



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 44 | Number 1

Article 22

---

12-1-1965

# Limitation of Actions -- Equitable Remedies -- Repudiation

Robert O. Klepfer Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Robert O. Klepfer Jr., *Limitation of Actions -- Equitable Remedies -- Repudiation*, 44 N.C. L. REV. 202 (1965).

Available at: <http://scholarship.law.unc.edu/nclr/vol44/iss1/22>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

husband has in fact repudiated his trust or obligation.<sup>20</sup> Such a burden would not seem to create a threat to the maintenance of the family relation. However, where the wife's claim is to be subject to the running of limitations, perhaps it would better serve the policy of striving for domestic peace to require a clear showing of repudiation by the husband.<sup>21</sup>

The protection of the family relation is a worthy policy; but, when used in support of judicial determinations, it would seem to stand as a statement of a conclusion only, leaving vacant the area of discussion in which should fall the reasons why and the manner by which the decision has in fact supported the stated policy. The danger appears when "the protection of the family relation" becomes a mere shibboleth of the courts to be utilized perfunctorily in engrafting judicial exemptions into the statute of limitations.

ROBERT O. KLEPPER, JR.

#### Limitation of Actions—Equitable Remedies—Repudiation

In consideration of her husband's oral promise to convey to her a one-half interest in land held in the husband's name, the wife advanced him money for improvements.<sup>1</sup> Upon completion of the improvements and in answer to his wife's request to put her name on the deed, the husband replied: "You don't think I am a damn

---

<sup>20</sup> Further protection is afforded by N.C. GEN. STAT. § 1-52(9) (1953), which provides that for relief based upon fraud or mistake the cause of action is not deemed to have accrued until the aggrieved party has or should have discovered such fraud or mistake. In addition, ". . . equity will deny the right to assert that defense [running of limitations] when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. . . ." *Nowell v. Great Atl. & Pac. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959) (defendant's promises to correct defects estopped him to plead limitations).

<sup>21</sup> In the rare case in which the husband has a claim based upon his wife's failure to act, exemption of his claim from the running of limitations would appear of little consequence, since whatever he gives his wife is presumptively a gift. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E.2d 228 (1960); *Shoe v. Hood*, 251 N.C. 719, 725, 112 S.E.2d 543, 548 (1960). It appears, therefore, that since lapse of time would decrease the possibilities of overcoming the presumption, it is doubtful that the exemption would be utilized.

<sup>1</sup> *Fulp v. Fulp*, 264 N.C. 20, 140 S.E.2d 708 (1965). It should be noted that in North Carolina full performance by one of the parties to a contract unenforceable under the Statute of Frauds does not take the contract out of the statute. *Carter v. Carter*, 182 N.C. 186, 108 S.E. 765 (1921).

fool, do you?' ”<sup>2</sup> In a subsequent action by the wife to establish a resulting or constructive trust, or in the alternative to recover her money, this statement was held to constitute a repudiation of the husband's agreement sufficient to start limitations running against the wife. The North Carolina Supreme Court also held that the wife's evidence was insufficient to establish either a resulting or a constructive trust,<sup>3</sup> and that her claim based upon contract implied in law<sup>4</sup> was barred by the three-year limitation statute.<sup>5</sup> However, the court conceded that “were plaintiff the *cestui que trust* of a resulting or constructive trust, the ten-year statute would apply. . . .”<sup>6</sup> Both the logic of this distinction between quasi-contracts and constructive trusts and the effectiveness of the husband's statement as a repudiation would seem open to inquiry.

The broad concession by the court that the ten-year limitation period applies in all constructive trust situations seems doubtful. Of the three cases cited as support for the concession, one involved a resulting trust;<sup>7</sup> one concerned an evidentiary problem and the statute of limitations was not in issue;<sup>8</sup> and the third, in holding a claim for breach of an express trust barred by limitations, stated in dictum that the ten-year period is applicable to constructive trusts.<sup>9</sup>

However, in an earlier case involving an action to set aside a deed for fraud and undue influence and to impress a trust on the property, it was stated that the ten-year statute did not apply because, “the alleged right to impress a trust upon the property is dependent upon the validity or invalidity of the deed . . . and if the

---

<sup>2</sup> 264 N.C. at 22, 140 S.E.2d at 711.

<sup>3</sup> It would seem that the use of the wife's money in making improvements on the land should not entitle her to hold her husband as constructive trustee of the property since the money was not used in acquiring the property. See generally 4 SCOTT, TRUSTS § 512 (2d ed. 1956).

<sup>4</sup> The court noted that, because of the confidential relationship, the wife could have acquired an equitable lien on the property if her action had not been barred. 264 N.C. at 25, 140 S.E.2d at 713.

