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Trusts - Implied Trusts in North Dakota

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of covenant is at an end. This in effect imposes a permanent incapacity to hold title against the covenantee [41] and his assigns.[42]

A situation approaching the impossible in detection arises where the wife of a mortgagor joins in the second mortgage. Later the first mortgage is foreclosed and the wife subsequently changes her name through divorce or re-marriage and then reacquires the property. The *Miller* case implies that the unsatisfied recorded junior mortgage would be constructive notice to subsequent purchasers from the wife.

Since North Dakota has unequivocally adopted the theory of revival of mortgages, the only possible solution is to except the prior mortgage specifically and distinctly from the covenants of warranty in the second mortage.[43] Although only a few cases have been litigated on this point, the possibility exists that a grantee in the chain of title may be one against whom the unsatisfied second mortgage may revive. It is incumbent that every precaution be taken in the examination of the abstract to protect the client against such a contingency.

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TRUSTS. — IMPLIED TRUSTS IN NORTH DAKOTA. — An implied trust is a trust created by operation of law [1] as distinguished from an express trust which is created by words or conduct of the settlor.[2] Into a single section [3] of the North Dakota Code are concentrated all the methods of creating implied trusts. Section 59-0106 of the code provides:

"An implied trust arises in the following cases:

1. One who wrongfully detains a thing is an implied trustee thereof for the benefit of the owner.
2. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it;
3. Each one to whom property is transferred in vio-

41. Merchants National Bank v. Miller, 59 N.D. 273, 285, 229 N.W. 357, 362 (1930) ". . . he is estopped from claiming (discharge in bankruptcy), so far as subsequent title to the property is concerned, that the property is not affected by his solemn warranty. He is simply not heard on that proposition. If he has any bad motive in mind to relieve himself from any agreements which he is estopped from asserting, it would be better for him to say farewell to the land and never again acquire an interest therein."; 52 Harv. L. Rev. 1177 (1939).

42. Patton, Titles §125 (1938).

43. See illustrated examples note 37, *supra*.

1. N.D. Rev. Code §59-0105 (1943).
2. N.D. Rev. Code §59-0104 (1943).
3. N.D. Rev. Code §59-0106 (1943).

lation of a trust holds the same as an implied trustee under such trust, unless he purchased it in good faith and for a valuable consideration;

4. When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

It should be noted at the outset that the code speaks only in terms of implied trusts and omits any direct recognition of the historical distinction between the two types of implied trusts, generally called constructive and resulting trusts. This note is concerned with the construction and operation of the foregoing code section. Constructive and resulting trusts will be treated separately, in spite of the code's failure to acknowledge the distinction, because vital practical differences distinguish the two types of trusts.

I. CONSTRUCTIVE TRUSTS

The first three sub-divisions of the above quoted code section deal with the creation of constructive trusts. The fourth sub-division concerns resulting trusts. A constructive trust is a device employed by equity, and exclusively by equity in this state,[4] to aid the rightful owner of property in recovering its possession from one who wrongfully obtained or retains it. The rationale is that equity, in the interest of fair play and substantial justice between the parties, will not recognize more than a bare legal title in one who acquires or withholds another's property wrongfully.[5] It would be unconscionable to allow such a one to profit from his own wrong.[6] "Chancery may compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs."[7] An important attribute is that, once declared by equity, a constructive trust is retroactive to render the wrongdoer a trustee from the time his control of the property first became wrongful.[8] However this does not mean that constructive trust principles operate automatically; only a

4. Prondzinski v. Garbut, 8 N.D. 191, 77 N.W. 1012 (1898); Jasper v. Hazen, 1 N.D. 75, 44 N.W. 1018 (1890).

5. Restatement, Restitution, §160 (1937).

6. "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Justice Cardozo, in Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378, 380 (1919).

7. 3 Bogert, Trusts & Trustees 3 (Part 1, 1946).

8. 3 Bogert, Trusts & Trustees 4 (Part 1, 1946).

decree of equity can impress property with a constructive trust.[9]

Another vital attribute of the constructive trust is that it requires no intent of the parties that a trust be created. In fact most constructive trusts are imposed in spite of or without regard to the intent of the parties.[10] Herein lies the chief distinction between constructive and resulting trusts. A resulting trust cannot be proved without clear and convincing evidence that the trustor intended the trustee to hold less than full beneficial title.[11] One learned writer emphasized this difference by referfering to constructive trusts as "fraud rectifying" trusts while labeling resulting trusts as "intent enforcing" trusts.[12]

A. Wrongful Detention

The first three subdivisions of §59-0106 enumerate the situations in which the courts declare a constructive trust. the section begins: "One who *wrongfully detains* a thing is an implied trustee thereof for the benefit of the owner. . . ."[13] The immediately apparent purpose of this language is to allow recovery in cases where the defendant originally acquired the property by legitimate means, but by subsequent wrongful conduct, or omission, rendered the continuance of his control inequitable. It has been held that a plaintiff seeking a constructive trust under this subsection need not allege fraud in the transaction by which the defendant procured the property, because equity considers mere inactive retention of another's property for a selfish advantage to be constructive fraud and grounds for impressing the property with a trust.[14] An illustrative case is *Equity Elevator & T. Co. v. Farmers' & Merchants' Bank*[15] where the plaintiff had deposited money in the defendant bank upon the latter's agreement to meet certain drafts to be drawn by the plaintiff. The defendant bank became insolvent, and the plaintiff had to pay the drafts himself. Although there was no claim of fraud in the acceptance of the plaintiff's deposit, a constructive trust was decreed because of the defendant's failure to apply the deposit for the agreed purpose. It was said that it would be in-

9. *See* Barker v. Barker, 75 N.D. 253, 263, 27 N.W.2d 576, 582 (1947).
10. 4 Pomeroy, Equity Jurisprudence §1044 (Symons, 1941).
11. Carter v. Carter, 14 N.D. 66, 103 N.W. 425 (1905) (no trust enforced because proof was sketchy); *cf* Bernauer v. McCaull-Webster Elevator Co., 41 N.D. 561, 171 N.W. 282 (1919).
12. Costigan, *The Classification of Trusts as Express, Resulting, and Constructive*, 27 Harv. L. Rev. 437 (1914).
13. N.D. Rev. Code §59-0106, (1) (1943).
14. Hanson v. Svarverud, 18 N.D. 550, 120 N.W. 550 (1909).
15. 64 N.D. 95, 250 N.W. 529 (1933).

equitable to allow the bank to retain the plaintiff's money and leave him to the remedies of an ordinary creditor against the insolvent bank's assets. Where a deposit is made for a stated purpose, the bank's non-performance of that purpose amounts to fraud in equity and renders the bank a trustee of funds so deposited.[16]

Another case where wrongful detention short of active fraud gave rise to a constructive trust was *Cardiff v. Marquis*.[17] There the plaintiff had conveyed land to her father in response to his good faith representation that he could profit by selling her land together with an adjacent tract of his own. He agreed to remit a share of the proceeds to the plaintiff, but died before performing. The plaintiff was allowed to impress a constructive trust upon her father's estate for the proceeds. Obviously neither the plaintiff's father nor his administrator had actively perpetrated fraud upon the plaintiff, but the court thought the unjust enrichment of the father's estate sufficient excuse for equitable intervention. A highly influential, if not decisive circumstance, was the close personal relation of the parties.[18] The case exemplifies numerous instances where a plaintiff whose legal right is without a remedy because of evidentiary rules[19] or the Statute of Frauds[20] falls back on the extraordinary relief of equity.

