The Consequences of Rebutting a Presumption of Advancement

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The consequences of rebutting a presumption of advancement

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Nelson v Nelson[1] *contains a dictum, adopting a statement of Scott, that when a presumption of advancement is rebutted the outcome is a resulting trust. Scott puts that statement on two bases. The first is that as a matter of 17th century legal history, rebuttal of a presumption of advancement led to a resulting trust. The second is that some North American cases support it. This article contends that Scott's statement is true sometimes but not always. His proposition of legal history is not supported by the cases on which he bases it, and the North American cases on which he relies are not persuasive precedents for Australian law. It contends that sometimes when rebuttal of a presumption of advancement occurs the doctrine that a statute cannot be used as an instrument of fraud becomes operative, leading to a constructive trust. Sometimes rebuttal of the presumption leads to an express trust. There are other possibilities also. Sometimes equitable doctrines other than those concerning trusts decide the outcome.*

I The presumptions of resulting trust and of advancement

Before coming to the substance of this article it is convenient to set out, in the first two sections, the legal background against which the argument of the article proceeds. The law relating to resulting trusts and advancement is usually expounded by starting with some presumptions. A presumption of a resulting trust can arise concerning three different types of trust.

A presumption concerning the first type of resulting trust (the purchase money resulting trust) arises when a person (whom I will call 'the payer') makes a purchase of property in the name of someone else (whom I will call 'the transferee'), and the payer pays the price in the role of purchaser rather than as, for example, a lender.[2] The presumption is that the transferee is a mere trustee, and the beneficial title is held by the payer.[3] The presumption can also arise if the payer makes a purchase in the name of himself and someone else.[4] It can arise concerning real property,[5] and concerning at least some types of personal property.[6] An analogous presumption arises if A provides B with the

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[1] (1995) 184 CLR 538, 547–8 ('*Nelson*').

[2] *Davies v National Trustees Executors & Agency Co of Australasia Ltd* [1912] VLR 397, 401 ('*Davies*'); *Calverley v Green* (1984) 155 CLR 242, 246 ('*Calverley*').

[3] *Anonymous* (1692) 2 Freem Ch 123; 22 ER 1100.

[4] Ibid; *Benger v Drew* (1721) 1 P Wms 781; 24 ER 613; *Smith v Baker* (1737) 1 Atk 385; 26 ER 246; *Fowkes v Pascoe* (1875) LR 10 Ch App 343, 345n (Jessel MR holding the presumption arose), cf 348 (James LJ merely assuming it and finding it rebutted) ('*Fowkes*'). It also arises if three people contribute the purchase price of an estate taken in the name of two of them: *Wray v Steele* (1814) 2 Ves 388; 35 ER 366 ('*Wray*').

[5] *Anonymous* (1692) 2 Freem Ch 123; 22 ER 1100; *Ambrose v Ambrose* (1716) 1 P Wms 321; 24 ER 407 ('*Ambrose*'); *Lloyd v Spillet* (1740) 2 Atk 148, 150, 26 ER 493, 494 ('*Lloyd*') (sub nom *Lloyd v Spillit* (1740) Barn C 384, 388; 27 ER 689, 690; *Wray* (1814) 2 V & B 388; 35 ER 366; *Brown v Brown* (1993) 31 NSWLR 582 ('*Brown*'); *Nelson* (1995) 184 CLR 538.

[6] Eg, bonds (*Ebrand v Dancer* (1680) 2 Cas in Ch 26; 22 ER 829 ('*Ebrand*')), company shares (*Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 ('*Charles Marshall*')), ships (*The Venture* [1908] P 218), annuities (*Rider v Kidder* (1805) 10 Ves 360; 32 ER 884 ('*Rider*')) a policy of life insurance (*Re Policy No 6402 of Scottish Equitable Life*

means, other than money, by which B acquires an item of property.[7] If two people contribute to the purchase price the presumption is that they hold the beneficial title in the same proportions as they provided the purchase money.[8]

A presumption concerning the second type of resulting trust (the voluntary conveyance resulting trust) arises when an owner of property makes a voluntary conveyance of it to a transferee. It can also arise when the cestui que trust of property directs the trustee to transfer the property to someone else.[9] There is some dispute among judges and legal historians about whether it became impossible to have a voluntary conveyance resulting trust concerning land.[10] Now there are decisions holding that s 44 of the *Conveyancing Act 1919* (NSW) abolishes any presumption of a voluntary conveyance resulting trust there might have been in New South Wales so far as land is concerned.[11] Statutory provisions in some other States and Territories (but not all) modify to varying extents whatever the general law on this topic might be.[12] However, it is clear that a presumption of a resulting trust can still exist so far as a voluntary conveyance of at least some types of personal property is concerned.[13]

Assurance Society [1902] 1 Ch 282), money in a bank account (*Russell v Scott* (1936) 55 CLR 440, 449 (Starke J), 451 (Dixon and Evatt JJ).

[7] *Raleigh v Glover* (1866) 3 WW & A'B (Eq) 163 (provision of certificate entitling holder to make a selection of land, and of money to pay rent in advance required on making a selection).

[8] *Lake v Gibson* (1729) 1 Eq Cas Abr 290; 21 ER 1052, 1052–3; *Calverley* (1984) 155 CLR 242, 246–7, 261, 266–7; *Brown* (1993) 31 NSWLR 582, 588.

[9] *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 312–3 ('*Vandervell*').

[10] *Lloyd* (1740) 2 Atk 148, 150; 26 ER 493, 494 (where Lord Hardwicke is reported as saying that a resulting trust arose only in certain identified circumstances that did not include a voluntary conveyance — but the case is more fully reported on this point sub nom *Lloyd v Spillit* (1740) Barn C 384; 27 ER 689, where Lord Hardwicke reasoned that because the conveyance was one to the grantees *to their own use* there was no resulting trust); *Cottington v Fletcher* (1741) 2 Atk 156; 26 ER 498, (where Lord Hardwicke held that when there was a conveyance to a grantee for a purpose that did not exhaust the fee simple, there was a resulting trust of the remaining interest in the property); *Young v Peachy* (1742) 2 Atk 255, 257; 26 ER 557, 558 (where Lord Hardwicke held that the rule about when a trust by implication or operation of law arises 'is by no means so large as to extend to every voluntary conveyance'); *Fowkes* (1875) LR 10 Ch App 343, 348 (where James LJ said no presumption of resulting trust arose on a voluntary conveyance of land); *House v Caffyn* [1922] VLR 67 (where Irvine CJ, dissenting, accepted at 73 that there was a presumption that a voluntary conveyance gave rise to a resulting trust, but Cussen J at 76–7 was of the view that under the general law whether a resulting trust arose from a voluntary conveyance depended upon the precise form of words of limitation that were used, and at 78 was of the view that a voluntary transfer of Torrens title land would give rise to a resulting trust, and Schutt J at 85 was indecisive);

[11] *Newcastle City Council v Kern Land Pty Ltd* (1997) 42 NSWLR 273; *Bhana v Bhana* (2002) 10 BPR 19,545; *Singh v Singh* (2004) 31 Fam LR 242, 251–2 [33]–[35] (Barrett J); *Drayson v Drayson* [2011] NSWSC 965 (24 August 2011) [57]–[59] (Ward J); *Voukidis v C & O Voukidis Pty Ltd (in liq)* [2018] VSC 267 (24 May 2018) [294]–[303] (Sloss J) (though in a context where neither party disputed its correctness), but cf contrary statements in *Ryan v Hopkinson* (1993) 16 Fam LR 659 (the appeal at (1993) 16 Fam LR 659 turns on a different point) and dicta in *Napier v Public Trustee (WA)* (1980) 32 ALR 153, 158 ('*Napier*') and *Nelson* (1995) 184 CLR 538, 600.

[12] *Property Law Act 1969* (WA) ss 38–9 are in the same terms as *Conveyancing Act 1919* (NSW) ss 44(1)–(2). Different provisions are found in *Property Law Act 1958* (Vic*)* s 19A, *Property Law Act 1974* (Qld) s 7(3)*, Law of Property Act* (NT) s 6 and *Civil Law (Property) Act 2006* (ACT*)* s 223.

[13] A war loan bond (*Re Vinogradoff* [1935] WN 68), 'consols' (that is, government debt charged on the consolidated fund — *Bone v Pollard* (1857) 24 Beav 283; 53 ER 367 ('*Bone*')), stock (*Fowkes* (1875) LR 10 Ch App 343, 345n (Jessel MR holding presumption arose), cf 348 (James LJ merely assuming it and finding it rebutted); *Standing v Bowring* (1885) 31 Ch D 282), shares (*HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680, 727–8 [260]), money (*Moore v Whyte [No 2]* (1922) 22 SR (NSW) 570, 579 (Street CJ) — inconsistent with,

The third type of resulting trust is one that arises when property is held by X on the basis that he or she does not have the beneficial title to it, but trusts attaching to that property either never come into effect, or fail after initially being in effect. In that situation as a matter of law the beneficial interest is held for the person who caused the property to be transferred to X.[14] Such trusts are referred to as automatic resulting trusts. If the trusts attaching to a property fail only in part, there is an automatic resulting trust concerning just the part of the beneficial interest that fails.

The explanation that has now become conventional for the first two types of resulting trust is that they arise as a matter of the presumed intention of the payer (for the purchase money resulting trust) or of the transferor or cestui que trust who directs the trustee to transfer (for the voluntary conveyance resulting trust) (collectively, the settlor). By contrast, the automatic resulting trust arises as a matter of legal necessity: once it is clear that the titleholder does not have the beneficial title, it has to be in somebody. However, the automatic resulting trusts are intention-enforcing at least to the extent that the settlor has expressed an intention that the titleholder is *not* to have the beneficial interest, and also that an automatic resulting trust can be rebutted by positive proof that the settlor has abandoned any interest in the property.[15]

Concerning the first two types of resulting trusts the presumption about the intention of the settlor is rebutted if the transferee is in a particular type of familial relationship to the transferee.[16] In that situation there arises, instead of a presumption of resulting trust, a presumption of advancement. The presumption is that the transferee will have full ownership of that item of property, so that no question arises of whether it is held on any trust. It is possible for title to property to arise by a presumption of advancement as to a partial interest in the property, and by a presumption of resulting trust as to the rest of the interest in the property.[17]

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though not expressly disapproving, the contrary statement of Harvey J at first instance at 575), a fishing licence (*Hendry v EF Hendry Pty Ltd* [2003] SASC 157 (11 June 2003) [49]).

[14] *Burgess v Wheate* (1759) 1 Wm Bl 123, 162; 96 ER 67, 84 (Lord Mansfield) ('the trustee is considered merely as an instrument of conveyance; therefore is in no event to take a benefit; and the trust must be coextensive with the legal estate of the land, and where it is not declared, it results by necessary implication'); *Vandervell* [1967] 2 AC 291, 313–14 (Lord Upjohn; Lord Pearce agreeing), 329 (Lord Wilberforce).

[15] See text at below n 211.

[16] Husband to wife (*Calverley* (1984) 155 CLR 242, 247), man to fiancée (*Wirth v Wirth* (1956) 98 CLR 228), man to his child, or to any person to whom he is in loco parentis (*Ebrand* (1680) 2 Cas in Ch 26; 22 ER 829; *Finch v Finch* (1808) 15 Ves 43; 33 ER 671; *Crabb v Crabb* (1834) 1 My & K 511; 39 ER 774; *Sidmouth v Sidmouth* (1840) 2 Beav 447; 48 ER 1254 (where the presumption of advancement arose even though the son did not know the stock in question had been purchased in his name); *Christy v Courtenay* (1850) 13 Beav 96; 51 ER 38 ('*Christy*'); *Currant v Jago* (1844) 1 Coll 261, 267; 63 ER 410, 413; *Oliveri v Oliveri* (1993) 38 NSWLR 665, 679), mother to child, even if the child is an able-bodied adult (*Brown* (1993) 31 NSWLR 582, 591, 598–600; *Nelson* (1995) 184 CLR 538). But not wife to husband: *Calverley* at 268 (Deane J), approved in *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278, 297–8 [55] or between a de facto couple: *Napier* (1980) 32 ALR 153, 158; *Calverley* at 259–60 (Mason and Brennan JJ), 268–9 (Deane J; Gibbs CJ at 250–1 disagreeing, and Murphy J at 264–5 favouring total abolition of presumptions of resulting trust and advancement). The courts have yet to decide whether a presumption of advancement can arise between parties to a same-sex marriage.

[17] *Kingdon v Bridges* (1688) 2 Vern 68; 23 ER 653 ('*Kingdon*') (also noted in (1688) 1 Eq Cs Abr 69; 21 ER 882 and (1688) 1 Eq Cas Abr 242; 21 ER 1019), where a man paid for land that was transferred into the name of his wife and X for their lives, and the life of the longest liver of them. The wife held the beneficial title during her life as an advancement, and after her death, any remaining interest was held for her husband's estate.

Evidence of the intention that the settlor had at the time of effecting the transfer can rebut both the presumption of resulting trust,[18] and the presumption of advancement.[19] In the case of a single settlor, it is only the intention of the settlor that matters,[20] and that intention can be a subjective and uncommunicated one.[21] If there is a purchase money resulting trust, where there are two or more contributors to the purchase price, it is the common intention of all the contributors that matters, and the intention is one manifested by words or conduct.[22]

When the law of evidence was the common law, the evidence of the intention of the settlor could include evidence of acts and declarations of the parties preceding or at the time of the transaction, acts and declarations that occurred so immediately after the transaction as to be part of it, and other subsequent acts and declarations to the extent that they are against the interest of the person who made them.[23] But the admissible evidence was not confined to those categories — anything that was relevant and admissible, under the common law of evidence, to cast light on the intention of the settlor could be received, including (and of particular importance) evidence of the relationship of the parties.[24] In those jurisdictions that have adopted the *Evidence Act 1995* (Cth), admissibility of evidence of the intention of the settlor would now be decided in accordance with the test in s 56 of that Act, that all relevant evidence is admissible unless it falls within one of the exclusionary provisions of that Act.

Some older cases said that the presumption of advancement was a presumption that the transferee would have the beneficial interest in the item of property. However, the current understanding is that if A has legal title to an item of property, and nobody else has a beneficial interest in that item of property, A does not have both a legal and beneficial title to that item of property. Instead, A simply has an undivided right of property concerning the item.[25] More recent formulations of the

[18] *Dowman's Case* (1586) 9 Co Rep 7b, 10a–b; 77 ER 743, 747 (allowing a post-transfer deed as evidence of intention concerning uses at the time of the transfer); *Lady Bellasis v Compton* (1693) 2 Vern 294; 23 ER 790 (oral statement by assignor of real estate that he intends certain third parties to benefit rebuts any presumption of resulting trust); *Lamplugh v Lamplugh* (1709) 1 P Wms 111; 24 ER 316; *Vandervell* [1967] 2 AC 291, 312–3.

[19] *Lord Gray's Case* (1676) 2 Freeman 7; 22 ER 1020; *Grey v Grey* (1677) 2 Swan 594, 597; 36 ER 742, 743 ('*Grey*'); *Murless v Franklin* (1818) 1 Swans 13; 36 ER 278; *Prankerd v Prankerd* (1820) 1 Sim & St 1; 57 ER 1; *Kilpin v Kilpin* (1834) 1 My & K 520, 542; 39 ER 777, 786 ('*Kilpin*'); *Christy* (1850) 13 Beav 96, 98–9; 51 ER 38, 39; *Devoy v Devoy* (1857) 3 Sm & G 403, 405–6; 65 ER 713, 714 ('*Devoy*'); *Bo*ne (1857) 24 Beav 283, 287; 53 ER 367, 368 (understanding between father and children that consols placed in name of children remain property of father rebuts presumption of advancement); *Jeans v Cooke* (1857) 24 Beav 513, 520–1; 53 ER 456, 459; *Dumper v Dumper* (1862) 3 Giff 583, 590; 66 ER 540, 543; *Williams v Williams* (1863) 32 Beav 370, 372–3; 55 ER 145, 146; *Davies* [1912] VLR 397, 401; *Warren v Gurney* [1944] 2 All ER 472; *Charles Marshall* (1956) 95 CLR 353, 364–5; *Nelson* (1995) 184 CLR 538, 547, 574, 586, 599.

