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free of the remainder. In a somewhat similar case, a provision in a will required the erection of a monument, and the upkeep of the testator's grave. The provision relating to the upkeep of the grave was held void, but the part of the trust relating to the erection of the monument was upheld.[31]

Conversely, if to enforce the other provisions would so distort the disposition as to produce a result which the settlor would never have intended, the whole trust will fail.[32]

Stanley Jones.

RESULTING TRUSTS—AN EXCEPTION TO THE STATUTE OF FRAUDS

THE Texas Trust Act,[1] enacted in 1943, declares that all oral trusts "in relation to or consisting of real property" are unenforceable.[2] Resulting and constructive trusts are expressly excluded from its operation.[3] Today, however, express, oral trusts in land are being enforced by the courts, these trusts having been created prior to the passage of the Trust Act, and are thus unaffected by it.[4] Of concern here is the resulting trust, and it will now be considered in relation to parol and constructive trusts, as exemplified by recent Texas cases.

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[31] McIlvain v. Hockaday, 36 Civ. App. 1, 81 S. W. 54 (1904) *writ of error refused.*

[32] Brooker v. Brooker, 130 Tex. 27, 106 S. W. (2d) 247 (1937); Anderson v. Menefee, 174 S. W. 904 (Tex. Civ. App. 1915) *writ of error refused.*

[1] TEX. REV. CIV. STAT. (Vernon, Supp. 1943) Art. 7425b.

[2] TEX. REV. CIV. STAT. (Vernon, Supp. 1943) Art. 7425b-7, "An express trust may be created by one of the following means or methods: ... Provided, however, that a trust in relation to or consisting of real property shall be invalid, unless created, established, or declared by a written instrument. ..."

[3] TEX. REV. CIV. STAT. (Vernon, Supp. 1943) Art. 7425b-2, " 'Trust' for the purpose of this act means an express trust only, and does not include resulting or constructive trusts. ..."

[4] Binford v. Snyder, 144 Tex. 134, 189 S. W. (2d) 471 (1945).

The Texas Statute of Frauds[5] and the Statute of Conveyances,[6] the counterparts of the English Statute of Frauds[7] had omitted Sections 7, 8, and 9 of the English statute. The omitted sections are now generally included in the Texas Trust Act. Early Texas cases refused to extend the Statute of Conveyances[8] to cover equitable interests and allowed parol trusts, but enforced them only where the oral trust agreement was contemporaneous with a written conveyance. Where the agreement was made after the conveyance, it was condemned by the statute.[9] The effect of the sections of the Trust Act under discussion is to deny validity to express, oral trusts, except those arising prior to 1943, unless a resulting or constructive trust can be found.

A resulting trust rests upon what is presumed to be the actual, though sometimes unexpressed, intention of the parties, and is founded upon the equitable principle that the beneficial interest follows the consideration.[10]

The type of resulting trust to be discussed is exemplified by the following situation: A conveys land to B, the consideration for which was paid by C, and variations of this.[11] Here B holds title as trustee under a resulting trust for C, unless certain exceptions prevail, mainly those arising from a contrary intent by C.[12] This example must be distinguished from a case where A conveys to B with instruction to hold in trust for C, or where A conveys to B

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[5] TEX. REV. CIV. STAT. (Vernon, 1925) Art. 3995.

[6] TEX. REV. CIV. STAT. (Vernon, 1925) Art. 1288.

[7] 29 Charles II, Chapter 3 (1676).

[8] TEX. REV. CIV. STAT. (Vernon, 1925) Art. 1288, "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

[9] James v. Fulcrod, 5 Tex. 512 (1851); Meade v. Randolph, 8 Tex. 191 (1852); Allen v. Allen, 101 Tex. 362, 107 S. W. 528 (1908).

[10] RESTATEMENT, TRUSTS, § 440 (1935); 54 AM. JUR. 22, § 5 (1936); 54 AM. JUR. 147, § 188 (1936).

[11] RESTATEMENT, TRUSTS, § 440 (1935).

