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PURCHASE-MONEY RESULTING TRUSTS IN LAND IN MISSOURI

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I. INTRODUCTION

If the number of reported cases is an accurate indication,¹ Missouri courts and lawyers are often confronted by countless variations and complications of the following basic fact situation: *A* conveys land to *B* by means of a standard deed form containing a recitation of consideration paid by *B*, but in fact the purchase price was paid by a third party, *C*. This transaction, of course, should normally raise in the mind of the reader the possible application of the oft-used remedy of the purchase-money resulting trust. In view of the importance of this remedy to Missouri lawyers, it is the purpose of this article to analyze the application in a real estate setting of the purchase-money resulting trust by Missouri appellate courts.² Because meaningful examination of the remedy is aided immensely by the presence of relevant fact situations, the facts of recent and, hopefully, instructive Missouri cases are emphasized wherever possible.

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1. 28 Mo. Dig. indicates that there have been well over 200 Missouri appellate decisions, each dealing with some aspect of purchase-money resulting trusts in real estate.

2. A short, but helpful and analytical student comment on certain aspects of the problem in Missouri may be found in McMullin, *Purchase-Money Resulting Trusts in Missouri*, 6 MO. L. REV. 354 (1941). For general coverage of the problem see G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES §§ 454-457 (2d Ed. 1964); 5 A. SCOTT, TRUSTS §§ 440-460 (3d ed. 1967); Scott, *Resulting Trusts Arising Upon the Purchase of Land*, 40 HARV. L. REV. 669 (1927). It is helpful at the outset to distinguish between express, resulting, and constructive trusts. Both express trusts and resulting trusts are concerned with the intention of the creating parties. The express trust is created only where by words the settlor manifests an intention to create it, whereas the resulting trust arises where circumstances justify an inference or presumption that the settlor did not intend that the person holding title have the beneficial interest therein. The constructive trust is a remedial device imposed not to recognize intention but to prevent unjust enrichment and to redress wrong. See RESTATEMENT (SECOND) OF TRUSTS § 1, comment e (1959). See also text at notes 217 through 254 *infra*. There are three situations in which a resulting trust properly arises: "(1) where an express trust fails in whole or in part; (2) where an express trust is fully performed without exhausting the trust estate; (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor conveys the property to another person." 5 A. SCOTT, TRUSTS § 404.1 at 3214 (3rd ed. 1967). The third type of resulting trust is the subject of this article.

II. GENERAL DISCUSSION OF THE DOCTRINE

Missouri and most other American jurisdictions recognize the long-established rule that where one person pays the purchase price of land but the legal title is conveyed to another, a presumption normally is created that the latter person holds the land under a resulting trust for the party paying the purchase price.³ The underlying theory of the rule is grounded in the assumption that normally a person who provides purchase money intends to receive the benefit of the purchase; in other words, the purchase-money resulting trust is "intent enforcing."⁴ The fact that the deed recitals refer to consideration having been paid by the grantee and that there is a statement that the conveyance is for the use of the grantee will not foreclose the presumption of resulting trust in the absence of evidence showing that such trust was not intended.⁵ A resulting trust may be enforced not only by the beneficiary, but also by creditors of the payor.⁶ Parol evidence is clearly admissible to establish the elements of a purchase-money resulting trust;⁷ but the burden of establishing these elements is on the plaintiff,⁸ and the evidence must be so "clear," cogent and convincing as to exclude from the mind of the court all reasonable doubt as to the existence of the trust.⁹ Once plaintiff has successfully established these elements, the defendant, in order to prevail, must establish that the parties intended that defendant take the beneficial as well as legal interest in the land.¹⁰

It should be pointed out that the Statute of Frauds prohibits the

3. *E.g.*, *Davis v. Roberts*, 365 Mo. 1195, 295 S.W.2d 152, 156 (1956); *Ferguson v. Stokes*, 269 S.W.2d 655, 659 (Mo. 1954); *Parker v. Blakeley*, 338 Mo. 1189, 93 S.W.2d 981, 988 (1936); *Carr v. Carroll*, 178 S.W.2d 435 (Mo. 1944); 5 A. SCOTT, TRUSTS § 440 at 3310 (3rd ed. 1967). Four state statutes expressly permit purchase-money resulting trusts. *See* MONT. REV. CODE ANN § 86-103 (1964); N.D. CODE ANN. § 59-01-06(4) (1960); OKLA. STAT. ANN. tit. 60, § 137 (1963); S.D. CODE § 59.0102(4) (1939); *cf.* GA. CODE ANN. §§ 108-106 (1959). Purchase-money resulting trusts have been abolished in New York, Michigan, Kentucky, Minnesota and Wisconsin and limited in Indiana and Kansas. *See* text at notes 258 through 266 *infra*.

4. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 454 at 512, 517-518 (2d ed. 1964).

5. 5 A. SCOTT, TRUSTS § 440 at 3312 (3rd ed. 1967).

6. *See, e.g.*, *Cape County Sav. Bank v. Wilson*, 225 Mo. App. 14, 34 S.W.2d 981 (St. L. Ct. App. 1931).

7. *E.g.*, *Mays v. Jackson*, 346 Mo. 1224, 145 S.W.2d 392 (1941); *Woodard v. Cohron*, 345 Mo. 967, 137 S.W.2d 497 (1940).

8. *Long v. Kyte*, 340 S.W.2d 623, 627 (Mo. 1960).

9. *Id.* at 627. *See* *Ellis v. Williams*, 312 S.W.2d 97, 102 (Mo. 1958); *Isenman v. Schwartz*, 335 S.W.2d 112, 116 (Mo. 1960).

10. 5 A. SCOTT, TRUSTS § 440 at 3314 (3rd ed. 1967).

creation of an express trust of land by oral agreement.¹¹ However, a resulting trust need not be evidenced by a writing because the Missouri Statute of Frauds, like that of most other states, excepts trusts which "arise or result by the implication of law."¹² It has been argued that the purchase-money resulting trust should not come within this statutory exception because such a trust arises on the theory that there is a presumed intention on the part of the parties to create a trust and therefore the arrangement resembles an express trust more closely than one which arises by legal implication.¹³ This argument has been satisfactorily rebutted on two grounds, however. First, the High Court of Chancery held, within seven years after the enactment of the statute, that a writing is not required to prove a purchase-money resulting trust of land.¹⁴ Secondly, although such trusts arise out of the intention of the parties, that intention is evidenced by the circumstances of the transaction and the *actions* of the parties rather than by any oral agreement of the parties.¹⁵

Another spurious argument based on the Statute of Frauds has occasionally been advanced. If a grantee agrees in writing to hold land in trust for the person paying the purchase price, but the writing is otherwise defective under the Statute of Frauds, the writing is unenforceable. Accordingly, it has been argued that a purchase-money resulting trust presumption may arise only where there is no express agreement because the

11. See § 456.010, RSMo 1959, which provides as follows:

All declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is, or shall be, by law, enabled to declare such trusts, or by his last will, in writing, or else they shall be void, and all grants and assignments of any trust or confidence shall be in writing signed by the party granting or assigning the same, or by his or her last will, in writing, or else they shall be void.

12. § 456.030, RSMo 1959.

13. McMullin, *Purchase-Money Resulting Trusts in Missouri*, 6 Mo. L. Rev. 354, 356 (1941).

14. Anonymous 2 Salk. 676, 86 Eng. Rep. 486 § 361 Case 4 (Ch. 1683). This case held that where land is purchased in the name of another, the land is held in trust for the person supplying the purchase price, even though there is no deed declaring the trust, because the Statute of Frauds did not apply to trusts created by operation of law. Interestingly, an eighteenth century treatise suggests that the Statute of Frauds prohibits a resulting trust in the purchase-money situation unless the deed recites the payment of the consideration by the payor. See F. SANDERS, *USES AND TRUSTS* 180-181 (1792). This position does not represent the present state of the law.

15. 5 A. SCOTT, *TRUSTS* § 440 at 3315 (3rd ed. 1967); *Purvis v. Hardin*, 343 Mo. 652, 122 S.W.2d 936, 938-939 (1938); *Wenzelburger v. Wenzelburger*, 296 S.W.2d 163, 166 (St. L. Mo. App. 1956).

presence of the express agreement removes the case from the category of resulting trusts and places it in the category of express trusts.¹⁶ Thus, since the express trust is unenforceable, the grantee should keep the land. Acceptance of such a position, of course, would lead to the anomalous result that where a grantee expressly agreed to hold the land in trust, he would be able to keep the land, but where there is no express agreement he would be forced to give up the land. Like most other courts,¹⁷ the Missouri Supreme Court, in *Carr v. Carroll*,¹⁸ has rejected the above argument. There the court approved earlier language to the effect that although "the trust resulting from the acts of the parties could not be converted into an express trust by the verbal contemporaneous agreement of the parties" because of the Statute of Frauds, "nevertheless a failure to put the declaration of trust in writing does not prevent a trust from resulting by operation of law."¹⁹ Furthermore, the *Carr* court held that parol evidence was admissible to show the *purpose* of the conveyance in that case.²⁰ Thus, it would appear that not only does evidence of an oral agreement of trust not preclude the establishment of a purchase-money resulting trust, but such evidence is extremely helpful in buttressing the existence of such a trust.²¹

The application of purchase-money resulting trust principles assumes that although the payor intends to retain the beneficial interest in the property conveyed to the grantee, he consents to or approves of the con-

16. Costigan, *The Classification of Trusts as Express, Resulting, and Constructive*, 27 HARV. L. REV. 437, 455 (1914). Professor Costigan would nevertheless find a constructive trust in such a situation. For an analytical rebuttal to this argument, see McMullin, *Purchase-Money Resulting Trusts in Missouri*, 6 MO. L. REV. 354, 356-357 (1941).

17. The cases may be found in 5 A. SCOTT, TRUSTS § 441.2, note 1 (3rd ed. 1967).

18. 178 S.W.2d 435 (Mo. 1944).

19. *Id.* at 437. See also *Condit v. Maxwell*, 142 Mo. 266, 275, 44 S.W. 467 (1898). But see *Ebert v. Myers*, 320 Mo. 804, 9 S.W.2d 1066 (1928), which seems inconsistent with the general trend of Missouri cases. In that case the court stated that due to the presence of an agreement to hold for the benefit of the person paying the purchase price, no trust could arise by implication of law. *Ebert* is strongly criticized in McMullin, *Purchase-Money Resulting Trusts In Missouri*, 6 MO. L. REV. 354, 357-358 (1941). The continued validity of *Ebert* is extremely doubtful in view of *Carr* and *Padgett v. Osborne*, 359 Mo. 209, 221 S.W.2d 210, 213 (1949).

20. *Carr v. Carroll*, 178 S.W.2d 435, 437 (Mo. 1944).

21. This also seems to be the conclusion of the court in *Mays v. Jackson*, 145 S.W.2d 392, 394 (Mo. 1941) where the court states:

The parol agreement alleged merely tends to show the relationship of the parties and the character of the transaction, while the resulting trust sought to be established would arise from the ultimate facts alleged, to wit, that the consideration was paid by plaintiff and the deed taken in the name of defendant.

veyance to the grantee of the legal title.²² Does this mean that the trust claimant is required to establish such consent as a prerequisite to the creation of the resulting trust presumption? Surprisingly the cases and commentators do not seem to consider this problem. It must be pointed out, however, that if in fact the conveyance was without the payor's consent, as we shall note later, a constructive trust will be imposed.²³ Accordingly, it would appear that the trust claimant should not be required to establish such consent on the part of the payor, since, in any event, one of the two trust remedies will be available for the trust claimant's benefit.

Although most purchase-money resulting trust cases arise in connection with real estate transactions, the concept is applicable to personal as well as a real property.²⁴ Cases imposing a resulting trust on personal property occur with much less frequency than do those dealing with real estate. This is because the Statute of Frauds does not prevent the proof of an express oral trust in personal property although it does so in the case of real property.²⁵ For example, suppose bonds are purchased with *A*'s money and *A* directs that they be registered in the name of *B*, *B* agreeing orally to hold the bonds in trust for *A*. If *B* refuses ultimately to re-transfer the bonds to *A*. *A* may establish by parol testimony the existence of the express oral trust. Nevertheless, there are occasions when reliance on a purchase-money resulting trust theory is necessary. If, in the above situation, there was no express promise by *B* to hold in trust, *A* would still be able to rely on the presumption of resulting trust because he paid the purchase price of property and title thereto was taken in the name of another. It may be especially difficult to establish the express oral trust in situations where one of the principal parties to the transaction is dead. Thus, reliance on the purchase-money resulting trust principle may be necessary and desirable in personal property as well as real property situations.

Although there appears to be no direct Missouri case so holding, the available cases strongly indicate that Missouri recognizes purchase-money

22. 5 A. SCOTT, TRUSTS § 440.1 at 3315-3316 (3rd ed. 1967).

23. See text at note 221 *infra*.

24. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES' § 454 at 515 (2d ed. 1964). RESTATEMENT (SECOND) OF TRUSTS § 440, comment *b* (1959).

25. RESTATEMENT (SECOND) OF TRUSTS § 440, comment *b* (1959); 5 A. SCOTT, TRUSTS § 440 at 3313 (3rd ed. 1967). See also *Northrip v. Burge*, 255 Mo. 641, 164 S.W. 584 (1914); *Gardner v. Bernard*, 401 S.W.2d 415 (Mo. 1966); *Harris Banking Co. v. Miller*, 190 Mo. 640, 89 S.W. 629 (1905).

resulting trusts in personal property.²⁶ An example is *Dee v. Sutter*.²⁷ In that case plaintiff brought suit against the deceased to establish a resulting trust in plaintiff's favor in an automobile held in the name of the deceased. Plaintiff alleged that the automobile had been purchased with funds furnished by her and that title was taken in the deceased because she did not drive and the deceased was to do most of the driving. The decree was for the administrator and the sole heir of the deceased, the latter having been permitted to intervene. The St. Louis Court of Appeals affirmed. It recognized, however, that a resulting trust was applicable to personal property, but in the instant case, such a trust was not decreed because the plaintiff could not "clearly and cogently" establish the essential element necessary for the presumption of resulting trust, namely that plaintiff actually paid the purchase price. The decision avoids consideration of whether motor vehicle title registration statutes²⁸ preclude the imposition of purchase-money resulting trusts with respect to automobiles; however, since the purchase-money resulting trust doctrine is primarily concerned with real estate, its further consideration with respect to personal property will in general be beyond the scope of this article.²⁹

26. *Wenzelberger v. Wenzelberger*, 296 S.W.2d 163, 166 (St. L. Mo. App. 1956); *Dee v. Sutter*, 222 S.W.2d 541, 543 (St. L. Mo. App. 1949). Cf., *Anderson v. Biddle*, 10 Mo. 23 (1856).

27. 222 S.W.2d 541 (St. L. Mo. App. 1949).

28. Now § 301.210, RSMo 1959.

29. A student writer in 48 MICH. L. REV. 1221 (1948) argues that the court in the *Dee* case was mistaken in assuming that resulting trusts may exist in automobiles registered under what is now § 301.210, RSMo 1959, and the writer further concludes that the statute was supposed to supplant old equitable principles of ownership. This reasoning seems highly questionable. To be sure, Missouri decisions admittedly have exhibited some tendency to use the registration statutes to cut off equitable interests in motor vehicles. See, e.g., *State ex rel. Conn. Fire Ins. Co. v. Cox*, 306 Mo. 537, 268 S.W. 87 (1924) (purchaser acquires no insurable interest when statutes not complied with); *Paragould Wholesale Groc. Co. v. Middleton*, 208 Mo. App. 592, 235 S.W. 469 (Spr. Ct. App. 1921) (attaching creditor of seller permitted to seize automobile from a purchaser who did not obtain a proper title certificate). There is even language in one Missouri case that there is "no case in this jurisdiction, or in those having statutes similar to ours, that lends encouragement to the theory that the legal holder of a title to an automobile can hold it in trust for another." *Hoshaw v. Fenton*, 232 Mo. App. 137, 141, 110 S.W.2d 1140, 1144 (Spr. Ct. App. 1937). *But cf.* *Rankin v. Wyatt*, 335 Mo. 628, 73 S.W.2d 764 (1934). Nevertheless, the purpose of the statute was to curb a problem which has become increasingly serious in this highly mobile day and age: the theft and fraudulent sale of used automobiles. Taylor, *Titles to Used Automobiles In Missouri*, 28 Mo. L. REV. 121 (1963). Accordingly, it would seem less likely that the intent behind the statute was to abrogate equitable doctrines with respect to motor vehicles. If equitable principles were replaced by the Statute, absurd results would obtain. For example, if *A* embezzled funds from *B*, purchased an automobile with *B*'s funds and had the automobile registered in *A*'s name,

Purchase-money resulting trusts, like other trusts, are subject to the bona fide purchaser rule.³⁰ Thus, the conveyance of land to a bona fide purchaser may cut off the payor's right to a resulting trust with respect to that land.³¹ Similarly, where the trust property is mortgaged to a bona fide purchaser, the rights of the payor against the mortgagee will be subject to the lien of the mortgage.³² On the other hand, the concept of a bona fide purchaser does not include donees, heirs, devisees or legatees of the grantee, and such persons take subject to the rights of the payor.³³ Moreover, creditors are not purchasers for value and creditors of the grantee generally will not be able to satisfy their claims against the trust property.³⁴ However, where creditors rely on the grantee's apparent ownership in advancing credit to him and the payor knows or has reason to know that credit is being advanced in reliance on the grantee's apparent ownership, the principle of estoppel may prevent the payor from defeating the claims of such creditors to the trust property.³⁵

there could be no constructive trust in the automobile because it would be impossible to go behind the title certificate to establish equitable rights. In fact, the Missouri Supreme Court has permitted a constructive trust in a very similar situation. See *McHenry v. Brown*, 388 S.W.2d 797 (Mo. 1965).