[20] *Calverley* (1984) 155 CLR 242, 246, 251, 258.

[21] *Martin v Martin* (1959) 110 CLR 297, 304–5 ('*Martin*'); ibid 261. See also cases at below nn 215–18.

[22] *Calverley* (1984) 155 CLR 242, 251, 258, 261.

[23] *Shephard v Cartwright* [1955] AC 431; *Charles Marshall* (1956) 95 CLR 353, 364–5.

[24] *Davies* [1912] VLR 397, 401–6; *Re Kerrigan; Ex parte Jones* (1946) 47 SR (NSW) 76, 81–3 ('*Re Kerrigan*').

[25] *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 442 (Gibbs CJ), 463–4 (Aickin J), 473–4 (Brennan J: 'an equitable interest is not carved out of the legal estate but impressed upon it'); *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592, 606 [30] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Peldan v Anderson* (2006) 227 CLR 471, 485 [37] (Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ).

presumption of advancement in the High Court have referred to it as being not a true presumption, but simply circumstances that show there is no reason for presuming a resulting trust.[26]

The presumption of advancement operates as an exception or qualification to the presumption of resulting trust.[27] For as long as a presumption of advancement is unrebutted it trumps a presumption of resulting trust, but if the presumption of advancement is rebutted it is possible for a presumption of resulting trust to become operative. Statements in the High Court that the presumption of advancement is not a true presumption but rather circumstances that show that there is no reason for presuming a resulting trust[28] are consistent with this view. If the only evidence is of the circumstances that give rise to a presumption of advancement there is indeed no reason to presume a resulting trust. However, once there is additional evidence, beyond that of the transfer of title and the relationship from which a presumption of advancement can arise, there might come to be reason to presume the settlor intended to have a beneficial interest in the transferred property, or to decide that there are circumstances from which an automatic resulting trust arises.

There is some divergence in judicial statements about the nature of the settlor's intention that is sufficient to rebut a presumption of advancement — some cases suggest that all that needs to be proved to rebut the presumption is absence of an intention to make a gift to the transferee,[29] others

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[26] *Martin* (1959) 110 CLR 297, 303 (Dixon CJ, McTiernan, Fullagar and Windeyer JJ); *Calverley* (1984) 155 CLR 242, 247 (Gibbs CJ), 256 (Mason and Brennan JJ), 265 (Murphy J), 267–8 (Deane J); *Nelson* (1995) 184 CLR 538, 547 ('there are certain relationships from which equity infers that any benefit provided for one party at the cost of the other has been provided by way of "advancement". The consequence is that the equitable estate follows the legal estate and is at home with the legal title; there is an absence of any reason for assuming that a trust arose.'), 574 ('the effect of the presumption is to displace any resulting trust with the inference that a transfer of the beneficial, as well as legal, ownership was intended'), 584, 600 ('if such a relationship exists, the transfer is presumed to be made for the benefit of the transferee').

[27] In *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 93–4; 30 ER 42, 43 Eyre CB held that the transferee being a child of the payer operated to rebut the presumption of resulting trust but did so *as a circumstance of evidence only*, so that upon the whole of the evidence about the intent with which the payer had caused the property to be placed in the name of the transferee it might be concluded that the presumption of resulting trust was not rebutted. In *Napier* (1980) 32 ALR 153, 158 (Aickin J; Mason, Murphy and Wilson JJ agreeing) said explicitly that the presumption of advancement was an exception to the presumption of resulting trust. In *Bloch v Bloch* (1981) 180 CLR 390, 397 (Wilson J; Gibbs CJ, Murphy and Aickin JJ agreeing) ('*Bloch*') approved reasoning that where a father had contributed part of purchase price of land purchased in name of son, where there was no specific intention about the land being held on a trust, but where the presumption of advancement was rebutted, there was a resulting trust for the father proportionate to his contribution to purchase price — a result achievable only if the presumption of advancement was an exception to the presumption of resulting trust. In *Calverley* (1984) 155 CLR 242, 251–2 Gibbs CJ held, contrary to the majority view, that a presumption of advancement arose in the circumstances of the particular de facto relationship there being considered, that the presumption of advancement was rebutted but the presumption of resulting trust was not rebutted, and so the presumption of resulting trust applied. In *Brown* (1993) 31 NSWLR 582, 589 (Gleeson CJ; Cripps JA agreeing) said that if the presumption of advancement is rebutted by evidence 'then the exception does not apply and the basic presumption operates', at 590 approved statements in Philip H Pettit, *Equity and the Law of Trusts* (Butterworths, 6th ed, 1989) 123, and of Needham J in *Malsbury v Malsbury* [1982] 1 NSWLR 226, 229 that when a presumption of advancement is rebutted a presumption of resulting trust arises, and at 591 stated, as the ratio of the case, that since 'there was no operative presumption of advancement, the basic presumption of resulting trust applied'.

[28] See cases cited at above n 26.

[29] Eg, see *Bloch* (1981) 180 CLR 390 discussed in above n 27. In *Damberg v Damberg* (2001) 52 NSWLR 492 [42] ('*Damberg*') (a passage edited out from the New South Wales Law Report of the case) Heydon JA (Spigelman CJ and Sheller JA agreeing) said: 'There is a presumption that where one or more parents convey property to a child, the parent or parents intended to give the child the beneficial interest in the property, not merely the legal

suggest that it must be proved that the settlor intended some different result to the transferee receiving a gift.[30] The focus of this article is on what happens when a presumption of advancement is rebutted, rather than on precisely what must be proved to rebut it.[31]

II The *Statute of Frauds* and its derivative statutes

Ever since the *Statute of Frauds 1677* (Eng) was enacted, whenever a question arises about whether a trust has been created concerning land, there is a need to enquire whether a statute requires the trust to be created or evidenced by writing.

The relevant provisions of the *Statute of Frauds*[32] were:

> 7. all declarations or creations of trusts or confidences of any lands tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of none effect.
>
> 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made. Any thing herein before contained to the contrary notwithstanding.

These sections of the *Statute of Frauds* were construed as not requiring a declaration of trust to be created in writing, just that it be proved by writing that was signed (at any time) by the appropriately qualified person,[33] unless the court found that a trust would 'arise or result by the implication or construction of law'.

The current provision derived from the *Statute of Frauds* is s 23C of the *Conveyancing Act*:[34]

> (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:

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title. That presumption can be rebutted by showing, on the balance of probabilities, that the parent or parents did not have that intention.'

[30] Eg, in *Charles Marshall* (1956) 95 CLR 353, 364 Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ said 'the relation of parent and child is only evidence of the intention of the parents to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee'. And their Honours said: 'the plaintiffs are the daughters of the donor and the initial presumption is that he intended to give the shares to them … The presumption can be rebutted or qualified by evidence which manifests an *intention to the contrary*': at 365. In *Damberg* (2001) 52 NSWLR 492 [44] Heydon JA citing the dissenting judgment of Dixon J in *Drever v Drever* [1936] ALR 446, 450 ('*Drever*') said the intention necessary to rebut the presumption of advancement was a 'definite intention' to retain beneficial title, not a 'nebulous intention to rely upon the … relationship as a source of control over the property'. See also *Stewart Dawson & Co (Vic) Pry Ltd v Federal Commissioner of Taxation* (1933) 48 CLR 683, 691 ('*Stewart*'); *Martin* (1959) 110 CLR 297, 303.

[31] Jamie Glister, 'Is There a Presumption of Advancement?' (2011) 33 *Sydney Law Review* 39 explores the precise nature of the intention required to rebut the presumption of advancement.

[32] Modernising the spelling and punctuation.

[33] *Forster v Hale* (1798) 3 Ves 696, 707; 30 ER 1226, 1231–2; *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 ('*Rochefoucauld*').

[34] Other Australian states have similar provisions: *Conveyancing and Law of Property Act 1884* (Tas) s 60; *Law of Property Act 1936* (SA) s 29; *Property Law Act 1958* (Vic) s 53; *Property Law Act 1969* (WA) s 34; *Property Law Act 1974* (Qld) s 11.

> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law,
>
> (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will,
>
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.
>
> (2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.[35]

There is a question of construction concerning what counts as a 'resulting trust' for the purposes of s 23C(2). Sometimes a 'resulting trust' is a trust concerning which the beneficial interest is in the person who created the trust, or whose property came to be held on the trust (the settlor). This is sometimes said to reflect the etymology of the expression, derived from '*resalire*', meaning to jump back.[36] If that were the whole of the meaning of 'resulting trust', a resulting trust could arise by operation of law, or through being an express trust, or even through being a constructive trust — all that matters, on that meaning, is that the beneficiary and the settlor are the same person.

However, in the context of a provision like s 23C(2) that is derived from the *Statute of Frauds*, a 'resulting trust' is likely to be not merely one in which the beneficial interest is held by the settlor but in addition one that would 'arise or result by implication or construction of law'. In accordance with that meaning, the 'resulting trust' that is exempted from the requirement of writing in s 23C(1) is a trust whose beneficiary is the settlor *and* that comes into being through the operation of a provision of the law, such as the presumption of resulting trust.[37] Analogously, the 'constructive trust' that is exempted from the requirement of writing in s 23C is a trust that arises by construction of law, such as when the law says that the circumstances in which a person came to acquire or holds property are such that he or she must be subjected to some or all of the obligations that a trustee of that property would be subject to.[38]

III *Nelson v Nelson* on the consequences of rebutting a presumption of advancement

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[35] *Conveyancing Act* ss 23D(2), 23E(a)–(c) provide ways in which interests in land can be created by parol, but it is hard to see how they would ever apply to a situation in which a presumption of resulting trust was rebutted.

[36] Peter Birks, 'Misnomer' in W R Cornish et al (eds), *Restitution: Past, Present and Future — Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 1; *Salvo v New Tel Ltd* [2005] NSWCA 281 (25 August 2005) [93] ('*Salvo*'); *Anderson v McPherson [No 2]* [2012] WASC 19 (25 January 2012) [90] (Edelman J).

[37] This account is broadly in accord with that in J Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) [3-07] (hereinafter '*Jacobs*'). As a matter of the taxonomy of trusts, there is no authoritative statement as to when trust should be classified as presumed, resulting or constructive: *Robb Evans v European Bank Ltd* (2004) 61 NSWLR 75, 100 [112]. What is the correct construction of 'resulting trust' in s 23C is a narrower question.

[38] In *Giumelli v Giumelli* (1999) 196 CLR 101, 111–12 [2] ('*Giumelli*') Gleeson CJ, McHugh, Gummow and Callinan JJ said that a constructive trust arises when the court 'construes the circumstances in the sense that it explains or interprets them'.

In *Nelson*[39] land had been purchased by a mother in the name of her children. All the judges in the High Court held that a presumption of advancement arose when a mother purchased property in the name of her child, but that in the instant case the presumption had been rebutted by evidence that the mother intended the beneficial title to be held for herself.

In *Nelson* Deane and Gummow JJ were the only judges who considered the juristic nature of the trust for the mother that arose when the presumption of advancement was rebutted. Their Honours said:

> Where the presumption of advancement is rebutted, the trust which then is enforced is a resulting trust, not an express trust. The trust thus is outside the operation of the requirement for writing in s 7 of the *Statute of Frauds 1677* (Eng) and its modern Australian equivalents. Accordingly, oral evidence is admissible to rebut the presumption of gift and thus to affirm the operation of the presumption of resulting trust. Professor Scott deals with the matter as follows:
>
> > This reasoning is somewhat artificial; but trusts arising where the evidence shows an intention to create a trust when land is purchased in the name of a relative were considered to be resulting trusts before the enactment of the *Statute of Frauds*, and that statute expressly excepts resulting trusts from its operation.[40]

This statement appears in a part of the judgment that states general principles, before dealing with the facts of the case. It appears to be saying more than that, in this particular case, the trust in favour of Mrs Nelson was a resulting trust.[41] It accords with the statement of Cussen J in *Davies v National Trustees Executors & Agency Co of Australasia Ltd*[42] that 'If on the whole of the evidence the Court is satisfied that the husband or father did not intend at the time of the purchase that his wife or child should take by way of advancement, the rule of law is that there is a resulting trust for the husband or father.' Cussen J made that statement without citation of any authority. However, the judgment in *Davies* has been spoken well of in several High Court judgments[43] (though in general terms rather than on this specific point).

We have already seen that if a presumption of advancement is rebutted it is possible that a presumption of resulting trust comes back into play. However, this article argues that sometimes when a presumption of advancement is rebutted the outcome is not a resulting trust. Rather, depending on the precise circumstances that are established by evidence, a variety of different situations are capable of arising when a presumption of advancement is rebutted. A judge would exercise great care before differing from an expression of view by either Deane J or Gummow J on a matter of equity, let alone a joint statement of both of them, particularly when it is buttressed by a statement of Cussen J. However, this article argues that this is a course that should be followed. The statement of their Honours was neither accepted nor rejected by the other judges who decided *Nelson*, so it is not part of a binding ratio decidendi of the case. Further, there was no issue in the

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[39] *Nelson v Nelson* (1995) 184 CLR 538.
[40] Ibid 547–8.
[41] It has been quoted in later decisions as though it stated a general principle: eg, *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164, 180 [71]–[72] ('*NSW Trustee*').
[42] [1912] VLR 397, 401.
[43] In *Stewart Dawson* (1933) 48 CLR 683, 690–1 Dixon J said that the judgment 'contains what is, perhaps, the best modern statement of the whole doctrine'; see also *Martin* (1959) 110 CLR 297, 304 (Dixon CJ, McTiernan Fullagar and Windeyer JJ); *Calverley* (1984) 155 CLR 242, 258 (Mason and Brennan JJ).

High Court,[44] or in the judgment appealed from,[45] about whether, if the presumption of advancement were rebutted, the trust that arose was a resulting trust or some other sort of trust, nor about whether it was necessary for the trust to be in writing. A dictum on an issue that was not argued can be less persuasive than a statement on an issue that was argued.

Professor Scott's proposition of legal history, quoted above, is found in Austin Wakeman Scott and William Franklin Fratcher.[46] Deane and Gummow JJ record that Scott bases his historical proposition on six cases, namely *Binion v Stone*,[47] *Scroope v Scroope*,[48] *Grey v Grey*,[49] *Elliot v Elliot*,[50] *Woodman v Morrel*,[51] and *Clark v Danvers*.[52] The first step in the argument of this article is to suggest that the cases that Scott relies on do not support the conclusion that he draws from them.

IV The supposed basis for Scott's proposition of legal history

IV.I Scott's first case — *Binion v Stone*

In *Binion*[53] Sir George had purchased a house for £2000 in the name of his son, who was then 5 years old. During the time of the Civil War or the Commonwealth, Parliament ordered that all of Sir George's estate be sold for his 'delinquency' (that is, support of the Royalist cause). Trustees for sale then sold the land in question to the defendant. After the son had come of age Sir George's son and wife made a further conveyance of the house to the defendant, for £500, and swore that they were not trustees for Sir George. After the Restoration Sir George sought to have the estate reconveyed to him. The Earl of Clarendon LC, Lord Chief Baron Hale and Wyndham J were of the view that there was a trust upon which Sir George could obtain relief. The decisive factors seem to have been that the son was so young at the time of the purchase, and that the trustees for sale had sold the estate on the basis that it was Sir George's. After the judges had made their views known the defendant agreed to reconvey it upon being repaid his £500.