<sup>5</sup> The statute provides a three-year limitation period for actions “upon a contract, obligation or liability arising out of a contract, express or implied. . . .” N.C. GEN. STAT. § 1-52(1) (1953).

<sup>6</sup> 264 N.C. at 26, 140 S.E.2d at 714. This statute is a catchall provision providing that, “an action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued.” N.C. GEN. STAT. § 1-56 (1953).

<sup>7</sup> *Bowen v. Darden*, 241 N.C. 11, 84 S.E.2d 289 (1954).

<sup>8</sup> *Rochlin v. P.S. West Constr. Co.*, 234 N.C. 443, 67 S.E.2d 464 (1951).

<sup>9</sup> *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938).

right to assail this deed is barred by the statute, any and all claim to the proceeds in the possession and control of defendants is also barred."<sup>10</sup>

More recently, a federal court, in applying North Carolina law, came to the following conclusion:

A constructive trust is merely a procedural device by which a court of equity may rectify certain wrongs. It is suggestive of a power which a court of equity may exercise in an appropriate case but it is not a designation of the cause of action which justifies an exercise of the power. . . . We find nothing in any North Carolina decision suggesting that the courts of that state, for purposes of limitations, classify a cause of action by reference to the court's remedial power to grant redress. . . . For purposes of limitations . . . the North Carolina court has looked to the nature of the right of the litigant which calls for judicial aid, not to the nature of the remedy to rectify the wrong.<sup>11</sup>

These views, though in apparent conflict with the broad statement in *Fulp*, would seem to reach the better result. As defined by Professor Scott, "a constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . ."<sup>12</sup> The constructive trust is apparently established for the purpose of preventing unjust enrichment without regard to the intention of the parties; whereas the express resulting trust is established when circumstances raise an inference that the settlor did not intend the person taking title to have the beneficial interest.<sup>13</sup> The constructive trust should also be distinguished from the equitable lien. The equitable lien entitles a defrauded party to a charge on the property to the extent of funds traced there; the constructive trust entitles him to the property itself.<sup>14</sup>

---

<sup>10</sup> *Little v. Bank of Wadesboro*, 187 N.C. 1, 6, 121 S.E. 185, 188 (1924) (dictum).

<sup>11</sup> *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839, 842 (4th Cir. 1962).

<sup>12</sup> 4 SCOTT, TRUSTS § 462 at 3103 (2d ed. 1956).

<sup>13</sup> See *Avery v. Stewart*, 136 N.C. 426, 434-35, 48 S.E. 775, 778 (1904).

<sup>14</sup> 23 MINN. L. REV. 706 (1939). It was stated in *Fulp* that

the very essence of every real trust, express, resulting, or constructive, is the existence of two estates in the same thing,—a legal estate vested in the trustee, and an equitable estate held by the beneficiary. In an equitable lien there is a legal estate with possession in one person, and a special right *over* the thing held by another.

264 N.C. at 24, 140 S.E.2d at 712. Such a distinction appears doubtful. Even though the beneficiary of a constructive trust has "some kind of an equitable interest," his interest would appear not to be in all respects similar

It would seem that the constructive trust is established on the same general principles of unjust enrichment<sup>15</sup> that lie at the foundation of quasi-contract obligations and equitable liens, *i.e.*, it appears to be merely one of several remedial devices available for relief in situations calling for restitution.<sup>16</sup> Whereas an action by the beneficiary of an express trust is generally brought for the determination of interests, the *cestui que trust* of a constructive trust is seeking a reconveyance founded, apparently, upon an implied-in-law promise to reconvey. Consequently, since in all cases where a party seeks restitution, whether by quasi-contract or by constructive trust, the wronged party is generally required to assert some specific ground, such as fraud or mistake, in order to recover,<sup>17</sup> it would seem that this right asserted, not the remedy available, should be determinative of the applicable limitation period. The same reasoning would seem equally applicable to actions based upon contracts implied in law.<sup>18</sup> Such an emphasis upon substance rather than form would seem to serve better the purposes of the statute of limitations as well as avoid the anomaly of applying differing periods of limitation to the same substantive wrong.<sup>19</sup>

Cases may arise in which no underlying wrong is discernible.<sup>20</sup>

---

to the estate held by the beneficiary of an express trust. RESTATEMENT, RESTITUTION § 160 (1937). See SCOTT, TRUSTS § 462.5 (2d ed. 1956).

<sup>15</sup> See *Speight v. Branch Banking & Trust Co.*, 209 N.C. 563, 183 S.E. 734 (1936).