Even assuming that motor vehicle title registration is to have an effect similar to the Torrens systems for real estate, in effect in a few states, this should not necessarily preclude the establishment of a resulting trust in registered automobiles. To be sure, under a Torrens system, the *registration* itself is unimpeachable save in a few instances, and third party purchasers and lienors are generally permitted to rely on the title certificate without having to be concerned with equitable interests not appearing thereon. See generally, Staples, *The Conclusiveness of a Torrens Certificate of Title*, 8 MINN. L. REV. 200 (1924). However, this should not automatically preclude the establishment of equitable interests where there is no prejudice to the protected third parties. Finally, it should be pointed out that there is non-Missouri authority specifically holding that automobile title registration provisions similar to those in Missouri do not prevent the imposition of a purchase money resulting trust. See *Douglas v. Hubbard*, 91 Ohio App. 200, 107 N.E.2d 884 (1951); *In re Lee*, 129 F. Supp. 920, 928 (N.D. Ohio 1955).

30. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES, § 466 at 655 (2d ed. 1964). According to the *Restatement of Trusts*, a "bona fide purchaser" is "a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction. . . ." RESTATEMENT (SECOND) OF TRUSTS § 284(1) (1959). See *Condit v. Maxwell*, 142 Mo. 266, 44 S.W. 467 (1898).

31. 5 A. SCOTT, TRUSTS § 459 at 3402 (3rd ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 284, Illustration 2 (1959).

32. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 466 at 655 (2d ed. 1964). RESTATEMENT (SECOND) OF TRUSTS § 284, Illustration 5 (1959); see *Warford v. Smoot*, 361 Mo. 879, 237 S.W.2d 184 (1951).

33. G. G. BOGERT, LAW OF TRUSTS 436 (1963).

34. 5 A. SCOTT, TRUSTS § 469 at 3402 (3rd ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 308 (1959).

35. 5 A. SCOTT, TRUSTS § 459 at 3402 (3rd ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 313 (1959).

Finally, the purchase-money resulting trust should not be confused with the related gratuitous conveyance resulting use doctrine which is seldom specifically mentioned in American cases. Under the latter doctrine, where there is a conveyance of land without consideration, the transferee presumptively holds upon resulting use for the transferor.³⁶ This doctrine developed because it was common practice during the fifteenth century to convey legal title to land with a reservation of the beneficial interest in the transferor.³⁷ The inference or presumption of resulting use was rebuttable by showing that the use was intended to be in the transferee or a third party.³⁸ The gratuitous conveyance resulting use differed substantially in one important aspect from the purchase-money resulting trust. Under the latter doctrine the mere recital of payment of consideration by the grantee or an habendum clause to the use of the grantee does not rebut the presumption of a purchase-money resulting trust, although either provision had that effect in the case of the gratuitous conveyance resulting use.³⁹ Interestingly, even after the enactment of the Statute of Uses,⁴⁰ which turned uses into legal estates, the common law courts in England continued to apply the gratuitous conveyance resulting use theory, until its statutory abrogation in 1925.⁴¹ Moreover, the doctrine was not adversely affected by the enactment of the trust sections of the Statute of Frauds.⁴² Prior to the Statute of Frauds, an oral or improperly executed written declaration of uses incident to a land conveyance was equally as effective to create an express use as a properly executed declaration.⁴³ After the Statute of Frauds, the gratuitous conveyance resulting use concept came within the exception where "a trust or confidence shall or may arise or result by implication or construction of law."⁴⁴

According to the *Restatement of Trusts* the gratuitous conveyance resulting use "has not been applied in the modern law of trusts."⁴⁵ Although

36. Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. 93, 116 (1962); RESTATEMENT (SECOND) OF TRUSTS § 73, comment a (1959).

37. 5 A. SCOTT, TRUSTS § 405 at 3216 (3rd ed. 1967).

38. *Ibid.*

39. Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. 93, 117 (1962).

40. 27 Hen. 8, c. 10 (1535); reenacted by Mo. REV. LAWS 1825, at 215; now § 456.020, RSMo 1959.

41. Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. 93, 117 (1962). The Statute of Uses was repealed in England by 15 Geo. 5, c. 20, § 1 (1925).

42. 29 Car. 2, c. 3, §§ VII, VIII, IX (1676); now §§ 456.010, 030, RSMo 1959.

43. Fratcher, *Trusts and Succession in Missouri*, 27 MO. L. REV. 93, 117 (1962).

44. 29 Car. 2, c. 3, § VIII; See § 456.030, RSMo 1959.

45. RESTATEMENT (SECOND) OF TRUSTS § 405, comment a (1959).

this statement is correct, it may be somewhat misleading. Of course, occasions for the application of the doctrine are extremely rare because conveyancing in the United States is done in most instances by some type of form deed containing a recital of consideration and an habendum clause to the use of the grantee. Professor Fratcher analyses the problem as follows:

The modern law of trusts deals with uses only to the extent that they are excepted from execution by the Statute of Uses; that is, only when the beneficiary's interest is equitable. The gratuitous conveyance resulting use doctrine applies only to uses which are executed by the Statute of Uses, so that the interest of the *cestui que use* is legal, not equitable.⁴⁶

Thus, Professor Fratcher concludes that the statement in the Restatement of Trusts does not necessarily mean that the gratuitous conveyance resulting use doctrine is no longer viable.⁴⁷

An examination of Missouri case law indicates that it may be unwise to disregard completely the gratuitous conveyance resulting use doctrine. Although the question will seldom arise, several older Missouri cases⁴⁸ seem to assume that the doctrine is still in force and one fairly recent decision tends to reinforce that assumption.⁴⁹

46. Fratcher, *Trusts and Succession in Missouri*, 27 Mo. L. REV. 93, 118 (1962).

47. *Ibid.*

48. See *Parker v. Blakeley*, 338 Mo. 1189, 93 S.W.2d 981 (1936); *Weiss v. Heitcamp*, 127 Mo. 23, 29 S.W. 709 (1895); *Bobb v. Bobb*, 89 Mo. 411 (1886); *Hickman v. Hickman*, 55 Mo. App. 303 (K.C. Ct. App. 1893).

49. *Long v. Kytte*, 340 S.W.2d 623 (Mo. 1960). In the *Long* case a one-shareholder corporation in 1946 conveyed by quitclaim deed to one Mitchell, a strawman, land purchased by the corporation in 1930. Mitchell immediately delivered to the sole shareholder of the corporation a promissory note and a deed of trust to the land. He also gave the shareholder a fully executed warranty deed with the space provided for the grantee left blank. In 1955, the defendant received from the shareholder the warranty deed with defendant's name inserted, which deed the defendant promptly recorded. In addition, the shareholder released the note and deed of trust. The heirs of the shareholder sued to recover the land on a purchase-money resulting trust theory. The Missouri Supreme Court correctly determined that a purchase-money resulting trust was inapplicable in this situation because payment of the purchase price occurred in 1930, and thus could hardly have been a circumstance attending the disposition of the property in 1946 or 1955. The supreme court considered extrinsic evidence, consisting partly of oral statements, and concluded that the intent of the sole shareholder was that the defendant have the beneficial interest as well as the legal interest in the real estate. The *Long* opinion did not indicate whether the deeds contain habendum clauses or recitals of consideration, although it did quote language from *Parker v. Blakely*, 338 Mo. 1189, 93 S.W.2d 981 (1936), indicating that a recital of consideration prevents a resulting "trust" in favor of the grantor, "particularly where the conveyance is absolute in form and the habendum clause declares the beneficial use or interest in the property

III. THE NATURE OF THE PRESUMPTION

Once the basic facts have been established by clear, cogent and convincing evidence, the presumption of resulting trust may be rebutted by establishing that the payor intended that the grantee have the beneficial interest in the property.⁵⁰ The usual examples of such situations are where the payor intends a gift of the purchase price to the grantee or where the payor advances the purchase price as a loan to the grantee.⁵¹ Obviously, in the latter situation the real payor of the purchase price is the grantee since he has incurred a legal obligation to repay the lender.⁵²

Before examining the problems inherent in rebutting the presumption of a purchase-money resulting trust, a closer examination of the nature of the presumption is necessary. It is important initially to determine whether the term "presumption" connotes what is in reality a presumption or simply an inference. A presumption is a procedural rule requiring the court to assume the existence of the presumed fact once the basic fact is established until the presumption is rebutted.⁵³ In the case of an inference, once the basic fact is established the trier of fact *may*, but is not required, to infer the existence of the presumed fact.⁵⁴ If we are dealing with a presumption, once the party seeking to impose the resulting trust has established that *A* paid the purchase price and the property was taken in the name of *B*, the presumption of a resulting trust would be established and the burden of producing further evidence to rebut the presumption would be on the grantee. The failure to produce such evidence would result in a judgment for the party seeking to impose the resulting trust. If, however, the establishment of the essential facts creates only an *inference*, the failure of the

to be in the grantee or some third person." Long v. Kyte, 340 S.W.2d 623, 630 (Mo. 1960). Professor Fratcher has advanced the view that the court perhaps was applying parol evidence to rebut the presumption of resulting use in a situation where such an application was permitted under the Statute of Frauds at common law and that the supreme court thus indirectly recognized that the gratuitous conveyance resulting use concept is still in force in Missouri. Fratcher, *Trusts and Succession in Missouri*, 27 Mo. L. Rev. 93, 118 (1962). Professor Fratcher has also pointed out that an argument could be made that § 442.460, RSMo 1959 abrogates the gratuitous conveyance resulting use doctrine. *Id.* at 117, note 116.

50. 5 A. SCOTT, TRUSTS § 441 at 3326 (3rd ed. 1967).

51. *Id.* at 3326-3328.

52. A related fact situation which would show no intention that the payor have the beneficial interest would be where the purchase price is advanced to discharge a debt to the grantee. See RESTATEMENT (SECOND) OF TRUSTS § 446 (1959).

53. See, e.g., MAGUIRE, WEINSTEIN, CHADBOURNE, MANSFIELD, CASES AND MATERIALS ON EVIDENCE 698 (5th ed. 1965).

54. *Ibid.*

grantee to provide rebutting evidence should not automatically result in a judgment in favor of a resulting trust, but would merely *permit* the fact finder to make such a determination.

Both major treatises examining resulting trusts equivocate somewhat as to the nature of the presumption. Professor Scott, for example, although occasionally referring to "presumptions," for the most part speaks in terms of an "inference of resulting trust" and "rebutting the inference."⁵⁵ The Bogert treatise, on the other hand, tends to use the term "inference" and "presumption" interchangeably.⁵⁶ With respect to Professor Scott, at least, there is strong evidence that by using the term "inference" he is really delineating a "procedural presumption," as a close analysis of the following language will indicate:

In other words, if the payor shows that he paid the purchase price with his money, the burden of going forward with evidence that it was paid by way of gift or loan to the grantee is on the grantee; but if evidence is introduced tending to show that it was paid by way of gift or loan, the ultimate burden of proof is on the payor to establish his claim to a resulting trust, by showing that the money was paid as his money with the intention of obtaining the beneficial interest in the property and was not paid as a gift or loan to the grantee with the intention that the grantee should have a beneficial interest in the property.⁵⁷

In view of Professor Scott's emphasis on the grantee's burden of going forward with rebutting evidence once the payor establishes the essential facts, it would appear that he is talking about a procedural presumption rather than an inference, since logically he would not refer to a "burden" unless failure to go forward with evidence would result in a judgment for the party seeking the imposition of the resulting trust. After all, an inference, however persuasive, "does not affect the duty of producing evidence,"⁵⁸ whereas a presumption is compulsory and remains so if it is not disproved. The Missouri Supreme Court has consistently used the term "presumption" and has apparently not used "inference" interchangeably therewith. In *Williams v. Ellis*,⁵⁹ the Missouri Supreme Court stated that

55. See generally 5 A. SCOTT, TRUSTS §§ 440-448 (3rd ed. 1967).

56. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES §§ 454-460 (2d ed. 1960).

57. 5 A. SCOTT, TRUSTS § 458 at 3399 (3rd ed. 1967).

58. MAGUIRE, WEINSTEIN, CHADBOURNE, MANSFIELD, CASES AND MATERIALS ON EVIDENCE 698 (5th ed. 1965).

59. 323 S.W.2d 238 (Mo. 1959); Fratcher, *Trusts and Succession in Missouri*, 25 Mo. L. REV. 437 (1960).

"when one person furnishes the purchase price of land and another takes the title, the law *implies* a resulting trust in favor of the former. As the term signifies, the trust *results* from those facts; and in that sense it may be said the law presumes or supposes an intent to create a trust after the basic facts are proven."⁶⁰ This language plainly negates any argument that in Missouri the establishment of the basic facts create only an inference of a resulting trust rather than a procedural presumption. If the law "presumes" or "supposes" an intent to create a trust after the establishment of the basic facts it would be difficult indeed to argue that the trier of fact has the option rather than the duty of finding in favor of a resulting trust.

Assuming Missouri follows a "presumption" rather than an "inference" approach in purchase-money resulting trust cases, the courts must, at least theoretically, face the more difficult problems of (1) determining when the grantee has satisfied his duty of rebutting the presumption of resulting trust and (2) what happens to the lawsuit once the presumption is rebutted by the grantee. There is surprisingly little Missouri case law dealing specifically with resulting trusts in this context. The Missouri Supreme Court, however, has stated the general rule that "When substantial evidence is introduced by the party against whom a presumption operates controverting the presumed fact, then its existence or non-existence is to be determined from the evidence, exactly as if no presumption had ever been operative in the case."⁶¹ It is unclear what is meant by "substantial evidence." The cases in many jurisdictions expressing this doctrine do not define the term but they do make it clear that the evidence must be of greater persuasive effect than the minimum that would carry the issue to a jury.⁶² In any event, the rebutting of the presumption of resulting trust should not necessarily mean that payor automatically loses, but rather that he loses the benefit of the presumption. "Of course, the facts which give rise to the presumption remain in the case and are to be considered with other evidence for whatever probative value they may have."⁶³ The presumption of resulting trust, as noted earlier, is justified by the common experience that people who pay the purchase price for property intend to receive the benefit of the property.⁶⁴ It has been

60. *Williams v. Ellis*, 323 S.W.2d 238, 240-241 (Mo. 1959).

61. *Michler v. Krey Packing Co.*, 363 Mo. 707, 715, 253 S.W.2d 136, 140 (En Banc 1952); See LAUER, MISSOURI SUPPLEMENT TO MORGAN, BASIC PROBLEMS OF EVIDENCE, 25 (1963).

62. MORGAN, BASIC PROBLEMS OF EVIDENCE 35 (1963).

63. *Michler v. Krey Packing Co.*, 363 Mo. 707, 715, 253 S.W.2d 136, 140 (En Banc 1952).

64. See text at note 4 *supra*.

said that when courts are dealing with presumptions that rest on common experience and inherent probability, and substantial countervailing evidence is produced, the presumption *as such* disappears, but the facts or circumstances which gave rise to the presumption will remain and afford the basis for a like inference by the trier of fact.⁶⁵ Thus, under such a theory, the inference of a trust may remain in the case even though the presumption of a resulting trust drops out.

The foregoing analysis, of course, seems especially applicable to a jury trial situation although most resulting trust cases are tried in chancery before the court as the finder of fact. Thus, the chancellor will not as a general rule be concerned about instructions as to presumptions, directed verdicts and other problems inherent in a jury trial situation. In fact, as a practical matter, the concept of rebutting the presumption of a resulting trust in chancery would appear to lose most of its technical characteristics and probably boils down to a determination by the chancellor whether, in view of the fact that the payor has established the essential facts of the presumption, the grantee ultimately has provided strong enough evidence under the circumstances to establish that there was no intent that the payor retain a beneficial interest in the property. In fact, this practical, rather than technical, approach to the problems of rebuttal is the dominant theme in the coverage of resulting trusts by both Scott and Bogert. An examination of a few leading Missouri cases will provide some insight into the type of evidence of gift or loan required of the grantee to defeat the otherwise judicially favored resulting trust.

In *Williams v. Ellis*,⁶⁶ the heirs at law of an uncle sought to impose a resulting trust on commercial real estate held jointly by defendants, a niece and nephew of the uncle. In 1949, the uncle bid in at a foreclosure sale of a second deed of trust on the real estate and was the successful bidder at \$3,500. The property was still subject to a first deed of trust with a balance of approximately \$6,800. Although the uncle paid the purchase price at the sale, title to the real estate was taken in the names of the defendants. The documents in connection with the first deed of trust also were "transferred to the defendants." Although there was conflicting testimony by numerous third parties as to the uncle's intent with respect to the real estate there was a substantial amount of evidence indicating a very close personal relationship between the uncle and the defendants.

65. See, e.g., *O'Dea v. Amodeo*, 118 Conn. 58, 170 A. 486 (1934).

66. 323 S.W.2d 238 (Mo. 1959).

The uncle often looked after the defendant's children and was frequently a house and dinner guest. The Missouri Supreme Court affirmed the finding of the trial chancellor that the evidence sustained a gift from the uncle to the defendants rather than a resulting trust in favor of the uncle. Presumably, in view of the above testimony, the Supreme Court concluded that it was natural in this instance for an uncle to feel beneficent toward the defendants.

In *Adams v. Adams*,⁶⁷ appellant son in 1912, provided a down payment of \$100 on several lots, but the title thereto was taken in the names of his father and mother. The balance of the purchase price was secured by three promissory notes and deeds of trust, all of which were executed by the mother and father. The son subsequently paid off the notes although there was no indication that there was an agreement to do so prior to the conveyance.⁶⁸ The notes were not cancelled, but were simply assigned to the son. The son often paid the real estate taxes and also supplied some money and labor in helping the father build a house on the property, although older brothers and sisters also shared in maintaining the property. The mother, who was predeceased by her husband, died in 1935. In a partition suit brought by the widow of one of the other brothers, appellant son claimed title to the real estate on the theory of resulting trust. The trial chancellor refused such relief and the supreme court affirmed, although the supreme court directed that the appellant was equitably entitled to reimbursement for his contribution to the taxes. The supreme court denied the resulting trust on at least three grounds: (1) appellant had waited over 23 years to assert equitable title to the real estate; (2) appellant's own witnesses indicated that the down payment was advanced as a *gift or loan* because he "was helping out" the parents; (3) the payments on the notes by appellant were not made pursuant to any agreement existing at a time prior to the conveyance.⁶⁹

*Isenman v. Schwartz*⁷⁰ is a recent instance where the grantee avoided the imposition of a resulting trust by establishing that the payor advanced part of the purchase price as a loan to the grantee. In that case land was conveyed to the plaintiff and defendant as tenants in common. Plaintiff paid the entire down payment of \$2,000. The balance of the purchase

67. 348 Mo. 1041, 156 S.W.2d 610 (1941).