This case does not support Scott's proposition. Unless the decision in *Binion v Stone* is an aberration, it seems that at the time it was decided in 1663 the presumption of advancement had not yet taken on the absolute form of operating on every occasion when a father made a purchase in the name of his child. Rather, a presumption of advancement in favour of a son arose only when the son was of an age and stage in life when it would be usual for a father who had caused property to be transferred to the son to intend it to be an advancement. The presumption did not arise concerning a very young

[44] As well as being not mentioned in the judgment of any of the judges other than Deane and Gummow JJ, there is no trace of such an issue in the report of the argument in the High Court: *Nelson* (1995) 184 CLR 538, 540–1.
[45] *Nelson v Nelson* (1994) 33 NSWLR 740 (itself an appeal from *Nelson v Nelson* (Unreported, Supreme Court of New South Wales, Master Macready, 5 November 1993).
[46] Austin Wakeman Scott and William Franklin Fratcher, *Law of Trusts* (Little, Brown, 4th ed, 1989) [443].
[47] (1662) 2 Freem Ch 169; 22 ER 1135 ('*Binion*').
[48] (1663) 2 Freem Ch 171; 22 ER 1138; (1663) 1 Cas in Ch 27; 22 ER 677 ('*Scroope*').
[49] (1677) 2 Swan 594; 36 ER 742.
[50] (1677) 2 Cas in Ch 231; 22 ER 922 ('*Elliot*').
[51] (1678) 2 Freem Ch 32; 22 ER 1040 ('*Woodman*').
[52] (1679) 1 Ch Cas 310; 22 ER 815 ('*Clark*').
[53] *Binion v Stone* (1662) 2 Freem Ch 169; 22 ER 1135; *Binion v Stone* (1663) Nels 68; 21 ER 791.

son, and it did not arise concerning a son who was already established in life and had already received property by way of advancement.[54]

Neither of the reports of *Binion* say that a presumption of advancement arose, but was rebutted. Rather, the reports are consistent with the judges having regarded the presumption of advancement as not having arisen, because of the extremely young age of the son. The report in Freeman says:

> Sir George seeks relief against Stone as for a trust, and in regard to the estate was sold as Sir George's, and that the son was about five years old at the purchase, the court presumed it a trust for which Sir George was relievable.[55]

That suggests that the Court went directly to presuming a resulting trust.

IV.II Scott's second case — *Scroope v Scroope*

Scroope[56] goes against Professor Scott's proposition. X was the grandfather of the plaintiff, and father of the defendant. After X's death the plaintiff claimed possession of a parcel of land by virtue of a gift in X's will. The defendant pleaded that the land in question had been purchased by X in the name of X and the defendant, and that he was entitled to the land by survivorship. The Court held that the purchase should be taken to be intended as an advancement for the defendant. This was not just by virtue of a presumption of advancement, but also because the purchase money had come from selling ancestral land which would have descended to the defendant if it had not been sold, and that the (manorial) courts relating to the land had been held in the name of both X and the defendant. The Court held that this was 'a good plea *unless the Plaintiff could prove an express trust*'[57] — and proof of an express trust would have required the plaintiff to file a reply, which he had not done.

In other words, this was a case where there was a presumption of advancement which was not rebutted. And further, the court was of the view that the way to rebut the presumption of advancement would have been by proof of an express trust. Nothing was said about it being possible that rebutting of the presumption of advancement, when an express trust was not proved, could give rise to a resulting trust.

IV.III Scott's third case — *Grey v Grey*

Grey[58] was a case where a father had purchased land in the name of his son. There was some evidence consistent with an intention that the father have the beneficial title: after the purchase the father had done various acts that an owner of land might do, including keeping the rents, and buying some adjoining land in his own name and enclosing it with the subject land. As well the son had sometimes said that the land was his father's. But, on the other hand, there was some evidence consistent with the father having intended that the son have the beneficial title — the father had on occasions said

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[54] See Proposition 7 in *Grey* (1677) 2 Swan 594; 36 ER 742 at text following footnote below n 63, and *Elliot v Elliot*, discussed in text following below n 66.
[55] *Binion* (1662) 2 Freem Ch 169; 22 ER 1135.
[56] *Scroope v Scroope* (1663) (1663) 2 Freem Ch 172; 22 ER 1138, more fully reported (1663) 1 Cas in Ch 27; 22 ER 677. The unusual factual background to the case is recounted in Jamie Glister, '*Grey v Grey* (1677)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 63.
[57] *Scroope* (1663) 1 Cas in Ch 27, 28; 22 ER 677, 677.
[58] *Grey v Grey* (1677) 2 Swan 594; 36 ER 742; 1 Cas in Ch 296, 22 ER 809.

the land was the son's, the son's will had left the land to his father for life, and the father had proved the will. The Court held that the purchase was an advancement for the son.

Contrary to Scott's proposition, no question arose of the kind of title the father would have had if the presumption of advancement had been rebutted. Indeed, the fuller report of the case in Swanston's reports[59] contains some passages that suggest that an express trust would be necessary to rebut a trust arising by presumption when there is an advancement, that the declaration should ordinarily be in writing, but an oral declaration could suffice if both parties concur in the declaration:

> the law will best appear by these steps. 1. Generally and *prima facie,* as they say, a purchase in the name of a stranger is a trust, for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent. 2. But yet *it may be a trust, if it be so declared* antecedently or subsequently, *under the hand and seal of both parties*. 3. Nay, it may be a trust, *if it be so declared by parol, and both parties uniformly concur* in that declaration. 4. The parol declarations in this case are both ways; the father and son sometimes declaring for, and sometimes against, themselves. 5. *Ergo,* there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. 6. And herein the great question is, whether the law will admit of any constructive trust at all between father and son
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> 1. For the natural consideration of blood and affection is so apparently predominant, that those acts which would imply a trust in a stranger, will not do so in a son ; and, *ergo,* the father who would check and control the appearance of nature, *ought to provide for himself by some instrument, or some clear proof of a declaration of trust*, and not depend upon any implication of law ; for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions.
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> 2. The wisdom of the common law did so; for all the books are agreed on this point, that a feoffment to a stranger, without a consideration, raised a use to the feoffer; but a feoffment to the son, without other consideration, raised no use by implication to the father, for the consideration of blood settled the use in the son, and made it an advancement. How can this court justify itself to the world, if it should be so arbitrary as to make the law of trusts to differ from the law of uses, in the same case?[60]
>
> 3. Again, as land can never lineally ascend, so neither shall the trust of land lineally ascend, where it is left to the construction of law;[61] for the reason why land doth not lineally ascend, is from moral philosophy, *quia amor descendit non ascendit*,[62] and from divinity, because fathers are bound to provide for their children, but children do not provide for their fathers; therefore, when a father, according to his duty, has provided for his son, it were hard to take away that provision by a constructive trust …
>
> *6. Ergo,* where the father intends a trust, he *ought to see it declared in writing, or supported by direct proof*, and not rest upon constructions …

[59] Ibid 2 Swans 597–600; 36 ER 743–4 (emphasis added). The report of *Grey* in Swanston is virtually identical with the best available report, that in D E C Yale (ed), *Lord Nottingham's Chancery Cases Vol II*, Vol 79 (Bernard Quaritch for the Selden Society, 1961) vol 79, 481, case 643.

[60] Ie, the rules about when there was a presumption of advancement rather than of resulting *trust* arose ought to be the same as the rules about when a presumption of advancement rather than a resulting *use* would arise. I also mention that this paragraph shows Lord Nottingham being of the view that a resulting trust arose on a voluntary conveyance of land.

[61] Ie, when land passes by the operation of the common law it is from father to son, never from son to father.

[62] Because love goes downwards, not upwards.

The quotation is not completely clear about what is needed to rebut a presumption of advancement, as his Lordship does not clarify what he means by 'direct proof'. What is clear is that the quotation provides no basis for a conclusion that the trust that arises when a presumption of advancement is rebutted is a resulting trust. That is because the presumption of advancement was not rebutted, but still operated.

In *Grey*, Lord Nottingham was of the view that a father who purchased land in his son's name could have the benefit of a trust of it if the son had previously married with his father's consent and received a settlement — but that was because in those circumstances, contrary to the view that later judges took,[63] there was no presumption of advancement at all:

> 7. Lastly, the difference I rely upon is this; where the son is not at all or but in part advanced, and where he is fully advanced in his father's lifetime. If the son be not at all or but in part advanced, there if he suffer the father, who purchased in his name, to receive the profits, &c., this act of reverence and good manners will not contradict the nature of things, and turn a presumptive advancement into a trust **;** the rather because in this family there were neither debts nor casualties, so no occasion to create trusts ; but if the son be married in his father's lifetime, and by his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated, there a subsequent purchase by the father in the name of such a son, with perception of profits, &c., by the father, will be evidence of a trust ; *for all presumption of an advancement ceases*.[64]

Here Lord Nottingham accepts that if a father purchases land in the name of a son who is already fully advanced the father would hold the land beneficially, by virtue of a presumption of resulting trust. But that is because, when the son is fully advanced, a father's purchase in the son's name is no different to a father's purchase in the name of a stranger.

The case was decided before the *Statute of Frauds* came into operation,[65] so nothing turned on whether the alleged trust for the father was an express trust (requiring writing under the Statute) or one arising by implication (not requiring writing). However, Lord Nottingham's view that an oral declaration of trust could be sufficient *if concurred in by both parties* is consistent with the later law that in such a situation an oral declaration of trust would suffice because it would be a fraud to rely on the lack of writing.

IV.IV Scott's fourth case — *Elliot v Elliot*

Elliot[66] concerned a man who purchased land in the name of his younger son. Lord Nottingham's own account of the case[67] makes clear that the decision was given after the commencement of the *Statute of Frauds*, and that he was concerned to rein in trusts arising by implication:

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[63] Eg, in *Chapman v Gibson* (1791) 3 Bro CC 229, 230; 29 ER 505, 506 Sir Richard Arden MR said, concerning purchases made 'where there is a natural obligation':

> Formerly, some judges thought otherwise; but it is now settled that the Court will not enquire into the quantum of the provision. It is sufficient, that the testator is acting in discharge of moral or natural obligations; and it is very difficult for the Court to enter into such an enquiry: the father must be the best judge.

[64] *Grey v Grey* (1677) 2 Swan 594, 600–1; 36 ER 742, 744 (Proposition 7) (emphasis added).

[65] The decision was given on 26 March 1677. The *Statute of Frauds 1677* (Eng) was assented to on 16 April 1677 and commenced on 24 June 1677.

[66] *Elliot v Elliot* (1677) 2 Cas in Ch 231; 22 ER 922.

[67] Yale, above n 59, 517, case 690; 566, reheard case 751.

> and this judgment was like to be of great example and consequence for the future, for since by the late new Act for the prevention of frauds and perjuries all trusts not declared in writing are abolished, except such trusts as do arise by construction and implication of law, it is high time to set some bounds to such constructions and implications.[68]

Lord Nottingham followed his own decision in *Grey*, and held that there was a resulting trust for the father, because the son was already fully advanced at the time of the purchase. Like the hypothetical situation that Lord Nottingham considered in proposition 7 of *Grey* this was a case of a presumption of advancement not arising, rather than of it being rebutted.

IV.V Scott's fifth case — *Woodman v Morrel*

Woodman[69] concerned a man who took a mortgage of a copyhold in the name of his daughter in 1660 (that is, well before the passing of the *Statute of Frauds*), and the next year purchased the remaining interest in the copyhold in the name of his daughter, but reserving a life estate in it for his wife. The man remained in occupation of the property, even after his daughter had been married for 11 or 12 years. In 1678 the father sought a declaration that the land was held in trust for him.

The report to which Scott refers, in Freeman's reports, is of a decision of Atkins J,[70] sitting in Chancery. The judge held that there was a trust for the father. He recognised that there had been many previous cases where a father had purchased land in the name of his child, and after the death of the father the court had held the purchase to be an advancement. He distinguished those cases on the basis that in the present case the father was alive, 'and by his bill declares it a trust for himself, which takes away the presumption'.[71] His Honour accepted that if it could be proved that at the time of the purchase the father really did intend a provision for the child no later declaration could undo it, but there was no such proof of actual intention in the present case.

Even accepting this decision at face value, it does not support Scott's proposition. It is rather that the judge accepted that there was a presumption that a father intended a conveyance taken in the name of his child to be an advancement, but thought that a later sworn statement by the father that it was a trust for himself could undo that presumption. The decision says nothing about whether the trust for the father that Atkins J would have enforced arose as a resulting trust by virtue of the presumption of resulting trust, or an express trust by virtue of the intention that the father swore he had had.

The report of the case in Freeman contains a note that the case was later reheard, and the decree reversed. That reversal deprives the decision of Atkins J of all authority.

The rehearing[72] disapproved the basis on which the case had been decided previously. Lord Nottingham said that the fact that the purchase had been made in the name of the daughter, when the father had sons, was 'strong evidence of an advancement intended',[73] and 'the father declaring

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[68] Ibid 568.
[69] *Woodman v Morrel* (1678) 2 Freeman 32, 22 ER 1040.
[70] Possibly Robert Atkyns, a judge of the Court of Common Pleas (1672–79). He later served as Chief Baron of the Exchequer: Sir Leslie Stephen, *Dictionary of National Biography* (MacMillan, 1885) vol 2, 230–2.
[71] *Woodman* (1678) 2 Freeman 32, 33; 22 ER 1040, 1040.
[72] Yale, above n 59, op cit 692, case 855.
[73] Again, this was at a time when it had not been established that whenever a father purchased in the name of the child there was a presumption of advancement.

this to be a trust and suing for it as such is not material, for if it be once an advancement it continues irrevocably so'.

One of Lord Nottingham's reasons for declining to hold a trust for the father was that:

> the law never implies a trust but in case of absolute necessity, and when the father would have a purchase in the child's name to be a trust and no advancement, he ought to provide for himself by express declaration at the time and not leave it to construction of law. For since the late Act hath abrogated all trusts which are not in writing, except those which arise by implication and construction of law, it is fit to restrain those implications and constructions to as narrow a compass as is possible, even in cases which arise before the Act, for example's sake.

This is another example of Lord Nottingham taking the view that a father could rebut a presumption of advancement arising from a purchase in the name of his child only by an express trust in his own favour. It does not support Scott's proposition because there was a presumption of advancement that was not rebutted.

IV.VI Scott's sixth case – *Clark v Danvers*

The final case that Scott cites, *Clark*,[74] arose when X had acquired a copyhold estate, the reversion of which was taken in the name of three people — his daughter, Y, and another man. X paid the fine that was exacted upon the transfer. Of the three holders of the reversion the daughter was named first in the copy. After the death of X's daughter Y was admitted as holder of the estate. The plaintiff was the executrix and heir of X's daughter. She succeeded in having it declared that the copyhold was held on trust for her.

There was a custom of the manor under which the first taker of a copyhold estate could bar the reversion. According to the report in 1 Chancery Cases that Scott cites, Lord Nottingham held:

> that though [X] paid the fine, yet when by his consent [his daughter] was made purchaser in the copy, it shall be taken as all one as if she had paid it. And if so, it shall be intended that all the estates in remainder were in trust for her, and she hath power, as by the custom, so by the trust, as cestui que trust to dispose of them.[75]

That is to say, the daughter is taken to have provided the purchase money for the purchase in the name of herself and the other two, and therefore they held on trust for her. Both this trust, and the particular custom of the manner, gave her a right to dispose of the land.

The fuller report of the case in the Selden Society volume supports this reading of the case. It describes the custom in somewhat greater detail:

> the first life named in the copy is always the purchaser and the subsequent lives are always taken in trust for the purchaser … because the custom of this manor … is to grant three copies one upon another, but yet few have children enough to fill all copies so they are fain to fill all copies with the names of friends, for which cause there is another custom that the first purchaser alone may surrender and bar the other lives, who are only his trustees[76]

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[74] *Clark v Danvers* (1679) 1 Ch Cas 310; 22 ER 815.
[75] Ibid.
[76] Yale, above n 59, op cit 723, case 908, sub nom *Clerk v Davers*.

Lord Nottingham was prepared to act in accordance with the custom because it was 'reasonable, for the law is so without a custom' — that is, the custom required nothing different to what the law required. That was so 'because the latter lives paid no part of the fine and by consequence there is no consideration why they should retain to their own use, but they must be understood to be trustees for them who paid the consideration'. A presumption of advancement entered into this case only insofar as the father paid the fine on his daughter's behalf — and that presumption was not rebutted. The only contentious issue in the case did not concern the presumption of advancement at all, but rather purchase money trusts arising between people who are not in a family relationship.

From this analysis, it can be seen that the cases that Scott cites are not authority for the proposition of legal history for which he cites them.