Apparently the use of the word "thing"[21] in the statute to denote the trust res does not limit operation of this subsection to personalty, for constructive trusts for wrongful detention of realty are common. Typical is the case of *Hughes v. Fargo Loan Agency*.[22] In that case the grantor had deeded land to his son on the parol understanding that the son was to pay the proceeds to the grantor for life, then divide the land equally among the grantor's children. The court held that by failing to divide the land as agreed, the grantee became a constructive trustee for the

16. *Cf.* Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232 (1922) (bank bound by conditions of deposit; misapplication justifies recovery as trust deposit).

17. 17 N.D. 110, 114 N.W. 1088 (1908).

18. *Id.* at 118, 114 N.W. at 1090.

19. *E.g.* N.D. Rev. Code §31-0103 (1943) strict application of this statute forbidding testimony concerning conversations with a deceased person and the consequent hardship can be obviated by equity).

20. N.D. Rev. Code §47-1001 (1943) "An estate in real property . . . can be transferred only *by operation of law* or by an instrument in writing. . . ." (Italics added); N.D. Rev. Code §59-0303 (1943) "No trust in relation to real property is valid unless created or declared: 1. By a written instrument, subscribed by the trustee or by his agent thereto authorized in writing; 2. By the instrument under which the trustee claims the estate affected; or 3. *By operation of law.*" (italics added).

21. N.D. Rev. Code §59-0106 (1943). "One who wrongfully detains a thing is an implied trustee thereof. . ."

22. 46 N.D. 26, 178 N.W. 993 (1920).

benefit of the grantor's children. Here the conditions imposed in the original transfer amounted to an oral express trust, but were unforceable as such because of the Statute of Frauds.[23] However, constructive trusts have never been within the prohibition of the Statute of Frauds.[24] A court of equity "in granting relief in case of an oral agreement, proceeds upon the ground of fraud, actual or constructive, and enforces the agreement, notwithstanding the statute, by reason of the special circumstances... it will not permit the Statute of Frauds to be used as in instrument of fraud. . . ." [25] As in other wrongful detention cases, the grantee who takes real property subject to an oral trust initially procures control without fraud, but by failing to honor the oral trust converts his title to a wrongful claim. Equity will not countenance such abuse of a trust, and, branding the grantee's defection as constructive fraud, the court proceeds to grant practical relief with little regard to technical objections.

B. Wrongful Acquisition

The second subsection in the code section above set out asserts that one may be declared a constructive trustee of any property gained through: (1) fraud, (2) accident or mistake, (3) undue influence, (4) the violation of a trust, or (5) other wrongful act.[26] In cases arising under this subsection the plaintiff's right depends upon establishing that the defendant originally obtained the controverted property through some unfair means tantamount to *equitable* fraud.[27] Except in instances of accident or mistake, constructive trust principles are invoked in these cases because the defendant's control over the plaintiff's property was wrongful in the first instance. Cases involving accident or mistake usually fall into the category of resulting trusts,[28]

23. See note 20 *supra*.

24. The original English Statute of Frauds expressly excepted from its operation both constructive and resulting trusts. 29 Chas. II, c. 3, §VIII.

25. Cardiff v. Marquis, 17 N.D. 110, 118, 114 N.W. 1088, 1091 (1908).

26. N.D. Rev. Code §59-0106 (1943); *cf.* Dak. Comp. Laws §3920 (1887). "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

27. See 4 Pomeroy, Equity Jurisprudence 95, n. 12 (Symons, 1941) "So far as the results which flow from the existence of a constructive or involuntary trust are concerned, it is immaterial whether the acts from which the trust arises are found to be fraudulent in fact, or be deemed fraudulent in law. The intent with which the acts were done becomes immaterial. The trust arises with the same effect regardless of intent." Citing Stianson v. Stianson, 40 S.D. 322, 167 N.W. 237 (1918).

28. *See, eg.,*. Redman v. Biewer, 48 N.W.2d 372 (N.D. 1951) (money furnished by wife for property mistakenly deeded in husband's name); Kernkamp v. Schultz, 44 N.D. 20, 176 N.W. 108 (1919) (mistake in deed grounded resulting trust). *But cf.* Wehe v. Wehe, 44 N.D. 280, 175 N.W. 366 (1919) (no trust arose from mistaken deed to wife because husband filed to assert claim before wife's death).

but may justify imposition of constructive trusts where constructive fraud, based on wrongful continuance of the control after discovery of the mistake, is present.

1. *Fraud*

Where property is obtained by fraudulent misrepresentation of material fact, the defrauded owner should be allowed to assert his equitable title over the property in the defrauder's hands, and the court so holds.[29] An affirmative misrepresentation amounts to fraud only if it relates to a material fact and is: (1) made by one who knows or should know its falsity, and (2) made to induce action or non-action by one who in fact acts or fails to act in reliance on that inducement.[30]

In clear cases of fraud the deed may be cancelled,[31] or the suit may be in tort for damages,[32] thus bypassing the issue of constructive trust. But where the fraud is not obvious, as in cases where the fact misrepresented is the defendant's state of mind at the time of the conveyance, constructive trust is the usual remedy. Such a case was *Barker v. Barker*,[33] a suit between the parties to a previous divorce. The suit involved a post-divorce property arrangement by which the former husband had orally agreed to make the down payment and future deferred payments on a house for the former wife and their two children. The wife was to receive a one-half interest in the house, but had to agree to joint liability on the note and mortgage. The plaintiff wife, after signing the note and mortgage, discovered that her former mate had taken title in himself as sole owner. The wife was allowed to impress the title with a constructive trust for the one-half interest promised her. In holding the defendant guilty of fraud, the court stated, "Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained."[34] The

29. Currie v. Look, 14 N.D. 482, 106 N.W. 131 (1905); Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969 (1901) (the plaintiff may elect to recover the specific property, or its proceeds with interest, or the value of the property, with interest).

30. 3 Bogert, Trusts & Trustees 20 (Part 1, 1946).

31. *See, e.g.*, Currie v. Look, 14 N.D. 482, 106 N.W. 131 (1905) (trial court cancelled deed, but the appellate court went beyond that relief to impress a constructive trust and compel a conveyance by the trustee).

32. Guild v. More, 32 N.D. 432, 155 N.W. 44 (1915); *see* Tvedt v. Haugen, 70 N.D. 338, 347, 294 N.W. 183, 187 (1940) (court stated obiter dictum that a physician who misrepresents his ability to effect a cure is liable in an action of deceit).

