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TRUSTS AND THE STATUTE OF FRAUDS

BY JOSEPH WARREN MADDEN*

Whenever the law attempts to require that a transaction, in order to be valid or enforceable, shall be clothed in a particular form, it is, of course, consciously taking the risk of frequently defeating intent. The reason why the law is willing to take that risk is, of course, that it conceives that a greater good is to be accomplished by insisting upon a definite requirement of form than the evil which will result from the defeat of the party's intent in a small, or even a considerable number of cases. Apparently the benefits which are sought to be attained by statutes or legal rules which require that a particular form be observed in order to make a transaction valid are of two kinds. First. By requiring, for example, that a contract or conveyance be written in order to be effective, the danger that one will be subjected to the burdens of an alleged contract or conveyance, which he in fact never made, but which has been proved against him for legal purposes by false or mistaken testimony, will be, to a considerable extent, obviated. Second. The danger that one with whom a contract or to whom a conveyance was in fact made, will find himself unable to enforce that contract or conveyance because of failure of proof on his part, or perhaps on account of perjured or mistaken evidence on behalf of the other party, will be rendered less frequent since the insistence by the law upon the formal requirement will create a habit in the legal profession and finally among laymen of putting such transactions into written form, a habit which is, without doubt, highly commendable, and which, if universally followed, would relieve the courts of much burdensome labor and the responsibility of making many decisions on exceedingly doubtful evidence. The real question then in determining the wisdom of formal requirements is whether the supposed

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and hoped for benefits will outweigh the obvious and quite frequently apparent injustice which results from the rule.

It should perhaps be stated at the outset that we have no way of gathering statistics as to the cases in which the legal rule works beneficially and without hardship. We have no way of knowing, for example, how many false and fraudulent claims would be urged in court nor what proportion of claims so urged would be effective were it not for the fact that the alleged claim could easily and immediately be defeated by a plea that the transaction, if it took place at all, was not in the form required by law to make it enforceable. Neither have we any way of determining the number of cases in which, were it not for the fact that the law has required that the transaction be put in writing, the parties would have carelessly neglected to do so, and the party justly entitled to the benefits of the contract or conveyance would have found himself unable, because of the unsatisfactory form of his evidence, to prove his case. On the other hand, the evidence of cases in which the legal rule has probably resulted in an injustice is readily available. Whenever, for example, we find that the statute of frauds has been successfully pleaded we have at least the probability that the defendant has thereby escaped an obligation which he entered into with the intent to bind himself and which obligation satisfies all of the requisites of a legally binding transaction, except the formal requisite of a writing. Of course it may, and at least occasionally does happen, that the defendant has, or honestly believes he has, a just and moral defense, but that he fears that through some miscarriage of justice he might lose if he should make his contest upon that ground. He therefore acting upon the theory that the end of winning his case justifies the means which the law allows him to use to win it, simply sets up the statute of frauds as a complete and effective bar.

The problem of this discussion is to determine what, if any, formal requirements are made requisite by the law of West Virginia, to the creation of an enforceable trust in lands in this state. It is necessary therefore, in order to intelligently interprete the statutes and judicial decisions of this state, to observe the background of English Statutes and decisions upon which the law of Virginia and our law was projected.

The English Statute of Frauds\(^1\) contained the following sections relating to trusts:

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\(^1\) 29 Charles II, c. 3 (1676)
"Sec. VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June (1677) all declarations or creations of trust 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.

"Sec. VIII. 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; anything hereinbefore contained to the contrary notwithstanding.

"Sec. IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of no effect."

The plain intent of the English statute was to require a writing in order to make enforceable express trusts, or the assignment of the interest of the cestui que trust in any trust, while leaving trusts created by the operation of the rules of equity for the specific reparation of wrongs, or the prevention of unjust enrichment, outside the requirements of the statute.