V The more modern North American case law basis for Scott's view

Deane and Gummow JJ cite no authority except Scott in connection with their dictum that the trust that arises when a presumption of advancement is rebutted is a resulting trust. That suggests that the passage that they cite from Scott should be examined closely. The passage that their Honours quote appears as part of a somewhat longer passage. Scott says:

> It might be thought that evidence of an oral agreement by the grantee to hold the property in trust for the payor would be inadmissible because of the *Statute of Frauds*, where the grantee is a natural object of bounty of the payor. It might be argued that in the absence of such evidence a gift would be inferred and that although parol evidence is admissible to rebut a resulting trust it cannot be admitted to establish an express trust. The courts have explained, however, that the trust which is enforced is a resulting trust, not an express trust; that the presumption of a gift to a relative is a rebuttable presumption, and parol evidence is admissible to rebut the presumption of a gift and thus automatically to create a resulting trust. This reasoning is somewhat artificial; but trusts arising where the evidence shows an intention to create a trust when land is purchased in the name of a relative were considered to be resulting trusts before the enactment of the *Statute of Frauds*, and that statute expressly excepts resulting trusts from its operation.[77]

In the extract from Scott that Deane and Gummow JJ quote, the 'This reasoning' in the phrase 'This reasoning is somewhat artificial' is the reasoning in the sentence starting 'The courts have explained, however'. Scott cites four cases as authority for the sentence commencing 'The courts have explained, however'. They are *Smithsonian Institution v Meech*,[78] *Wilson v Warner*,[79] *Thomas v Thomas*[80] and *Glenn Estates v O'Reilly*.[81]

Whether those cases are acceptable persuasive precedents in Australian law will depend on whether they actually decide that the trust that is enforced when a presumption of advancement is rebutted is a resulting trust, and, if they do, how cogent their reasoning is. I suggest that not all of them hold that the trust that is enforced when a presumption of advancement is rebutted is a resulting trust, and that in so far as they do so hold that their reasoning to some extent is not the best reasoning in

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[77] Scott and Fratcher, above n 46. The passage expresses the same thought as Scott had stated much earlier: Austin Wakeman Scott, *Resulting Trusts upon the Purchase of Land* (1927) 40 *Harvard Law Review* 669, 684.
[78] 169 US 398 (1898) ('*Smithsonian*').
[79] 89 Conn 243 (1915) ('*Wilson*').
[80] 79 NJ Eq 461 (1911) ('*Thomas*').
[81] 77 NBR 2d 28 (1968) ('*Glenn Estates*').

accordance with Australian law, and to some extent is not the whole story about the consequences that can follow when a presumption of advancement is rebutted.

The first three of these cases have a similar fact structure — X contracts to purchase land, pays for it from his own money, and has it transferred to Y (a wife or son), after reaching agreement with Y that Y would deal with the land in a particular way.

V.I – *Smithsonian Institution v Meech*

In *Smithsonian Institution*[82] the agreement was between husband and wife. The wife predeceased the husband, and died intestate. By his will, the husband stated that the property was his although it was in his wife's name, and that he left it to the Smithsonian. The wife's next of kin claimed the property. The Smithsonian sued the representative of the next of kin and sought to establish its title to the property.

Brewer J, delivering the opinion of the United States Supreme Court, found for the Smithsonian. In the course of so doing he also said that there was a resulting trust for the husband — though the role that that proposition played in the reasoning overall is a long way from clear. Two different types of reason were given for the outcome of the case.

V.I.I Brewer J's first reason — Resulting trust

The first reason started by reciting basic law that there was a presumption of resulting trust in favour of the person who purchased property in the name of another, but a presumption of advancement when a husband purchased property in the name of his wife. In the present case the presumption of advancement in favour of the wife was rebutted, because evidence of 'antecedent or contemporaneous acts or facts' can be received either to rebut or support the presumption:

> Declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time.[83]

The evidence in *Smithsonian* included testimony of a witness that the husband and wife had agreed that the title should be in the name of the wife, and that she should make a will transferring it at her death to the Smithsonian. Other evidence was to the effect that the agreement was one under which the wife would make a will leaving the property to her husband, who in turn would leave it to the Smithsonian. The judge regarded this difference in the evidence as immaterial: 'the Smithsonian was to be the ultimate beneficiary, and the manner in which this should be accomplished was merely a matter of detail'.[84] The property was 'conveyed to her not as an advancement, but on an agreement that it should subsequently pass to this plaintiff'.[85]

Notwithstanding that finding about the terms of the agreement, the judgment then returned to the question of whether there was a resulting trust:

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[82] *Smithsonian Institution v Meech*, 169 US 398 (1898).
[83] Ibid 400.
[84] Ibid 399 col 2.
[85] Ibid 400 col 2.

> The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate, by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title – an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of advancement, and to indicate the disposition which the real owner intended to should be made of the property.[86]

As a matter of principle, an agreement made about the terms on which property *will be* held when it is later acquired can sometimes be every bit as capable of giving rise to a trust as an agreement made *after* the property has been acquired — though the juristic nature of such a trust requires further examination. And it is turning the meaning of words upside down to call a 'resulting trust' any trust arising from an agreement between the payer and the transferee that a third party will have a beneficial interest in the property.

Brewer J also quoted with approval a statement that:

> if the facts make out a case of resulting trust independently of the agreement, relief will not be denied because of the agreement; it being well-settled that an invalid agreement cannot destroy an otherwise good cause of action, and this is no less true of resulting trusts than of other legal rights.[87]

It is hard to see what connection that proposition had to the facts of the case, where the trust that the husband and wife both intended was for the Smithsonian, not for the husband. Even if their mutual intention was that the trust for the Smithsonian would come into operation only on the death of the husband, so that there was room for there to be a resulting trust to the husband of a life interest, by the time of the litigation the husband had died, and so any life interest he may have had had expired and become irrelevant.

But, even considering the proposition on its own, it is hard to accept as a statement of the law in Australia. There is ample authority that a presumption of resulting trust is a faute de mieux thing. As early as 1693, in *Lady Bellasis v Compton*,[88] a man assigned real estate to X, gave instructions for a declaration of trust to be drawn up under which the property was to be held on trust for third parties, but died before signing the document. X admitted that he was bound by the trust. The man's executrix failed in an attempt to allege that the property was held on a resulting trust for his estate. The Court was inclined to accept the argument that the resulting trusts that are saved by the *Statute of Frauds* were only those that would have been resulting trusts before the passing of the Act, and a parol declaration of trust for a third party before the Act would have prevented a resulting trust from arising. In *Vandervell v Inland Revenue Commissioners*[89] Lord Upjohn said, 'the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution'. In *Stockholm Finance Ltd v Garden Holdings Inc*[90] Robert Walker J (as his Lordship then was) said that he 'must look first for evidence of actual intention before having recourse to the judicial last resort'. In the American case of *Mockowik v Kansas City*[91] Lamm J said that 'presumptions may be looked on as the bats of the law, flitting in the twilight but disappearing in

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[86] Ibid.
[87] From *Robinson v Leflore*, 59 Miss 148, 151 (1881), in turn citing *Keller v Kunkel*, 46 Md 565 (1877).
[88] (1693) 2 Vern 294; 23 ER 790.
[89] [1967] 2 AC 291, 313.
[90] [1995] NPC 162 quoted in *M v M* [2014] 1 FLR 439, 477 [178].
[91] 94 SW 256, 264 (Mo, 1906).

the sunlight of actual facts'.[92] In *Brown v Wylie*[93] Powell J said, 'where an express intention be found, there seems to be no room for the operation of the presumed intention which is the basis of cases dealing with a resulting trust'.[94]

V.I.II Brewer J's second reason — Fraud

The second reason that Brewer J gave was the *Statute of Frauds* could not be used as an instrument of fraud. This reasoning focused upon the fact that the wife received property knowing the basis upon which she was receiving it, that it would have been fraudulent for her in her lifetime to deal with the property in any other way, and after her death it was fraudulent for her next of kin to seek to deal with it in any other way. It can be accepted that parol evidence is admissible to rebut the presumption of advancement, but on the facts in *Smithsonian* what remained after the presumption of advancement was rebutted was not an intention that there should be a resulting trust — it was an intention that there should be a benefit for a third party. It is in accordance with principle for it to be a fraud on the statute for the next of kin to deny the trust in favour of the Smithsonian, but the case does not bear out Scott's proposition that when a presumption of advancement is rebutted the trust that then arises is a *resulting* trust. As I argue below, in Australian law the trust that is enforced when the court applies the principle that the *Statute of Frauds* cannot be used as an instrument of fraud is a constructive trust, not a resulting trust.

V.II *Thomas v Thomas*

Thomas[95] is a decision of Leaming VC, a single judge of the Court of Chancery of New Jersey. A father purchased land in the name of his three sons, after obtaining their agreement that the title be conveyed to them, and their promise that they would convey it to him when he required. The father was living apart from his wife at the time, he expected to sell part of the land fairly soon, and he thought that by putting the title in the name of his sons he would avoid any possibility of difficulty in getting his wife to sign the transfer. The case came to Court only because one of the sons died, and legal title to the land descended to a minor. The Court held that there was a resulting trust for the father. The presumption of advancement was rebuttable, and once it was rebutted 'then the conveyance to the son stands exactly on the same plane as a conveyance to a stranger'.[96] The conversation between the father and his sons did not establish a trust in favour of the father, because it was incompetent to do so — no doubt because of the *Statute of Frauds* — but it was sufficient to rebut the presumption of advancement, leaving the presumption of resulting trust to operate.

For the same reason as discussed earlier concerning *Smithsonian*, this reasoning is unconvincing. Once the presumption of resulting trust is rebutted by evidence that shows what the actual intention

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[92] See also, to similar effect, *Neilson v Letch [No 2]* [2006] NSWCA 254 (22 September 2006) [26]–[27].
[93] (1980) 6 Fam LR 519, 525 ('*Wylie*').
[94] See also *Ambrose* (1716) 1 P Wms 321; 24 ER 407. A purchase of land was made by A's money in the name of B, and B afterwards executed a declaration of trust of the land in favour of A. Cowper LC said that 'had it not been for the statute of frauds this would have made a resulting trust, and [B] executing the declaration of trust, this plainly took it out of the statute'. That does not go as far as actually deciding that there is no occasion for the resulting trust once the declaration of trust has been made, but is consistent with that proposition. Edward Burtenshaw Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (J Butterworth, 5th ed, 1818) 533 says (unfortunately without identifying the source): 'as Lord Mansfield has observed, an equitable presumption is only a kind of *arbitrary implication* raised, to stand until some *reasonable proof* brought to the contrary'.
[95] *Thomas v Thomas*, 79 NJ Eq 461 (1911).
[96] Ibid 749 col 2.

of the parties to the transaction was, it is the evidence of the actual intention that governs the legal situation, not the presumption. On the facts of *Thomas* it would have been a fraud on the statute for the sons to claim the property for themselves, but the trust that an Australian court would then enforce would be a constructive trust, not a resulting trust.

V.III *Wilson v Warner*

Wilson[97] is a decision of Wheeler J in the Supreme Court of Errors of Connecticut. It concerned a man who purchased property in the name of his wife, on the basis of an oral agreement that 'the title should be placed in her to be held by her in trust for him, and on his request be conveyed to him at any time, and that he should enter into possession, pay the mortgage thereon, and maintain and improve the property, and that if she should outlive him the title should invest in her at his decease'. After the purchase, this trust was recorded in writing and the wife signed the writing**.** The plaintiff's wife predeceased him. The court held that the property was held on a resulting trust for the husband, because the presumption of gift was rebutted. An important statement of principle was:

> When title is taken in the name of the wife, and the consideration of the conveyance paid by the husband under an agreement which is *identical with that which the law implies* from the circumstances of the transaction, it rebuts the presumption of a gift, and supports the implied agreement of the law, and a resulting trust arises. When the agreement proven is not identical with that implied by law, it cannot be held that the intention of the parties is identical with that implied by law; hence no resulting trust arises.[98]

This principle demonstrates the weakness of the argument that had been accepted in *Thomas.* If the actual intention of the parties, expressed in their agreement, is in any way different to the beneficial title being held for the payer, it is the actual agreement of the parties that decides on what trusts the property is held. Why should the situation be any different if the actual agreement of the parties is that the beneficial title *will* be held for the payer? Further, even if the principle is accepted at face value it asserts, contrary to the dictum in *Nelson*, that it is not always true that rebuttal of a presumption of advancement gives rise to a resulting trust.

The result in all three of these cases could be reached quite satisfactorily by using the principle that the statute not be used as an instrument of fraud. It would be a fraud for any of the transferees to assert that they had a title to the property that was inconsistent with the agreement. And, if the agreement was not in writing, the court would then decide that the transferees held the property on a constructive trust that required them to act exactly as the agreement had required them to act.

V.IV *Glenn Estates v O'Reilly*

The fourth case that Scott cites, *Glenn Estates*[99] (a decision of the Court of Queen's Bench of New Brunswick), does not support his proposition at all.[100] It concerned a conveyance of land made for a particular purpose, which failed. The conveyance was a voluntary transfer to the son-in-law of the transferor. The decision says nothing about a son-in-law being in a relationship concerning which a

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[97] *Wilson v Warner*, 89 Conn 243 (1915).

[98] Ibid 534 col 2 (emphasis added).

[99] *Glenn Estates v O'Reilly*, 77 NBR 2d 28 (1968).

[100] It is not clear just what role the editor of Scott saw it as playing in his account of the law. While the case is cited in the footnote of authorities for the sentence commencing 'The courts have explained, however', its citation is preceded by 'cf', and followed by '(oral surrender of beneficial interest under a resulting trust sufficient)'.

presumption of advancement arose under the law of New Brunswick. Indeed, the decision says nothing about a presumption of advancement at all. When the intended purpose failed, there was thereupon a resulting trust for the transferor. The case held that that resulting trust could be rebutted or discharged by parol proof. That resulting trust was an automatic resulting trust, the type of trust that arises when property is conveyed on terms that it is to be held on a particular trust, and that trust fails. The trust arose not because of any presumption of resulting trust in favour of the payer, but because the payer made clear that in the circumstances that had arisen the transferee was not to have the beneficial title, no trusts had been expressed about who was to hold the beneficial title in those circumstances, and thus there was no alternative to the payer holding the beneficial title.

Thus, the cases on which Scott relies do not provide persuasive support, so far as the Australian law is concerned, for his proposition that when a presumption of advancement is rebutted, the trust that arises is a resulting trust.

VI Remedy granted for using the *Statute of Frauds* as an instrument of fraud

Before proceeding further, I should make good my contention that when there is a situation where equity will not permit a person to use the *Statute of Frauds* as an instrument of fraud, the remedy that is granted is a constructive trust, which does not need to be in writing if the trust property is land.

It is well-established that the *Statute of Frauds* cannot be used as an instrument of fraud.[101] The principle has been applied to a variety of fact scenarios. For example, if a conveyance has been made in terms that are absolute, but the parties have orally agreed the conveyance is to be by way of mortgage, it is a fraud on the statute to contend that the conveyance is absolute.[102] Parol evidence is admissible to prove what the real agreement was, as a means of proving the fraud.[103] Likewise, if land is conveyed from X to Y subject to an oral agreement that Y will reconvey it in certain circumstances, it is a fraud for Y to refuse to reconvey in those circumstances.[104] Relevantly for present purposes, if land is conveyed by father to son, and the son knew that the conveyance was made with no intention of advancement, it would be a fraud on the statute for the son to assert a beneficial title to the land.[105] The doctrine can sometimes apply when A acquires property from B, on the basis of an unwritten arrangement between A and C about the terms on which A acquires the property.[106]

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[101] Eg, *Thynn v Thynn* (1684) 1 Vern 296; 23 ER 479 ('*Thynn*'); *Reech v Kennigate* (1748) Amb 67; 27 ER 39 ('*Reech*'); *Haigh v Kaye* (1872) LR 7 Ch App 469, 474 ('*Haigh*'); *Re Duke of Marlborough* [1894] 2 Ch 133, 145; *Rochefoucauld* [1897] 1 Ch 196; *Hodgson v Marks* [1971] Ch 892, 907–8, 933; *Last v Rosenfeld* [1972] 2 NSWLR 923, 927 ('*Last*'); *Nelson* (1995) 184 CLR 538, 553. White J discusses many of the cases in detail in *Ciaglia v Ciaglia* (2010) 269 ALR 175, 190–4 [64]–[84].

[102] *Lincoln v Wright* (1859) 4 De G & J 16, 21–2; 45 ER 6, 9 (Knight Bruce and Turner LLJ) ('*Lincoln*') .