68. See text at notes 162 through 163 *infra*.

69. See text at notes 160 through 193 *infra*.

70. 335 S.W.2d 112 (Mo. 1960); Fratcher, *Trusts and Succession in Missouri*, 27 Mo. L. Rev. 93, 116 (1962).

price of \$16,000 was supplied by the sale of timber from the land for \$7,000 and by a \$7,000 note executed by the plaintiff, the defendant and their wives. Plaintiff sued to establish a resulting trust in all of the one half interest held in the name of the defendant, presumably on some unique theory that since he supplied all of the cash, he should receive the title. The trial chancellor denied the resulting trust and this ruling was affirmed by the supreme court. Evidence provided by the defendant clearly established that the parties agreed orally that the land should be sold, that the sales price should first be used to repay the money supplied by the plaintiff, and that the balance was to be divided equally between the parties. Accordingly, the supreme court concluded that the payment in cash by the plaintiff constituted a loan by plaintiff to defendant and that in any event such payment could not create a resulting trust for plaintiff's benefit.

An examination of cases such as those above buttresses the conclusion that it is probably impossible to define clearly for general application either the quantity or the nature of the evidence required of a grantee to prevent the imposition of a resulting trust once the basic elements of the presumption have been established. Too much depends on the facts and circumstances of the case and the relationship between the parties. Countless factors may be relevant. What was the relative financial status of the parties? In view of the financial status was it imprudent for the payor to make a gift to the grantee?⁷¹ Is there a logical reason why the payor would want legal title in the name of another? Perhaps, as the payor in the *Adams* case unsuccessfully argued, title was taken in the grantee's name only because the payor was disabled because of infancy.⁷² Are the parties related to each other so that a gift would be normal and understandable notwithstanding the fact that the relationship is not one which raises a presumption of gift rather than resulting trust? For example, if a child pays the purchase price and title to real estate is taken in the name of a parent, even though there generally is a presumption of resulting trust, rather than a gift,⁷³ a gift in such circumstances of the amount of the purchase price is surely not unusual or extraordinary. Nor would a loan by the payor in such a situation be unexpected. This much was im-

71. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 454 at 524 (2d ed. 1964).

72. 348 Mo. 1041, 156 S.W.2d 610 (1941). See G. G. and G. T. BOGERT, § 454 at 524, *supra* note 71.

73. See text at note 101 *infra*.

plicity recognized by the Missouri Supreme Court in the *Adams* and *Williams* cases, both of which involved close family relationships. On the other hand, where a real estate broker takes title to land and the purchase price is paid by a stranger, it would appear highly unlikely at best that either a gift or a loan was intended for the benefit of the broker. Thus, one could reasonably conclude that the broker should be required to provide the chancellor with much more convincing and substantial evidence to prevent the imposition of the resulting trust than would be required of a family member grantee as described above. In any event, the above examples illustrate that the grantee's burden of producing evidence is not clearly definable but really depends in each case on the extent to which the circumstances have a natural tendency to indicate an intention on the part of the payor of a gift or loan.

IV. WHERE GRANTEE IS NATURAL OBJECT OF PAYOR'S AFFECTION

The general rule creating a presumption of a purchase-money resulting trust does not obtain in certain circumstances where the grantee is otherwise the natural object of the payor's affection. The important consideration in this connection is not the closeness of the relationship or the extent of the natural affection between the payor and the grantee, but whether the grantee stands in such a relationship to the payor that it is probable that the payor intends to make a gift to the grantee.⁷⁴ The *Restatement of Trusts* incorporates what appears to be the general rule in this country by creating a presumption of gift rather than resulting trust where the purchase price is paid by another and the transferee is a wife, child, or other natural object of bounty of the person paying the purchase price.⁷⁵ A determination of the extent to which Missouri follows, expands upon or qualifies the above approach requires analysis of Missouri cases dealing with specific familial relationships.

A. Husband-wife Relationship

Where the husband pays the purchase price and has the property conveyed to his wife, Missouri courts uniformly recognize that there is a presumption of gift to the wife rather than a resulting trust in favor of the husband.⁷⁶ The reasoning behind this presumption of gift to the wife as-

74. See RESTATEMENT (SECOND) OF TRUSTS § 442, comment *a* (1959).

75. *Id.* at § 442.

76. *E.g.*, *Dallmeyer v. Dallmeyer*, 274 S.W.2d 250, 254 (Mo. 1955); *Hampton v. Niehaus*, 329 S.W.2d 794, 799 (Mo. 1959); *Fisher v. Miceli*, 291 S.W.2d 845, (Mo. 1956); *Hernandez v. Prieto*, 349 Mo. 658, 162 S.W.2d 829 (1942); *Davis v. Broughton*, 369 S.W.2d 857 (Mo. App. 1963).

sumes the legal and moral duty of support owed by husband to wife and also that gifts from husband to wife are such common occurrences that such transfers naturally would be attributed to a gift-motive.⁷⁷ One of the more common fact situations in Missouri applying the above reasoning involves payment of purchase price by a husband with the conveyance going to the husband and wife as tenants by the entirety. *Hiatt v. Hiatt*⁷⁸ exemplifies this type of situation. In *Hiatt*, plaintiff-wife took title to real estate in 1938 as a co-tenant by the entirety, with defendant-husband paying the purchase price. In 1941, the parties apparently were divorced. Shortly thereafter plaintiff prevailed in an action to partition the real estate, the trial court finding that she was the owner of an undivided one-half interest in fee. On appeal, the Missouri Supreme Court affirmed and stated that "where a husband purchases real estate with his own funds and causes the same to be conveyed to his wife, it will be presumed the husband intended the conveyance as a provision for his wife, and a trust will not result."⁷⁹ The court noted that the same rule applies where, as in this case, the title was taken in the names of the parties as tenants by the entirety. The presumption in these cases is that the wife should have the benefits of the property during the husband's lifetime and should succeed to the entire property in the event he predeceases her.⁸⁰

When the relationship is meretricious, however, courts in most jurisdictions hold that there is a presumption of a resulting trust and no inference of gift where the man pays the purchase price, but title is taken partially or wholly in the name of the woman.⁸¹ The Missouri Supreme Court appears to have reached essentially the same result in *Anderson v. Stacker*,⁸² although on a different theory. In that case plaintiff with his own funds purchased a house and procured a deed purporting to convey to plaintiff and defendant as tenants by the entirety. Although they were living together, defendant was not plaintiff's wife. Plaintiff later sued to quiet title to the real estate which relief was granted by the trial court. The supreme court affirmed on the theory that a tenancy in common had been created and it concluded that since plaintiff had contributed

77. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 549 at 579-581 (2d ed. 1964).

78. 168 S.W.2d 1087 (Mo. 1943).

79. *Id.* at 1090.

80. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 459 at 582-583 (2d ed. 1964).

81. 5 A. SCOTT, TRUSTS § 442 at 3341 (3rd ed. 1967).

82. 317 S.W.2d 417 (Mo. 1958).

all of the down payment and monthly payments, plaintiff should have full title. The court cited a general rule applicable in partition proceedings that apportionment need not always be in equal shares but in proportion to the contributions of the parties.⁸³ Although the court reached the correct result, the simpler approach would have been to apply a purchase-money resulting trust theory. Here the court could have determined that since plaintiff paid all of the purchase price, but title was partially in defendant's name, there was a presumption of a resulting trust unrebutted by defendant. In any event, the case could be rationalized as placing Missouri within the general rule with respect to meretricious relationships.

Interestingly, the majority of courts hold that a resulting trust and not a gift is presumed where a wife purchases property and title is taken in the name of her husband.⁸⁴ A substantial minority of jurisdictions, however, take the opposite approach and presume a gift to the husband.⁸⁵ The majority approach, may have made sense at a time when the wife was economically inferior and had legal disabilities with respect to owning and managing property. In such circumstances it perhaps would be normal to assume that wives did not give gifts to husbands. In 1954, in *Ferguson v. Stokes*,⁸⁶ the Missouri Supreme Court in dictum indicated an unwillingness to adhere to the majority position. In that case a wife paid the purchase price for land and after full deliberation decided to have the property conveyed to herself and her husband as tenants by the entirety. Later the wife's heirs brought an action to determine title to the land and to declare a resulting trust in favor of her estate. The supreme court did not find it necessary to determine the general type of presumption applicable because it found ample evidence that the deceased had intended her husband to take a beneficial interest and that no resulting trust was intended. The court also indicated that at least where the wife-payor, having considered the problem, *elects* to have the property conveyed to herself and her husband, there will be no presumption of resulting trust. This reasoning accords with the general approach in this country,⁸⁷ and ap-

83. *Id.* at 421.

84. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 460 at 598 (2d ed. 1964).

85. *E.g.*, Bingham v. Nat'l. Bank of Montana, 105 Mont. 159, 72 P.2d 90 (1937); Peterson v. Massey, 155 Neb. 829, 53 N.W.2d 912 (1952).

86. 269 S.W.2d 655 (Mo. 1954).

87. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 460 at 601 (2d ed. 1964); Annot. 43 A.L.R.2d 917, 922 (1955); Cisel v. Cisel, 352 Mo. 1097, 180 S.W.2d 748 (1944); Haguewood v. Britain, 273 Mo. 89, 199 S.W. 950 (1917).

parently applies the rule applicable to *all* husband-payor situations to the wife-payor concurrently-held property cases.⁸⁸ What is most interesting about the *Ferguson* case, however, is that the court hints strongly in dicta that in *all* cases the general rule as to presumption should be the same in both wife-payor and husband-payor situations:

It may be that the Married Woman's Acts . . . , and the present position of married women in financial, commercial, business, industrial and professional spheres render purely arbitrary the contrary assumptions as to the wife-payor and the husband-payor. And, in the absence of evidence to the contrary, we certainly cannot assume that the wife does not have the same love and affection for her husband as he has for her. And while the wife has no legal duty to support her husband, we cannot assume that (again, absent evidence to the contrary) she has no inclination or desire to assist her husband in financial matters, or to make gifts or confer benefits upon her spouse.⁸⁹

88. RESTATEMENT (SECOND) OF TRUSTS § 441, comment *e* (1959) suggests that in *all* situations where one party supplies the purchase price and title is taken jointly with another, a gift rather than a resulting trust should be presumed. There is some support for this proposition. See 5 A. SCOTT, TRUSTS § 441.4 (3rd ed. 1967). However, no Missouri case law could be found to sustain such a theory in other than husband-wife joint transactions or possibly in family transactions where the presumption of gift would otherwise be applicable. See generally text at notes 74 through 106 *infra*. In fact, in *Dunlap v. Dunlap*, 218 S.W.2d 108, 110 (Mo. 1949), there is a substantial indication that where one brother pays the purchase price and title is taken jointly with another brother there is a presumption of resulting trust rather than gift. A fortiori the result would be the same if strangers are involved. Thus it appears doubtful that the *Restatement* view prevails in Missouri in *all* concurrently held title situations.

It should be noted that the term "concurrently," as used in the above text with reference to Missouri wife-payor cases, may be overly broad. As we have noted above, the *Restatement* would apply a gift presumption in *all* cases where the payor takes title with another. The *Restatement* appears to encompass all types of concurrent ownership including tenancy in common. RESTATEMENT (SECOND) OF TRUSTS § 441, comment *e* (1959). Professor Scott would similarly seem to include all types of concurrent ownership, survivorship and non-survivorship, within the latter rule. 5 A. SCOTT, TRUSTS § 441.4 at 3332 (3rd ed. 1967). Although in one instance the *Ferguson* court refers to title running to "herself and her husband," which would indicate some intention to include all concurrent estates, at other places the word "jointly" is used, which would indicate at most the inclusion of only survivorship estates. *Ferguson v. Stokes*, 269 S.W.2d 655, 660-661 (Mo. 1954). However, with respect to Missouri, it must be noted that tenancies in common in husband and wife are somewhat rare and most cases considering this problem dealt, as did *Ferguson*, with tenancies by the entirety. Thus, arguably the Missouri Supreme Court intended to apply a gift rather than trust presumption only in wife-payor survivorship estate situations. However, there would appear to be no strong reason why it should not apply *Ferguson* reasoning to all wife-payor concurrent estate situations.

89. *Ferguson v. Stokes*, 269 S.W.2d 655, 659 (Mo. 1954).

Ironically, in some cases the Married Women's Property Act⁹⁰ could create a presumption of trust in favor of the wife. The Act provides for the wife's separate property, but also provides it

shall not affect the title of any husband to any personal property *reduced to his possession* with the express assent of his wife; provided, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, *in writing*, full authority shall have been given by the wife to the husband to sell, encumber, or otherwise dispose of the same for his own use and benefit.⁹¹

This statute is significant when a husband purchases land with money belonging to his wife. His title to her money is determined in accordance with the above statute and if the land is conveyed to him, the legal title will pass to him, but the equitable interest will be disposed of in accordance with the ownership of the purchase money.⁹² Thus, if the husband without the wife's *written consent* takes his wife's money and purchases land in his name or in concurrent estate with his wife, he will, because of the statute, hold the land *on trust* for her.⁹³ Thus, even if there is oral consent by the wife to the husband's action, there would appear to be a trust for the wife because of the statute.⁹⁴ It should be pointed out, however, that this statute will not apply to fact situations such as that in the *Ferguson* case, where the wife herself actually makes the expenditure for the purchase price—in other words—where the wife is actually the purchaser.⁹⁵

B. Parent-Child and Other Familial Relationships

Where the person paying the purchase price is the parent of the grantee or otherwise stands in *loco parentis* with the grantee, a presump-

90. § 451.250, RSMo 1959.

91. § 451.250(2), RSMo 1959. (emphasis added).

92. 6 U. Mo. BULL. 40, 41 (1915).

93. See *Milligan v. Bing*, 341 Mo. 648, 108 S.W.2d 108 (1937); *Hudson v. Wright*, 204 Mo. 412, 103 S.W. 8 (1907); *Moss v. Ardrey*, 260 Mo. 595, 169 S.W. 6 (En Banc 1914); *McCloud v. Venable*, 163 Mo. 536, 63 S.W. 847 (1901).

94. See *Hudson v. Wright*, *supra* note 93.

95. *Ferguson v. Stokes*, 269 S.W.2d 655, 661 (Mo. 1954). Even if the instant statute were inapplicable, if a husband uses his wife's money without her *actual* permission to purchase property in his own name or if he uses her money with *actual* permission, but takes title in his name without her actual permission, he would hold on constructive trust for her. See text at note 23 *supra*, and note 221 *infra*.

tion or inference of gift or advancement rather than of resulting trust arises.⁹⁶ The underlying theory is that the grantee in such circumstances normally is the natural object of the affection of the payor. Thus, the presumption of gift applies where a parent takes title in the name of a son, daughter, son-in-law or daughter-in-law.⁹⁷ Moreover, the same concept has been utilized in parent-adopted child and parent-illegitimate child situations.⁹⁸ Although there are early Missouri cases indirectly accepting a presumption of gift in most of the above situations,⁹⁹ there has been little or no recent litigation in connection therewith. There would appear, however, to be little doubt that Missouri accepts the presumptions described above.¹⁰⁰

On the other hand, where the payor is a child and the property is taken in the name of the father, mother or other person standing in loco parentis with the payor, courts create a presumption of resulting trust rather than one of gift or advancement.¹⁰¹ The same rule generally obtains where the grantee is a sibling, niece, nephew, uncle, or aunt of the payor.¹⁰² Gifts in such situations are presumably abnormal rather than usual. Missouri has specifically rejected any presumption of gift in the child-payor-parent-grantee situations. In *Padgett v. Osborne*,¹⁰³ the Missouri Supreme Court stated that in the above situation "a resulting trust arises in favor of the child unless a different intent is manifested and a presumption of a gift or an advancement does not arise from the relationship."¹⁰⁴ Of course, if there is a legal obligation on the part of the child to support the parent, perhaps a presumption of gift arguably would result.¹⁰⁵ In any event, when

96. See RESTATEMENT (SECOND) OF TRUSTS § 442, comment *a* (1959). See also § 474.090(1), RSMo 1959.

97. 5 A. SCOTT, TRUSTS § 442 at 3333-3337 (3rd ed. 1967).

98. *Ibid.*

99. *E.g.*, Rankin v. Harper, 23 Mo. 579, 582 (1856). *Cf.*, Blake v. Blake, 226 S.W. 837 (Mo. 1920).

100. There is some indication, however, that there will be a presumption of resulting trust and not of gift in an uncle-payor, nephew-grantee situation. See *Williams v. Ellis*, 323 S.W.2d 238 (Mo. 1959).

101. 5 A. SCOTT, TRUSTS § 442 at 3337-3339 (3rd ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 442, comment *a* (1959).

102. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 460 at 614-616 (2d ed. 1964).

103. 359 Mo. 209, 221 S.W.2d 210 (1949).

104. *Id.* at 213, 221 S.W.2d at 212. See also *Davis v. Roberts*, 365 Mo. 1195, 295 S.W.2d 152, 156 (En Banc 1956); *Adams v. Adams*, 348 Mo. 1041, 1047, 156 S.W.2d 610, 614 (1941).

105. *Cf.* *Adams v. Adams*, 348 Mo. 1041, 156 S.W.2d 610 (1941). There the Missouri Supreme Court stated that money advanced by a child to secure title in the name of a parent "is not presumed to be a gift, the status of a child being the same as that of a stranger, at least where no legal obligation rests on the child to support the parent." *Id.* at 1047, 156 S.W.2d at 614. (emphasis added).