As was true of all of the other sections of the English statute, a large body of precedent was built up around the foregoing sections relating to trusts. A considerable number of the American states adopted practically verbatim the sections of the English statute quoted above. Many of the states, however, among others the state of Virginia, and in its turn, West Virginia, failed to include in their statutes of frauds any provision whatever which in terms related to trusts. The usual inference from the omission in the statutes of these states of the sections relating to trusts would have been that it was the intent of the legislature to eliminate the requirement of written evidence to prove such transactions. However, the courts of at least some of our states have not drawn that inference, and have practically disregarded the English statute and have treated their own statutes as if they had been original enactments having no background in the law of any other jurisdiction.

The provisions of the West Virginia statutes which may have a bearing upon the subject of trusts in lands are the following:

5 Code of Virginia, 1919, c. 232.
Sect. 1 of Chapter 71 of our Code provides in part that "No estate of inheritance or freehold, or for a term of more than five years in land, shall be conveyed, unless by deed or will; * * * * *"

Chapter 96 provides in part that "No action shall be brought in any of the following cases: * * * *

"6. Upon any contract for the sale of real estate, or the lease thereof, for more than one year; * * * *

"Unless the promise, contract, agreement, assurance, or ratification, or some memorandum or note thereof be in writing and signed by the party to be charged thereby or his agent."

Quite obviously the first of these two statutory provisions does not have any bearing whatever upon the creation of rights in land cognizable solely in equity, as is proved by our numerous decisions recognizing the equitable right to specific performance of unsealed contracts to convey land, and treating the person entitled to such a right as the owner, in equity, of the interest which was agreed to be conveyed to him. It will probably be agreed that this provision relates only to legal interests.

With respect to the second statutory provision quoted above, however, its application to the creation of trusts in land is full of difficulties. In the light of the history of this statute, it might be supposed that it had no application whatever to the creation of trusts, since, in the original English Statute of Frauds the fourth section from which the above quoted portion of our Chapter 98 was copied almost verbatim, was not supposed to apply to trusts at all, since it was followed by the seventh, eighth and ninth sections quoted above which related exclusively to trusts, and covered the subject completely. By well settled rules of statutory construction, where a statute is adopted from another jurisdiction the interpretation which the statute had been given in that jurisdiction at the time of its adoption in the second jurisdiction, is incorporated into the statute. That construction would leave us with

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7 Cf. Code Va., 1880, c. 143.
8 The fourth section of the English Statute reads:

"And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of any person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that it is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." 29 Charles II, c. 3 (1676).
no formal requirements whatever for the creation of trusts in land. If we may assume that the Legislature was fully cognizant of the historical situation at the time our Chapter 98 was enacted, we may suppose that it was the legislative intent to leave the matter of trusts outside the scope of our statute of frauds. Just why the creation of legal interests, and of equitable interests by way of contract in land should be hedged about by formal requisites while the creation of trusts should be left entirely untrammelled, might be difficult to understand, yet such an anomaly would not be without precedent in the law. A similar one occurs in the case of gifts of chattels. A sealed deed of gift is commonly required to consummate a passing of the legal title when there is neither consideration nor the delivery of the chattel, yet a valid trust may be declared by mere words.  

**Express Trusts.**

In the early case of *Troll v. Carter,* this quaere is found in the syllabus: "Does the omission in our statute law of the Seventh Section of the English Statute of Frauds have any effect?" In seeking the answer to this question, if one should take certain expressions of our Supreme Court of Appeals at their face value, he would conclude that the omission did have an important effect, and that there is no requirement as to the form in which a transaction creating a trust in lands should be embodied. In *Currence v. Ward,* paragraph three of the syllabus is as follows: "Neither an express or constructive trust in lands need be created, declared or proven by writing in this state, but may be shown by oral evidence." In the course of the opinion Judge Brannon said concerning express trusts, "It is well settled that before the statute (the statute of frauds) in England, such a trust in lands could be created without a writing, and, of course, it can be so created here now. Parol declarations or creations of trust in realty must amount to clear and explicit expressions of trust; loose and indefinite expressions will not do."