[103] Ibid De G & J 22; ER 9 (Turner LJ).

[104] *Davies v Otty [No 2]* (1865) 35 Beav 208, 212–13; 55 ER 875, 877 ('*Davies*'); *Re Duke of Marlborough* [1894] 2 Ch 133.

[105] *Childers v Childers* (1857) 1 De G & J 482, 495; 44 ER 810, 815 (Turner LJ) ('*Childers*').

[106] *Rochefoucauld* [1897] 1 Ch 196 itself was such a case — the defendant acquired the land from a mortgagee, after reaching an informal agreement with the mortgagor about the basis on which he (the defendant) would hold the property. *Lincoln* (1859) 4 De G & J 16; 45 ER 6, which Turner LJ decided on the basis of the doctrine, had a similar fact scenario.

The Victorian Full Court[107] considered the consequences of rebuttal of a presumption of advancement in *Organ v Sandwell*.[108] A man had purchased a house in the name of his wife. The Court found as a fact that there was an agreement between husband and wife that the house should be held by the wife in trust for herself and the husband substantially on a joint tenancy. The Full Court held that the agreement rebutted the presumption of advancement. In rejecting the submission that the agreement was unenforceable because of the Victorian equivalent of the *Statute of Frauds* their Honours said:

> it is now clear that in such a case as the present the Statute shall not be allowed to prevail. What may be the precise limits to be assigned to the operation of this doctrine, and how much actual operation it may leave to the Statute in cases of verbal agreement to create trusts, may be difficult to define. But it is clear that the doctrine takes out of the statute cases in which any person has become possessed of the property of another upon an agreement to hold that property on certain trusts, and where he or his representatives insist upon claiming to possess the property free from such trusts. To make use of the Statute to smother the proof of such an agreement is itself a fraud. The cases on this point are examined at length by Stirling, J., in *In re Duke of Marlborough, Davis* v. *Whitehead.* At .p. 146 he cites the judgment of Turner, LJ, in *Iincoln v. Wright,* in which he says :- 'If the real agreement' between the parties was 'that the transaction should be a mortgage transaction, it is in the eye of this Court a, fraud to insist on the conveyance being absolute, and parol evidence must be admissible to prove the fraud.' The principle was applied similarly (where there was no fraud in the original acquisition of the property but only in the claim set up in the Court) in *Haigh v. Kaye*,[109] where conveyance of land had been made without consideration, and in *Rochefoucauld v. Boustead*.[110] See also *Cadd v Cadd*[111]. [112]

The principle applied in such cases is:

> It is further established … that the *Statute of Frauds* does not prevent the proof of a fraud; and that is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute in order to keep the land himself.[113]

Even if the property was not originally acquired by fraud, the doctrine against fraud on the statute prevents the transferee relying on the lack of writing later, as a defence in court, to attempt to justify not adhering to the basis on which the transferee knows the property was acquired.[114] This is so whether the basis was for the transferee to hold the property for the benefit of the settlor, or for the benefit of some third party.[115]

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[107] Irvine CJ, Cussen and Schutt JJ.
[108] [1921] VLR 622 ('*Organ*').
[109] (1872) LR 7 Ch 469.
[110] [1897] 1 Ch 196.
[111] (1909) 9 CLR 171, 187.
[112] [1921] VLR 622, 630 (citations omitted).
[113] *Rochefoucauld* [1897] 1 Ch 196, 206. *Cadd v Cadd* (1909) 9 CLR 171, 187 (Isaacs J) is to similar effect.
[114] *Organ* [1921] VLR 622, 630; *Bannister v Bannister* [1948] 2 All ER 133, 136 ('*Bannister*'); *Last* [1972] 2 NSWLR 923, 928, 934.
[115] Arguments for and against the trust being enforceable by a third party beneficiary are found in T G Youdan, 'Formalities for Trusts of Land and the Doctrine in *Rochefoucauld v Boustead*' (1984) 43 *Cambridge Law Journal* 306, 334–6; J D Feltham, 'Informal Trusts and Third Parties' [1987] *Conveyancer and Property Lawyer* 246 and T G Youdan, 'Informal Trusts and Third Parties: A Response' [1988] *Conveyancer and Property Lawyer* 267. English

The basis of the court's power to require that property so acquired be held on a trust is the inherent jurisdiction of an equity court to prevent fraud.[116] The way that the court prevents the fraud is by recognising that the defendant must hold the land in accordance with the terms on which he or she knows he or she acquired it. Thus, it is the agreement pursuant to which the titleholder obtained the title, or the terms that the titleholder knew of and acquiesced in, that identifies the contents of the remedy that the court gives. To that extent, the trust that the court enforces is like an express trust.

Some have argued that a consequence of s 23C(1)(b) of the *Conveyancing Act* not requiring a declaration in trust to be made in writing, but only 'manifested and proved' by writing, is that, before any such writing comes into existence, there exists a trust that is 'valid but unenforceable'.[117] I suggest that that view is misleading, for several reasons.

First, it does not fit well with the wording of s 23C(1)(b). When s 23C(1)(b) says that a declaration of trust of land *must* be manifested and proved by writing appropriately signed, why does not 'must' mean must? The wording of s 23C(1)(b) is to be contrasted with that of s 54A(1) of the *Conveyancing Act*[118] '*No action or suit may be brought* upon any contract for the sale or other disposition of land' unless the appropriate writing exists. Section 54A(1) is explicitly concerned with a precondition for the bringing of litigation. The ordinary meaning of the words of s 23C (1)(b) is that it is concerned with a precondition for the recognition of a trust, whether that recognition is in litigation or for any other purpose.

Second, if the express trust exists before the writing comes into existence it is a very strange juristic creature. It has the effect that if the putative trustee were voluntarily to act in accordance with it, he would be committing no legal wrong. But likewise, even if the trust did not exist, if the putative trustee

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cases permitting enforcement by a third-party beneficiary are *Neale v Willis* (1968) 19 P & CR 836 ('*Neale*'), *Binions v Evans* [1972] Ch 359 (Lord Denning MR) ('*Evans*'), *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044. The enforceability of the trust by the third-party beneficiary in Australian law is established by *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 ('*Bahr*') discussed at below n 128. Examples of such a trust being enforced by a third party are *Ryan v Starr* (2005) 2 BPR 22,803, 22,818 [84], 22,820 [95] and *Imam Ali Islamic Centre v Imam Ali Islamic Centre* [2018] VSC 413 (31 July 2018) [486]–[488], [495], [685] ('*Imam Ali Islamic*').

[116] *Blackwell v Blackwell* [1929] AC 318, 336–7, approved by Starke J in *Drever* [1936] ALR 446 provided the requirements of certainty of intention to create a trust, certainty of trust property and certainty of beneficiaries are satisfied.

[117] In *Hagan v Waterhouse* (1991) 34 NSWLR 308, 386 (Kearney J) made a passing remark that such a trust was 'valid though unenforceable'. See also Youdan, 'Formalities for Trusts of Land', above n 114, 320–1.Youdan bases that conclusion on two cases — *Rochefoucauld* [1897] 1 Ch 196 itself, and *Gardner v Rowe* (1828) 5 Russ 528; 38 ER 1024. I consider *Rochefoucauld* below in the text following below n 181. In *Gardner* Baron Lyndhurst LC approved the decision below of Leach V-C (*Gardner v Rowe* (1825) 2 Sim & St 346; 57 ER 378). Leach V-C had held that, when a lease had been acquired by A in trust for B, and A made a written declaration of trust only after committing an act of bankruptcy, the lease did not vest in the trustee in bankruptcy. The assumed legal background to the case was that a bankruptcy related back to the first available act of bankruptcy before the order of bankruptcy was made, all property of the bankrupt as at the date of the first available act of bankruptcy vested in the trustee in bankruptcy, but property of the bankrupt that was held on trust at that date did not vest. The reason Leach V-C gave for why A was bound by the trust before his bankruptcy was because it would have been a fraud on the statute to deny it. I suggest that the result of the case arose because A was already bound by a constructive trust in favour of B at the time of the act of bankruptcy. The case provides no basis for the trust existing *as an express trust* before the writing came into existence. See also William Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 95.

[118] Which was brought into the *Conveyancing Act* by the same statute as s 23C, the *Conveyancing (Amendment) Act 1930* (NSW).

were voluntarily to carry out exactly the same actions as those the oral trust required he would be committing no legal wrong, because he was carrying out actions that he was entitled to carry out by virtue of being the owner of the 'trust' property. And if the putative trustee were to act contrary to the requirements of the 'trust', no-one could enforce the 'trust' against him on the basis that it was an express trust. That is the situation that exists when someone orally declares a trust over land that he already owns.[119] An express trust that results in no practical consequences is a very odd type of trust. The situation of the beneficiary of such trust is analogous to that of the donee of a gift that is subject to a condition precedent, when that condition precedent has not occurred.

Third, the lack of efficacy of the oral trust would apply in contexts outside attempts to enforce it in court. For example, if the 'trust' entitled B to a particular amount of income, and the 'trustee' actually paid that amount to B, the liability to pay income tax on that amount would probably fall upon the trustee, with the payment to B regarded as a gift, because there was no enforceable obligation to make the payment.[120] If the land in question was not income-producing, liability for land tax would fall on the putative trustee, because he was the 'owner' within the meaning of s 3 of the *Land Tax Management Act 1956* (NSW) and the putative beneficiary was not an owner. If there has been an oral declaration of trust of land it would be prudent for the 'trustee' to keep the sort of records and accounts that a trustee under a properly constituted trust must keep, against the possibility that the trust later comes into existence through the appropriate writing coming into existence — but not as a matter of having a present obligation as an express trustee to do so.

Fourth, some but not all of the situations where there is an oral declaration of trust of land are ones where the doctrine that a statute is not to be used as an instrument of fraud applies. When that doctrine applies the trust that arises is not 'valid but unenforceable' — it is enforceable despite the lack of writing, though not as an express trust, for the reasons given below.

When an express trust comes into existence through a declaration of trust it is the making of the declaration of trust by a person who has title to the trust property that gives rise to the equity that the court enforces. By contrast, the equity that the court enforces under the doctrine that the statute is not to be used as instrument of fraud arises from the defendant having acquired what appears to be an absolute title but having acquired it on the basis that the defendant agreed, or acquiesced in the proposition, or represented, that he would honour a qualification or limitation on the absolute nature of the title. The equity does not arise because the titleholder has actually engaged in equitable fraud by asserting that he holds an absolute title and is not bound by the qualification or limitation: it arises because it *would be* a fraud for him to make such an assertion. It arises as soon as he has acquired the apparently absolute title on the basis of it being subject to that qualification or limitation. As Ben McFarlane has put it:

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[119] *Wratten v Hunter* [1978] 2 NSWLR 367.

[120] This example considers the situation concerning just one payment of income. Sometimes in tax law a succession of gifts can count as income of the recipient (*Federal Commissioner of Taxation v Dixon* (1952) 86 CLR 540, 557), but in that situation the subject matter of the gift might be taxable in the hands of both the donor and the donee.

> the trust does not arise simply because the former owner of the property so intended; rather, the trust arises to prevent [the recipient]'s reneging on the understanding subject to which he received the property.[121]

But when the justification for the trust is the prevention of fraud, and the court recognises that an express trust cannot be enforced because of the Statute, the remedy that is granted is the imposition of a constructive trust. It is because the remedy is a constructive trust, and constructive trusts are exempted from the statutory requirement of writing, that the court is able to require a defendant who has acquired land on oral terms that he will deal with it in some particular way to hold it on trusts that require those terms to be carried out.

There is considerable authority that a constructive trust is the means whereby the court enforces the doctrine that the *Statute of Frauds* cannot be used as an instrument of fraud. It starts from soon after the enactment of the *Statute of Frauds*. A 1689 case, *Devenish v Baines*,[122] concerned copyhold land in relation to which there was a custom that a copyholder could nominate a successor who would have a life interest in the land, and could except any rights from such a nomination. A woman persuaded her ailing husband not to nominate his godson, with a reservation of certain rights for the woman, as his successor. She assured the husband that if he nominated her she would ensure that the godson had the rights that the husband wanted the godson to have. When the man had died, and the woman had refused to recognise any rights in the godson, the godson succeeded in an action to claim the land. The woman pleaded the *Statute of Frauds*, and argued that the only way the godson could make a claim was by establishing a trust, for which the Statute demanded writing. The godson succeeded. The report contains two reasons. The first is that the Court 'decreed it not as an agreement or a trust, but as a fraud'.[123] The second, which appears from the skimpy report to be not the ratio, is 'they were of opinion, that seeing by the custom of the manner an estate might be created by parol without writing, a trust of such parol estate might likewise be raised without writing, notwithstanding the statute'.[124]

The reasoning in *Devenish*, that the remedy was granted to prevent the fraud rather than to enforce the trust as such, was consistent with another case from around the same time that had required land to be held on trust when a person had acquired title following an oral promise to a testator that he would hold the property on particular trusts if the testator's will left the property to him.[125] Similarly, in 1741 in *Young v Peachy* Lord Hardwicke LC said:

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[121] Ben McFarlane, 'Constructive trusts arising on a receipt of property sub conditione' (2004) 120 *Law Quarterly Review* 667, 675.

[122] (1689) Prec Ch 3, 24; 24 ER 2 ('*Devenish*'). Another report at (1689) 2 Eq Cas Abr 43; 22 ER 38 is substantially identical.

[123] Ibid Prec Chan 4; ER 3.

[124] Ibid Prec Chan 4–5; ER 3. Even if the second reason was one for reaching the outcome of the case, if two independent reasons are given for reaching a decision each is part of the ratio: *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 712–13 [215]–[216]; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 361 [293].

[125] *Thynn* (1684) 1 Vern 296; 23 ER 479, which expressly said that the decision was based on fraud. Fraud is likewise given as the basis for a similar decision concerning similar facts in *Reech* (1748) Amb 67; 27 ER 39.

> there have been a great many cases, ever since the statute of frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud.[126]

There are cases in the 19th, 20th and 21st centuries that put the avoidance of fraud as the basis for the doctrine that the *Statute of Frauds* cannot be used as an instrument of fraud.[127] Decisively, so far as Australian law is concerned, there is High Court authority that expressly referred to the remedy as a constructive trust, or that it was a trust *imposed by the court* rather than created by the parties.[128]

It may be that the doctrine that the *Statute of Frauds* is not to be used as an instrument of fraud can be explained, in at least some of its applications, as a particular manifestation of the law of estoppel: the mutually understood limitation or qualification on the defendant's title creates an expectation on which the plaintiff acts to his detriment, such that it would be unconscientious for the defendant to fail to act in accordance with that qualification or limitation.[129] It is beyond the scope of this article to explore that possibility.

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[126] (1742) 2 Atk 255, 257; 26 ER 557, 558. Similarly, in *Lloyd* [1741] 2 Atk 148, 150, 26 ER 493, 494 Lord Hardwicke recognised that there could be a 'resulting trust by operation of law' in cases of fraud. In the fuller report of the case *Lloyd v Spillit* (1740) Barn C 384, 388; 27 ER 689, 690 his Lordship is reported as saying: 'where there has been a Fraud in gaining a Conveyance from another, that may be a Reason for making the Grantee in that Conveyance to be considered meerly as a Trustee'.

[127] *Davies* (1865) 35 Beav 208, 212–13; 55 ER 875, 877; *Haigh* (1872) LR 7 Ch App 469, 475 used language consistent with the remedy being the imposition of a constructive trust when James LJ said the defendant '*is to be treated as* a trustee of the property'; *Bannister* [1948] 2 All ER 133, 136 (Scott and Asquith LJJ, Jenkins J); see also *Neale* (1968) 19 P & CR 836; *Evans* [1972] 1 Ch 359, 368; *Staden v Jones* [2008] 2 FLR 1931, 1932 [1], 1934–5 [6]–[9], 1942–2 [30]–[32] holding that the trust that is enforced is a constructive trust; *Imam Ali Islamic* [2018] VSC 413 (31 July 2018) [486]. Youdan, 'Formalities for Trusts of Land', above n 114, 330–4 tends to favour the trust being a constructive one.