33. 75 N.D. 253, 27 N.W.2d 576 (1947).

34. *Id.* at 262, 27 N.W.2d at 582.

court added that the relation of divorced husband and wife is a confidential relation within the rule of allowing constructive trust relief for violation of such relation. It is submitted that decision of the question of confidential relation was unnecessary, because the essentials of equitable fraud were present regardless of the former marital status of the parties.[35]

A second class of fraud cases are those where the defendant is guilty of no affirmative misrepresentation, but defrauds the plaintiff by failing to speak when under a duty to speak. Thus in *State v. Farmers' State Bank* [36] the defendant bank had accepted the plaintiff's deposit without notifying the plaintiff that there had been a "run" on the bank and that its directors had discussed a temporary suspension of business. It was held that the deposit was accepted subject to an implied trust, since it was constructive fraud not to warn the prospective depositor of the imminent closing. The court indicated that even if the directors had believed the bank solvent, or if in fact it had been solvent when the deposit was accepted, there was a duty to fully appraise a depositor of an intention to temporarily suspend business, before accepting his money. Constructive fraud existed because "reception of a deposit is an assurance by the bank . . . that the amount of the deposit will be paid to the depositors upon demand. . . ." [37] Instead of the normal debtor-creditor relation, such a deposit creates a trust relation based on the bank's non-feasance. The fraud is entirely negative. It is unlikely that the bank's omission would amount to legal fraud sufficient to ground a tort action.[38]

2. *Accident or Mistake*

Generally where one gains real property through accident or mistake he is treated as trustee of a resulting trust, and no problem of constructive trust is raised. However, if one should receive property accidentally or through a mistaken conveyance, there is no doubt that he could be compelled to convey it if his holding became wrongful by refusal to correct the mistake.[39] Cases involving personalty are susceptible of solution on the wrongful detention theory. The court has on occasion seemed uncertain whether to solve accident and mistake cases on constructive

35. *Id.* at 264, 27 N.W.2d at 582 (concurring opinion).
36. 62 N.D. 426, 244 N.W. 45 (1932).
37. *Id.* at 430, 244 N.W. at 47.
38. See Restatement, Torts §550, comment *a* (1938).
39. Kernkamp v. Schultz, 44 N.D. 20, 176 N.W. 108 (1919).

or resulting trust principles.[40] It is submitted that, since the determing factors in such cases are intent and payment of consideration rather than fraud, the problem is properly one of resulting trust.[41] It has been held that one claiming a constructive trust based on mistake may be estopped, or barred, by failure to assert his claim until after the death of the person named as grantee in the deed.[42]

3. *Undue Influence.*

The rule is well established in equity that one standing in a confidential [43] or fiduciary relation [44] to another must not in any way exercise undue influence or take advantage of the confidence reposed in him to gain property advantage.[45] In cases of undue influence the usual requirement of clear and convincing proof of fraud is relaxed, because "the law presumes that the influence . . . upon the mind of the person who confided was undue, and a case of constructive trust arises, not however, on the ground of actual fraud, but because of the facility for practicing it." [46] Any dealings between persons who occupy close postions of mutual trust arouse the suspicion of equity. One who would retain profits from such dealing must assume the burden of establishing the good faith of his conduct,[47] or be converted into a trustee.[48]

The 1950 case of *Rovenko v. Bokovoy* [49] is a good example

40. Id. at 29, 176 N.W. at 111, 112 citing both constructive and resulting trust code sections).

41. Redman v. Biewer, 48 N.W.2d, 372, 377 (N.D. 1951) "The evidence in this case shows that the entire consideration was paid with plaintiff's monies and that there was no intention on her part or on the part of her husband that plaintiff should make a gift of the land to her husband."

42. Wehe v. Wehe 44 N.D. 280, 175 N.W. 366 (1919).

43. N.D. Rev. Code §59-0108 (1943). "Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter not only as to the person who reposes such confidence, but as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

44. N.D. Rev. Code §59-0109 (1943). "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

45. N.D. Rev. Code §59-0112 (1943). "A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary." I Perry, Trusts & Trustees §195 (7th ed. 1929).

46. Arntson v. First National Bank, 39 N.D. 408, 419, 167 N.W. at 764 (1918).

47. N.D. Rev. Code §59-0116 (1943). "All transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."

48. I Perry, Trusts & Trustees §193 (7th ed. 1929).

49. 77 N.D. 740, 45 N.W.2d 492 (1950).

because it involved both the fiduciary relation of principal and agent, and the personal relation of half-brother and half-sister. There the defendant was a wholesale grocer and half-brother of the plaintiff, who, with her deceased husband, had been a farmer with neither formal education nor business experience. The plaintiff and her husband moved to Canada leaving management of their farmlands to the defendant as their agent. On the plaintiff's return many years later, the defendant informed her that she had lost the lands by tax foreclosures, and that he, the defendant, had redeemed them in his own right and was fee simple owner. The court found there had been overreaching which warranted imposition of a trust. In addition it was held that the usual statute of limitations had not run to perfect the defendant's claim by adverse possession. It was said that a holding under constructive trust cannot become adverse unless there is an open assertion of the hostile claim, and such assertion is brought to the knowledge of the true owner.[50] No mere lapse of time can defeat the interest of a beneficiary in trust property.[51]

Whether a particular relationship is a confidential relation within the above rule is a question of fact.[52] The term "confidential relation" cannot be reduced to the narrow confines of exact definition, but can be defined only by the gradual process of judicial inclusion or exclusion of specific relations.[53] Among relationships considered confidential the North Dakota court has included the relations of parent and child,[54] half-brother and half-sister,[55] divorced husband and wife,[56] physician and patient,[57] principal and agent,[58] bank and depositor,[59] mort-

50. N.D. Rev. Code §59-0114 (1943). "If a trustee acquires any interest . . . adverse to the interest of his beneficiary in the subject of the trust, he immediately must inform the latter thereof and may be removed at once." *Cf.* §59-0111.

51. *See* Rovenko v. Bokovoy, 77 N.D. 740, 754, 45 N.W.2d 492, 499 (1950).

52. 3 Bogert, Trusts & Trustees §482 (Part 1, 1946).

53. Sours v. Colvin, 55 N.W.2d 462, 465 (Iowa 1952) "Confidential relationship is not restricted to any particular association of persons. It exists whenever there is a trust and confidence, regardless of its origin. . . . The character and the duty of the relationship are immaterial. They may be legal, but not necessarily so. They may be social, domestic, or personal, and their origin is wholly immaterial."

54. Arntson v. First National Bank, 39 N.D. 408, 167 N.W. 760 (1918) (father died without making a will relying on oral promise of sons to convey land to their mother when inherited); Hanson v. Svarverud, 18 N.D. 550, 120 N.W. 550 (1909) (deed absolute from parents held subject to oral trust to remit proceeds to grantors for their lives, then divide land equally among their children; *see* McDonald v. Miller 73 N.D. 474, 481, 16 N.W.2d 270, 272 (1944) (good example of factors considered).