<sup>16</sup> See *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E.2d 666 (1945). 4 SCOTT, TRUSTS § 461 (1956). See 12 N.C.L. REV. 400, 401 (1934). "He is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee." 4 SCOTT, *op. cit. supra* § 462, at 3103.

<sup>17</sup> DAWSON, UNJUST ENRICHMENT 117 (1951).

<sup>18</sup> Such a rule is applied in Kansas. *Orozem v. McNeill*, 103 Kan. 429, 175 Pac. 633 (1918). *Student Symposium on Statutes of Limitation in Kansas*, 9 KAN. L. REV. 179, 183 (1960). *Contra*, *McFarlan v. Stillwater County*, 109 Mont. 544, 98 P.2d 321 (1940) (holding mistake of law to be mere incident to action on implied contract). In North Carolina the same limitation period would generally apply; but, for relief based upon fraud or mistake the cause of action is not deemed to have accrued until the aggrieved party has or should have discovered such fraud or mistake. N.C. GEN. STAT. § 1-52(9) (1953).

<sup>19</sup> "If restrictions are to be imposed on the remedy they should rest on the fact of the underlying wrong, not on the form the gains assume." DAWSON, *op. cit. supra* note 17, at 23. It would seem arguable that where limitations have run on the underlying wrong that the wrongdoer could not be said to hold unjustly.

<sup>20</sup> There remains an intractible group that cannot be classified in these terms [of some specific wrong]. Among the quasi-contract cases there are numerous decisions that rest on no more than the receipt of some asset (usually money) that should have gone to the plaintiff. In some

In such a situation, it would seem that either the three-year or the ten-year statute might be applied. In either case, it would appear to be the better rule to apply the same period to all actions founded upon the same substantive grounds.

Another limitation problem is raised by the court's statement that when a husband acquires possession of the separate property of his wife, he is deemed to hold it in trust for her benefit.<sup>21</sup> Since no underlying wrong may be discernible in such a situation,<sup>22</sup> it becomes necessary to determine when the statute of limitations will begin running against the wife on her action to enforce the trust. In nontrust situations, where the claim is grounded not in fraud or mistake, but in an unenforceable promise, the three-year statute has been used.<sup>23</sup>

The majority rule in regard to both resulting and express trusts seems to be that limitations will run against the *cestui que trust* only when the trustee has repudiated the trust to the knowledge of the beneficiary.<sup>24</sup> However, since the constructive trust is normally founded upon an adverse holding from the beginning, it has been

---

of the constructive trust cases the equitable 'wrong' is so attenuated that one can find only the conscience of equity at work, retrieving the gain. DAWSON, *op. cit. supra* note 17, at 118.

<sup>21</sup> 264 N.C. 20, 23, 140 S.E.2d 708, 711-12 (1965). By process of elimination, any such trust would appear to be a constructive trust since there would appear to be a refutation of the mutual assent necessary for an express trust. Neither would such a situation appear always to fall within any of the resulting trust situations, *i.e.*, failure of an express trust, full performance of an express trust without exhausting the trust estate and purchase of property by one person with conveyance to another at his direction. See 4 SCOTT, TRUSTS § 404.1 (2d ed. 1956).

<sup>22</sup> It would seem that, in lieu of proof of actual fraud, the wife might make an argument for constructive fraud. Constructive fraud "rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced." *Miller v. First Nat'l Bank*, 234 N.C. 309, 316, 67 S.E.2d 362, 367 (1951). However, the imposition of this doctrine seems to have been limited to cases involving attorney and client, trustee and beneficiary, mortgagor and mortgagee, guardian and ward, and principal and agent. See *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943).

<sup>23</sup> *E.g.*, *Dunn v. Brewer*, 228 N.C. 43, 44 S.E.2d 353 (1947).

<sup>24</sup> *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E.2d 8 (1957). 4 SCOTT, TRUSTS § 481.1 (1956). In *Teachey v. Gurley* 214 N.C. 288, 199 S.E. 83 (1938), it was held that where an express trust was based upon contract, the three-year limitation period applicable to contract actions governed the action to establish the trust, not the ten-year statute. The propriety of extending this rule to all express trust situations seems questionable. Consideration is not required for the establishment of the trust and the trustee by accepting the trust does not make a contract to perform the trust enforceable in an action at law. See generally RESTATEMENT (SECOND), TRUSTS § 197 (1959).

suggested that limitations should run immediately with no requirement of repudiation.<sup>25</sup> Nevertheless, where the wife is beneficiary of a constructive trust and has no reason to believe the trustee-husband is holding adversely to her, it would seem that limitations would not run until repudiation.<sup>26</sup>

Statements concerning the requisites for a finding of repudiation have generally appeared in cases involving alleged anticipatory breaches.<sup>27</sup> In such situations, the established guidelines appear to be that the repudiation need not be written; but it must be unequivocal, positive, distinct, absolute, inconsistent with the existence of the contract, and accepted by the adverse party as a repudiation.<sup>28</sup> Applying such a standard to the husband's statement—"You don't think I am a damn fool, do you?"—it would seem doubtful that there had in fact been a repudiation.