[128] In *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 583 [39] Gaudron, McHugh, Gummow, Hayne and Callinan JJ said: 'one species of constructive trust is concerned with cases where the intent of a settlor or testator in transferring or devising property otherwise would fail for want of compliance with the formalities for creation of express trusts inter vivos or by will'. See also *Bahr* (1988) 164 CLR 604, 638 (Wilson and Toohey JJ), 646 (Brennan J) (including at 656: 'it is a doctrine of long standing that the Statute does not preclude the imposition of a constructive trust when a transferee relies on the absolute character of the transfer to defeat a beneficial interest which, according to the true bargain between transferee and transferor, is to belong to another'). (In *Bahr* the second defendants had acquired land on the basis of an acknowledgment to the vendor of the land that the plaintiffs had certain rights in the land. As there was a five-judge bench in *Bahr*, the combined view of Wilson, Toohey and Brennan JJ that the trust that arose in favour of the plaintiffs was a constructive trust outweighs the view of Mason CJ and Dawson J at 618–19 that the trust involved was an express trust.) In *Voges v Monaghan* (1954) 94 CLR 231 the High Court upheld a secret trust claim. Fullagar and Kitto JJ at 240 approved a statement of Lord Davey in *French v French* [1902] 1 IR 172 that the jurisdiction was based upon fraud 'because it is a trust which is imposed upon the conscience of the legatee, then if the legatee betrays the confidence in reliance upon which the bequest was made to him, then it is what I should think everybody would consider a fraud'. The order of the Court, at 253, reflects their Honours' view that the trust that was imposed was a constructive trust — the order that had been made below was that the legatee held the property 'upon trust' to perform the testator's intentions, but the High Court altered it to state that the property was 'subject to a trust' to that effect.

[129] *Bannister* [1948] 2 All ER 133 has been explained in those terms in *Timber Top Realty Pty Ltd v Mullens* [1974] VR 312, 319 and in *Francis v NPD Property Development Pty Ltd* [2005] 1 Qd R 240, 246–7 [5], 252 [21], 254 [26] (McPherson JA), 258 [45] (Williams JA agreeing). Parker J pointed out the similarity between estoppel and the 'fraud on the statute' doctrine in *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* [2018] NSWSC 761 (28 May 2018) [209].

VII *Jacobs*' contrary proposition

A problem for the analysis I am putting forward comes from a statement in *Jacobs*. *Jacobs* says, concerning the doctrine that the *Statute of Frauds* cannot be used as an instrument of fraud:

> fifthly, the trust declared in such cases is an express trust, thereby operating in the face of the statute, not a constructive trust, which would fall within its second subsection. The suggestion in *Bannister v Bannister* to the contrary is inconsistent with what was stated in *Rochefoucauld v Boustead* and later cases.[130]

A footnote to that paragraph lists the 'later cases' referred to,[131] and correctly observes that the paragraph was approved in *Schweitzer v Schweitzer*.[132]

The statement in *Rochefoucauld v Boustead* that it refers to is where Lindley LJ said:

> The trust which the plaintiff has established is clearly an express trust within the meaning of that expression as explained in *Soar v Ashwell*.[133] The trust is one which both plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises although there may have been no intention to create a trust. The intention to create a trust existed from the first … The statute which is applicable is the *Judicature Act 1873* … [s 25(2)], which enacts as follows: 'No claim of the cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any *Statute of Limitations*.' The *Statutes of Limitation*, therefore, afford no defence if the plaintiff's action is to be regarded as one brought by a cestui que trust against his trustee seeking for an account of trust property.[134]

I suggest that the paragraph in *Jacobs* could be misleading if it is taken as suggesting that the type of trust of land that the court enforces under the doctrine that a statute cannot be used as an instrument of fraud is an express trust. There are four types of reasons why.

The first is that there is no principled basis on which an express trust, that was required by statute to be manifested and proved in writing, could operate 'in face of the statute' when it was not in writing. When the *Statute of Frauds* was enacted in the 17th century judges sometimes considered themselves free to graft glosses and exceptions onto statutes. These days judges do not have that freedom. The modern progeny of the *Statute of Frauds* state expressly in what circumstances there can be an exception to a statutory requirement of writing. It is only if a trust of land falls within one of the exceptions that a trust can be valid, if it is not evidenced in writing. This reason requires no further elaboration.

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[130] Heydon and Leeming, above n 37, [7-12]. To similar effect is *Jacobs*' statement at [13-06] that where it would be fraudulent to set up a statute 'the better view is that the removal of fraudulent reliance on the statute clears the way to show an express trust as what was intended'.

[131]

> namely," *Allen v Snyder* [1977] 2 NSWLR 685 at 692, *Dalton v Christofis* [1978] WAR 42, *Avondale Printers v Haggie* [1979] 2 NZLR 124 at 161 – 5; *Redden v Lillis* [1979] WAR 161; *Brown v Wylie* (1980) 6 Fam LR 519; *Bloch v Bloch* (1981) 180 CLR 390 at 403; 37 ALR 55 at 64; *Sharp v Anderson* (1994) 6 BPR 13,801 at 13,813."

Ibid.

[132] [2012] VSCA 260 (23 October 2012) [43].

[133] [1893] 2 QB 390.

[134] [1897] 1 Ch 196, 208.

The second is that the 'express trust' explanation does not cover all situations in which the doctrine that a statute cannot be used as an instrument of fraud applies. The doctrine is capable of applying when A purchases an item of property in the name of B, and makes known to B the terms on which the item is to be held. However, it is only the absolute owner, or the beneficial owner,[135] of an item of property who has the ability to declare an express trust of that property.[136] If A never has any property right concerning that item A will not be capable of declaring a trust concerning it. While sometimes B might, on receiving the property, declare the trust on which he held it, that would not always happen. For B to merely accept the property with knowledge of the terms on which A expected it to hold it would not amount to declaring an express trust concerning it.

The third is that the cases that the authors rely on, when considered in full, provide only weak support for the proposition.

The fourth is that the reference in *Rochefoucauld* to such a trust being an express trust uses the expression 'express trust' for a special and limited purpose.

VII.1 Reason three — The cases provide only weak support for the proposition

VII.1.1 *Allen v Snyder*

In *Allen v Snyder*[137] Glass JA certainly says that a trust that arises from the common intention of parties about how the beneficial interest in property will be held is 'an express trust which lacks writing'. Earlier he had similarly said:

> An express trust of land is not enforceable unless it is evidenced in writing and signed by the party able to declare the trust: *Conveyancing Act 1919*, s 23C. By way of exception, an express trust may be proved by oral evidence where otherwise the statute would be made 'an instrument of fraud': *Rochefoucauld v Boustead* [1897] 1 Ch 196 at p 206.[138]

However, as with most judicial statements, these words of Glass JA should not be read in isolation from their context. His Honour had earlier also said:

> Constructive trusts arise where it would be a fraud for the legal owner to assert a beneficial interest. Unlike express and implied trusts, which reflect actual intentions, they are imposed, without regard to the intentions of the parties, in order to satisfy the demands of justice and good conscience.[139]

When Glass JA said that the constructive trusts are imposed 'without regard to the intention of the parties' he was saying that the intentions of the parties are not the reason why the constructive trust is imposed. He was not saying that the intentions of the parties are always irrelevant to the constructive trust that is imposed.

He also said, concerning a common intention trust:

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[135] *Tierney v Wood* (1854) 19 Beav 330, 336; 52 ER 377, 3379 ('*Tierney*'); *Kronheim v Johnson* (1877) 7 Ch D 60, 66 ('*Kronheim*').
[136] Brewer J recognised this in *Smithsonian*, 169 US 398 (1898) in the passage at above n 86.
[137] [1977] 2 NSWLR 685, 692 (the reference cited in *Jacobs*, above n 37).
[138] Ibid 689.
[139] Ibid 690.

> Since it is based upon actual intention, expressed or inferred, and notions of justice are irrelevant, constructive trusts, as traditionally defined, appear to be excluded. Is it a new kind of constructive trust, an express trust or a resulting trust?[140]

His Honour's assertion that notions of justice are irrelevant to a common intention trust (a proposition for which he cites no authority) is hard to accept. One would think that notions of justice were centrally relevant to whether the court should allow X to disown a common intention with Y, on the basis of which Y had contributed to X acquiring a property right.

However, for the moment I will continue with what *Allen* actually said about the type of trust that is enforced when the *Statute of Frauds* is sought to be used as an instrument of fraud.

The 'express trust which lacks writing' phrase is at the end of the passage where his Honour rejects the possibility that a common intention trust is a resulting or implied trust:

> There is, no doubt, a problem of classification in deciding what kind of trust it is, when an agreement or common intention is established that the beneficial interest is to be held in certain proportions. Since the respective shares of the spouses may be unrelated to their respective contributions to the purchase price, it is not suggestive of a resulting or implied trust. It is rather an express trust which lacks writing.[141]

His Honour immediately went on, however, to recognise that in *Gissing v Gissing* their Lordships had described such a trust as a constructive trust, and he went on to explain what sort of constructive trust it was:

> I conclude that their Lordships were describing it as a constructive trust because, in the absence of writing, it was to be distinguished from express trusts. It would, nevertheless, be enforced because reliance by the trustee on the statute requiring writing would be an equitable fraud: *Rochefoucauld v Boustead*;[142] *Re Densham*.[143] The expression 'breach of faith' used by Viscount Dilhorne,[144] and the insistence by Lord Diplock that the legal owner's conduct, in disclaiming the beneficial interest, would be inequitable,[145] support this view. So understood the trust falls into the same category as *Bannister v Bannister*[146] and *Last v Rosenfeld*,[147] where the legal owner acquired his title pursuant to a bargain with his transferor that a beneficial interest was being reserved to the latter; *Binions v Evans*,[148] where the legal owner took with express notice of an agreement made by the transferor to him that a third party retained a beneficial interest, and *Ogilvie v Ryan*,[149] where the claimant was promised a beneficial interest by the legal owner, if she lived with him and looked after him. The trust is enforced, because it is unconscionable of the legal owner to rely on the statute to defeat the beneficial interest.[150]

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[140] Ibid 691.
[141] Ibid 692.
[142] [1897] 1 Ch 196.
[143] [1975] 3 All ER 726, 732.
[144] *Gissing v Gissing* [1971] AC 886, 900.
[145] Ibid 905.
[146] [1948] 2 All ER 133.
[147] [1972] 2 NSWLR 923.
[148] [1972] Ch 359.
[149] [1976] 2 NSWLR 504.
[150] [1971] AC 886.

Of the cases that Glass JA here relied upon, *Re Densham*,[151] *Bannister v Bannister*,[152] *Last v Rosenfeld*,[153] *Binions v Evans*,[154] and *Ogilvie v Ryan*,[155] all described the type of trust that arose to prevent the statute being used as an instrument of fraud as being a constructive trust.

Glass JA went on to say that a common intention trust:

> could justifiably be called an express trust, as it was in *Rochefoucauld v Boustead*. Or it might be called an implied trust, based upon presumed intentions which have been modified by evidence to accord with the actual intentions. But when it is called a constructive trust, it should not be forgotten that the courts are giving effect to an arrangement based upon the actual intentions of the parties, not a rearrangement in accordance with considerations of justice, independent of their intentions and founded upon their respective behaviour in relation to the matrimonial home[156]

That passage recognises that the trust that is enforced *can* be regarded as a constructive trust.

The judgments in *Allen* must be read bearing in mind the stage in the development of the law of constructive trusts at which they were written, and what issues the judges saw themselves as addressing. A significant concern of the judges in *Allen* in 1977 was to reject the broad notion that some English judges had then recently developed, that property acquired by a couple who lived together could have a constructive trust imposed on it by *imputing* an intention to the couple (rather than finding, or inferring, that they actually had some particular intention), or, worse, by imposing a trust to accord with what the judge saw as being fair.[157] The concern of Glass JA was to insist that the terms of the trust that was imposed must be one that held the parties to the same obligations as were contained in their agreement or common intention.

Samuels JA said that he agreed with Glass JA but also said that in the collocation of trusts as 'resulting, implied or constructive' the implied trust:

> cannot, I would think, mean a trust raised by an intention yielded by inference from the words and conduct of the parties. An intention derived in this way would lead to the creation of an express trust. It is yielded by applying the same method as that which finds express intention to contract, or express contractual terms, by inference from conduct, or from language which is indirect. Moreover, if A holds property in which B claims a beneficial interest which A denies, recourse may be had to parol evidence

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[151] In *Re Densham* [1975] 3 All ER 726, 732 Goff J said that where there was a common intention concerning proportionate property rights, 'to hold such an agreement unenforceable unless it is in writing, or a specifically enforceable contract, is, in my opinion, contrary to equitable principles, because once the agreement is found it would be unconscionable for a party to set up the statute and repudiate the agreement. Accordingly, in my judgment, he or she *becomes a constructive trustee* of the property so far as necessary to give effect to the agreement' (emphasis added).

[152] [1948] 2 All ER 133, 136 referred to 'the equitable principle on which *a constructive trust is raised* against a person who insists on the absolute character of the conveyance to himself for the purpose of defeating a beneficial inch trust which, according to the true bargain, was to belong to another, and referred to the fraud which brings the principle into play' (emphasis added).

[153] [1972] 2 NSWLR 923, 928 Hope J quoted the passage set out in n 152 from *Bannister* [1948] 2 All ER 133, and at 934 drew on the analogy of mutual wills and referred to them as depending upon constructive trust.

[154] In [1972] Ch 359, 368–9 Lord Denning MR referred to the trust as a constructive trust no fewer than nine times.

[155] [1976] 2 NSWLR 504, 514–19 Holland J repeatedly referred to such trusts as being constructive.

[156] *Allen* [1977] 2 NSWLR 685, 694–5.

[157] Ibid 693–5 lists, and rejects, cases that had imposed a constructive trust on one of these bases. The issue was finally disposed of, so far as Australian law was concerned, in the High Court's decision in *Muschinski v Dodds* (1985) 160 CLR 583, 593–5, 615–16.

> in order to prove the existence of a trust, because equity will not permit a statute requiring writing to be used as an instrument of fraud … In such cases, the constructive trust may represent the remedy by which the plaintiff seeks to vindicate an express trust founded upon a common intention which the defendant later repudiates or it may be seen as a separate class of trust raised by the existence of some fiduciary or other relevant relationship between the parties, or by the defendant's unconscionable conduct. The distinction is certainly not without importance and difficulty … It is, however, not of direct relevance in the present case[158]…[159]

Thus, Samuels JA expressly left open the possibility that the remedy, in cases where a common intention had been manifested concerning the ownership of an item of property, and the defendant sought to repudiate the intention, was a constructive trust based on the unconscionable behaviour of the defendant.[160]

VII.I.II *Dalton v Christofis*

In *Dalton v Christofis*,[161] a case decided when the *Statute of Frauds* still applied in Western Australia, there is no mention of whether the trust involved was an express trust or some other kind of trust. The plaintiff and the defendants agreed orally, before some land was purchased in the name of the defendants, that the plaintiff would contribute £1000 to the price, and would be entitled to one third of the eventual proceeds of sale. Smith J enforced that agreement, despite a plea that the *Statute of Frauds* was not complied with. He quoted and applied the decision of Burnside J in *Phillips v Selegovitch*, that oral proof of such an agreement was permissible because:

> the *Statute of Frauds* does not prevent proof of the fraud, and that it is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it to be so conveyed to deny the trust and claim the land for himself.[162]

That remark is consistent with the remedy that is granted in such a case being a constructive trust that aims to prevent the fraud.

VII.I.III *Avondale Printers & Stationers Ltd v Haggie*

The decision in *Avondale Printers & Stationers Ltd v Haggie*[163] is quite clear that the trust that is frequently enforced when a person departs from an oral agreement on the basis of which he or she has acquired title to property is a constructive trust. Mahon J said:

> The ordinary rule is that reliance upon the *Statute of Frauds* in order to defeat a beneficial interest intended to be conveyed by oral agreement will constitute equitable fraud so as to fasten upon the legal owner the liability of a constructive trustee. But mere reliance upon the *Statute of Frauds* to defeat

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[158] Apart from one presently irrelevant exception

[159] *Allen* [1977] 2 NSWLR 685, 697.