[12] *Id*, §§ 441, 442, 444.

with instruction to hold in trust for A.[13] The latter transactions, if declared in writing, are enforceable express trusts, but if declared orally, they are parol trusts and as such are expressly declared unenforceable by the Trust Act, unless elements are present from which a constructive trust may be found.[14]

Two recent cases have enforced parol, express trusts that were made prior to the Texas Trust Act, but in either case the trust could have been enforced as a resulting trust to the amount contributed.[15] In *Haigh v. Calhoun*[16] A conveyed land to B, the consideration being paid equally by B, C, and D. Heirs of B, the record title holder, sued in trespass to try title for the entire tract. Evidence showed that B, at the origin of the transaction and at all times subsequent, had claimed only a one-third beneficial interest. The Court indicated that a resulting trust might have been found, but affirmed the decision on the ground of an express, oral trust.

In the other case, *Scott v. Cliett*,[17] A conveyed land to B. Both B and C paid the consideration. After the death of B, C sued in two alternative counts for title to the entire tract. The first count alleged a parol trust, the understanding being that C would contribute to the purchase price and would take care of B during his life, and that he would hold the entire tract in trust for C. The second count alleged that B had made a verbal gift of the land to C in consideration of C paying part of the purchase price, going into possession, and providing a home for B during his life. The Court of Appeals sustained a decision of the trial court, holding that the evidence was sufficient to support either an oral trust or a gift.

It is to be borne in mind that in both the *Haigh* and *Scott* cases the purchase of the land was made several years before 1943. The

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[13] Note, 35 A. L. R. 281 (1925).

[14] RESTATEMENT, TRUSTS, § 44 (1935); 54 AM. JUR. 178, § 233 (1936); 1 SCOTT, TRUSTS 253, § 44.2 (1939).

[15] RESTATEMENT, TRUSTS, § 454 (1935).

[16] 215 S. W. (2d) 426 (Tex. Civ. App. 1948).

[17] 213 S. W. (2d) 562 (Tex. Civ. App. 1948).

court seems to be correct in each case in finding a parol trust. If either transaction had occurred after 1943, probably each court would have ruled for the same parties on the basis of a resulting trust to the extent of the money contributed.

However, in the *Scott* case both B and C contributed to the consideration. C was not suing just for her *pro rata* share of the land, but for the entire tract. No difficulty would be encountered in finding a resulting trust for C to the amount contributed, but a different problem is encountered in regard to the portion that she did not pay. This would have to be sustained as a gift, if occurring after 1943, or not at all, for this is a transaction in which B declares himself trustee for C, an example of an express trust which is unenforceable by the Statute of Frauds.[18] One other possible solution is that B would get a life estate in the land and C would get the remainder, this being the value of the consideration contributed by each, but this occurs only where B and C agreed at the time of purchase that such would result.[19]

It is essential to the existence of a resulting trust that A pay the consideration or that B make a loan to A at the time of the purchase.[20] In *Morrison v. Farmer*[21] A was owner of a house. B orally agreed to buy a lot, move, install, and re-condition the house, and when the work was completed A was to pay B. This was done, but after completion a disagreement arose in regard to the price owed. A sued to enforce an oral contract or trust. The trial court found for A, and the Court of Civil Appeals affirmed on the theory that a resulting trust arose. The judgment was reversed by the Supreme Court on the basis that there was no resulting trust, and that neither an oral contract for the sale of land nor an express, oral trust was enforceable. The court said:

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[18] RESTATEMENT, TRUSTS, § 440 (1935).

[19] Reyes v. Boyd, 140 Cal. App. 167, 34 P (2d) 1058 (1934).

[20] RESTATEMENT, TRUSTS, §§ 440, 451.

[21] ___Tex.___, 213 S. W. (2d) 813 (1948).

"A resulting trust arises by operation of law when title is conveyed to one person but the purchase price is paid by another. The parties are presumed to have intended that the grantee hold title to the use of him who paid the purchase price and whom equity deems to be the true owner. The trust arises out of the transaction and must arise at the time when the title passes."[22]

Possibly the court could have found a resulting trust on the theory of a loan from B to A, but there was no evidence of intent to loan when B purchased the lot, and the decision seems correct.

Confusion exists in situations where A gives money to B and B buys land from C. Where B buys and takes title in his own name with the consent of A, a resulting trust arises, but if A does not consent to the purchase, or does not consent that the property purchased should be recorded in B's name, the majority rule is that a constructive trust arises, not a resulting trust.[23]

In the recent case of *Berry v. Rhine*,[24] A gave money to B with intention that B buy property for A. B took title in her name without A's consent. A sued to impress a resulting trust and received judgment on that theory. The court seemed to consider the situation to be one where A had consented to the taking of title in B's name, which was not the case. B's act was done in denial of A's rights, and it is believed that a constructive, not a resulting, trust should have been found. Actually, however, the theory adopted was immaterial since the result would be the same.