Missouri courts are faced with less close family relationships such as brother-sibling, uncle-nephew, aunt-niece and variations thereof, *a fortiori* the presumption should be in favor of a resulting trust rather than of gift or advancement.¹⁰⁶

C. *Rebuttal of Gift Presumption in Inter-Familial Transfers*

Although a presumption of gift or advancement is created in certain transfers, parol evidence is admissible to rebut the presumption of gift and to establish a resulting trust.¹⁰⁷ Missouri cases, however, enunciate what appears to be a difficult standard for overcoming the gift presumption by requiring that "such rebuttal must be accomplished by evidence which is strong, unequivocal and convincing"¹⁰⁸ and "must leave no reasonable room for doubt in the mind of the trial chancellor."¹⁰⁹ Nevertheless, since there are numerous Missouri cases where the presumption of gift was rebutted and a resulting trust imposed,¹¹⁰ the burden apparently is not insurmountable.

What type of evidence rebuts the presumption of gift or advancement? The intention to create a trust rather than a gift may be established by circumstances surrounding the transfer or by an examination of the subsequent conduct of the parties.¹¹¹ In looking to the circumstances attending the transfer, courts consider the testimony of the parties as to their intent at the time of transfer.¹¹² The grantee may have indicated orally at the time of transfer that he took no beneficial interest in the property. The fact that it would be economically unwise for the payor to make a gift may indicate an intention not to make a gift. Moreover, it would be relevant to show that the payor had a valid reason for keeping

106. Cf. *Dunlap v. Dunlap*, 218 S.W.2d 108, 110 (Mo. 1949). See note 88 *supra*.

107. 5 A. SCOTT, TRUSTS § 443 at 3343 (3rd ed. 1967). RESTATEMENT (SECOND) OF TRUSTS § 443 (1959) provides:

Where a transfer of property is made to one person and the purchase price is paid by another, and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, and the latter manifests an intention that the transferee should not have the beneficial interest in the property, a resulting trust arises.

108. *Warford v. Smoot*, 237 S.W.2d 184, 187 (Mo. 1951).

109. *Davis v. Broughton*, 369 S.W.2d 857, 862 (Spr. Mo. App. 1963). See also *Dallmeyer v. Dallmeyer*, 274 S.W.2d 250, 255-256 (Mo. 1955).

110. *E.g.*, *Warford v. Smoot*, 237 S.W.2d 184 (Mo. 1951); *Rebel v. Lunsford*, 216 S.W.2d 68 (Mo. 1949); *Clark v. Clark*, 322 Mo. 1219, 18 S.W.2d 77 (1929); *Thierry v. Thierry*, 298 Mo. 25, 249 S.W. 946 (1923).

111. 5 A. SCOTT, TRUSTS § 443 at 3345 (3rd ed. 1967); *Hovey v. Hovey*, 379 S.W.2d 621, 624-625 (Mo. 1964).

112. RESTATEMENT (SECOND) OF TRUSTS § 443, comment *a* (1959).

the public from discovering that he purchased the property.¹¹³ Actions of the parties, especially those of the payor, *subsequent to* the transfer are also relevant.¹¹⁴ The *Restatement of Trusts* emphasizes, however, that subsequent conduct of the parties is relevant only if it serves to establish the payor's intent at the *time of transfer* because it is the latter intent that is crucial to the creation of a resulting trust.¹¹⁵ Recent Missouri opinions have adopted the *Restatement* position in this respect.¹¹⁶ Of course, the fact that the payor after the transfer pays taxes and insurance premiums, makes improvements and collects rents may, in any event, be strong indicia that the payor never intended a gift in the first place.

Modern Missouri cases not only illustrate the varying degrees of emphasis that may be placed on acts of the parties subsequent to the transfer, but they also drive home the salient point that, in the last analysis, the appellate courts will sustain the trial chancellor's findings with respect to gift rebuttal evidence. The latter tendency seems to hold true even though Missouri courts review the fact determinations of the trial chancellor on a *de novo* basis. The interesting cases of *Warford v. Smoot*¹¹⁷ and *Dallmeyer v. Dallmeyer*¹¹⁸ illustrate not only this latter tendency, but also provide helpful examples of the supreme court's treatment of after-transfer acts of the parties.

In the *Warford* case, plaintiff-father, who was elderly, provided the purchase price for a piece of unimproved land and directed that defendant-daughter take title thereto. Plaintiff contended that he intended that the land be in his daughter's name because he was not a Missouri resident and he therefore felt it would be a more convenient arrangement. Defendant claimed that the conveyance was a birthday gift. Subsequent to the transfer, plaintiff had made payments on the real estate taxes, had built a substantial building on the premises, and had contributed to the costs of bringing a water main to the property. The trial chancellor found that the usual presumption in favor of a gift to the daughter had been successfully rebutted and imposed a resulting trust on the property in favor of the plaintiff. The supreme court affirmed contending that the acts of the plaintiff

113. *Ibid.*

114. *Ibid.*

115. *Ibid.*

116. *E.g.*, *Dallmeyer v. Dallmeyer*, 274 S.W.2d 250 (Mo. 1955); *Warford v. Smoot*, 237 S.W.2d 184 (Mo. 1951); *Hampton v. Niehaus*, 329 S.W.2d 794, 800 (Mo. 1959). *Cf. Hovey v. Hovey*, 279 S.W.2d 621, 624-625 (Mo. 1964).

117. 237 S.W.2d 184 (Mo. 1951).

118. 274 S.W.2d 250 (Mo. 1955).

after the transfer constituted "positive acts of ownership" which "tended to corroborate" plaintiff's testimony that "title was placed in defendant for his convenience."¹¹⁹ Moreover, the supreme court emphasized that the trial chancellor obviously believed plaintiff's version of his intent and that its finding was supported by evidence which was "clear, cogent and convincing."¹²⁰

The *Dallmeyer* case presents an interesting contrast to *Warford*. In *Dallmeyer* defendant-husband incident to a divorce proceeding claimed a resulting trust in certain real properties which stood in the name of plaintiff-wife, the purchase price of which had been paid by the husband. Plaintiff-wife testified that the conveyances were intended as gifts. Defendant never directly testified that the transfers were in trust but instead that they were "for the children." Evidence also indicated that after the transfers the defendant collected rents from the property, made repairs, and paid for the taxes and the insurance. The supreme court upheld the trial court's determination that the presumption of a gift to the wife had not been rebutted. The court noted that the activity of the defendant subsequent to the transfers was relevant, but not conclusive, in rebutting the presumption of gift. It stated that such evidence was of "little weight" where the "overwhelming weight of the other evidence—and, especially, the evidence as to the circumstances *at the time* of the transfer—supports the presumption of an intended gift to the wife."¹²¹ Thus, it is quite clear in *Dallmeyer* that much less weight was given the husband's subsequent "acts of ownership" than was given to similar acts in the *Warford* case. In fact, *Warford* was not cited in *Dallmeyer*. Nevertheless, the cases both appear to reach a correct result, and they do demonstrate a marked inclination to defer to the trial court's findings with respect to the presumption of gift. As in *Warford*, the *Dallmeyer* court emphasized that "the trial court expressly found that plaintiff was a more credible witness than defendant. We defer to that finding."¹²² Moreover, the presumption of gift from husband to wife should be stronger because of the husband's obligation to support than should be the same presumption in a parent-child situation as in *Warford* where there is ordinarily no obligation of supporting children who have reached majority.

119. *Warford v. Smoot*, 237 S.W.2d 184, 187 (Mo. 1951).

120. *Ibid.*

121. *Dallmeyer v. Dallmeyer*, 274 S.W.2d 250, 255 (Mo. 1955).

122. *Id.* at 255. See also *Hovey v. Hovey*, 379 S.W.2d 621, 625 (Mo. 1964).

V. SPECIAL CONSIDERATIONS UNDER THE DOCTRINE

A. *Loan to Trust Claimant by Grantee*

In the ordinary case of a purchase-money resulting trust the person seeking to establish the trust will be able to prove that he paid the purchase price out of his own funds directly to the grantor. However, a more sophisticated variety of resulting trust occasionally arises out of what would otherwise be considered a form of equitable mortgage situation. For example, *A* may wish to purchase Blackacre but be unable to secure the necessary funds. Accordingly, he may agree with *B* that the latter shall pay the amount of the purchase price to the grantor as a loan to *A*, and as security for the repayment of the loan *B* shall hold title to Blackacre. It is simply the same transaction as having *A* first borrow and physically receive the money from *B* and then having *A* *himself* make the payment. In effect we have a form of oral mortgage or absolute deed as mortgage.¹²³ Such mortgage arrangements are perfectly lawful and are enforced by the courts.¹²⁴ However, the arrangement also has resulting trust implications. In reality, *A* is using his *own* money to pay the purchase price and title is taken in the name of another. Thus courts uniformly impose resulting trusts in such situations, subject, of course, to the payment by *A* of any remaining amounts on the loan because *A*'s interest in Blackacre is always subject to *B*'s security interest.¹²⁵

The early well-reasoned Missouri case of *Scott v. Ferguson*¹²⁶ is in most respects an excellent example of the application of the resulting trust in an equitable mortgage situation. In that case plaintiff owned a sawmill and was engaged in the manufacture of lumber. Defendants were retail lumber dealers. Plaintiff had dealt with defendants for several years prior to the transaction involved in this case. In 1899, plaintiff negotiated for the purchase of land and agreed on a purchase price of \$2,000. Plaintiff entered into an arrangement with the defendants whereby the latter advanced the purchase price and the legal title was conveyed to defendants as security for repayment of the purchase money advanced. Plaintiff occupied the land and removed timber. Also incident to the loan transaction was an agreement between plaintiff and defendants whereby defendants

123. See generally, OSBORNE, MORTGAGES § 69-86 (1951).

124. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 455 at 534 (2d ed. 1960).

125. 5 A. SCOTT, TRUSTS § 448 at 3359-3360 (3rd ed. 1967).

126. 235 Mo. 576, 139 S.W. 102 (1911).

agreed to provide financing for plaintiff's sawmill business and plaintiff agreed to market all of his product through defendants. Defendants were to receive a commission on lumber marketed through them. After a disagreement between the parties over the lumber marketing arrangement, plaintiff brought suit to impose a resulting trust in his favor on the real estate. The trial chancellor granted the relief subject to the lien of the amount unpaid on the loan for the purchase price. The Missouri Supreme Court affirmed. Defendants argued before the supreme court that a resulting trust was improper in this case because plaintiff did not pay the purchase price. The court rejected this argument, noting that plaintiff was charged with the full amount of the purchase price advanced by defendants and concurred in the rule that "if one should advance the purchase money and take title to himself, but should do this wholly upon the account of the other, he would hold the estate upon resulting trust for the other."¹²⁷

Meyer v. Meyer,¹²⁸ a relatively recent case, imposed a resulting trust where the grantee's loan to the purchaser consisted both of cash and an assumption of debt. There the plaintiffs lacked the necessary cash but owned rental property, a part of which was occupied rent-free by their son and daughter-in-law. Plaintiffs requested their son to locate a house for them which they could rent or purchase. The son located a house selling for \$4,000. The down payment of \$1,000 was supplied by a loan made by the son to the parents. Title was taken in the name of the son and his wife as security for the \$1,000 down-payment. The son signed a note for the \$3,000 and executed a deed of trust. During the succeeding six years plaintiffs paid off the loan and paid all taxes and insurance. After the plaintiffs tendered the payment of the \$1,000, the defendants, son and daughter-in-law, evicted them. Plaintiffs then brought suit to impose a resulting trust. Defendants claimed that plaintiffs were mere tenants, the rental consisting of bimonthly payments on the loan and the payment of insurance and taxes. The trial court granted the relief to the father subject to reimbursement of defendants for certain amounts expended by them on the property. The supreme court affirmed and concluded that the facts supported a resulting trust in the situation described above, to wit: where the title holder supplies the purchase money as a loan to the actual purchaser and takes title as security for repayment of the loan. The result and reasoning are sound and are supported by the court's

127. *Id.* at 582-583, 139 S.W. at 103.

128. 285 S.W.2d 694 (Mo. 1956).

determination that the \$1,000 down-payment and the assumption of a \$3,000 debt by defendants constituted a loan to plaintiffs.¹²⁰

B. *Partial Payment*

Should the same presumption of resulting trust obtain when the trust claimant alleges payment of part, rather than all, of the purchase price? Should the part-payment, albeit small or large, result in a natural inference of gift or loan rather than resulting trust? Arguably, most persons have no desire for small interests in land, as for example where one pays \$200 toward the purchase price of \$10,000. On the other hand, it is not at all unusual today for large real estate interests to be owned by numerous owners with relatively small shares of the total enterprise. Of course, it could be argued that where there is a relatively small part payment the presumption should be weaker and thus the defendant should not need evidence as strong and convincing as normally needed to prevent the imposition of the trust.¹³⁰ In any event, if it is human nature to expect a return for an expenditure for the whole purchase price, it would seem just as normal to expect a return on an expenditure for part of the purchase price. Moreover, an inference of a loan is equally unreasonable since it would appear more usual for the payor in such a situation at least to obtain a note or an express agreement with respect to the loan.¹³¹

A few courts, however, have been troubled by the "aliquot part rule" although this concept seems of less importance today than formerly. These courts have said that the person seeking the imposition of the resulting trust must have paid "an aliquot part" of the entire purchase price.¹³² If

129. See also, *Mays v. Jackson*, 346 Mo. 1224, 1234, 145 S.W.2d 392, 399 (Mo. 1940); cf. *Clowser v. Noland*, 133 Mo. 221, 226, 34 S.W. 64, 67 (1896). The above situation should be sharply contrasted with the following situation: Suppose there is an oral contract under which *A* and *B* agree that *B* is to purchase land from *C* and to resell the land to *A*, *A* agreeing to purchase it from *B*. *B* then purchases the land with his own money. *A* cannot compel *B* to sell the land to him because the agreement is unenforceable under the Statute of Frauds. Here it is impossible to show a loan from *B* to *A* so *A* cannot prove that when *B* purchased the land he did so with money lent to *A*. See 5 A. SCOTT, TRUSTS § 448 at 3361-3362 (3rd ed. 1967). Also to be contrasted is the situation where *B* purchases land in his own name with money borrowed from *A*, and *A* and *B* subsequently agree orally that *A* is to have an interest in the land. No resulting trust should arise because the subsequent oral agreement is unenforceable because of the Statute of Frauds. Cf. *Stevenson v. Haynes*, 220 Mo. 199, 119 S.W. 346 (1909).

130. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES, § 457 at 561 (2d ed. 1964).

131. *Ibid.*

132. E.g., *First State Bank of Phillipsburg v. Mussigbrod*, 83 Mont. 68, 271 P. 695 (1928); *Sayre v. Townsends*, 15 Wend. 647, 650 (N.Y. 1836). For an interesting general discussion of the problems of partial payment, see Meriwether, *Resulting Trusts—Part Payment of the Purchase Price*, 2 ARK. L. REV. 53 (1947).

we give "aliquot part" its true dictionary and mathematical meaning it will mean a fraction which is contained in the whole a certain number of times without a remainder.¹³³ In other words, the fraction must have a numerator of one. Thus, if a person pays \$500 out of a \$2,000 purchase price he would meet all requirements of the rule because his contribution would be one-fourth of the total price. On the other hand, a payment of \$900 presumably would not satisfy the rule because a fraction of 9/20 would be created. It would be unrealistic to suppose that the person making the \$500 payment wished to retain the beneficial interest in his expenditure any more than the person making the \$900 payment. This strictly mathematical version of the rule has been rejected by most courts,¹³⁴ and there is specific language in one Missouri case which appears to have that effect.¹³⁵

Another offshoot of the aliquot part rule has been to require proof that "a definite part of the price [was] paid for a definite, corresponding part of the land," as a prerequisite to a resulting trust based on a partial payment of the purchase price.¹³⁶ Although there can be little problem with the first part of the requirement, the part of the rule contemplating a definite interest in the land defeats the basic assumptions of the purchase-money resulting trust. The principle behind this type of trust is that the trust intent can be inferred from the actions of the payor.¹³⁷ If we require the showing of a "definite, corresponding part of the land," in effect we require the payor to establish some type of express agreement delineating the exact interest in the land. Arguably this approach violates the Statute of Frauds since we are attempting to establish a resulting trust by parol evidence when it would be prohibited by the Statute to do so with respect to other express trusts. Although in full payment situations oral agreements are admissible to strengthen the presumption created by the payment itself, such an agreement is not *required* to create the resulting trust, as would appear to be the case with partial payment under the above rule.¹³⁸ Moreover, it is difficult to comprehend

133. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES, § 457 at 565 (2d ed. 1960).

134. *Id.*, § 457 at 566.

135. *Cassity v. Cassity*, 240 S.W. 486, 490 (K.C. Mo. App. 1922).

136. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 457 at 570 (2d ed. 1964). *See, e.g., MacNeil v. MacNeil*, 312 Mass. 183, 43 N.E.2d 667 (1942); *Druker v. Druker*, 308 Mass. 229, 31 N.E.2d 524 (1941); *White v. Carpenter*, 2 Paige 217, (N.Y. 1830). *Cf. Checovich v. Checovich*, 157 N.E.2d 643 (1959).

137. *See text at note 15 supra.*

138. *See text at notes 16 through 21 supra.*

the reason that in the full payment situations the law implies that a trust results from certain acts, while in a partial payment situation, proof of an express understanding is an additional requirement.¹³⁹ Although this requirement seems illogical, it may not be a serious problem because in many cases there will be some type of conversation between the payor and the grantor or grantee. However, where one of the original parties is dead, the Dead Man's Statute may prevent the admission of such conversations and thus the requirement of an express agreement would prevent the imposition of the resulting trust.¹⁴⁰

Most American courts seem to ignore both aspects of the aliquot part rule and apply the presumption of resulting trust to *all* fractional as well as full payments of the purchase price.¹⁴¹ The result is to grant to the payor a resulting trust in the land in a proportion equal to the proportion the payor's contribution is to the whole purchase price. The cases lay down no requirement of a showing of an agreement for a specific interest in the land, although such agreements are often present. This majority view appears to be represented by the *Restatement of Trusts* which provides that "a resulting trust arises in favor of the person by whom such payment is made in such proportion as the part paid by him bears to the total purchase price,"¹⁴² unless a contrary intention is manifested. This provision creates an inference or presumption of resulting trust rather than of gift or loan.¹⁴³ Missouri cases reflect this majority position of treating

139. The following rationale has been suggested: Where only a part of the purchase price is paid, the natural result should be a loan; thus, there will be a presumption of loan intent; this presumption may be overcome by evidence of an agreement inconsistent with a loan, an agreement for an interest in the land for the benefit of the payor. See G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 457 at 573-574 (2d ed. 1964).