[160] Mahoney JA reached the same conclusion as Glass and Samuels JJA, but for different reasons. From the point of view of the present law, he was writing under the disadvantage of accepting the then orthodoxy that it was subjective intention that was necessary to create an express trust, and accepting that there was no subjective intention to create a trust on the facts of the instant case. He accepted that thus any trust in the case before him had to be one imposed by the court. In his view, the guide to the sort of circumstances in which the court could do so was to be found in the types of circumstances in which courts had imposed a trust previously: at 704–5. Taking the view that there was no such type of circumstances in the instant case, he refused to impose a trust. That process of reasoning does not cast light on the problem presently being considered.

[161] [1978] WAR 42.

[162] (1922) 25 WALR 50, 53.

[163] [1979] 2 NZLR 124, 158–65.

> an oral agreement relating to land does not in itself give rise to a constructive trust. Prima facie the *Statute of Frauds* or its modern statutory equivalent must be given its legal effect. Fraud in equity will only arise when in all the circumstances it will be dishonest for the legal owner to rely upon the statute, and that result will most commonly occur when … the legal owner has so conducted himself as to induce the other party to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.[164]

VII.I.IV *Redden v Lillis*

The case that *Jacobs*' footnote refers to as '*Redden v Lillis* [1979] WAR 161' appears to be properly called *Redden v Wilks*.[165] It does not relate in any way to what type of trust arises when it would be a fraud to rely on the *Statute of Frauds*,[166] and so is not authority for the proposition for which *Jacobs* cites it.

VII.I.V *Bloch v Bloch*

Bloch v Bloch[167] concerned a situation where parents and their son both contributed to the purchase of a block of flats, and title was taken in the name of the son alone, in circumstances where a presumption of advancement was rebutted. The passage on which *Jacobs* relies is the conclusion of the judgment of Brennan J.[168] His Honour took a different view of the facts to the other judges in the High Court in *Bloch*.[169] He found that the parties had a common intention that the beneficial interest would be proportionate to the contributions made to acquire the land and to free it from encumbrances. He avoided deciding the juristic nature of the trust that arose — he said:

> Whatever be the classification of the trust which binds the person entrusted with the legal title to property, his repudiation of the terms upon which he was entrusted with that property is a fraudulent use of another's confidence, and the Statute is not intended to cover fraud.[170]

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[164] Ibid 163–4.

[165] [1979] WAR 161.

[166] Rather, it accepts that by reason of the High Court's decision in *Adamson v Hayes* (1973) 130 CLR 276 an oral contract to dispose of an interest in land for valuable consideration is an agreement which creates an interest in land and so requires writing, or must fall within one of the statutory exceptions to the requirement of writing. In *Redden v Wilks* [1979] WAR 161 the agreement was enforceable because there were adequate acts of part-performance. *Redden* does not even relate to a situation where X has acquired an interest in land as a result of an oral agreement that X later repudiates — it was an attempt to enforce an oral agreement to convey land, when the person who had promised to convey it resiled from the promise.

[167] (1981) 180 CLR 390.

[168] Ibid 403.

[169] Ibid 397 Wilson J (Gibbs CJ, Murphy and Aickin JJ agreeing) found that there was insufficient certainty for the creation of an express trust, but it was clear that the son was not to have the entire beneficial interest, in consequence of which there was an automatic resulting trust, under which the beneficial interests were proportional to the contributions to the purchase price. The flats had been bought after the parties reached a consensus that 'whatever we put in, that is what we will receive in the proceeds from the flats — we will separate it correctly'. That could equally have given rise to a constructive trust, preventing the defendant from acting contrary to the common intention even though there was no express trust, through reasoning similar to that in *Green v Green* (1989) 17 NSWLR 343, special leave to appeal refused (1990) 171 CLR 674 ('*Green*'). In *Green v Green* a couple had a common intention about the basis on which a house would be purchased, but too imprecise an intention to give rise to an express trust, yet an equity arose that prevented the estate of one of the parties from acting inconsistently with that intention.

[170] *Bloch* (1981) 180 CLR 390.

VII.I.VI *Brown v Wylie*

Wylie[171] was a case that held there was a common intention trust attaching to a house that had been a couple's matrimonial home, title to which was solely in the name of the husband. Powell J, relying on *Rochefoucauld* and *Allen*, held it was an express trust that was enforced notwithstanding the se 23C of the *Conveyancing Act* to prevent the statute being used as an instrument of fraud. His Honour made no mention of any of the matters concerning *Rochefoucauld* and *Allen* to which this article draws attention.

VII.I.VII *Sharp v Anderson*

In *Sharp v Anderson*[172] a son had made significant financial contributions to the purchase of a home in which his mother and stepfather lived. The son transferred his registered half interest in the property to his mother and stepfather on the basis of an oral promise that they would leave the property to him on their death. The litigation occurred after the death of the stepfather but during the lifetime of the mother, and after the son and the mother had fallen out. Santow J refused the mother's application for an order that the son remove a caveat that he had lodged on the title. His Honour explicitly identified the issues for decision in the case.[173] The first issue was whether there was a testamentary contract obliging the survivor of the mother and the stepfather to execute a will in favour of the son. That was decided in favour of the son. The second issue was whether the contract was enforceable notwithstanding the lack of writing. Concerning the second issue, the first alternative that he identified was that the plaintiff had the benefit of:

> a constructive trust, to prevent the *Statute of Frauds* (or the corresponding provisions of the *Conveyancing Act 1919* (NSW)) being called in aid as an instrument of fraud to defeat the true bargain between the parties, that is, to prevent the plaintiff, contrary to that unwritten bargain, insisting on the absolute character of a conveyance to the plaintiff to override a sufficiently defined beneficial interest so created by the bargain in favour of the defendant, so that the court may intervene to apply a constructive trust over the plaintiff's interest in the property in favour of the defendant so as to protect that interest.[174]

Other alternatives that his Honour identified were whether relief could be obtained pursuant to equitable estoppel, or a constructive trust arising from mistake of fact, unconscionability, estoppel, or unjust enrichment.[175] He did not say anything about the possibility of there being an express trust.

A step in the reasoning towards whether the plaintiff had the benefit of a constructive trust was deciding whether the plaintiff had 'a sufficiently defined beneficial interest so as to be enforceable'.[176] The problem His Honour posed for himself was:

> does such a contractual promise create a sufficiently defined beneficial interest in the property so as to override the *Statute of Frauds*, being therefore such as to create a trust, though without explicit

[171] *Brown v Wylie* (1980) 6 Fam LR 519, 522, 525.
[172] (1994) 6 BPR 97,510.
[173] Ibid 13,806–7.
[174] Ibid.
[175] He repeated the first two alternatives that were open concerning the second issue at 13,810–11.
[176] Ibid 13,811.

> reference to a trust, see *Bannister v Bannister* and *Willets*[177] per MacPherson JA which held that a trust can be treated *as if express* in those circumstances.[178]

The finding of Santow J was that 'there was a sufficiently defined beneficial interest so created in favour of the plaintiff so as to create a trust, *as if express*, thus preventing the *Statute of Frauds*, or its modern equivalent, from precluding enforcement'.[179] That is not a decision that the trust actually *was* an express trust. It is a decision that the trust had the degree of specificity that an express trust would need, and thus there arose the constructive trust, under which the parties would be required to adhere to the terms of the agreement, just as they would if there had been an express trust.

VII.I.VIII *Schweitzer v Schweitzer*

The acceptance in *Schweitzer* of *Jacobs*' proposition made no difference to the outcome of the case — there was a situation where it would be a fraud to rely on the lack of writing, whatever type of trust might then arise. Given a choice between the statement in *Schweitzer* and the High Court's statements that the trust that the court enforces when a statute is used as an instrument of fraud is a constructive trust,[180] an Australian court should follow the High Court.

Overall, these cases do not provide any basis on which the High Court should reconsider its earlier statements that the remedy in such a case is a constructive trust.

VII.II Reason four — *Rochefoucauld v Boustead* used 'express trust' in a special sense

Rochefoucauld[181] found that the defendant had acquired some estates in Ceylon from a mortgagee on terms that he would hold them as trustee for the plaintiff/mortgagor, notwithstanding which he had tried to keep the estates for himself. The plaintiff obtained orders enforcing the obligations of a trustee against the defendant, on the basis that the *Statute of Frauds* could not be used as an instrument of fraud.

The reference that *Jacobs* makes to *Rochefoucauld* does not lead to the conclusion that the trust that is enforced when there is an attempt to use a statute as an instrument of fraud is an express trust for all purposes. In particular, it does not mean that it is a type of trust that fails to fall within the exception, concerning trusts that arise or result by the implication or construction of law, to the *Statute of Frauds*' requirement of writing. Indeed, Ying Khai Liew[182] has argued persuasively that detailed analysis of the facts in *Rochefoucauld*, not all of which appear in the authorised version of the report of the decision of the Court of Appeal, shows that the trust in that case could not have been an express trust.

In *Rochefoucauld* itself there had been a submission that the trust that the plaintiff sought to prove contravened the *Statute of Frauds*. Lindley LJ held that the Statute was not a defence. He was indecisive about whether certain letters were sufficient writing to satisfy the Statute.[183] However, he

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[177] *Willets v Marks* [1994] QCA 006 (14 February 1994).
[178] (1994) 6 BPR 13,813, 13,812 (emphasis added).
[179] Ibid 13,813 (emphasis added).
[180] See above n 128.
[181] *Rochefoucauld v Boustead* [1897] 1 Ch 196.
[182] Ying Khai Liew, '*Rochefoucauld v Boustead* (1897)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 423.
[183] *Rochefoucauld* [1897] 1 Ch 196, 207: 'We are by no means satisfied that the letters signed by the defendant do not contain enough to satisfy the *Statute of Frauds*.'

held that 'Whether this is so or not, the other evidence is admissible in order to prevent the statute from being used in order to commit a fraud; and such other evidence proves the plaintiff's case completely.'[184] That result could only have been reached if the trust that the court enforced was one arising by implication or construction of law.

The question of whether the trust on which the defendant held the property was an *express* trust did not arise in connection with whether there had been a failure to comply with a statutory requirement of writing — it arose in the context of the defendant's contention that the plaintiff's claim was statute barred. Though the action had been brought in 1894[185] Lindley LJ held that s 8 of the *Trustee Act 1881* (UK) was not available to the defendant.[186] The relevant statutory provision was the one in s 25(2) of the *Judicature Act 1873* (UK), which said: 'no claim of the cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations'. It was in connection with that argument that Lindley LJ said:

> The trust which the plaintiff has established is clearly an express trust within the meaning of that expression as explained in *Soar v Ashwell*.[187] The trust is one which both plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises although there may have been no intention to create a trust.[188]

Because the property was 'held on an express trust', within the meaning of s 25(2) of the *Judicature Act*, the law that was applied was the same as had existed prior to 1890. Under that law:

> there was no statutory protection based on lapse of time for trustees under an express trust. The courts of equity in their jurisdiction over trusts and trustees had developed the rule that, apart from laches and acquiescence, the liability of express trustees for breach of trust was perpetual. In other cases, e.g. constructive trusts and fiduciary relationships merely analogous to trusts, the appropriate statutory limitation provision would be applied by analogy to protect the defendant.[189] In developing the general rule the courts in the interests of justice extended the meaning of 'express trustee' to include persons who would normally be described as implied or constructive trustees or fiduciary agents.[190]

In *Soar v Ashwell* there had been express reference to this extended concept of 'express trustee' that applied for the purpose of the law of limitations. Lord Esher MR said:

> if there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him

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[184] Ibid. See also the quotation from *Rochefoucauld* ibid above n 113.
[185] Ibid 200.
[186] *Trustee Act 1881* (UK) s 8 applied to proceedings brought after 1 January 1890, but it did not apply 'where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his use'.
[187] [1893] 2 QB 390. The trust is one which both plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises although there may have been no intention to create a trust.
[188] *Rochefoucauld* [1897] 1 Ch 196, 208.
[189] *Beckford v Wade* (1805) 17 Ves 87, 97; *Soar v Ashwell* [1892] 2 QB 390, 395.
[190] Michael Franks, *Limitation of Actions* (Sweet and Maxwell, 1959) 66. In a footnote at 67 Franks refers to *Rochefoucauld* as an example of a case where the court 'simply concludes that there is an express trust for limitation purposes'.

> to vouch a Statute of Limitations against a breach of that trust. Such a trust is in equity called an express trust.[191]

However, he went on[192] to recognise that there are cases that do not fall within that description which 'have been treated by the courts of Equity as within the class in respect of which a Statute of Limitations will not be allowed to be vouched'. One such case (and the relevant one in *Soar v Ashwell*) was:

> where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will *impose upon him* all the liabilities of an express trustee, and will class him with and *will call him* an express trustee of an express trust.[193]

Another is that a person who 'has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property … will be treated by a Court of Equity as if he were an express trustee of an express trust'.[194]

Similarly, Bowen LJ said that:

> the doctrine that time is no bar in the case of express trusts *has been extended* to cases where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust … to cases where a stranger participates in the fraud of a trustee … [and] where a person receives trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant.[195]

Kay LJ spoke more bluntly, and in a way directly relevant to the present argument:

> There are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of Limitations cannot be set up as a defence.[196]

Thus, when Lindley LJ in *Rochefoucauld* said that the defendant held the property on 'an express trust within the meaning of that expression as explained in *Soar v Ashwell*' that could not have involved a denial that the remedy that the court gave to prevent the statute being used as an instrument of fraud would be classified as a constructive trust, for the purpose of the *Statute of Frauds*.[197]

More recently in *Paragon Finance Plc v D B Thakerar & Co* Millett LJ included *Rochefoucauld* in his list of examples of constructive trusts. He said it belonged to a class of case in which the trustee:

> does not receive the trust property in his own right but by a transaction by which both parties intended to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.[198]

He explained:

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[191] [1892] 2 QB 390, 393.
[192] Ibid.
[193] Ibid (emphasis added).
[194] Ibid 394–5.
[195] Ibid 396–7.
[196] Ibid 405.
[197] Ben McFarlane, above n 120 likewise concludes: 'to say that a trust is to be treated as an express trust "within the meaning" of a limitation statute is not the same as saying that trust is an express trust for all purposes'.
[198] [1999] 1 All ER 400, 409 (Pill and May LJJ agreeing).

> Before 1890 constructive trusts of [this] kind were treated in the same way as express trusts and were often confusingly described as such; claims against the trustee were not barred by the passage of time.[199]

VIII So what are the consequences of rebutting a presumption of advancement?

To simplify exposition in this section of the article I will speak as though a settlor of property is male, and a transferee of property is female. As well I will assume that a presumption of advancement is rebutted by proof that the person who made the voluntary conveyance or provided the purchase money did not intend to make a gift to the legal titleholder. If the correct legal analysis is that more than that is needed to rebut the presumption of advancement[200] adjustments may need to be made to the views in this section of the article, to account for the 'something extra' that must be proved to rebut the presumption.

As a matter of principle, what happens when property comes to be transferred to a person in a relationship of advancement to the settlor, but a presumption of advancement is rebutted, depends on just what has been proved. In real-life litigation in which evidence is brought which rebuts a presumption of advancement it will seldom happen that the only thing that that evidence does is to rebut the presumption. Very frequently, in the course of rebutting the presumption the evidence proves at least something about what the intention of the settlor actually was concerning ownership of the property. It often proves whether any intention of the settlor was one that was manifested in words and action, or was a private and uncommunicated thought. As well, it frequently proves the extent of the transferee's knowledge (if any) concerning that intention, and whether the transferee accepted or acquiesced in that intention. These extra matters are critical to deciding whether the property is held on trust and if so on what trust or trusts, to whether that trust is express, resulting or constructive, and thus to whether it is a type of trust concerning which writing is necessary.

But there is quite a variety of circumstances in which the presumption of advancement can be rebutted. As a result, the consequence of rebutting the presumption can be of many different types. Among the possibilities[201] are:

(1) A presumption of advancement can be rebutted in part.

   (a) One such situation is if it is shown that the settlor intended at the time of transfer that the transferee should not have a certain limited interest in the property. If nothing else is proved about the intention of the settlor, there would be a resulting trust concerning the limited interest that was intended not to pass to the transferee, and the presumption of advancement would continue to operate concerning the balance of the beneficial interest.[202]

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[199] Ibid.

