Peace, 188 N. C. 298, 124 S. E. 571 (1924).

⁸⁹ Arrington v. Arrington, *supra* note 45.

⁹⁰ Nelson v. Nelson, *supra* note 47.

⁹¹ Scott, *op. cit.* *supra* note 1, 675-678; BOGERT, TRUSTS 111-112.