140. In *Cassity v. Cassity*, 240 S.W. 486 (K.C. Mo. App. 1922), for example, the plaintiff wife, who paid part of the purchase price, was able to establish a purchase-money resulting trust against the relatives of her deceased husband even though the Dead Man's Statute prohibited plaintiff from testifying as to any agreement between husband and wife. Presumably in a jurisdiction requiring the agreement, the plaintiff in *Cassity* would not have been able to impose a resulting trust.

141. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 457 at 562 (2d ed. 1964). See, e.g., *Waterman v. Buckingham*, 79 Conn. 286 (1906); *Clark v. Clark*, 398 Ill. 592, 76 N.E.2d 446 (1948); *Hatch v. Rideout*, 95 N.H. 431, 65 A.2d 702 (1947).

142. RESTATEMENT (SECOND) OF TRUSTS § 454 (1959).

143. RESTATEMENT (SECOND) OF TRUSTS § 454, comment *b* (1959). Interestingly, the latter comment uses the word "inference" rather than "presumption" in describing the effect of partial payment of the purchase price. *Quaere* which meaning was intended. See text at notes 53 through 73 *supra*.

full and fractional payments the same for purposes of creating a presumption of resulting trust.¹⁴⁴

In the early Missouri case of *Stevenson v. Smith*,¹⁴⁵ the mother of the grantee-son supplied \$1,500 of a total purchase price of approximately \$4,800. Upon the mother's death, several of her heirs brought suit to impose a resulting trust on the son for the benefit of the heirs. In reversing a trial court determination in the son's favor, the Missouri Supreme Court ignored the implications of the aliquot part rule, stating that a just result would be better attained "by giving the heirs such proportion of the land as \$1,500 bears to \$4,800, i.e., 15/48 or 5/16, but this should be free of liens."¹⁴⁶ Moreover, the court seemed to assume the applicability of the same type of presumption of resulting trust in part-payment cases as in full payment situations. The court said: "[W]here land is purchased by one in his own name with the money of another, a resulting trust is created by implication of law, which follows the ownership of money. And where a part only of the purchase money is furnished by the beneficiary *the trust is for a proportionate share of the land bought*."¹⁴⁷

In the recent case of *Dougherty v. Duckworth*,¹⁴⁸ two persons supplied \$3,200 and \$4,000 respectively toward a total purchase price of land of approximately \$17,000. Title was taken in the name of a third party, the defendant. In a suit to impose a resulting trust, the Missouri Supreme Court, as in *Stevenson*, ignored the aliquot part rule or any mention of a requirement of an agreement for a specific interest in the real estate. Instead, the court cited with apparent approval the *Restatement* provision referred to above,¹⁴⁹ and also stated that "upon the proof thereof, Dougherty will be entitled to a resulting trust in the proportion which his \$3,200 contribution bears to the purchase price. Snider, his co-plaintiff, will be entitled to a resulting trust in the proportion which the \$4,000 . . . bears to the entire price."¹⁵⁰

144. *E.g.*, *Dougherty v. Duckworth*, 388 S.W.2d 870 (Mo. 1965); *Hynds v. Hynds*, 253 Mo. 20, 161 S.W. 812 (1913); *Wrightsmans v. Rogers*, 239 Mo. 417, 144 S.W. 479 (1911); *Stevenson v. Smith*, 189 Mo. 447, 88 S.W. 86 (1905). *See also* *Larrick v. Heathman*, 288 Mo. 370, 231 S.W. 975 (1921); *Cassity v. Cassity*, 240 S.W. 486 (K.C. Mo. App. 1922).

145. 189 Mo. 447, 88 S.W. 86 (1905).

146. *Id.* at 465, 88 S.W. at 91.

147. *Id.* at 466, 88 S.W. at 91 (emphasis added).

148. 388 S.W.2d 870 (Mo. 1965).

149. *See* note 142 *supra*.

150. *Dougherty v. Duckworth*, 388 S.W.2d 870, 877 (Mo. 1965). One previously mentioned Kansas City Court of Appeals decision, *Cassity v. Cassity*, 240 S.W. 486 (K.C. Mo. App. 1922), although sound and for the most part well-reas-

A closely related problem is exemplified by the Missouri case of *Shelby v. Shelby*.¹⁵¹ In that case several brothers and sisters together with their mother and father contributed varying and undefined sums to the down payment for the purchase of a family residence. Title was originally taken in the name of the mother and after several conveyances without consideration, title wound up in the name of the spouse of one of the siblings. Several of the brothers and sisters brought suit to impose a resulting trust in their favor in the property. The Missouri Supreme Court reversed the trial chancellor's decree in favor of the trust claimants because "one who proves that he paid 'some money' toward the price . . . should get no trust, because of the *indefiniteness and vagueness of his evidence*."¹⁵² The above case reflects the fairly common situation of family members purchasing real estate with money from a pool or fund contributed to in varying degrees by the family members, title being taken in the name of one of the family members. Many courts follow the rule in *Shelby*,¹⁵³ although some courts solve the problem by awarding all of the contributors equal shares.¹⁵⁴

Professor Scott indicates that the indefiniteness of the payor's contribution in situations similar to that described above results in a rebuttable presumption of gift or loan.¹⁵⁵ It seems unnecessary, however, that courts should have to consider this situation as one of changed presumptions. Where the amount of the contribution is indefinite, it simply means that the payor has failed to establish by "clear and convincing evidence" the amount of his payment toward the purchase price. The common fund situations simply demand that the payor be able to show with relative exactness the amount of his contributions. This is clearly a

oned, does have one puzzling aspect. In that case the court affirmed the trial chancellor's award of a resulting trust in favor of a wife for a fractional interest in real estate. In so deciding, the court specifically rejected the argument that required the payor to pay for a specific part or interest in the real estate. However, after stating the otherwise acceptable rule that where several persons contribute to the purchase money, a resulting trust arises in favor of each pro tanto, the court added the qualification "so long as the contribution made is not a general one." What does the court mean by "general"? Does this mean that there must be some type of agreement or understanding that the payor take a specific interest or part of the real estate? If so, the court's effort in its prior attempt to discredit such a concept would appear to have been negated.

151. 357 Mo. 557, 209 S.W.2d 896 (1948).

152. *Id.* at 563, 209 S.W.2d at 899.

153. 5 A. SCOTT, TRUSTS § 454 at 3374 (3rd ed. 1967). *See, e.g.,* Dee v. Sutter, 222 S.W.2d 541 (St. L. Mo. App. 1949); Clubine v. Frazier, 346 Mo. 1, 139 S.W.2d 529 (1940).

154. 5 A. SCOTT, TRUSTS § 454 at 3375-3376 (3rd ed. 1967).

155. *Id.* at 3376.

reasonable requirement since the court must know the amount of the contributions in order to assign proportionate beneficial shares in the real estate.

Where the payor provides a fractional share of the purchase price, will the presence of an oral agreement that he is to receive a greater share of the real estate permit him to enforce a resulting trust with respect to that greater share? In *Dougherty v. Duckworth*,¹⁵⁶ discussed above, the Missouri Supreme Court followed traditional lines of analysis in resolving the question. In that case the trial chancellor decreed a resulting trust for the two plaintiffs for a three-fourths interest in the real estate based on an oral agreement at time of purchase providing for such an apportionment. The supreme court however, refused to permit a resulting trust in the real estate in a proportion greater than the proportion the contributions toward the purchase price were to the total purchase price, because to do so the court felt would violate the Statute of Frauds.¹⁵⁷ This reasoning is sound because there is ordinarily no Statute of Frauds problem when the court imposes a purchase-money resulting trust since the trust arises from the legal implications of the *actions* of the parties rather than from any oral agreements.¹⁵⁸ To permit the imposition of a resulting trust for an interest greater than that represented by the part payment of the purchase price would *require* reliance on an oral agreement and therefore run afoul of the Statute of Frauds. On the other hand, the party seeking to prevent the imposition of the trust should be able to show that under an oral agreement the payor agreed to take *less* of an interest in the real estate than would otherwise be indicated by the amount of the part payment. Here the agreement is merely used to rebut in part the presumption of an intention to create a trust, and partial as well as complete rebuttal of this presumption is permissible.¹⁵⁹

156. 388 S.W.2d 870 (Mo. 1965).

157. *Id.* at 876.

158. See text at note 15 *supra*.

159. See generally 5 A. SCOTT, TRUSTS §§ 441.3 and 454.2; RESTATEMENT (SECOND) OF TRUSTS § 454, comment *h* (1959). Also to be considered are the resulting trust consequences where the oral agreement provides for beneficial interests in land other than concurrent undivided interests in the whole. Suppose that the grantee and the non-grantee payor each pay half of the purchase price and there is a pre-conveyance oral agreement that one party was to have a limited estate in the land, such as a life estate or a term for years, and the other the remainder interest. Should the non-grantee payor be entitled to a resulting trust in the interest or estate in land provided for in the oral agreement? There are cases that answer in the negative. See *Long v. Scott*, 24 App. D.C. 1 (1904); *Juranek v. Juranek*, 29 Cal. App. 2d 276, 84 P.2d 195 (1938). However, other

C. *Deferred Payment Problems*

The Missouri Supreme Court has repeatedly said that "a resulting trust must arise, if at all, at the instant the deed is taken. Unless the transaction is such that the moment the title passes the trust results from the transaction itself, then no trust results. It cannot be created by subsequent occurrences."¹⁶⁰ The same court has also phrased the rule to the effect that the trust must arise "at the time of or anterior to the execution of the conveyance by which the title passes and cannot be created by subsequent occurrences."¹⁶¹ The above statements, although not entirely clear, suggest that although the circumstances necessary to create a resulting trust may arise prior to the passage of legal title to the grantee, the *latest* date, for the occurrence of such circumstances is the time of passage of legal title.

It has been argued that where the payor pays the purchase price after the grantee has entered into a written land contract, but prior to the passage of legal title, "[a] resulting trust will not arise in [the payor's] favor unless he pays the purchase price at or prior to the time when [the grantee] receives the beneficial interest."¹⁶² Support for this argument is found in the fact that equitable or beneficial title normally passes to the

cases and more recent commentary advocate giving effect to the oral agreement. *See, e.g.*, *Bailey v. Scribner*, 97 N.H. 65, 80 A.2d 386 (1951). *See also* RESTATEMENT (SECOND) OF TRUSTS § 454, illus. 12 and 13 (1959).

Suppose instead that in the above hypothetical the oral agreement provides that each party is to have exclusive fee simple ownership in a specific part of the whole tract equal in area to one half of the whole tract. Courts generally impose a resulting trust in favor of the non-grantee payor on the specific part of the whole tract. *See, e.g.*, *Cloud v. Ivie*, 28 Mo. 578 (1859); RESTATEMENT, (SECOND) OF TRUSTS § 454, illus. 9 (1959). Where the oral agreement provides that the non-grantee payor is to have a specific part of the whole tract with an area proportionately larger, with respect to the whole tract, than his contribution bears to the whole purchase price, it would appear that such a payor should get the part of the whole tract orally agreed upon. *See* 5 A. SCOTT, TRUSTS § 454.3 at 3381 (3rd Ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 454, illus. 11 (1959). *But c.f.* *Stevenson v. Smith*, 189 Mo. 447, 88 S.W. 86 (1905). Presumably the same rule should apply where the non-grantee payor orally agrees to take a specific part of the whole tract with an area proportionately smaller, with respect to the whole tract, than his contribution bears to the whole purchase price. *See* 5 A. SCOTT, TRUSTS § 454.3 at 3381 (3rd ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 454, illus. 10 (1959). In all of the above situations the tendency of the courts is to rely on the valuation of the parties as to the different parts of the whole tract.

160. *Davis v. Roberts*, 295 S.W.2d 152, 157 (Mo. En Banc 1956); *Dougherty v. Duckworth*, 388 S.W.2d 870, 874 (Mo. 1965); *Lehr v. Moll*, 247 S.W.2d 686, 689 (Mo. 1952); *Bender v. Bender*, 281 Mo. 473, 477, 220 S.W. 929, 930 (1920).

161. *Welborn v. Rigdon*, 231 S.W.2d 127, 133 (Mo. 1950). *See also* *Parker v. Blakely*, 338 Mo. 1189, 1201-1202, 93 S.W.2d 981, 988 (1936).

162. 5 A. SCOTT, TRUSTS § 457 at 3397-3398 (3rd ed. 1967).

grantee at the date of the contract. Nevertheless, the date of passage of legal title and not the date of the land contract should be the crucial date for determining the rights of the parties. The Bogert treatise supports this position as follows:

True, the contract vendee . . . at the time of the making of the land contract, gets an equitable interest in the land solely for his own benefit; but when the deed is delivered to him as the sole grantee, after the payment on the price has been made by the third person with the knowledge and consent of the grantor and grantee, both grantor and grantee, as well as the third party payor, are assumed to intend that the third party's payment shall give him a beneficial interest in the land pro tanto.¹⁶³

This is the majority view¹⁶⁴ and *a fortiori* applies to the common earnest money situation where the contract is not a long-term financing device.

In *Davis v. Roberts*,¹⁶⁵ the plaintiff concluded a transaction by which a lot containing a house was conveyed to his parents. The plaintiff paid \$1,000 down on a purchase price of \$5,000. The balance was covered by notes secured by deeds of trust, all of the instruments being executed by the parents only. Subsequently, plaintiff paid off the \$1,000 second deed of trust and purchased the \$3,000 first deed of trust. Plaintiff sued the other heirs of his parents to have a resulting trust imposed on the real estate as to the whole title. The trial chancellor granted plaintiff's request. The supreme court reversed the trial chancellor and in relying on the above rule permitted a resulting trust in plaintiff's favor only to the extent of his \$1,000 down payment, because the subsequent payments were not paid under any obligation assumed at the time of the passage of legal title and were thus not incident to the transaction in which the conveyance was made.

The rule followed in the *Davis* case would appear to require that the trust claimant either make his payment or at least obligate himself before legal title passes to the grantee. Thus, if property is conveyed to *A*, who pays a down-payment and executes a promissory note for the balance, the subsequent payment by *B* of the note indebtedness pursuant to a subse-

163. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 456 at 560 (2d ed. 1964).

164. *E.g.*, *Neusted v. Skernswell*, 69 Cal. App. 2d 361, 159 P.2d 49 (1945); *Rexburg Lumber Co. v. Purrington*, 62 Idaho 461, 113 P.2d 511 (1941); *Moore v. Moore*, 74 Miss. 59, 19 So. 953 (1896) (an excellent analysis). *Lynch v. Herrig*, 32 Mont. 267, 80 P. 240 (1905); *Contra*, *Musselman v. Myers*, 240 Pa. 5, 87 A. 425 (1913).

165. 295 S.W.2d 152 (Mo. En Banc 1956).

quent oral agreement by which *B* is to get an interest in the land will not create a presumption of resulting trust because *B* was not obligated to do so before the passage of legal title.¹⁶⁶ To give effect to the oral agreement would run afoul of the Statute of Frauds.¹⁶⁷ However, *B* may, presumably, recover from *A* the amount he paid on the promissory note because otherwise *A* would be unjustly enriched.¹⁶⁸ On the other hand, if the promissory note is secured by a mortgage, payment of the indebtedness by *B* will permit him to be subrogated to the mortgage lien.¹⁶⁹ The rights of reimbursement and of subrogation are supported in the Missouri case of *Dougherty v. Duckworth*,¹⁷⁰ where one of the parties paying part of the purchase price also made a few payments on a first deed of trust promissory note executed by the grantee as his contribution to the purchase price. Although no resulting trust was permitted with respect to the note payments, the Missouri Supreme Court stated that the payor "may . . . elect on remand to assert a claim for reimbursement based upon the payments which he has made on the indebtedness and also for subrogation to the rights of the holder of the deed of trust with respect to the payments so made."¹⁷¹ Although the foregoing language is somewhat unclear, the court presumably does not mean that the payor can get both reimbursement and subrogation but only that subrogation is available to secure his claim for reimbursement.¹⁷²

166. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 456 at 548-549 (2d ed. 1964).

167. 5 A. SCOTT, TRUSTS § 457 at 3397 (3rd ed. 1967).

168. *Ibid.*

169. *Ibid.*; RESTATEMENT (SECOND) OF TRUSTS § 458, comment *a* (1959).

170. 388 S.W.2d 870 (Mo. 1965). The case is also discussed in pt. V, § B of this article.

171. *Id.* at 877.

172. A difficult problem presented by the facts in *Dougherty* but not considered is what type of subrogation can be given, if any, where the payor does not satisfy the entire encumbrance, but only made part payment thereof. Of course, if the entire encumbrance is satisfied by such a payor, the payor should step into the shoes of the mortgage or trust deed holder for purposes of property and other rights. But if the payor makes only a part payment on the encumbrance, should he become proportionally a coordinate lienor with the holder of the encumbrance, or should he simply get what amounts to a second lien on the real estate? If the real estate is worth enough to satisfy both the mortgage or trust deed holder and the payor, there is no problem. However, unless the mortgagee has in effect agreed to an assignment of a proportionate amount of the encumbrance by accepting part payment, the mortgagee arguably should be able to treat the payor as agent for the mortgagee, in which case the status of the encumbrance would not be effected. In fact, it is not at all clear that there are rights to subrogation unless there is a full discharge of the lien. Cf. 50 AM. JUR. SUBROGATION § 120 (1944). In such a case the payor would be relegated to second lien status. Very little authority could be found dealing with the above problem. For a general discussion of mortgage subrogation, see OSBORNE, MORTGAGES § 277-283 (1951).