[200] See text at above n 28–30.

[201] This listing is intended only to provide illustrations, not to be exhaustive.

[202] *Kingdon* (1688) 2 Vern 68; 23 ER 653; *Re Kerrigan* (1946) 47 SR (NSW) 76, 82–3 (Jordan CJ); *Napier* (1980) 32 ALR 153, 155 (Gibbs ACJ); *Dullow v Dullow* (1985) 3 NSWLR 531, 540–1; *Davies* [1912] VLR 397, 406. Analogously, depending on the intention of the payer, a purchase of property in the name of someone not in a relationship of advancement can give rise to a resulting trust concerning the income of the property during the life of the payer, but the corpus belong to the transferee after the death of the payer: *Rider* (1805) 10 Ves 360, 368;

(b) Alternatively, there might be an intention expressed that someone other than the transferee have some limited part of the beneficial interest. That could give rise, as discussed below, to either an express trust or a constructive trust in favour of that other person concerning that part of the beneficial interest in the property, and the presumption of advancement would continue to operate concerning the balance of the beneficial interest.

(2) If the presumption of advancement is rebutted by there being objective words, acts and circumstances from which an intention to create a trust is inferred, the beneficiary of which is not the transferee, that intention is sometimes given effect to as an express trust.[203] An intention to create a trust does not require any special words or technicality. Rather, 'an intention to create an express trust can be inferred from the full range of relevant circumstances, including the nature of the transaction and the construction of the words used'.[204] Who is the beneficiary of that trust will depend on the precise intention that has been expressed — it might be the transferor,[205] it might be some third party,[206] or it might be two or more people.

However, a clear expression of intention by a settlor of the beneficial interests he wants to exist concerning the property that passes to the transferee will not always result in there being an express trust. One such circumstance is where the property in question is land, and a statutory requirement of writing is not complied with.

Another arises because a presumption of advancement can arise concerning either a purchase in the name of another, or of a voluntary transfer, but the range of possible consequences of rebutting the presumption is not the same for the two types of circumstance. This is because it is only the absolute owner, or the beneficial owner,[207] of an item of property who has the ability to declare an express trust of that property. The transferor of property has, by virtue of his ownership of the property, the ability to declare an express trust of it. However, frequently a person who provides the purchase price for a purchase in the name of another will have no property rights concerning the property that is purchased, and so will be unable to declare an express trust concerning it. In such a situation, the intention of the payer that someone other than the transferee have the beneficial interest can be effective to rebut a presumption of advancement, but even when expressed would not be effective, by itself, to enable an express trust to come into existence. If the payer were to make known the terms on which the payer wants the transferee to hold the property, and the transferee were to agree, this might sometimes result in a valid declaration of an express trust by the transferee, subject to any statutory requirement of writing being complied with — but this would not always happen.

Madison v Andrew (1747) 1 Ves Sen 57, 60–1; *Nicholson v Mulligan* (1869) 3 I R Eq 308, 323; *Standing v Bowring* (1884) 27 Ch D 341, on appeal (1885) 31 Ch D 282; *Dullow v Dullow* at 540–1.

[203] The intention to create an express trust must be objectively manifested: *Byrnes v Kendall* (2011) 243 CLR 253, 260–4 [13]–[18], 271–7 [46]–[66], 284–91 [98]–[118].

[204] *Salvo* [2005] NSWCA 281 (25 August 2005) [33] (Spigelman CJ), citing *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 120; *Walker v Corboy* (1990) 19 NSWLR 382, 395–9; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588, 605–6 [34]; *Tito v Waddell [No 2]* [1977] Ch 106, 211 and *Commonwealth v Booker International Pty Ltd* [2002] NSWSC 292 (12 April 2002) [34]–[45].

[205] *Kilpin* (1834) 1 My & K 520, 533–4, 542; 39 ER 777, 783, 786 (as to long annuities).

[206] Ibid My & K 532, 542; ER 782, 786 (as to consols and South Sea stock).

[207] *Tierney* (1854) 19 Beav 330, 336; 52 ER 377, 3379; *Kronheim* (1877) 7 Ch D 60, 66.

(3) If the presumption of advancement is rebutted by there being objective words, acts and circumstances from which an intention to create a trust is inferred, the beneficiary of which is not the transferee, and the subject matter of the trust is land, but there is no writing, that attempt will not be effective until such time as the writing comes into existence. What happens if the writing never comes into existence depends on precisely what has been proved.

    (a) If the trust is the sort of trust that could be recognised if it were in writing, and the settlor is the beneficiary of that trust, the intention that the settlor has expressed is consistent with the presumption of resulting trust. Thus, the presumption of resulting trust will not be rebutted, and there will be a resulting trust arising through the operation of that presumption.

    (b) If the trust is the sort of trust that could be recognised if it were in writing, and the beneficiary of the invalid express trust is, or includes, anyone other than the settlor the intention that has been expressed will rebut the presumption of resulting trust. If that is all that is proved, there will be a situation where it is clear that the transferee is not to take beneficially, but no presently effective trust has been declared. That will give rise to an automatic resulting trust in favour of the settlor.

    (c) If the trust is the sort of trust that could be recognised if it were in writing, and the transferee knows that the property is transferred to her on the basis that she will deal with the property consistently that trust, she will be bound by a constructive trust that requires her to deal with the property in that way. It is the inevitable result of the cases that have upheld a constructive trust that prevents the requirement of writing being used as an instrument of fraud that such a constructive trust trumps any automatic resulting trust that might otherwise arise from the inability to recognise the express trust.

(4) If the presumption of advancement is rebutted by showing that the settlor intended that the transferee not have the beneficial title, but any intention of the settlor that is proved would not amount to a valid trust if it were in writing, a variety of situations could arise.

    (a) If the presumption of advancement is rebutted by showing the settlor intended that the transferee not have the beneficial title, but nothing else is proved (for example, 'I'll put it in Susan's name for now because she hasn't used up her tax-free threshold for land tax yet, but it's not hers, and I'll decide later what to do with it') the settlor has no intention at all about who will have the beneficial title. In that situation the transferee will hold the property, but as a trustee because it is clear that she is not to hold the beneficial title. Because no other beneficial titleholder has been identified there could be a resulting trust for the settlor.[208]

[208] Depending on the terms of the land tax legislation in question such a resulting trust might be recognised subject to a term, similar to that imposed in *Nelson* (1995) 184 CLR 538, requiring the settlor to give up any benefit obtained by having paid less land tax because the property was in the name of the transferee.

(i) The resulting trust can be explained as one arising from the presumed intention of the payer, if nothing at all is proved about his intention concerning beneficial ownership.[209]

(ii) If in addition it is proved that the payer intended that he would not have any part of the beneficial title, but nothing is proved about who he intended would have the beneficial title, there might still be a resulting trust, but of the automatic type.[210]

(b) If the presumption of advancement is rebutted by showing that the settlor intended that the transferee not have the beneficial title, and intended that the transferee hold it for a purpose that is not a valid trust (for example, 'I'll put it in Susan's name on the basis that she must use it to help the family and my friends') the presumed intention resulting trust is rebutted, but there is an automatic resulting trust for the settlor.

(c) If the presumption of advancement is rebutted, in circumstances where it is clear that the settlor does not intend the transferee to have the beneficial interest in the property, and where the settlor has abandoned any beneficial interest in the property (with the consequence that the presumption of resulting trust is also rebutted), the property would be held on trust for the Crown as bona vacantia.[211]

(5) If the settlor pays some of the price of property purchased in the name of someone with whom he is in a relationship of advancement, and the presumption of advancement is rebutted by showing that the intention of the settlor was that the transferee not have the full beneficial title,

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[209] In *Brown* (1993) 31 NSWLR 582 a mother had contributed part of the purchase price of land, title to which was taken in the name of her sons. The judge found that the mother did not intend to make a gift to her sons. She did not have any intention concerning the potential ownership of the property to the effect that the ownership should be otherwise than in proportion to contributions made by her and her sons. There was no relevant agreement or common intention with the sons concerning the beneficial ownership. In that situation the presumption of advancement was rebutted, and the presumption of resulting trust (to which the presumption of advancement was held to be an exception) came back into play, so the beneficial interests were proportional to the contributions to the purchase price.

[210] In *Vandervell* [1967] 2 AC 291 Vandervell, the absolute beneficial owner of shares held by a trustee, gave a direction to the trustee to transfer the shares to a new owner. Vandervell intended to give up all beneficial interest in the shares, but did not succeed in doing so. He failed to do so because at the same time as the transfer occurred Vandervell arranged for the transferee to grant to X an option to purchase the shares, in circumstances where X was a trustee but the trusts on which X held the option had not been declared. The consequence was that the property was held on a resulting trust for the Vandervell. Lord Upjohn approved the statement '… a man does not cease to own property simply by saying "I don't want it". If he tries to give it away the question must always be, has he succeeded in doing so or not?': at 314.

[211] *Cunnack v Edwards* [1896] 2 Ch 679, 682, 686, *Braithwaite v A-G* [1909] 1 Ch 510, 520; *Hobart Savings Bank v Federal Commissioner of Taxation* (1930) 43 CLR 364, 383 (Dixon J); *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1, 10–14; *Rees v Dominion Insurance Co of Australia Ltd (in liq)* (1981) 6 ACLR 71; *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511, 1539–42; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 708 (Lord Browne-Wilkinson) ('*Westdeutsche*'); *Commissioner of Australian Federal Police v Courtenay Investments Ltd [No 4]* [2015] WASC 101 (27 March 2015) [23]–[27], [339]–[350]. The reasoning in the *Re West Sussex* case has been criticised in so far as it relates to how the property of an unincorporated association devolves when the organisation becomes defunct (*Re Bucks Constabulary Widows' & Orphans' Fund Friendly Society [No 2]* [1979] 1 WLR 936) but if there really has been an effective abandonment of the beneficial interest there might be no alternative but for the property to be bona vacantia: *NSW Trustee* (2012) 10 ASTLR 164, 185–9 [94]–[111].

and if in addition the settlor intended that he have a beneficial interest of some sort, but the intention is not precise enough to be an express trust, there can be a resulting trust of the presumed intention type, whereby the beneficial title is held in the same proportions as the contributions to the purchase price.[212]

(6) There is a mass of authority that states that whether a presumption of advancement is rebutted depends on the actual intention of the settlor, existing at the time that the property is transferred into the name of the transferee.[213] The authority goes as far as holding that if it is proved that the settlor intended that the transferee not have the beneficial title, and the intention of the settlor is a unilateral uncommunicated intention, that can be enough to rebut the presumption of advancement. *Devoy v Devoy*,[214] followed in the High Court in *Martin v Martin*,[215] decides that an uncommunicated intention of a transferor, that is known only through evidence the transferor gives about what his intention was, can be sufficient to rebut the presumption of advancement[216] Similarly, in *Birch v Blagrave*[217] and *Childers v Childers*[218] a father had conveyed land into the name of his child, the child did not know of the conveyance, the father intended to retain the beneficial interest for himself, and kept practical control of the land and received its income or produce. Proof of the father's intention at the time of transfer was sufficient to cause the court to decide that the heir at law of the child held the land on a resulting trust for the father.

Lord Browne-Wilkinson has said that the cases just cited are consistent with the principle that a person cannot be a trustee of property while he is ignorant of facts that bind his conscience to recognise that someone else is entitled to the property. That principle exists because a trust is something that is impressed on a title, not carved out of it.[219] Before a court holds that the title of the transferee is subject to any trust there ought to be something that binds the conscience of the transferee, such as an express trust, or the type of constructive trust that arises under the doctrine that the *Statute of Frauds* not be used as an instrument of fraud. His Lordship's explanation of the cases is that no resulting trust would arise until the child was aware of the facts by virtue of which the child did not have the beneficial title, but in these cases, by the time action had been brought, the child or his successors in title had become aware of the facts that gave rise to a resulting trust.[220]

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[212] *Bloch* (1981) 180 CLR 390, 397 (Wilson J; Gibbs CJ, Murphy and Aickin JJ agreeing) — contribution of part of purchase price by father of land purchased in name of son, no specific intention about on what trusts, but where presumption of advancement rebutted, held resulting trust for father proportionate to his contribution to purchase price.

[213] See cases cited at above n 18–21.

[214] (1857) 3 Sm & G 403; 65 ER 713.

[215] (1959) 110 CLR 297, 304. In *Calverley* (1984) 155 CLR 242, 261 (Mason and Brennan JJ), 269–70 (Deane J) it was accepted that evidence of the subjective intention of the payer can rebut a presumption of advancement.

[216] In *Devoy* (1857) 3 Sm & G 403; 65 ER 713 a man, when he was in comfortable circumstances, transferred annuities that he held into the joint names of himself his wife and his daughter. After he had been injured and become unable to work, and was in need of money, he applied for, and obtained, a decree for transfer of the stock. There was no suggestion that any trust attached to the transfer. The only evidence was his own affidavit, that at the time of the transfer he had not intended to make a gift, but had intended to put the stock aside, but that in circumstances where if he had need of it he would be able to use it. His wife accepted this account of his intention. The court's intervention was needed only because the daughter was still an infant. *Davies* [1912] VLR 397, 403 accepts that the settlor can give evidence about what was his intention at the time of the transfer.

[217] (1755) Amb 264; 27 ER 176 ('*Birch*').

[218] (1857) 1 De G & J 482; 44 ER 810.

[219] See cases cited at above n 24

[220] *Westdeutsche* [1996] AC 669, 705–6.

This explanation accepts that an apparent gift to the transferee can be upset, maybe years later, by showing that the settlor had a secret intention not to make a gift. It was just fortuitous, in *Devoy*, *Birch* and *Childers*, that the child did not know of the conveyance. The reasoning in the cases would apply equally to a situation where the child *did* know that the transfer had been made to her, but did not know of the secret intention of the settlor until much later.

(7) The potential for injustice in a situation like that discussed in para (6) above must be dealt with by equities different from those concerning trusts. If the transferee knew that she had the title, and did not know of circumstances by reason of which a trust attached to the title, whatever trust arose from the intention of the settlor might be defeated in whole or part by an estoppel. Conferring an apparently unqualified title on the transferee could be encouraging an expectation in her that she be able to deal with the property completely as her own. If the transferee, on the basis of the apparently unqualified title that she was given had engaged in acts of detrimental reliance on that expectation, an estoppel might arise[221] that prevented enforcement of a trust in favour of the settlor. Whether the trust that arose from the settlor's intention was defeated wholly would depend on whether the detriment that the transferee would suffer, if the settlor resiled from the expectation, could be cured only by the transferee having the full beneficial title.[222] It might be possible, in particular fact situations, for the settlor to retain the beneficial interest in the trust property but that it be encumbered by a lien, or that the settlor retain the full beneficial title but the settlor be made subject to a personal obligation to make good the detriment.

(8) The situations considered in paras (1)–(6) above were all ones in which a presumption of advancement operated as an exception to a presumption of resulting trust that would otherwise exist. However, in New South Wales or Western Australia there is no presumption of resulting trust arising from a voluntary conveyance of land.[223] Thus, there is no presumption of resulting trust that is capable of reviving if there is a voluntary conveyance to someone in a relationship of advancement to the transferor, and it is shown that the transferor did not intend that person to have the beneficial title. If a voluntary conveyance occurs in a situation where the settlor has an intention that the transferee not have the beneficial title, but there is no writing to declare a valid trust in favour of the settlor or some third party, it will be possible for the transferee to be bound by a constructive trust if the transferee knows that the transfer is made to her on the basis that the title will be dealt with in some particular way. However, if the transferor has such an intention, but the transferee is unaware of it, it is debateable whether the outcome is that the title of the transferee is unencumbered by any trust, or whether the mere existence of the intention that the transferee not have the beneficial title is enough to give rise to an automatic resulting trust.

This list of possibilities shows that the situations that can arise when a presumption of advancement is rebutted are far more numerous, and more complicated, than the dictum in *Nelson* suggests.

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[221] *Sidhu v Van Dyke* (2014) 251 CLR 505, 529–30 [82]–[84].
[222] *Giumelli* (1999) 196 CLR 101, 113–14 [10].
[223] See text at above nn 10–12.