55. Rovenko v. Bokovoy, 77 N.D. 740, 45 N.W.2d 492 (1950).

56. Barker v. Barker, 75 N.D. 253, 27 N.W.2d 576 (1947).

57. *See* Tvedt v. Haugen, 70 N.D. 338, 347, 294 N. W. 183, 187 (1940).

58. Northern Dakota Elevator Co. v. Clark, 3 N.D. 26, 53 N.W. 175 (1892).

59. State v. Farmers' State Bank, 62 N.D. 426, 244 N.W. 45 (1932) (failure to make full and frank disclosure of intent to suspend business).

gagee and mortagor,[60] and business partnership.[61] It is obvious that some of the above relations are of a purely business nature and not confidential in the ordinary sense of the word. However, the court has applied the rule whenever one who in fact relied upon the entire good faith of another has suffered detriment through abuse of his confidence.

4. *The Violation of a Trust*

Where property is held subject to an express trust, the "trustee is held to the utmost good faith in all dealings with the trust property. He is bound to the *cestui que trust* for the payment of every farthing properly due, as proceeds or products of trust property. . . ."[62] The trustee can not obtain any advantage over the beneficiary "by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."[63] A trustee who wrongfully disposes of trust property[64] or deals with it for personal gain[65] may be required to account for any proceeds with interest,[66] or to compensate by paying the full value.[67] These principles apply although the express trust under which the property is originally held may be invalid and unenforceable.[68] In the latter cases it is the constructive trust, not the express trust, that is enforced.

In *General Motors Acceptance Corp. v. Thompson*,[69] the plaintiff had entrusted possession of an automobile to an auto dealer on the latter's written promise not to sell or otherwise

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60. Farmers State Bank v. Anton, 51 N.D. 202, 199 N.W. 582 (1924) (failure to redeem during lawful period in reliance on promise to extend time).

61. Engstrom v. Larson, 55 N.W.2d 579 (N.D. 1952); Bodding v. Herman, 76 N.D. 324, 35 N.W.2d 561 (1949).

62. Jasper v. Hazen, 1 N.D. 75, 81, 44 N.W. 1018, 1020 (1890) (defendant took title for security only but sold the land in violation of oral trust).

63. N.D. Rev. Code §59-0109 (1943).

64. *Cf.* Anderson v. Bank, 6 N.D. 497, 72 N.W. 916 (1897), *aff'd.* 172 U.S. 573 (1899) (plaintiff sued for conversion instead of seeking constructive trust).

65. N.D. Rev. Code §59-0110 (1943). "A trustee shall not use or deal with the trust property for his own profit or for any other purpose not connected with the trust. If he does so, he, at the option of the beneficiary, may be required to account for all profits made thereby, or to pay the value of the use of the trust property, and, if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest."

66. General Motors Acceptance Corp. v. Thompson, 70 N.D. 99, 292 N.W. 85 (1940); *see* Jasper v. Hazen, 1 N.D. 75, 84, 44 N.W. 1018, 1021 (1890) (imprisoned owner entrusted land title and management to defendant who converted it).

67. Larson v. Baird, 60 N.D. 775, 236 N.W. 634 (1931) (trust impressed to extent of *value* of bonds misappropriated); Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969 (1901) (malfeasant trustee cannot, by placing trust realty beyond reach of cestui by selling it to a bona fide purchaser, force the latter to accept the proceeds of the sale for he may recover the value of the land).

68. *See* Hanson v. Svarverud, 18 N.D. 550, 120 N.W. 550, 552 (1909) "There can be no doubt but that the defendant's promise to convey was invalid, and could not be enforced."

69. 70 N.D. 99, 292 N.W. 85 (1940).

dispose of the car until the plaintiff had been fully paid. The agreement was embodied in the form of a trust receipt.[70] After selling the car in violation of the trust receipt terms, the dealer died leaving an insolvent estate. The court held that the plaintiff could impress a trust on the insolvent's bank account because it appeared that the proceeds of the tainted sale had been there deposited. The money received from the unauthorized sale was received in a fiduciary capacity amounting to a quasi trust. Not only was the dealer a constructive trustee, but so also was the bank after notification and demand by the plaintiff.[71] "If one sells the property of another and deposits the money in a bank in his own name, upon notice to the bank, by the owner of the property, of the facts, and a demand for the money, the bank becomes a quasi or constructive trustee for the true owner." [72]

A similar case was *Larson v. Baird*,[73] where the defendant bank converted and sold the plaintiff's bonds which had been left for "safe-keeping" in the bank's vault. The bank failed, and the plaintiff sued the receiver claiming a trust preference in assets. In allowing recovery the court said, "The bank was acting in a fiduciary capacity and held the bonds in trust. . . . Plaintiff's claim is based on the right of property, the title to which is not affected by a change in the trust property. . . . A mere change in the form of property confided to and converted by a trustee does not change the ownership, the beneficiary remaining the owner." [74] Here again violation of an express trust grounded equitable imposition of an implied trust.[75]

5. *Or Other Wrongful Act.*

This clause seems to be a catchall phrase intended to include by anticipation any inequitable conduct not within the previ-

70. See N.D. Rev. Code c. 59-06 (Supp. 1949) (Uniform Trust Receipts Act).

71. Denomination of the relation created by a trust receipt as a trust seems a strained interpretation of the trust receipt transaction. A trust receipt is a financing device and would ordinarily give an automobile dealer the beneficial ownership of the property, subject only to a security title retained by the financing house, the plaintiff here. The very purpose of this financing method is to enable dealers to obtain goods on credit for resale. Vold, Sales 341, *et seq.* (1931). It seems strange, therefore, to find a court holding the sale anticipated as the purpose of the trust receipt's issuance to be a violation of a trust. A trust receipt is not a trust, in spite of the North Dakota Code's classfication of this credit device under the heading of trusts. See note 70 *supra*. *Compare* General Motors Acceptance Corp. v. Thompson, 70 N.D. 99, 292 N.W. 85 (1940), *with* Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934) (trust receipt does not ground trust preference in bankruptcy).

72. General Motors Acceptance Corp. v. Thompson, 70 N.D. 99, 109, 292 N. W. 85, 88 (1940).

73. 60 N. D. 775, 236 N.W. 634 (1931).

74. *Id.* at 780, 236 N.W. at 636.

75. *Cf.* Equity Elevator & T. Co. v. Farmers & M. Bank, 64 N.D. 95, 250 N.W. 529 (1933) (special deposit to meet designated checks constituted constructive trust res).

ously enumerated categories. The broad phraseology indicates the general attitude of equity not to narrowly confine relief from any unfair conduct which should entitle the plaintiff to relief in furtherance of substantial justice. The attitude is commendable.