On the other hand, where the payor is able to establish that he made subsequent payments with respect to the land to the grantor pursuant to an obligation to do so incurred *prior to the passage of legal title* to the grantee, he may in certain instances be entitled to a resulting trust.¹⁷³ For example, suppose a vendor conveys land to *A*, the latter making a down payment. A promissory note for the balance is executed by *A* and *B* or by *B* alone prior to the passage of legal title. If *B* pays the note in full under either of the above situations, *B* should be entitled to a presumption of resulting trust in the land.¹⁷⁴

A resulting trust has also been imposed in the situation where the trust claimant makes payments to the grantee or the grantor after passage of legal title pursuant to a pre-conveyance agreement with the *grantee* to do so.¹⁷⁵ In *Shelton v. Harrison*,¹⁷⁶ Harrison entered into an oral understanding with several other persons, including plaintiffs, whereby land was to be purchased and paid for in twelve monthly installments by all of the parties. Ultimately the land was to be held by a corporation with each of the parties an equal shareholder. Pursuant to their obligations under the agreement plaintiffs began making monthly payments to Harrison. Shortly thereafter, Harrison paid a small down payment and took title to the real estate in his name. After each payment Harrison issued a receipt referring to the understanding and used the monthly payments in turn to pay notes and a deed of trust executed by him to cover the balance of the purchase price. After nine of the twelve payments had been made by the plaintiffs and applied by Harrison to the notes, Harrison died. After his death no further payments were made and the deed of trust was foreclosed. After the foreclosure sale a surplus of over \$700 was paid to Harrison's wife, the defendant. The plaintiffs sought a purchase-money resulting trust in the surplus. The decree of the trial court in their favor was affirmed by the Springfield Court of Appeals.

An argument could have been made in *Shelton*, as well as in all similar situations, that the plaintiffs did not promise to pay the purchase price, because technically one can only pay the purchase price to the seller of the land.¹⁷⁷ The plaintiffs' agreement was simply to pay the grantee so the

173. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 456 at 522 (2d ed. 1964).

174. *Id.*, § 456 at 552.

175. *E.g.*, *Shelton v. Harrison*, 182 Mo. App. 404, 167 S.W. 634 (Spr. Ct. App. 1914); *Crowley v. Crowley*, 72 N.H. 241, 56 A. 190 (1903).

176. 182 Mo. App. 404, 167 S.W. 634 (Spr. Ct. App. 1914).

177. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 456 at 555 (2d ed. 1964).

latter could pay the purchase price. On the other hand, it could be argued that the performance of the plaintiffs was in substance the same as paying the purchase price at the time of the deed or that, in any event, the actions of the plaintiffs justified a presumption of an agreement that the plaintiffs should have an equitable interest in the real estate. The court in *Shelton* did not directly consider these arguments but seemed to implicitly endorse the former position because it referred to plaintiffs as those "who furnish the purchase money."

Whether the agreement to pay is entered into between trust claimant and grantor or between trust claimant and grantee, if the trust claimant never performs, (i.e., if no payments are made) there can be no resulting trust in the real estate.¹⁷⁸ Presumably it would be inequitable to afford such a promisor an interest in the real estate merely because a promise was made that was not performed. A more difficult question in such cases would arise where the trust claimant, because of a *breach* of his agreement, only partially performs his obligation to pay. The question then becomes whether he should be entitled to a pro rata presumption of resulting trust corresponding to his actual payments or whether his breach should bar such a result. Surprisingly, there is very little authority on this problem. In fact, the plaintiffs in *Shelton* apparently ceased to make payments after the grantee's death and this action arguably constituted a breach of the agreement to pay the grantee. Yet apparently no significance whatsoever was attached by the court or the parties to this possible breach on the part of the plaintiffs. Although the imposition of a resulting trust does not constitute the enforcement of a contract because the trust is legally implied from certain acts of the parties,¹⁷⁹ it could nevertheless be argued that to permit the breaching payor to receive a pro rata resulting trust is analogous to allowing a party in substantial breach to enforce a land contract. And, of course, any plaintiff in substantial default will not be allowed in other situations to enforce a land contract.¹⁸⁰ Nevertheless, even if there is a refusal to permit a resulting trust presumption in such circumstances, the breaching plaintiff arguably should be able to recover the value of his payments from the grantee personally on an unjust enrichment theory.¹⁸¹

178. See *Id.*, § 456 at 551-552.

179. See text at note 15 *supra*.

180. See SIMPSON, CONTRACTS § 184 at 373 (2d ed. 1965).

181. In the somewhat analogous land contract breach situations where the vendor rescinds the contract for the vendee's material breach and sells the land to another purchaser, there are cases granting restitution for the payments made less the damages. SIMPSON, CONTRACTS § 204 at 413, note 58 (2d ed. 1965). Pre-

Another interesting question not directly considered in the *Shelton* case is whether the pre-conveyance promise to the grantee to make future payments must be legally enforceable. In *Shelton*, the agreement to make the monthly payments was oral and thus there may have been some doubt as to whether the Statute of Frauds rendered the promise unenforceable. A New Hampshire case, *Crowley v. Crowley*,¹⁸² presents a better illustration and a cogent analysis of the problem. In that case plaintiff-son at age 17 made the down payment of \$300 on a farm he wished to purchase. Since the seller refused to convey to a minor, plaintiff's father took title and also executed a promissory note and a mortgage for the balance of \$440. The facts suggested an oral agreement that plaintiff would make the payments on the note, and he did in fact pay off the note. After the death of the father, the defendant, the stepmother of the plaintiff, refused on demand to convey the legal title to the plaintiff. Plaintiff sued for the imposition of a resulting trust. Although the New Hampshire Supreme Court reversed a lower court decree for the plaintiff on grounds not relevant to the present discussion, the court's reasoning is extremely instructive. One of the defendant's arguments was that no resulting trust was possible because the entire purchase price was not paid at the time of purchase. The court rejected this argument and pointed out that if plaintiff induced his father to execute the note and plaintiff at the time of its execution promised to pay it, a resulting trust would arise by implication. Moreover, the court also reasoned that "It matters not how it is paid, whether by money on hand or borrowed, or by the promise or obligation of the *cestui que trust* himself, or of some other person procured by him for the purpose."¹⁸³ Most importantly, however, the court considered the fact that the plaintiff's promise to pay the note executed by the father may have been unenforceable because of plaintiff's infancy or because of the Statute of Frauds. Since the payments had already been made, the fact that an unexecuted promise to pay may have been unenforceable was considered by the court to be "immaterial."¹⁸⁴ This reasoning is sound; the unenforceability of the promise in such a situation should be irrelevant since the promise has already been performed. What

sumably, the grantee in a situation where no resulting trust will be imposed should not be able to retain both full title and the trust claimant's payments, notwithstanding the default on the latter's part.

182. 72 N.H. 241, 56 A. 190 (1903).

183. *Id.* at 244, 56 A. at 192.

184. "If the plaintiff had avoided paying the note by availing himself of his infancy, or the statute of frauds, the foundation for a resulting trust would fail; but as he has paid the note, the infirmity in the original agreement, if it be found that he made one, would become immaterial." *Id.* at 244-245, 56 A. at 192.

the resulting trust claimant seeks is not enforcement of that promise but, rather, simply to establish that he agreed *prior* to the passage of legal title to the grantee to pay the balance of the purchase price—in other words, to help establish that the subsequent payments *relate back* to the acquisition by the grantee of legal title in the real estate.

May improvements to real estate have resulting trust consequences? Missouri courts have generally refused to impose a resulting trust where the trust claimant's request is based on improvements made to real estate held in the name of another.¹⁸⁵ The reasoning is relatively simple: The price of the land generally has already been paid and the trust claimant is simply adding to the value of real estate owned by another in fee simple absolute. *Welborn v. Rigdon*¹⁸⁶ is illustrative of this principle. In that case plaintiff and defendant agreed that plaintiff would make certain improvements to the real estate already owned by the defendant. Thereafter the property was to be sold and the proceeds divided as follows: defendant was to have what the property cost her, plaintiff was to have the amount of his expenditures and each was to have half of the balance of the sale proceeds. At the time of the agreement plaintiff and defendant were romantically interested in each other. Plaintiff made improvements to the real state of a value of over \$7,000 and after a falling out between the parties, plaintiff brought suit and, among other things, sought the imposition of a resulting trust on the real estate for his benefit. The Missouri Supreme Court stated that a resulting trust was unavailable because "none of his funds were used in the purchase of the property," and because a resulting trust must arise "at the time of or anterior to' the execution of the conveyance by which the title passes and 'cannot be created by subsequent occurrences.'"¹⁸⁷

It should be emphasized, however, that resulting trust consequences should not necessarily be denied to all claimants who have constructed improvements on real estate. To be sure, most such claims arise out of agreements to construct improvements entered into with a party who already has taken title. In such cases, as we have noted, the improvements

185. *E.g.*, *Welborn v. Rigdon*, 231 S.W.2d 127 (Mo. 1950); *Wenzelburger v. Wenzelburger*, 296 S.W.2d 163 (St. L. Mo. App. 1956).

186. 231 S.W.2d 127 (Mo. 1950).

187. *Id.* at 133. The court also rejected plaintiff's request for an equitable lien, but did rule that the agreement was not within the Statute of Frauds and that the plaintiff would have an action for damages based on defendant's breach of contract to make improvements. *Id.* at 133-134. *But see* *Cunningham v. Kinnerk*, 74 S.W.2d 1107 (St. L. Mo. App. 1934) where a resulting trust was imposed on land in favor of one who constructed building thereon after grantee obtained title although apparently the construction did not relate back to prior agreement.

have no relationship to the purchase price. However, it is not difficult to conceive of situations where the promise to make improvements constitutes the promisor's contribution to the purchase price. For example, suppose *A* and *B* are interested in purchasing together certain partially swampy property for real estate development. The desire is that *A* own a two-thirds and *B* a one-third interest in the property. *B*, however, does not have enough cash to meet his part of the purchase price. *B* does, however, own drainage equipment and would be able to construct the necessary drains to make the land suitable for development. Accordingly, *A* agrees orally to pay the full purchase price for the land and *B* agrees that, after the vendor delivers title, *B* will construct the drainage system necessary to drain the land. The oral understanding is that *B*'s improvements should entitle him to a one-third interest in the real estate. *A*, with *B*'s approval, takes title in his own name. *B* later constructs the improvements in accordance with his agreement and *A* refuses to convey to *B* his one-third interest. *B* sues to impose a purchase-money resulting trust. *B* should benefit by a presumption of resulting trust in his favor. Here the improvements admittedly were made after *A* took title, but the agreement to construct the improvements took place *prior* to the conveyance and are simply *B*'s contribution to the purchase price. Thus, a convincing argument could be made that *B* did contribute to the purchase price of property taken in the name of *A* and that *B*'s resulting trust rights arose " 'at the time of or anterior to' the execution of the conveyance by which the title passe[d]. . . ." ¹⁸⁸ This hypothetical situation is somewhat analogous to the one in *Crowley v. Crowley*,¹⁸⁹ the New Hampshire case discussed previously. In that case the trust claimant in all likelihood agreed before the conveyance to pay off a note to be executed by his father to cover the balance of the purchase price, and in fact the note was thus satisfied. There the subsequent payments related back to a pre-conveyance agreement and a resulting trust was appropriate. Similarly, in the hypothetical case, the subsequent building of the drainage system is in reality *B*'s contribution to the purchase price and relates back to a pre-conveyance agreement and a resulting trust was appropriate. Of course, in the latter situation, the "payment" is not directed to the vendor, but as in *Shelton v. Harrison*,¹⁹⁰ the "payment" instead goes to the grantee so the latter is enabled to pay the purchase price.

188. *Welborn v. Rigdon*, 231 S.W.2d 127, 133 (Mo. 1950).

189. 72 N.H. 241, 56 A. 190 (1903).

190. 182 Mo. App. 404, 167 S.W. 634 (Spr. Ct. App. 1914).

In certain improvement cases, even though a resulting trust would be inappropriate, other relief such as an equitable lien may be available to the trust claimant. Such a remedy may be imposed, for example, where one party erects improvements on land under an honest mistake as to the title.¹⁹¹ For example, in the very recent case of *Coffman v. Coffman*,¹⁹² a husband paid for the construction of a house on a lot he thought was owned by his wife, but in which his wife actually had only a life estate. The supreme court agreed that the imposition of a resulting trust was improper, but concluded that an equitable lien was appropriate because of the husband's mistake as to the state of the title to the lot. However, in situations such as the *Welborn* case, this ground for an equitable lien does not exist because the plaintiff is fully aware of the state of title. This will usually be the case where the agreement to construct improvements does not antedate the grantee's legal title. Missouri cases also state that an equitable lien would be appropriate where there is no adequate remedy at law and justice would suffer without the equitable remedy. This doctrine has generally been limited, however, to situations where there is an express agreement or conduct from which an intention may be implied that specific property shall be security for a debt or obligation.¹⁹³ The *Welborn* court, for example, was unable to find such an intention either implicitly or by express agreement in that case.

One additional problem with respect to purchase-money resulting trusts and credit land transactions deserves special attention. The problem is posed by the following hypothetical presented by the *Restatement of Trusts*:

X is the owner of Blackacre. *A* purchases Blackacre from *X* for \$10,000, \$4,000 to be paid in cash, the balance to be secured by a mortgage on the land. *A* pays *X* \$4,000, and at *A*'s direction *X* conveys Blackacre to *B* who gives *X* his note for \$6,000 secured by a purchase-money mortgage on Blackacre.¹⁹⁴

Clearly, *A* should have the benefit of a presumption of purchase-money resulting trust at least as to the \$4,000 down payment. As to the balance

191. See *Coffman v. Coffman*, 414 S.W.2d 308 (Mo. 1967); *Welborn v. Rigdon*, 231 S.W.2d 127 (Mo. 1950).

192. 414 S.W.2d 308 (Mo. 1967).

193. E.g., *Wilkinson v. Tarwater*, 393 S.W.2d 538, 542 (Mo. 1965); *Hahn v. Hahn*, 297 S.W.2d 559, 565 (Mo. 1957) (En Banc).

194. RESTATEMENT (SECOND) OF TRUSTS § 456, Illustration 8 (1959). (Italics added).

of \$6,000, however, the *Restatement of Trusts* concludes that the fact alone that *B* obligated himself as to the balance should not raise an inference that *B* has a beneficial interest in the real estate; rather there should be an inference of resulting trust for the benefit of *A* for all of the land. Here the additional inference is that *A* undertakes to exonerate *B* from any liability to pay *X* if on foreclosure the property should be insufficient to pay the balance of the purchase price.¹⁹⁵ Of course, *B* cannot be compelled to transfer title to *A* until *A* pays off the mortgage.¹⁹⁶

Missouri cases, however, apparently apply different reasoning with respect to the \$6,000 balance. *Davis v. Roberts*¹⁹⁷ exemplifies Missouri's difference from the *Restatement* in this respect. In that case plaintiff's son made a \$1,000 down payment on a house, the title to which was taken in the name of his parents. The parents executed notes and deeds of trust for the balance. Even though the son paid off the notes, the court allowed no presumption of resulting trust in the son's favor beyond the \$1,000 down payment because the son was not legally obligated in any way to pay off these notes; nor were the payments made pursuant to any pre-conveyance agreement with the parents or the vendor. In other words, the court seemed to assume that the actions of the parents in executing the notes and deeds of trust simply constituted, without other indication to the contrary, their contribution to the purchase price of the house.¹⁹⁸ On the other hand, the *Restatement of Trusts* would seem to assume that where more than one party contributes toward the purchase of land, the party supplying cash should have a preferred status, as to the presumption of resulting trust in the whole interest, over the party who takes title and contributes his secured note toward the purchase price. The Missouri approach, however, appears somewhat more realistic in that it assumes, absent evidence to the contrary, that a party who takes title and obligates himself alone as to the balance of the purchase price, intends to obtain a beneficial interest in the real estate. Normally, a person would think twice before executing a note as the sole obligor without some expectation of an interest in the property. The party supplying the cash in the above situation should at least have to establish that he agreed prior to the delivery of the deed that he would be responsible for payment of the

195. RESTATEMENT (SECOND) OF TRUSTS § 456, comment f (1959).

196. RESTATEMENT (SECOND) OF TRUSTS § 456, Illustration 8 (1959).

197. 295 S.W.2d 152 (Mo. En Banc 1956). See previous discussion of *Davis* in text at note 165 *supra*.

198. For reasoning apparently similar to *Davis* see *Dougherty v. Duckworth*, 388 S.W.2d 870, 875-877 (Mo. 1965); *Adams v. Adams*, 348 Mo. 1041, 156 S.W.2d 610, 614-616 (1941).

note and that the grantee was to be exonerated of any personal liability incurred because of his execution of the note.

VI. ILLEGAL CONDUCT OF PAYOR—"CLEAN HANDS" PROBLEM

As in other equitable contests, the clean hands doctrine is applicable to actions of payors to establish purchase-money resulting trusts.¹⁹⁹ Title is often taken in the name of a person other than the payor for a variety of legitimate reasons. These range from the desire in certain instances to conceal a purchase from friends and family to the credit situation where the grantee holds title as security for a loan repayment. However, where the payor pays the purchase price for land and title is taken in another's name because of some fraudulent or otherwise unlawful purpose on the part of the payor, equity courts will often refuse to enforce an otherwise clearly enforceable resulting trust.²⁰⁰ Courts tend to apply the same standards to the purchase-money resulting trust situation in this respect as they do where a person transfers land on express trust to a third party with a fraudulent or unlawful purpose.²⁰¹ In either case, the court may refuse to require the grantee to relinquish title to the real estate, even though the grantee is often party to the trust claimant's illegal purposes. These express trust cases as well as purchase-money resulting trust cases are helpful in considering the Missouri approach to the above problems.