In *Hamilton v. McKinney,* the first paragraph of the syllabus is as follows: "A trust, as the basis of an equitable title to real estate may be proved by clear and satisfactory parol evidence, and, in such case, the statute of frauds does not apply." In the course of the opinion, Judge Poffenbarger said, at page 321: "It is a

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9 Smith's Est., 144 Pa. 428; Ames, 125n; Lewin, Trusts, 71; Perry, Trusts, § 96; Pomeroy, Eq. Juris., § 996.
10 15 W. Va. 567 (1879).
11 43 W. Va. 367, 27 S. E. 323 (1897).
12 52 W. Va. 317, 43 S. E. 82.
bill to enforce an express trust. Neither an express or a constructive trust in lands need be declared or proven in writing in this state. It may be shown by parol evidence.\textsuperscript{113}

In \textit{Hudkins v. Crim},\textsuperscript{14} Judge Brannon said: "This is a case of an oral trust. Not a scratch of a pen appears to show the creation of a trust or to manifest its existence. Under an English statute of frauds known as section 7 of the Statute of Elizabeth,\textsuperscript{15} adopted in many of our states, this case could not get into court; but that feature of the statute of frauds has not been enacted in West Virginia, and so oral trusts, though not created or manifested in writing, are enforced in equity in West Virginia."

In \textit{Floyd v. Duffy},\textsuperscript{16} paragraph one of the syllabus is as follows: "Creations and declarations of trusts in lands may be made and proved in this state as they could be in England, before the English Statute of Frauds, the seventh section of that statute, requiring the proof of such creations and declarations to be in writing, never having been in force in this state." In his opinion in that case Judge Poffenbarger said: "At common law no particular form of creation or declaration of a trust or use was required. It could be by deed, or will, or writing not under seal, or by mere word of mouth. Uses and trusts were simply averred and proved like any other facts and writing was not required.\textsuperscript{17} In 1676, the English statute of frauds was passed, the seventh section of which required all declarations or creations of trusts or confidences in any land, tenements or hereditaments to be proved in some writing signed by the party, enabled to declare such trust, or by his last will in writing.\textsuperscript{18} Not being made expressly applicable to the Colonies, this statute was never in effect in Virginia,\textsuperscript{19} but, in 1787, Virginia enacted a statute of frauds, the same, in many respects, as that of England, but omitting said seventh section, relating to declarations of trust. Nor has it ever been incorporated in the statutes of this state. Hence, trusts in land may be declared in this state as at common law.\textsuperscript{120}

In \textit{Bennett v. Bennett},\textsuperscript{21} the second paragraph of the syllabus is


\textsuperscript{14} 64 W. Va. 225, 227, 61 S. E. 166 (1908).

\textsuperscript{15} The Statute referred to is, of course, the statute of 29 Charles II, c. 3 (1676).

\textsuperscript{16} 68 W. Va. 339, 69 S. E. 992 (1911).

\textsuperscript{17} The Court here cites: Currence v. Ward, \textit{supra}; 28 A. & E. ENCY. LAW 869;

\textsuperscript{18} The Statute referred to is, of course, the statute of 29 Charles II, c. 3 (1676).

\textsuperscript{19} 68 W. Va. 339, 69 S. E. 992 (1911).

\textsuperscript{20} SAUNDERS ON USES & TRUSTS 152, m.p. 210; PERRY ON TRUSTS, 75.

\textsuperscript{21} The Court here cites: SAUNDERS ON USES & TRUSTS \textit{supra}; PERRY ON TRUSTS, 75.

\textsuperscript{22} The Court here cites: 28 A. & E. ENCY OF LAW 873.

\textsuperscript{23} The Court here cites: Currence v. Ward, \textit{supra} note 11.