C. Limitations & Alternative Remedies

The first and most obvious limitation upon the right of a cestui to recover his property by constructive trust is the bona fide purchaser rule. This rule, codified in North Dakota,[76] limits both implied and express trusts. Simply stated, the rule is that a transfer of the legal title of property to one who gives valuable consideration and has neither actual nor record notice of the trust cuts off the cestui's equities in the property and gives the transferee full legal and equitable title clear of the trust.[77] There is no doubt that a constructive trustee conveys good title to an innocent third person who buys for value and that such a purchaser is not liable to the defrauded rightful owner.[78] In North Dakota, it has been held that pre-existing debt does not constitute value within the bona fide purchaser rule as applied to realty[79] but subsequent, as distinguished from antecedent, creditors are protected.[80] The rule may be different where the property involved is personalty,[81] a negotiable instrument,[82] or a stock certificate.[83]

Where the constructive trustee has placed the original trust property beyond the reach of the *cestui* by selling to a

76. N.D. Rev. Code §59-0106 (3) (1943). "Each one to whom property is transferred in violation of a trust holds the same as an implied trustee under such trust, unless he purchased it in good faith and for a valuable consideration. . . ." N.D. Rev. Code §59-0308 (1943). "No implied or resulting trust can prejudice the right of a purchaser or encumbrancer of real property for value and without notice of the trust."

77. 4 Bogert, Trusts & Trustees §881 (Part 1, 1948).

78. *See* Skelly Oil Co. v. Johnson, 209 Ark. 1107, 194 S.W.2d 425, 435 (1946) (oil and gas lease to bona fide lessee cut off equities of constructive trust cestui).

79. Merchants Bank v. Schatz, 59 N.D. 365, 230 N.W. 18 (1930); *cf.* N.D. Rev. Code §1-0120 (1943). "A valuable consideration shall mean a thing of value parted with, or a *new obligation* assumed *at the time* of obtaining a thing. . . ." (italics added).

80. N.D. Rev. Code §59-0309 (1943). "Where an express trust is created in relation to real property but is not contained or declared in the grant to the trustee or in an instrument signed by him and recorded in the same office with the grant to the trustee, such grant shall be deemed absolute in favor of the subsequent creditors of the trustee not having notice of the trust and in favor of purchasers from such trustees without notice and for a valuable consideration.

81. A pre-existing or antecedent claim constitutes value under the Uniform Sales Act. N.D. Rev. Code §51-0101 (21) (1943).

82. N.D. Rev. Code §41-0302 (1943). "An antecedent or pre-existing debt constitutes value. . . ." (Negotiable Instruments Law).

83. N.D. Rev. Code §10-1821 (10) (1943). "An antecedent or preexisting obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor." (Uniform Stock Transfer Act).

bona fide purchaser, or has otherwise made it impossible to impress a trust upon the specific property originally subject to the trust, a complicated problem is presented. How far may the *cestui* go in subjecting assets of the defaulting trustee to his trust? The conflict of North Dakota decisions on this point is typical of the conflict among the several states, and within many individual states. Of course where the *cestui* can show that specific money or property presently held by the trustee came to him through his wrongful dealing with trust property, or as the proceeds of an unauthorized sale of trust property, a constructive trust will be impressed on the identified assets. It is fundamental that a mere change in the form in which property is held does not change the ownership.[84] Therefore all courts allow a *cestui* to pursue his equitable claim as long as he can "trace" or follow the trust property and actually identify the specific property or its proceeds in the hands of the trustee or a third person not a bona fide purchaser. Apparently the majority of American courts limit recovery to situations where "tracing" and identification are possible.[85]

In contrast to the "tracing" theory is the "swollen assets" theory, by which many courts give the trust claimant a preference over general creditors in the assets of the malfeasant trustee. The proponents of the "swollen assets" theory reason that where the trustee misapplies trust funds to pay his own liabilities, the end result is an increase in the assets of the trustee's personal estate, for if he had not met his own liabilities with trust funds, he would have had to deplete his personal assets to meet them. Therefore it follows that the present assets of the malfeasant trustee are greater by the amount of the misappropriated trust funds, and his personal assets should be subjected to a constructive trust to the extent of funds misapplied. Bogert is sharply critical of this theory but admits that many cases have accepted it.[86]

Early North Dakota decisions adhered strictly to the majority "tracing" rule, the first case to expressly reject the "swollen assets" theory being *Northern Dakota Elevator Co. v. Clark.*[87]

84. "No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. . . . The product or substitute has the nature of the original imparted to it." 4 Pomeroy, Equity Jurisprudence §1058c. (*Symons*, 1941).

85. 4 Bogert, Trusts & Trustees §921 (Part 2, 1948).

86. 4 Bogert, Trusts & Trustees §922 (Part 2, 1948).

87. 3 N.D. 26, 53 N.W. 175 (1892).

There the trust property was misappropriated by one member of the defendant partnership before it could be absorbed into the general assets of the firm. The firm became insolvent and the plaintiff claimed a trust preference in the assets. His claim was denied because he could not trace his property into any specific firm asset. In an excellent opinion, Justice Corliss wrote: "The theory on which alone plaintiff can secure priority . . . is that the identical money can be traced in some form from plaintiff to Clark & Smart, and that it was still susceptible of identification. . . . But it is claimed that the proceeds . . . went to enrich the estate of Clark & Smart, and that, therefore, the plaintiff is entitled to priority of payment. Authorities are cited to sustain this view. . . . They stand on no principle, and are opposed to a much stronger array of decisions. The plaintiff . . . cannot identify any particular portion of the assets in the hands of the defendant as being its property. Neither can it trace such property into any particular fund. The very most that can be claimed is that the plaintiff's property has gone into the general mass of the property. . . ." [88] In 1892 this was not considered sufficient foundation for a preference, since the court reasoned that all creditors had contributed to increase the estate of the insolvent.

By 1911, however, the "swollen assets" theory had gained a foothold in North Dakota. In that year the court decided *Widman v. Kellogg* [89] and without express recognition of the "swollen assets" theory nevertheless allowed recovery without demanding the *cestui* trace trust money into specific present assets.[90] In that case the defendant bank, while insolvent, fraudulently accepted the plaintiff's deposit. Four business days later the bank closed. In the intervening four days there was considerable turnover of cash on hand, and checks were paid in excess of deposits made. At closing there was more than enough cash on hand to meet the plaintiff's claim, but it was inconceivable that the turnover of funds had not affected the specific money desposited by the plaintiff. Yet the court decreed a constructive trust preference, and in language indicating approval of the "swollen assets" rationale said: "There can be no doubt . . . that the cash assets of the insolvent bank were enhanced by the receipt of this money. Neither can there be

88. *Id.* at 29, 53 N.W. at 176.
89. 22 N.D. 396, 133 N.W. 1020 (1911).
90. *Cf.* Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232 (1922) (similar case assumed trust in assets without mention of tracing problem).

any doubt that the money turned over to the receiver was more by the amount paid the bank than it would have been had it not been paid the bank. The bank took appellant's money and the funds in its possession . . . were to that extent increased."[91] Instead of requiring the plaintiff to trace and identify his money as part of the cash on hand, the court applied the rule that where a trustee mingles trust funds with his own money, any money paid out of the common fund is presumed to be the trustees personal funds, and not trust money.[92] The burden of proving that the cash on hand did not contain the plaintiff's deposit was placed squarely upon the bank, but it was estopped to assert that it had paid out trust funds while retaining its own funds, thus neatly relieving the plaintiff of any burden of tracing or identification.[93]

In 1930, with *Behm v. Baird*,[94] the court directly reversed its position with a flat rejection of the "swollen assets" theory. Here too the defendant bank was insolvent at the time it accepted the plaintiff's deposit, just as in the *Widman* case. The plaintiff asserted his trust claim only against the cash on hand at closing, and thus seemed in a position identical to that of the successful plaintiff in the *Widman* case. This time however, no recovery was allowed. The court said, "Plaintiff claims the assets of the bank were augmented by his deposit. This would be good so far as it goes if proved, but not enough; he must trace the funds."[95] The court stated there could be no trust preference short of proof by the plaintiff that actual proceeds of the check he deposited made up the cash on hand at closing, and that it was not cash received from other depositors.[96] How this reasoning can be reconciled with the strong presumption and burden of proof rules laid down in *Widman v. Kellogg* is inconceivable to the present writer.