The most common situation raising the clean hands problem is created by the allegation that the payor had title taken by another for the purpose of defrauding his creditors. The Missouri cases in this respect are often confusing. Some say that no relief should be granted where the payor acted at the time of conveyance with the purpose of defrauding his creditors,²⁰² while others indicate that relief should be denied only where it can be established that harm has actually occurred to creditors.²⁰³ A few early

199. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEE. § 463 at 634 (2d ed. 1964). A few states have statutes providing that a conveyance of the purchase-money resulting trust type is presumed fraudulent against creditors. See statutes in notes 258 and 263 *supra*.

200. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES, § 463 at 634 (2nd ed. 1964).

201. *Ibid.*

202. *E.g.*, Keener v. Williams, 307 Mo. 682, 706, 271 S.W. 489, 496 (1925); Sell v. West, 125 Mo. 621, 628, 28 S.W. 969, 970 (1894); Gammage v. Latham, 222 S.W. 469, 471 (Mo. 1920); Rowley v. Rowley, 197 S.W. 152, 156 (Mo. 1917); Cape County Sav. Bank v. Wilson, 225 Mo. App. 14, 25, 34 S.W.2d 981, 984 (St. L. Ct. App. 1931).

203. *E.g.*, Stephenson v. Stephenson, 351 Mo. 8, 171 S.W.2d 565, 568 (1943). See also Cook v. Mason, 353 Mo. 993, 185 S.W.2d 793 (1945).

cases in the first category contain the language that "a resulting trust can not arise or spring into being when the transactions on which the supposed trust is bottomed, appear to have had their origin in *any* fraudulent purpose."²⁰⁴ In these cases, there is usually no delineation as to whether creditors were actually injured; rather the courts focus primarily on the *intent* of the original payor. Equally confusing about this category of cases is the fact that the courts assume that the payor's fraudulent purpose *prevents the creation* of a trust rather than the *enforcement* of the trust. It would appear to be inaccurate to say that no trust results in such a situation because the existing or subsequent creditors of the payor or a wife defrauded of her marital rights should be able to have the benefit of a resulting trust even though the wrongdoer and his successors should not have the benefit thereof. In fact, the "no trust" approach was rejected in later cases.²⁰⁵ In *Cape County Sav. Bank v. Wilson*,²⁰⁶ for example, a creditor was seeking to enforce a purchase-money resulting trust in real estate in favor of the debtor-payor and one of the defenses was that since the payor had taken title in order to defraud his wife of her marital rights, a resulting trust could not arise. The St. Louis Court of Appeals correctly concluded that even though a trust could not be declared in favor of the payor, a trust could result to him in favor of his creditors, existing and subsequent.²⁰⁷

*Stephenson v. Stephenson*²⁰⁸ falls within the category of cases which consider whether harm has actually resulted to creditors. In that case a makeshift written trust of real estate was set up by the plaintiff to avoid claims of creditors, pursuant to which real estate was transferred to plaintiff's mother-in-law. Upon the mother-in-law's death, the latter's heirs refused to reconvey the real estate to the plaintiff. Plaintiff sued to establish a trust. The Missouri Supreme Court rejected a clean hands defense based on plaintiff's fraudulent intent because it was established that all of plaintiff's creditors had apparently been paid and thus had suffered no harm. Admittedly, the *Stephenson* case involves an express and not a resulting

204. *Sell v. West*, 125 Mo. 621, 628, 28 S.W. 969, 970 (1894) (emphasis added). See also *Keener v. Williams*, 307 Mo. 682, 692, 271 S.W. 489, 496 (1925).

205. See *LaRue v. LaRue*, 294 S.W. 723, 726 (Mo. 1927); *Cape County Sav. Bank v. Wilson*, 225 Mo. App. 14, 25, 34 S.W.2d 981, 984 (St. L. Ct. App. 1931).

206. 225 Mo. App. 14, 25, 34 S.W.2d 981, 984 (St. L. Ct. App. 1931).

207. *Ibid.* In any event, if a creditor can establish a fraudulent conveyance under § 428.020, RSMo 1959, reliance on a resulting trust may be unnecessary. This statute, however, is beyond the scope of this article. See generally Comment, *Fraudulent Conveyances—Element of Intent in Missouri*, 25 U.K.C.L. REV. 104 (1957).

208. 351 Mo. 8, 171 S.W.2d 565 (1943).

trust. It could be argued that, while more than fraudulent motive is necessary in express trust situations, a more rigorous clean hands standard should be applied where trusts are implied by law. However, because courts tend to apply the same standards in both situations,²⁰⁹ the Missouri courts apparently could require "actual harm" to creditors in resulting trust situations.

Presumably, when a resulting trust is created without a fraudulent purpose, the subsequent concealment of the trust by the beneficiary to avoid creditors' claims should not prevent the beneficiary from enforcing it against the grantee.²¹⁰ The Missouri decision in *Abernathy v. Hamppe*²¹¹ casts some doubt on this assumption, however. In that case, the St. Louis Court of Appeals appeared to sustain a clean hands defense to a claim for resulting trust by plaintiff real estate broker in part because judgments were rendered against the plaintiff while the real estate was concealed in a trust. The court, however, may have felt that the subsequent concealment of the trust from creditors was strong evidence that the original conveyances were made with a fraudulent purpose.²¹² In other words, the subsequent fraudulent actions are *related* back to the original transaction.

The payor's conduct may prevent enforcement of a resulting trust for his or his successor's benefit in cases which do not involve fraud on creditors. Courts have refused to enforce resulting trusts where the payor was involved in an effort to defeat statutes governing homesteading of government land, to assist in carrying on an illegitimate business, to serve illicit sexual relations and to avoid restrictions on alien land holding.²¹³ In *Miller v. Davis*,²¹⁴ for example, an early Missouri case, a father purchased government land in the name of the defendant, his son, because under federal statutes, the father had already purchased the maximum legally permitted. The father sold his interest to plaintiff and plaintiff sued for the imposition of a purchase-money resulting trust in his favor. The Missouri Supreme Court held that because the father's act in so purchasing the land in the name of his son violated public policy, no trust would be imposed for plaintiff's benefit.

209. See text at note 201 *supra*.

210. 5 A. SCOTT, TRUSTS § 444 at 3354 (3rd ed. 1967).

211. 53 S.W.2d 1090 (St. L. Mo. App. 1932).

212. 5 A. SCOTT, TRUSTS § 444 at 3354 (3rd ed. 1967).

213. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 463 at 640-641 (2d ed. 1964).

214. 50 Mo. 572 (1872).

The basic problem with the clean hands defense is the absence of workable standards for predictable application. Courts not only consider the payor's illegal or fraudulent conduct but also the degree of involvement and culpability of the grantee.²¹⁵ It seems illogical to permit one guilty party to retain property paid for by another guilty party. Courts are probably unwilling to permit unjust enrichment of an obviously guilty party because of the payor's misconduct. The courts, when reiterating the clean hands maxim or the doctrine of nonenforceability of agreements that are against public policy, must not fail to recognize that such cases involve a delicate balancing process. Professor Scott and the *Restatement of Trusts* implicitly recognize the inadequacy of the traditional formulas by concluding that the question in each case should be whether the policy against unjust enrichment of the grantee is "out-weighed by the policy against giving relief to the payor who has entered into an illegal transaction."²¹⁶ Thus in each situation the court should be able to consider openly several subjective factors, such as the extent to which creditors were harmed, the amount of the enrichment of the grantee if relief is not given, and the relative wealth of the payor and the grantee. For example, a court may determine that a payor's prior attempt to defraud creditors should not be controlling where the payor is financially embarrassed and the grantee, on the other hand, is wealthy. In that case, perhaps the policy against unjust enrichment should prevail over the policy in favor of deterring defrauding of creditors. The *Restatement* rule openly recognizes a balancing approach and it seems to be desirable because it delineates in simpler terms what the courts have actually been doing while ostensibly following the traditional clean hands concept and related doctrines.

VII. RELATIONSHIP OF PURCHASE-MONEY RESULTING TRUSTS TO CONSTRUCTIVE TRUSTS

Certain fact situations are susceptible not only to possible application of purchase-money resulting trust theory, but to constructive trust concepts as well. The two theories are especially pertinent where the party paying the purchase price and the grantee agree orally that the grantee is to hold the title for the benefit of a third party. In order to understand the rather complex nature of the above and related fact situations, it is necessary to

215. *E.g.*, *Sines v. Shipes*, 192 Md. 139, 63 A.2d 748 (1949).

216. *RESTATEMENT (SECOND) OF TRUSTS* § 444 (1959); *See* 5 A. SCOTT, *TRUSTS* § 444 at 5349 (3rd ed. 1967).

examine briefly the nature of the constructive trust and its relationship to the purchase-money resulting trust.

Purchase-money resulting trusts, as we have seen, arise because the circumstances of the transaction and the *actions* of the parties raise a presumption that the payor intended to make the grantee a trustee rather than a beneficial owner of the conveyed property.²¹⁷ In other words, courts are enforcing the payor's presumed *intent*. On the other hand, a constructive trust will be imposed where a person holding title to property is under a duty to convey it to another in order to prevent the unjust enrichment of the title-holder.²¹⁸ The constructive trust does not depend on the presumed intention of the parties whereas the purchase-money resulting trust is intent-enforcing.²¹⁹

The basic distinction between the purchase-money resulting trust and the constructive trust is best explained by an analysis of the essential elements of the purchase-money resulting trust. If *A*'s money is used to purchase property in *B*'s name with *A*'s consent, or if *A* directs in such a situation that title be taken in *B*'s name, the law imposes a presumption of resulting trust because it is presumed that *A*'s intent was that *B* have the legal title, but not the beneficial interest in the property.²²⁰ In other words, it is not *B*'s actual acquisition of legal title that was wrongful, but rather his retention thereof. On the other hand, where the facts establish that *A* did not consent to the use of his money in the purchase or did not consent to the conveyance to *B*, the remedy technically is the imposition of a constructive trust—that is, he is permitted to follow his money into the land.²²¹ The theory behind the constructive trust is not that *A* intended that *B* have the legal but not the beneficial interest in the land, but rather that *B* has *wrongfully acquired* the legal title to the land and that *B* would be unjustly enriched if he is permitted to retain it.

One type of constructive trust situation highly relevant to the analysis of this section is the absolute conveyance of land on oral trust for the grantor or a third party beneficiary. Under the rule in effect in England and followed in a minority of American cases, courts will impose a constructive

217. See text at note 15 *supra*.

218. 5 A. SCOTT, TRUSTS § 440.1 at 3315 (3rd ed. 1967).

219. *Ibid.* See *Suhre v. Busch*, 123 S.W.2d 8, 15 (Mo. 1938).

220. 5 A. SCOTT, TRUSTS § 440.1 at 3316 (3rd ed. 1967).

221. RESTATEMENT (SECOND) OF TRUSTS § 440 Introductory Note (1959). A constructive trust in this context may also arise "where a person in a fiduciary relation to another uses his own money in purchasing property in his own name if the purchase is in violation of his duty as a fiduciary." *Ibid.*

trust in favor of a grantor who conveyed land upon an oral trust in favor of the *grantor* or pursuant to an oral contract with the grantee to reconvey to the *grantor*, notwithstanding the reliance by the recalcitrant grantee on the Statute of Frauds.²²² However, the large majority of American cases do not impose a constructive trust in the above situation unless (1) The transfer was obtained by fraud, duress, undue influence or mistake; (2) The grantee was at the time of the transfer in a confidential relation to the grantor; or (3) The transfer was made as security for an indebtedness of the grantor.²²³ Although there are a few early Missouri cases seemingly following the English rule,²²⁴ most recent Missouri authority appears to accept the majority American rule.²²⁵ Where the intended beneficiary of the oral trust or agreement is a *third party* the approach of most courts is simi-

222. *E.g.*, *Bannister v. Bannister*, [1948] 2 All E.R. 133; *Steinberger v. Steinberger*, 60 Cal. App. 2d 116, 140 P.2d 31 (Cal. Dist. Ct. App. 1943); *Eastmond v. Eastmond*, 2 N.J. Super. 532, 64 A.2d 901 (Ch. Div. 1949); 1 A. SCOTT, TRUSTS § 44 at 325-327 (3rd ed. 1967). Of course, those jurisdictions in which Section 16 of the Uniform Trust Act is in effect must be included within the minority rule. *See* Uniform Trust Act § 16 (1937). These jurisdictions are in New Mexico, North Carolina, South Dakota and the Virgin Islands. *See* 9C Uniform Laws Annot. 192 (1967 Supp.). For a general discussion of the absolute conveyance-oral trust doctrine, *see* Comments, 1 CREIGHTON L. REV. 95 (1968).

223. *Fratcher, Trusts and Succession*, 22 Mo. L. Rev. 390, 412 (1957). *See e.g.*, *Musser v. General Realty Co.*, 313 S.W.2d 5 (Mo. 1958) (fraud); *Basman v. Frank*, 250 S.W.2d 989 (Mo. 1952) (confidential relationship). It has been suggested that the trend in the American authority is toward the English rule. *See* RESTATEMENT (SECOND) OF TRUSTS § 44, comment *a* (1959).

224. *See Peacock v. Nelson*, 50 Mo. 256 (1872); *O'Day v. Annex Realty Co.*, 191 S.W. 41 (Mo. 1917). *O'Day* contains the following statement: "Where a grantee takes possession of real estate under a deed, absolute in its terms, under a parol agreement, whereby he undertakes to hold the property for some legitimate purpose, or to sell and account for the proceeds, or to reconvey it to the grantor, his refusal to perform his promise amounts to a constructive fraud, and he will be held to be a trustee for the grantor or his heirs." *O'Day v. Annex Realty Co.*, 191 S.W. 41, 48 (Mo. 1917).

225. *See, e.g.*, *Beach v. Beach*, 207 S.W.2d 481 (Mo. 1947); *Parker v. Blakeley*, 338 Mo. 1189, 93 S.W.2d 981 (1936). The *Parker* court practically overrules the language of the *O'Day* case quoted in note 224 *supra* with the following comment: "It [the language of *O'Day*] might be dismissed as surplusage or dictum, but we deem it advisable to point out that it does not accurately state the prevailing rule in this jurisdiction." *Parker v. Blakeley*, 338 Mo. 1189, 1205, 93 S.W.2d 981, 990 (1936). The *Beach* case states: "Fraud, either actual or constructive, was an essential element of the alleged constructive trust . . . The simple violation, however, of a parol contract does not give rise to a constructive trust for, if such was the law, the statute of frauds would be virtually repealed." *Beach v. Beach*, 207 S.W.2d 481, 486 (Mo. 1947). The latter language does not in any way conflict with *Parker* because *Parker*, as we have seen, rejected the *O'Day* language which would have equated a refusal to carry out an oral trust for the grantor with constructive fraud. *See Schultz v. Curson*, 421 S.W.2d 205, 213 (Mo. 1967), where mere breach of an oral agreement, without more was not sufficient to impose a constructive trust on grantee; *Karnopp v. Karnopp*, 387 S.W.2d 527, 531 (Mo. 1965). *But see* *Suhre v. Busch*, 343 Mo. 679, 696-697, 123 S.W.2d 8, 16-17 (1938) (*dicta*).

lar to that described above. Under the majority approach, the Statute of Frauds prevents the enforcement of the oral trust or the imposition of a constructive trust.²²⁶ However, a few courts have imposed a constructive trust in favor of the grantor where the grantee refuses to perform, notwithstanding the Statute of Frauds²²⁷ and the same result is reached in those states following Section 16 of the Uniform Trusts Act.²²⁸ Under the majority approach the grantee will be allowed to retain the land,²²⁹ but the courts will nevertheless impose a constructive trust in favor of the third party if the grantee is guilty of fraud, duress, or undue influence or if a confidential relationship or contemplation of death is involved.²³⁰ Although there is some confusion, Missouri appears to follow the majority approach.²³¹

With this brief background in certain areas of constructive trusts we should return to the following hypothetical: Suppose *A* supplies the purchase money for land and directs that title is to be taken in the name of *B*, the latter agreeing orally to hold in trust for or to convey to *C*, *A*'s intended beneficiary.²³² This situation differs from that in the preceding paragraph in that in the former situation the settlor of the trust was the grantor, whereas in the instant situation the settlor simply pays the purchase price without ever having had title to the land. Presumably *C* could not enforce the oral agreement because to do so would violate the Statute of Frauds.²³³ On the other hand, *C* should not be granted a purchase-money resulting trust because *C* did not supply the purchase money.²³⁴

226. See, e.g., *Jones v. Gachot*, 217 Ark. 462, 230 S.W.2d 937 (1950); *Ampuero v. Luce*, 68 Cal. App. 2d 811, 157 P.2d 899 (1945); *Levy v. Seadler*, 272 Pa. 366, 116 Atl. 294 (1922); 1 A. SCOTT, TRUSTS § 45 at 351 (3rd ed. 1967), and cases cited therein.

227. See, e.g., *Androscoggin County Savings Bank v. Tracy*, 115 Me. 433, 99 Atl. 257 (1916); *Androski v. Thurber*, 136 Cal. App. 2d 471, 288 P.2d 898 (1955). 9C Uniform Laws Annot. 290 (1957).

228. Uniform Trusts Act § 16 (1937). See note 222 *supra*.

229. See 9C Uniform Laws Annot. 290 (1957).

230. See RESTATEMENT (SECOND) OF TRUSTS § 45, comments *a* and *b* (1959).

231. See *Mugan v. Wheeler*, 241 Mo. 376, 145 S.W. 462 (1912); *Thomson v. Thomson*, 211 S.W. 52 (Mo. 1919); *Wolfskill v. Wells*, 154 Mo. App. 302, 134 S.W. 51 (K.C. Ct. App. 1911); *Janssen v. Christian*, 57 S.W.2d 692 (St. L. Mo. App. 1933), involving fraud and contemplation of death. *But see* *Suhre v. Busch*, 123 S.W.2d 8, 16-17 (Mo. 1938).

232. 5 A. SCOTT, TRUSTS § 453 at 3365 (3rd ed. 1967).

233. *Id.* at 3336.