\textsuperscript{24} 92 W. Va. 391, 116 S. E. 436 (1922).
as follows: "The statute of frauds does not apply to an express trust as a basis of an equitable interest in real estate." In his opinion in that case, Lively, J., said, at page 397: "But whether the contract is in writing or by parol an express trust may be created and it may be proven by parol. 22 A trust as a basis of an equitable title to real estate may be proved by clear and satisfactory parol evidence, and in such case, the statute of frauds does not apply." 23 The learned judge of the lower court, in deciding this point 'whether it was a trust in real estate or a trust in personality, that is, a trust in the land itself or in the proceeds to be derived from the sale of the land, would seem not to be material.' This is true, whether there be a memorandum in writing or not, as personality common law has always recognized the sufficiency of a parol agreement, and if it be a trust in reality, the seventh section of the English Statute of Frauds not being embraced in our statute of frauds, it is the law of West Virginia that a trust operating upon real estate is not within the statute and therefore may be by parol.' 24

However, if one would credit the statements to be found in another line of cases decided by the West Virginia court, he would reach the conclusion that there is in our law some requirement that trusts in land, at least under some circumstances, must be in writing. In Troll v. Carter, 25 two paragraphs of the syllabus are as follows:

"3. If a party obtains a deed without any consideration upon a parol agreement that he will hold the land in trust for the grantor, such trust will not be enforced, as it would violate the statute of frauds and this general rule, (the parol evidence rule), to permit parol evidence to establish such a trust."

"5. If a party obtains a deed for a valuable consideration, but agrees by parol with the grantor, at the time the deed is made, that he will hold the land in trust for third parties, whether a court of equity will enforce such a parol trust is questionable, and the decision of this point in this case is waived."

In Zane v. Fink, 26 the foregoing paragraph of the syllabus of Troll v. Carter is quoted with approval.

In Pusey v. Gardner, 27 paragraph one of the syllabus is as follows: "If a party obtains a deed for land without consideration

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22 The Court here cites: Currence v. Ward, supra note 11.
24 The Court here cites: Floyd v. Duffey, 68 W. Va. 339, 69 S. E. 933 (1911) and cases cited therein.
25 Supra note 10.
26 18 W. Va. 693, 775 (1881).
27 21 W. Va. 468.
upon a parol agreement, that he will hold the land in trust for the grantor, such trust will not be enforced, as it would violate the statute of frauds and the general rule of law, that parol evidence cannot be admitted to vary, add to or contradict a written contract."

In Poling v. Williams, Poffenbarger, President, says:

"Second: If the deed was not made to defraud the creditors of the grantor, he cannot set up an interest in the land by way of parol trust, and convey, or contract to convey, that to a third party. The statute of frauds and the rule against the admission of parol evidence to contradict, vary or add to, written contracts, make it impossible to create such an equitable title. The grantor here claims that the grantee was to hold the land upon a secret parol trust for him, the grantor, in direct contradiction of the terms of the deed, and has sold that alleged equitable title to Poling. It is for that Poling sues and it is a nonentity. The case in this aspect of it falls exactly within the principle announced in point three of Troll v. Carter."

In Richardson v. McConaughey, the syllabus is as follows: "Points 1, 2 and 8 of syllabus, Troll v. Carter, 15 W. Va. 567, re-affirmed." In Crawford v. Workman, paragraphs one and two of the syllabus are as follows:

"1. Where there is an absolute conveyance of land, though not upon valuable consideration, upon oral trust to hold it for the use of the grantor, and to reconvey it to him on request, such trust will not be enforced in equity. The statute of frauds forbids it.

"2. Where land is conveyed to one, for valuable consideration paid by him, coupled with a trust to hold for the use of a third party, who pays nothing, such trust must be declared or proven by a writing signed by the grantee. An oral trust will not do."

On page 20 Judge Brannon says: "Very plain it is that where a person grants land without consideration upon oral agreement to hold in trust for the grantor, the trust is not enforceable, as it would violate the statute of frauds."