By 1931 the court was already deviating from the strict rule announced only the year before. *Larson v. Baird*[97] allowed the plaintiff the benefit of the presumption that commingled funds returned to the insolvent bank contained the proceeds of his converted trust property, although strict adherence to the

91. Widman v. Kellogg, 22 N.D. 396, 402, 133 N.W. 1020, 1023 (1911).
92. *Id.* at 403, 133 N.W. at 1023.
93. Bogert cites the case in support of the majority "tracing" theory. 4 Bogert, Trusts & Trustees §921 n.5 (Part 2, 1948).
94. 59 N.D. 733, 231 N.W. 876 (1930).
95. *Id.* at 739, 231 N.W. at 878.
96. *Id.* at 741, 231 N.W. at 879.
97. 60 N.D. 775, 236 N.W. 634 (1931).

rule of *Behm v. Baird* would have required the plaintiff to prove that the funds returned were not made up of money derived from other sources. However, the court paid lip service to the "tracing" theory. The next year, in *State v. Farmers' State Bank*,[98] the "swollen assets" theory returned in full force. In that case, the bank received the plaintiff's deposit of checks subject to a constructive trust, but immediately cleared the checks with another bank. "Practically immediately . . . the checks . . . were used . . . to pay an indebtedness of the bank. Instead of drawing out of the cash on hand and paying the indebtedness of the bank, and thus depleting the cash to this extent, these checks were used. . . . In this way the assets of the bank were augmented." [99] The constructive trust was enforced against the assets because the plaintiff had shown ". . . fraud practiced on it . . . assets augmented by this amount, and that the cash value which the checks represented was used to pay the debt, thus saving the cash on hand." [100] It is difficult to imagine language more indicative of the reasoning associated with the "swollen assets" doctrine; yet there was no repudiation of the "tracing" rule.[101]

In a 1940 case [102] where the trust proceeds were, as a matter of fact, easily traceable, the court reaffirmed its original adherence to the tracing theory. In the opinion of the writer, the status of the North Dakota law on this problem is not as confused as it may appear on first inspection. The court seems to have adhered consistently to a policy of professing acceptance of the strict "tracing" rule, but applying what in fact amounts to the "swollen assets" rule wherever the equities of the individual case evoke application of the latter less stringent rule to prevent a miscarriage of justice. Occasionally the court, without reference to the "tracing" problem, allows recovery where the plaintiff has failed to assume the burden of indentifying his trust proceeds.[103] Other cases allow recovery by stretching the definition of "tracing" to include the facts at hand.[104] This elasticity in defining and applying the doctrine does not seem

98. 62 N.D. 426, 244 N.W. 45 (1932).
99. *Id.* at 432, 244 N.W. at 48.
100. *Id.* at 434, 244 N.W. at 48.
101. Id. at 433, 244 N.W. at 48, "The depositor has traced the cash value of the checks into this fund. He may follow such property and reclaim it in any form into which it may have been changed, providing identification is possible." Bogert cites the case in support of the "swollen assets" theory. 4 Bogert, Trusts & Trustee §922 n.18, (Part 2, 1948).
102. General Motors Acceptance Corp. v. Thompson, 70 N.D. 99, 292 N.W. 85 (1940) (proceeds of unauthorized sale traced to bank account).
103. See Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232 (1922).
104. See Larson v. Baird, 60 N.D. 775, 236 N.W. 634 (1931).

out of place when one considers that the original purpose of Equity was to introduce elasticity into a legal system grown brittle by strict adherence to precedent despite hardship and injustice in specific cases.

Another limitation of major practical significance is the requirement of clear and convincing evidence to prove the constructive fraud alleged as the basis for trust relief. "The evidence must be strong enough to lead to but one conclusion. If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient to establish a trust." [105] Mere proof of suspicious circumstances is not enough.[106] But a constructive trust may be created, although the evidence supporting it is almost entirely circumstantial.[107] Where the trust claimant seeks to prove that an absolute deed was taken subject to an oral trust, the Statute of Frauds ordinarily does not prohibit such evidence,[108] but an oral trust in land is unenforceable where no special circumstances suspend operation of the Statute.[109] It has been held that declarations of the grantor made prior to or contemporaneously with execution and delivery of a deed are admissible to support a constructive trust, but declarations made subsequent to the transaction and not in the grantee's presence are inadmissable.[110]

Since the constructive trust is by nature a remedy of equity, an early case refused relief where the suit was erroneously brought as an action at law.[111] Although a repetition of that decision would be unlikely today, it serves as a reminder that certain limitations are imposed upon a litigant seeking equitable

105. Lander v. Hartson, 77 N.D. 923, 931, 47 N.W.2d 211 (1951) (plaintiff failed to prove defendant purchased stock as agent and not for his own account).

106. McKenzie County v. Casady, 55 N.D. 475, 214 N.W. 461 (1927); First Nat. Bank v. Mensing, 46 N.D. 184, 180 N.W. 58 (1920) (fact that insolvent debtor purchased land in names of his children not fraudulent).

107. See Bodding v. Herman, 76 N.D. 324, 335, 35 N.W.2d 561, 566. "All the actions of the defendant bear him out. He took the greater risk in connection with the transactions. The confidence shown by each party in the other explains the looseness of the transactions between them. The failure of the plaintiff to produce the original records raises an inference against him . . . . The court has come to the conclusion that . . . the acts of the parties and the circumstances shown in the evidence establish the defendant's claims . . . ."

108. Hughes v. Fargo Loan Agency, 46 N.D. 26, 178 N.W. 993 (1929) (parol understanding failed to create express trust but justified imposition of constructive trust); Hanson v. Svarverud, 18 N.D. 550, 553, 120 N.W. 550, 551 (1909) "A court of equity will enforce a trust agreement under such circumstances, although the requirements of the statute of frauds have not been complied with."

109. Weber v. Bader, 42 N.D. 142, 172 N.W. 72 (1919) (land purchased under agreement to hold it for joint use with others held free of trust).