In some transactions it is difficult to differentiate between resulting and constructive trusts. The Court of Civil Appeals correctly recognized a distinction in *Jarret v. Hall*[25] where A desired to buy land from B. C agreed to lend the purchase price to A, but at the time of sale C took title in himself. A took possession and

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[22] ___Tex.___, ___, 213 S. W. (2d) 813, 815 (1948).

[23] Mills v. Gray, ___Tex.___, 210 S. W. (2d) 985 (1948); First State Bank v. Zetesky, 262 S. W. 190 (Tex. Civ. App. 1924) *writ of error refused*; Miller v. Himebaugh, 153 S. W. 338 (Tex. Civ. App. 1913); RESTATEMENT, TRUSTS, § 440 (1935); 42 TEX. JUR. 661, § 54 (1933); Note, 43 A. L. R. 1417, (1926).

[24] 205 S. W. (2d) 632 (Tex. Civ. App. 1948).

[25] 207 S. W. (2d) 261 (Tex. Civ. App. 1947).

used it as his own. Later C tried to collect rent from A, and A sued to establish a trust. The court said that if C had, at the time of taking title, intended to perform his promise, a resulting trust would have arisen.[26] The court did not have to apply this doctrine, however, since a breach of confidential relations was found, and a constructive trust was imposed.

A resulting trust must be created, if at all, at the very time a deed is taken and the legal title vested in the grantee.[27] The Court of Civil Appeals applied this rule in *Bunnell v Bunnell.*[28] A bought land, assumed a prior mortgage, and executed a note for $1,936.00 for the balance of the purchase price, the last amount to be paid from money received from the sale of other land owned by A, B, and C as tenants-in-common. C, mother of A and B, owned one-half of this land, and A and B owned one-fourth each. C died, named B as devisee, and B sued to impress a resulting trust upon three-fourths of the land bought by A, contending that it was agreed at the time of the purchase of the second tract that the parties would own it in the same proportion that they owned the first tract.

The jury found that the proceeds of the sale of the first tract were received by A, and that C gave her share to A, making his interest three-fourths of the total, which was more than enough to cover the $1,936.00 note. They further found that there was no agreement that the parties had intended to own the same proportion of the second tract of land that they did in the first. The Court of Civil Appeals affirmed a judgment of the trial court for A, saying that a subsequent agreement that B was to share in the second tract of land would not impress a resulting trust upon A, and that B had not sufficiently traced her money into the second tract, if any, for the court to determine the trust upon a equitable *pro tanto* basis.

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[26] RESTATEMENT, TRUSTS, § 448 (1935); Note, 43 A. L. R. 1423 (1926).

[27] Morrison v. Farmer, ___Tex.___, 213 S. W. (2d) 813 (1948).

[28] 217 S. W. (2d) 78 (Tex. Civ. App. 1949).

The Court of Civil Appeals in *Davis v. Pearce*[29] found that a resulting trust did not exist in a situation where A conveyed property to B, the purchase price being paid by C, applying an exception to the general rule which allows a resulting trust under such facts. At the time of the purchase there was no agreement or intention that B would convey the property to C, when C demanded; in fact the original intention was that B should have the beneficial interest. The court recognized the general rule, but said that the resulting trust may be rebutted by showing that it was the intention of C at the time of the conveyance that B was to have the beneficial interest. This is a well accepted exception to the rule imposing a resulting trust where the grantee does not pay the consideration.[30]

Implied trusts at law have been given increased importance by passage of the Texas Trust Act. Cases where evidence pointed to a resulting trust, but were enforced by the courts as express, oral trusts, as in the *Haigh* and *Scott* cases, will now be enforced as resulting trusts, or not at all. The result, it is believed, will be beneficial. The cases will be fewer, and of these, a larger percentage will be meritorious.

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[29] 205 S. W. (2d) 653 (Tex. Civ. App. 1947).

[30] RESTATEMENT, TRUSTS, § 441 (1935).