234. Professor Scott implicitly criticizes the Missouri Supreme Court decision in *Lewis v. Lewis*, 225 S.W. 974 (Mo. 1920) because a resulting trust was imposed in favor of a third party beneficiary. See 5 A. SCOTT, TRUSTS § 453 at 3368 (3rd ed. 1967). This interpretation of the case may be subject to some question. Actually the court determined that the supposed third party oral trust beneficiary paid the purchase price herself because the pertinent part of the money was

Moreover, a constructive trust in favor of *C* seems illogical since *B* is not enriched at *C*'s expense.²³⁵

Persuasive arguments, however, are available to support granting relief for the benefit of *A*. Perhaps a constructive trust for *A*'s benefit should be imposed to prevent *B*'s enrichment at *A*'s expense. In addition, as a general rule, where an express trust fails for reasons other than the Statute of Frauds, and consideration for the transfer is paid by a party not the transferor, a resulting trust will be imposed in favor of the person paying the consideration.²³⁶ Consequently, it would also seem proper to decree a resulting trust where the failure of the express trust is tied to the Statute of Frauds. The most compelling argument, however, can be advanced in favor of a purchase-money resulting trust in favor of *A*. The essential elements of a purchase-money resulting trust are present in that *A* has paid the purchase price and has directed that title be taken in the name of *B*. As we have noted earlier, *B* would not be permitted to rely on the existence of an unenforceable oral agreement to hold on trust for *A* to defeat the presumption of resulting trust created because of *A*'s other acts.²³⁷ *B* should similarly be prevented from utilizing such an oral agreement where the intended beneficiary is a third party, notwithstanding the fact that, in the latter situation, the oral agreement negates rather than supports a presumption that *A* should have the beneficial interest in the land. *B* should simply be prohibited from utilizing the unenforceable oral agreement to hold in trust in any way to enable himself to retain the land as against *A*, the payor. Simply stated, as to *A*, courts arguably should ignore the oral agreement and otherwise apply normal purchase-money resulting trust principles.

There is dictum lending some support to the latter argument above in the Missouri case of *Bender v. Bender*.²³⁸ In that case, the petition alleged that a husband provided the purchase price for real estate and had title taken jointly with his wife subject to an agreement that in the event

advanced by her father as a *gift* to her. The court also noted that without her consent her name was omitted as a grantee and that she continuously thereafter assumed that her name so appeared. Thus, the case would appear to call for a constructive trust because the daughter's money was used to purchase the land; however, there was no consent on her part to the conveyance to the actual grantee. See text at note 221 *supra*. Although the court erroneously labeled the trust "resulting" the result in the case seems perfectly justifiable.

235. 5 A. SCOTT, TRUSTS § 453 at 3366 (3rd ed. 1967).

236. 5 A. SCOTT, TRUSTS § 424 at 3273 (3rd ed. 1967).

237. See text at notes 16 through 21 *supra*.

238. 281 Mo. 473, 202 S.W. 929 (1920).

of a divorce the wife would hold her interest in the property as trustee for his children. The Missouri Supreme Court refused to find a resulting trust of any kind because of the presumption of gift to the wife.²³⁹ However, the court did indicate that if the title had been taken jointly and the parties had been strangers, "a trust would result in the payor's favor for the half interest held in the name of the other joint tenant."²⁴⁰ Implicit in such dicta is the recognition that although the children would not be entitled to relief, because to grant such relief would in effect enforce an invalid oral agreement, the presence of such an agreement should not prevent ordinary purchase-money resulting principles from applying to *A*, the payor.

Interestingly, Professor Scott suggests that if *B* is guilty of fraud in persuading *A* to make the conveyance or if *A* and *B* were in a confidential relationship with each other, *C* should be entitled to the land.²⁴¹ He appears to rely on the majority rule which entitles a third party beneficiary to a constructive trust in certain cases where there has been a breach of an oral trust or agreement to reconvey.²⁴² This reliance, of course, is probably by analogy only, because the majority rule as well as the language of section 45 of the *Restatement of Trusts* and section 183 of the *Restatement of Restitution* dealing therewith each specifies that the settlor actually have transferred an interest in land.²⁴³ Such rules, of course, do not literally apply where the settlor simply supplies the purchase money because he technically is not a transferor of real estate. In any event, this anomaly should not prevent such concepts from being applied by analogy to the purchase money situation. Moreover, it may be advisable to include within the rules in the *Restatements* the settlor who simply pays the purchase price, as well as the grantor-settlor who actually conveys an interest in real estate.

Another important fact situation raising both constructive trust and

239. See text at notes 76 through 77 *supra*.

240. *Bender v. Bender*, 281 Mo. 473, 474, 220 S.W. 929, 930 (1920).

241. 5 A. SCOTT, TRUSTS § 453 at 3367 (3rd ed. 1967).

242. See text at notes 229 through 230 *supra*.

243. RESTATEMENT (SECOND) OF TRUSTS § 45 (1959); RESTATEMENT OF RESTITUTION § 183 (1937). RESTATEMENT OF RESTITUTION §§ 163-179 (1937), dealing with mistake, fraud, duress and undue influence, seems inapplicable to the instant situation because it appears to assume a transferor who has a greater interest in the transaction than simply to receive the purchase price. Cf. RESTATEMENT OF RESTITUTION § 133 (1937). The Missouri Supreme Court has indicated, however, that RESTATEMENT OF RESTITUTION § 182(a) (1939) may be applicable in a confidential relationship situation where *A* pays the purchase price and has *B* take title on oral trust for *A*. See *Wilbur v. Wilbur*, 312 S.W.2d 86, 90-91 (Mo. 1958).

purchase-money resulting trust implications is as follows: *A* owns an interest in land which is about to be sold by a mortgage foreclosure sale or by some type of judicial sale. *B* promises *A* orally that *B* will buy in at the sale and *B* also agrees orally to reconvey the land to *A* upon *A*'s payment. Accordingly *A* takes no action to prevent the sale and does not bid in thereon. Thereafter *B* purchases the land at the sale and refuses to reconvey to *A*.²⁴⁴

Under the prevailing rule in this country a constructive trust will be imposed on the land in favor of *A* subject to *A*'s reimbursement of *B* for payments made by *B*, and *A* will not be required to establish that *B* never intended to carry out his promise or was guilty of fraud or that there was a fiduciary relationship or confidential relationship between the parties.²⁴⁵ The important requirement under the above position is that *B*'s promise actually induced *A* to forego steps to take part in the sale or otherwise protect his position. A few states, however, have held that a constructive trust is unavailable unless there is a showing of fraud or of a confidential relationship.²⁴⁶

Missouri has, to some extent, experimented with both positions, although more recent authority indicates that Missouri has adopted the majority approach. For example, in *Gates Hotel Co. v. CRH Davis Real Estate Co.*,²⁴⁷ the Missouri Supreme Court stated that in an oral trust of the kind discussed above "fraud must be distinctly alleged and clearly proved."²⁴⁸ Yet cases both prior to and after *Gates* indicate that proof of fraud is unnecessary so long as it can be shown that the owner in reliance on the promise of the purchaser did not take steps to protect his property interest.²⁴⁹ The relatively recent case of *Swon v. Huddleston*²⁵⁰ clearly re-establishes Missouri within the majority rule. In that case, the Missouri Supreme Court cited the majority rule with approval and rather ingeniously distinguished the *Gates* case. According to *Swon*, "circumstances showing that the oral promise actually induced the beneficial owner . . . from protecting . . . the property, and that bidding was actually 'chilled' and sup-

244. 1 A. SCOTT, TRUSTS § 44.4 at 344 (3rd ed. 1967).

245. *Id.* at 345.

246. *Id.* at 346.

247. 331 Mo. 94, 52 S.W.2d 1011 (1932).

248. *Id.* at 104, 52 S.W.2d at 1014. See also *Gates Hotel Co. v. Federal Inv. Co.*, 331 Mo. 107, 52 S.W.2d 1016 (1932).

249. See, e.g., *Swon v. Huddleston*, 282 S.W.2d 18 (Mo. 1955); *Laughlin v. Laughlin*, 291 Mo. 472, 237 S.W. 1024 (1922).

250. 282 S.W.2d 18 (Mo. 1955).

pressed, to the distinct financial advantage of the defendant"²⁵¹ could constitute "constructive fraud." Thus, in the latter sense, fraud could be "distinctly alleged and clearly proven." *Swon* also indirectly points out what must be implicit in the majority rule that the beneficial owner actually have had the ability to protect the property in absence of reliance on the oral promise of the actual purchaser.²⁵²

A slight change in the basic fact situation discussed above creates purchase-money resulting trust as well as constructive trust implications. Suppose that *B* bids in at the sale and pays the purchase price as a loan to *A*. In effect the situation is identical to that previously discussed where a grantee advances the purchase price of land and takes title thereto as security for the repayment of the purchase price.²⁵³ In the instant situation, of course, *A* at the time of the sale actually owns the real estate whereas in the normal case neither of the parties have a prior interest therein. However, the principle of a purchase-money resulting trust presumably is equally applicable in the forced sale situation.²⁵⁴ Of course, as in the constructive trust situation, the imposition of the purchase-money resulting trust would be subject to reimbursement of the grantee for the amount he paid on the purchase price.

VIII. EVALUATION AND CONCLUSION

The purchase-money resulting trust concept has not been free of criticism. Some courts have regarded such trusts as possible instruments of fraud and perjury by which rightful owners are deprived of their property.²⁵⁵ Another objection has been that purchase-money resulting trusts result in upsetting formal documents and thus make title to land uncertain.²⁵⁶ Moreover, it has been argued that fraud on creditors is encouraged by such trusts because creditors of the grantee are deceived with respect to the grantee's assets and the creditors of the payor are similarly misled with respect to the payor's assets.²⁵⁷

In fact, statutes in Kentucky, Michigan, Minesota, New York, and

251. *Swon v. Huddleston*, 282 S.W.2d 18, 27 (Mo. 1955).

252. *Ibid.*

253. See text at notes 123 through 125 *supra*.

254. 1 A. SCOTT, TRUSTS § 44.4 at 349 (3rd. ed. 1967).

255. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 452 at 505 (2d ed. 1964); *Boyd v. McLean*, 1 Johns. Ch. (N.Y.) 582, 590 (1815).

256. See note 255 *supra*.

257. McMullin, *Purchase-Money Resulting Trusts in Missouri*, 6 Mo. L. REV. 354, 359 (1941).

Wisconsin have abolished the purchase-money resulting trust.²⁵⁸ Such statutes are very similar because they have a common origin in the statute adopted by New York in 1830.²⁵⁹ In general they provide that in the usual purchase-money resulting trust situation, no trust or use shall be declared for the payor unless (1) the grantee takes title in his own name without consent of the payor or (2) the grantee in violation of some trust purchases the land with the money or property of another.²⁶⁰ Moreover, there is a presumption that such purchase-money conveyances are fraudulent against the creditors of the payor and unless the fraudulent intent is disproved, a trust shall result in favor of such creditors to the extent necessary to satisfy their demands.²⁶¹ The two exceptions, of course, involve the wrongful acquisition of legal title and, as we have noted previously, call for the imposition of a constructive rather than a resulting trust.²⁶²

Indiana and Kansas have similar provisions abolishing purchase-money resulting trusts,²⁶³ but these statutes are inapplicable where it can be established that, absent any fraudulent intent, there is an agreement that the grantee hold the land in trust for the payor.²⁶⁴ Such agreements need not be written.²⁶⁵ Since in most cases there is some type of agreement present in addition to the elements creating the resulting trust presumption, it would appear that the Indiana and Kansas statutes are really not serious limitations on the creation of purchase-money resulting trusts. Essentially, these statutes simply do away with the presumption of resulting trust and put the burden on the trust claimant to establish the trust intent.²⁶⁶

In those states with statutes similar to that of New York, the simple fact of payment of the purchase price for a conveyance to another gives the payor no trust claim with respect to the property. Moreover, some cases have reached the same result notwithstanding the fact that the

258. See KY. REV. STAT. § 381.170 (1962); MICH. STAT. ANN. §§ 26.57-26.59 (1957); MINN. STAT. §§ 501.07-501.09 (1965); N. Y. ESTATES, POWERS AND TRUSTS LAW § 7-1.3 (1967); WIS. STAT. ANN. §§ 231.07-231.09 (1957); 5 A. SCOTT, TRUSTS § 4402 at 3317 (3rd ed. 1967). Four other states expressly permit purchase-money resulting trusts. See note 3 *supra*.

259. 5 A. SCOTT, TRUSTS § 440.2 at 3318 (3rd ed. 1967).

260. *Id.* at 3317-3318.

261. *Id.* at 3318.

262. See text at note 221 *supra*.

263. IND. ANN. STAT. §§ 56-606-56-608 (1962); KAN. STAT. ANN. §§ 58-2406-58-2408 (1964).

264. IND. ANN. STAT. § 56-608 (1962); KAN. STAT. ANN. § 58-2408 (1964).

265. See *Hadley v. Kays*, 121 Ind. App. 112, 98 N.E.2d 237 (1951); *Taylor v. Walker*, 114 Kan. 614, 220 P. 518 (1923); *Gossage, Constructive and Resulting Trusts in Kansas*, 24 J. KAN. B. ASS'N. 104, 108 (1955).

266. 5 A. SCOTT, TRUSTS § 440.2 at 3318 (3rd ed. 1967).

grantee orally agreed to hold the property in trust.²⁶⁷ Many other cases, however, have imposed a constructive trust where there has been an oral trust agreement,²⁶⁸ although most of these cases have also relied on an element of fraud,²⁶⁹ of confidential relationship between the grantee and payor,²⁷⁰ or of part performance in reliance on an oral trust by the payor.²⁷¹ A very interesting case in this regard is the early Michigan case of *Linsley v. Sinclair*.²⁷² In that case, plaintiff had previously hired the defendant as an attorney to clear up title to certain land plaintiff had purchased. Defendant for two years bid in at tax sales as agent for the plaintiff. Defendant then suggested that it would make the title stronger if defendant would take title in his own name from the tax sales and later deed the land over to the plaintiff. Plaintiff consented and supplied the consideration for such purchases. Defendant, however, refused to reconvey to plaintiff and the latter sought a constructive trust against the defendant. Notwithstanding the Michigan statute discussed above, the Michigan Supreme Court affirmed a lower court decree in plaintiff's favor on the grounds that "a conveyance obtained by fraud can never be accepted as a shield of defence against the equitable claim of the party defrauded."²⁷³ Apparently the court considered the defendant guilty of fraud because he never intended to carry out his promise to reconvey.

Finally, it should be pointed out that none of the statutes prevent the payor from getting relief when the transaction is a combination of resulting trust and oral mortgage in favor of the grantee. In those situations, the courts simply permit the payor to establish the mortgage even though the statute would preclude reliance on a resulting trust.²⁷⁴

An analysis of the objections to purchase-money resulting trusts and of the experience in those jurisdictions having statutes prohibiting such trusts indicates that it is unwise to replace or modify the traditional purchase-money resulting trust doctrine applied by Missouri and the vast majority of American jurisdictions. As noted, in many instances juris-

267. See cases noted in 5 A. SCOTT, TRUSTS § 440.2 at 3320, note 9 (3rd ed. 1967).

268. See cases noted in 5 A. SCOTT, TRUSTS § 440.2 at 3320, note 8 (3rd ed. 1967).

269. *E.g.*, *Linsley v. Sinclair*, 24 Mich. 380 (1872).

270. *E.g.*, *Foreman v. Foreman*, 251 N.Y. 237, 167 N.E. 428 (1929).

271. *E.g.*, *Muller v. Sobol*, 277 App. Div. 884, 97 N.Y.S.2d 905 (1950). See 5 A. SCOTT, TRUSTS § 440.2 at 3321 (3rd ed. 1967).

272. 24 Mich. 380 (1872).

273. *Id.* at 382.

274. G. G. and G. T. BOGERT, TRUSTS AND TRUSTEES § 467 at 667 (2d ed. 1964).

dictions governed by statutes abolishing purchase-money resulting trusts reach essentially the same result as those jurisdictions applying the traditional resulting trust doctrine. Moreover, strong countervailing arguments seem to neutralize the traditional objections referred to earlier in this section. While it may be true that the purchase-money resulting trust doctrine to some extent encourages fraud and perjury, resulting trust cases will almost always be tried to a chancellor who probably is much less likely than a jury to be swayed by questionable testimony. In addition, the trust claimant has the burden to establish the essential elements of the presumption by "clear, cogent and convincing evidence to exclude all reasonable doubt from the mind of the court."²⁷⁵ While the purchase-money resulting trust does in a sense render formal title documents uncertain, such uncertainty is also caused by numerous other doctrines and remedies, of which the constructive trust and equitable lien are suitable examples. The trust claimant's rigorous burden of proof with respect to the essential elements of the presumption aids the creditors of the grantee, and the creditors may also in certain instances receive the benefit of an estoppel theory.²⁷⁶ Moreover, payor's creditors may be protected by the Fraudulent Conveyances Act,²⁷⁷ and the clean hands doctrine may also deter the payor from attempting to deceive his creditors.²⁷⁸ Perhaps the best argument in favor of the purchase-money resulting trust is simply that it is unfair to permit an undeserving grantee to retain the property as against the party paying the purchase price who is otherwise not guilty of misconduct.

Professor Scott has suggested that it may be reasonable to abolish the presumption that a trust is intended merely because the purchase price is paid by one and the title is taken in the name of another, in favor of simply putting the burden on the trust claimant to establish that a trust was intended.²⁷⁹ Although such an approach ostensibly would place a heavier burden on the trust claimant, it is difficult to predict whether it would substantially change the results obtained under the traditional doctrine. In any event, the traditional doctrine appears to have worked fairly well, and on balance there is little need to disturb rather well-settled purchase-money resulting trust principles.

275. See note 9 *supra*.

276. McMullin, *Purchase-Money Resulting Trusts in Missouri*, 6 MO. L. REV. 354, 359 (1941). See text at note 6 *supra*.

277. See note 207 *supra*.

278. See text at notes 199 through 216 *supra*.

279. 5 A. SCOTT, TRUSTS § 440.4 at 3325 (3rd ed. 1967).