110. McDonald v. Miller, 73 N.D. 474, 16 N.W.2d 270 (1944).

111. Prondzinski v. Garbut, 8 N.D. 191, 77 N.W. 1012 (1898) (refused damages at law). *But cf.* Prondzinski v. Garbut, 10 N.D. 300, 86 N.W. 969 (1901) (same case correctly brought resulted in declaration of constructive trust and recovery of value of converted trust res).

relief. Thus a constructive trust will not be imposed where the plaintiff has rested too long without asserting his right,[112] or has not come into court with clean hands.[113] Since a decree of equity is a matter of grace and not of right, the court may require that the plaintiff do equity as a condition of granting the constructive trust.[114] It is fitting that any discussion of constructive trusts close with an acknowledgment that this extraordinary remedy is today, as it was centuries ago, essentially a device to insure a just result where the issue is the simple one of right and wrong.

II. RESULTING TRUSTS

Resulting trusts constitute the second major category of implied trusts. Here the word "implied" is used in a sense similar to its meaning in the law of implied contracts. The existence of the resulting trust depends upon acts or expressions of the parties indicating an intent that a trust relation result from their transaction. Unlike the constructive trust, the resulting trust is not judicially imposed because of fraud.[115] The indispensable requirement is the establishment of a trust intent by evidence which is "clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt."[116] The court's function is not to create the trust, as it creates a constructive trust, but only to recognize and enforce the trust.[117] Thus the North Dakota code is not strictly correct in including resulting trusts in a section dealing with trusts created by law.[118] Resulting trusts are trusts created by the parties.

North Dakota statutory law on the creation of resulting trusts is centered around a single code subsection and apparently recognizes only the purchase money type of resulting trusts. The statute recites: "When a transfer of real property is made to

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112. Wehe v. Wehe, 44 N.D. 280, 175 N.W. 366 (1919).
113. Fleischer v. Fleischer, 11 N.D. 221, 91 N.W. 51 (1902) (refused constructive trust which would have perfected claimant's purpose to evade statute).
114. Merchants Bank v. Schatz, 59 N.D. 365, 371, 230 N.W. 18, 20 (1930) "But this is an action in equity. . . . The plaintiff must do equity, and, therefore, under these circumstances, though it is entitled to be decreed the owner of the property, it must take such property charged with . . . the claim for which it is responsible."
115. *See, eg.*, Hyland v. Tousley, 67 N.D. 612, 275 N.W. 340 (1937) (resulting trust enforced without mention of fraud; Dalrymple v. Security L. & T. Co., 9 N.D. 306, 83 N.W. 245 (1900) (resulting trust enforced although no fraud was alleged).
116. Carter v. Carter, 14 N.D. 66, 103 N.W. 425 (1905).
117. 2 Bogert, Trusts & Trustees §452 (1935).
118. N.D. Rev. Code §59-0106 (1943).

one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."[119] It must be noted that the rule is limited to real property. The readily apparent primary factor in this type of implied trust is the element of consideration. If the trust proponent can establish that the consideration was paid *by or for* him he will likely enforce his trust. Equity here take cognizance of the ordinarily selfish and aquisitive nature of men when dealing with property. The normal desire to obtain value in exchange for value paid out, and the less ordinary intent to donate property, form the common sense foundation of the trust presumption.[120] Purchase money resulting trusts were well established in equity long before the original Statute of Frauds and were expressly excepted from its operation.[121] In fact the common law inferred a resulting trust intent whenever one man gratuitously transferred land to another.[122]

In North Dakota the doctrine of the purchase money resulting trust was established by the leading case of *Dalrymple v. Security L. & T. Co.*[123] In that case a father bought and paid for a tract of land. However, he directed that the deed be made in the name of his brother as grantee. Circumstantial evidence indicated an intent that the brother hold this land as trustee for the purchaser's children, who were plaintiffs in the action. There was no written reference to a trust, but the court held that a trust resulted since the purchase had been by one who paid the consideration *for* someone other than the named grantee. The court was not inclined to presume a gift to the purchaser's brother.

Frequently a husband purchases land and pays the consideration, but takes the conveyance in his wife's name. In such cases the normal presumption is that the husband intends a gift to his wife, but this is a presumption of fact and can be rebutted by convincing evidence that a trust was intended.[124]

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119. *Ibid.*

120. See 2 Bogert, Trusts & Trustees §454 (1935).

121. 4 Pomeroy, Equity Jurisprudence §§1030, 1040 (Symons 1941).

122. For a brief historical background see Meriwether, *Resulting Trusts—Part Payment of the Purchase Price*, 2 Ark. L. Rev. 53 (1948).

123. 9 N.D. 306, 83 N.W. 245 (1900).

124. 2 Bogert, Trusts & Trustees §459 (1935); *see* Kosters v. Hoover, 98 F.2d 595, 598 (D.C. Cir. 1938) "The general rule is well established that when the purchase money is paid by one and the property is taken in the name of another, a resulting trust arises in favor of the party paying. However, there is an equally well established exception to the rule, to the effect that when the person who pays the purchase money has the title conveyed to his wife, the purchase and the conveyance are presumed to constitute a gift or advancement to the wife, or a settlement upon her, because of the husband's legal duty to make provision for his wife. This presump-

The conflict between the ordinary presumption of trust where the purchaser takes title in another's name, and the counter presumption of gift between husband and wife is illustrated in *Roberge v. Roberge*.[125] There the plaintiff, in a suit against his six children, sought to have an absolute deed to his deceased wife declared a trust deed. The plaintiff had bought the land by making a partial down payment and giving notes secured by a mortgage for the remainder. Both the plaintiff and his wife assumed liability on the notes and mortgage. The plaintiff, acting on mistaken legal advice, conveyed the land to his wife on the oral understanding that it would belong to both as security for their old age. In spite of testimony that the wife, as business head of the family, gave the plaintiff money to make the payments, the court found that the consideration was paid by him. It was held that the presumption of gift did not apply, since the plaintiff had established a contrary trust intent. Justices Birdzell and Christianson joined in an extremely cogent and persuasive dissent[126] which questioned the efficacy of the evidence to prove more than a claim on the land for the plaintiff's old age. Attention was focused upon the plaintiff's own testimony as indicative of an intent to give his wife a beneficial as well as a bare legal interest. Judge Birdzell pointed out that the burden of proof carried by the proponent of a resulting trust is necessarily heavy, and his evidence must be more than a mere preponderance, because his purpose is to overthrow the normal legal effect of his own act of placing title in another. It is submitted that the majority decision reached the more equitable result. Bearing in mind that the defendants were seeking to defeat their own father's old age security plan by claiming through their deceased mother, it is understandable that equity might strain the usual rules to aid the father.[127] A strikingly similar case held the plaintiff estopped to contest the absolute nature of a deed to his wife by waiting until after her death.[128]

The court implied in *Redman v. Biewer*[129] that the pre-

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tion may be rebutted by clear and satisfactory evidence that a resulting trust was intended."

125. 46 N.D. 402, 180 N.W. 15 (1920).