In *Fulp* the parties were not dealing at arm's length. Although the husband's failure to convey after full payment and demand had been made by the wife might be considered an avoidance of the express oral contract,<sup>29</sup> the controlling question would still appear to be whether the husband had so repudiated his agreement that the wife was chargeable with knowledge of his adverse holding of her money. The husband's subsequent statements of intention to convey at a future time would therefore seem relevant not only on the question of estoppel,<sup>30</sup> but also on the question of repudiation.

Consideration of the relationship of the parties would seem to

---

<sup>25</sup> 18 U. CINC. L. REV. 230, 231 (1949).

<sup>26</sup> See *McInnes v. McInnes*, 163 Md. 303, 163 Atl. 85 (1932) (applying doctrine of laches); *Opp. v. Boggs*, 121 Mont. 131, 193 P.2d 379 (1948). "Thus where A conveys land to B who orally agrees to reconvey it to A, and B is in a confidential relation to A, B holds the property upon a constructive trust for A. In such a case A is not guilty of laches in failing to sue as long as B has not repudiated his promise." 4 SCOTT, TRUSTS § 481.1 at 3152 (2d ed. 1956).

<sup>27</sup> See *Edwards v. Proctor*, 173 N.C. 41, 91 S.E. 584 (1917).

<sup>28</sup> *Ibid.* The requirement that the repudiation must be accepted as such by the injured party seems proper since there is the possibility of retraction so long as no substantial change of position has intervened. See 4 CORBIN, CONTRACTS § 981 (1951).

<sup>29</sup> In North Carolina oral contracts for the conveyance of land are not void, but voidable merely at the instance of the party to be charged. *Durham Consol. Land & Improvement Co. v. Guthrie*, 116 N.C. 381, 384, 21 S.E. 952, 953 (1895). 30 N.C.L. REV. 292 (1952).

<sup>30</sup> See *Nowell v. The Great Atl. & Pac. Tea Co.*, 250 N.C. 575, 108 S.E.2d 889 (1959). The husband had replied to repeated requests to convey, "Oh, we'll do that later . . . we will, but let's go ahead with it." 264 N.C. 20, 22, 140 S.E.2d 708, 711.

require that on the equitable claim for money had and received limitations should not commence running until the husband clearly and unequivocally repudiates his agreement.

ROBERT O. KLEPFER, JR.

Patents—Section 103 Obviousness as a Time-bar Under Section 102(b)

The Congress shall have Power . . . .

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .<sup>1</sup>

This is the constitutional basis of the United States patent system. In 1790 the first patent act was enacted by Congress,<sup>2</sup> to be followed by others, each growing in complexity. For a patent to issue, it was necessary that an "invention" be useful, new or novel, and *an invention*. Typical of these acts was the act of 1870 which provided that "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . ."<sup>3</sup> was entitled to a patent. A great body of decisional law was developed as the courts attempted to define "invention," but as was pointed out by the Supreme Court,<sup>4</sup> "invention" cannot be defined. In recognition of the indefinableness of invention, affirmative rules were developed to aid the courts in determining the presence of invention as were negative rules to indicate the lack thereof.<sup>5</sup> But these rules did not definitively establish either the presence or lack of invention in fact. In

<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> Act of 1790, 1 Stat. 109.

<sup>3</sup> Act of 1870, ch. 230, § 24, 16 Stat. 201, reenacted, REV. STAT. § 4886 (1875).

<sup>4</sup> *McClain v. Ortmyer*, 141 U.S. 419, 427 (1891).

<sup>5</sup> Examples of the affirmative rules are the long-felt want for the invention; successful efforts on the part of the inventor over unsuccessful efforts by those skilled in the art; commercial success of the invention; imitation by others; new or unexpected results; turning a halt in the art into progress; and solutions to an outstanding unsolved problem. Some examples of the negative rules are the mere exercise of skill expected of a person having ordinary skill in the art; substitution of materials or elements; reversal of parts; and change in size, shape or form. 2 DELLER, DELLER'S WALKER ON PATENTS § 106 at 75 (2d ed. 1964) [hereinafter cited as DELLER].