126. *Id.* at 408, 180 N.W. at 17.

127. "Rather sad is the commentary that this property, comprising with the husband's other property, 'the community' in fact, of the husband's and wife's efforts of life, should now, near 'the end of his journey,' be sought, by anticipation, through descent." *Id.* at 407, 108 N.W. at 17. (this homey comment indicates the real reason for the decision as one of elemental justice).

128. Wehe v. Wehe, 44 N.D. 280, 175 N.W. 366 (1919).

129. 48 N.W.2d 372 (N.D. 1951).

sumption of gift also applies in the converse situation where the wife pays the consideration for a conveyance to her husband. In that case the husband purchased land with his wife's money, instructing the grantor to make the deed to the wife. By mistake the husband was named grantee. The evidence showed that all payments were made from the wife's funds, and that she paid the taxes. The court held that the ordinary presumption of gift had been upset by the evidence, and that the husband held title as trustee of a resulting trust. The presumption of gift from wife to husband is contrary to the prevailing rule, but indicative of the modern and more logical trend of legal thinking.[130] Of course, a clear intent to make a gift will not be defeated by resulting trust rules.[131]

Where only part of the consideration for the purchase is paid by the party claiming a resulting trust the problem is more complex.[132] The purchaser may have borrowed part of the price and placed title in the lender's name for security only.[133] American courts apply three rules, varying in strictness, to find a resulting trust in favor of one who has paid only part of the purchase price. The old rule held the trust claimant to the strict requirement of proving he paid an "aliquot part" of the price.[134] Thus the United States Supreme Court said in a leading case, "No trust arises unless his part is some definite portion of the whole, and is paid for some aliquot part of the property, as a fourth, a third, or a moiety."[135] Seldom do courts using the term "aliquot part" intend to employ its strict dictionary meaning of a part which divides the whole without a remainder[136] but rather use the term loosely in the sense of a *definite* part of the price to enable the court to establish with certainty the proportion of the property covered by the trust.[137] A second line of decisions invoke resulting trust principles in part payment cases only if the trust claimant made an express agreement with the named grantee that some specific interest in the property be

130. See Cassidy, *Trusts Resulting from Part Payment of the Purchase Price*, 20 Geo. L. J. 475, 482 (1932).

131. Hunt v. Holmes, 64 N.D. 389, 252 N.W. 376 (1934) (father's gift to daughter upheld against claim of trust).

132. For an interesting discussion see, Cassidy, *Trusts Resulting from Part Payment of the Purchase Price*, 20 Geo. L.J. 475 (1932).

133. See Hyland v. Tousley, 67 N.D. 612, 275 N.W. 340 (1937) (father who took title to secure purchase money loan to son held as trustee after son repaid loan).

134. Olcott v. Bynum, 17 Wall. 44 (U.S. 1872).

135. *Id.* at 59.

136. Webster, New Collegiate Dictionary 23 (1949).

137. *See, e.g.*, Culp v. Price, 107 Iowa 133, 77 N.W. 848 (1899) (no trust enforced where amount paid was indefinite); Currence v. Ward, 43 W. Va. 367, 27 S.E. 329 (1897). See 3 Scott, Trusts §454 (1939).

his in exchange for his share of the purchase price.[138] A third group of courts, considered by Bogert the majority,[139] presume a resulting trust in favor of the partial payor without much comment about the proportion of his payment to the total price.

The North Dakota case of *Fox v. Fox*[140] presented a situation where recovery would have followed by applying even the most stringent interpretation of "aliquot part". In that case a father and his three sons made a joint purchase of land in performance of an oral agreement that each would pay one-fourth of the price and receive a one-fourth interest in the land. For convenience title was taken in the name of the father as sole owner. The court, quoting with approval the strict federal rule[141] of "aliquot part," enforced a resulting trust. The case does not necessarily establish the strict rule as North Dakota law; however, for the issue was neither directly raised nor necessary to the decision. The court indicated it might take a more liberal view if occasion should demand by saying "Where the consideration proceeds from two or more persons jointly, . . . a resulting trust will arise *in proportion* to the amount of the consideration which they have respectively contributed."[142]

Ordinarily one who expects equitable relief in the form of a resulting trust must come into court armed with highly persuasive evidence.[143] The porportion of cases which have denied relief is much higher than in constructive trust cases. The strong policy favoring security of real estate titles against oral claims constrains courts to deny recovery where no special circumstances of equitable cognizance, such as payment of purchase money, operate to suspend the statutory bar of parol evidence.[144] Where there is genuine doubt by whom the consideration was paid, and the plaintiff's evidence is sketchy, no trust will result.[145] Resulting trust principles cannot be invoked to

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138. Druker v. Druker, 268 Mass. 334, 167 N.E. 638 (1929) (claimant must have furnished specific and definite part of consideration in return for a determinate and fixed fraction of the estate); *see* Moat v. Moat, 301 Mass. 469, 17 N.E.2d 710, 712 (1938).

139. 2 Bogert, Trusts & Trustees §457 (1935) and cases cited n.12.

140. 56 N.D. 899, 219 N.W. 784 (1928).

141. *Id.* at 908, 219 N.W. 788.

142. *Id.* at 907, 219 at 788 (italics added).

143. Carter v. Carter, 14 N.D. 66, 67, 103 N.W. 425, 426 (1905) "In order to overthrow the presumption in favor of defendant's title . . . plaintiff must have more than a preponderance of evidence. The proof must be 'clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt'."

144. Weber v. Bader, 42 N.D. 142, 172 N.W. 72 (1919).

145. Bernauer v. McCaull-Webster Elevator Co., 41 N.D. 561, 171 N.W. 282 (1919).

give operation to an otherwise imperfect gift [146] or to defeat a gift already perfected [147] because the essential element of clear trust intent is missing. Nor will the North Dakota courts countenance the use of the resulting trust as a device to give force to an invalidly created express trust.[148] In fact the court has been rather parsimonious in dispensing equitable relief in the form of resulting trusts. If a numerical comparison is indicative of the court's general attitude, it may be notable that relief has been denied more often than it has been granted.

In closing it must be observed that the field of implied trusts is replete with exemplary proof that law remains the servant of justice. All too often laymen deprecate the legal profession as one conceived in iniquity and dedicated to technicality. Yet one cannot read implied trust cases without sensing the profound concern for substantive justice that guides courts in dispensing or withholding the extraordinary remedies of constructive and resulting trusts. Justice is not confined to abstract discussions but descends to the practical level to provide the decisive factor in actual controversies.

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146. McWilliams v. Britton, 48 N.D. 975, 188 N.W. 44 (1922); *see* Hagerott v. Davis, 73 N.D. 532, 554, 17 N.W.2d 15, 26 (1944).

147. Hunt v. Holmes, 64 N.D. 389, 252 N.W. 376 (1934).

148. *See* Reel v. Hansboro State Bank, 52 N.D. 182, 191, 201 N.W. 864 (1924) (dictum states that equity will not aid a volunteer to perfect an incomplete trust).