In Hawkinberry v. Metz, Judge Miller says: "It is well settled by numerous decisions in this state that the grantee (grantor?) in
land can not set up by way of parol trust an interest in the land conveyed. To permit this would be to go in the face of the statute of frauds and the rule against the admission of parol evidence to contradict, vary or add to written contracts. The authorities make it impossible to so create such an equitable title in land.\(^{34}\)

If we now attempt to reconcile these two lines of cases, we may take *Troll v. Carter* as our point of departure, for two rules laid down by President Green in that case, and a third one merely suggested by him, have been followed with remarkable fidelity by our Supreme Court of Appeals. The rules may be stated as follows:

1. If A convey land to B upon B's oral agreement to hold the land in trust for A, the agreement is not enforceable, even though B pay no consideration, and B may hold the land for his own benefit.

2. If A convey land to B upon B's oral agreement to hold the land in trust for a third person, C, C can enforce the trust against B, if B paid no consideration for the conveyance to himself.

3. If A conveys land to B who pays a consideration for it, and B agrees by parol to hold the land in trust for C, it is questionably whether C can enforce the trust. Judge Green in his opinion at page 587, however indicates strongly that the trust should not be enforceable, and this suggestion has been followed in the later decisions.\(^{35}\)

Taking up these three propositions in their order, the first question is whether the parol evidence rule is properly applicable to the case of a conveyance from A to B on oral trust for A. The purpose of the parol evidence rule, of course, is to make it possible for parties to integrate their contract or conveyance in a writing, and thus free themselves from the perils and uncertainties of oral proof of its terms. The writing therefore is held to be the only competent evidence of the transaction, in so far as the writing purports to embody the transaction. But of course if there are necessary or customary terms of such a transaction which the writing does not purport to cover at all, those may be proved by any sort of competent evidence. The question is then, does the deed from A to B in the case under discussion purport to state that B is to have the legal title, free and clear of any equity on the part of A? It is submitted that it does not, necessarily, purport to state anything except that B is to have the legal title. That gives

\(^{34}\) The Court here cites: *Troll v. Carter*, *supra* note 10; *Polling v. Williams*, *supra* note 31; *Hersey v. Hersey*, 56 W. Va. 148, 156, 49 S. E. 367.

\(^{35}\) *Crawford v. Workman*, *supra* note 31.
full effect to every word in the deed. The custom of attaching equitable claims or interests to the legal title by way of trust, is so familiar to the law and to the community that it cannot be ignored by the law without greatly disarranging the affairs of the community. In fact, it is known that at one time before the statute of uses was enacted, the title to most of the land in England was held in trust, or to uses, and many of these uses were for the grantors in the conveyances creating them. If there is any real vice in the separation of the legal title from the equitable, that vice is just as inherent in the case where the equitable interest is in a third person, as where it is in the grantor. In both cases, of course, the rights of bona fide purchasers and creditors are protected by the rules of equity and statutes requiring recordation. If the parol evidence rule were logically applied to the case under discussion, it would require that a preceding or contemporaneous writing signed by B in which he agreed to hold in trust for A would be disregarded as being inconsistent with the deed from A to B. No court would so hold, for the reason that there is no real incompatibility between the deed and the trust agreement. It follows that there is no real incompatibility between the deed and the parol agreement, and that the parol evidence rule has nothing to do with the case.

The other reason given by Judge Green in *Troll v. Carter* for holding the parol trust for the grantor unenforceable is "The Statute of Frauds." The learned judge must have had reference to Subsection 6 of Sec. 1 of Ch. 98, of our Statutes which requires that contracts for the sale or lease of lands must be in writing, in order to be enforceable. But the obvious question recurs, is an agreement to hold land in trust an agreement to sell? If not, Chapter 98 has no application whatever. The Parliament which enacted the original Statute of Frauds clearly made a distinction between agreements to sell and agreements to hold in trust, by enacting the seventh, eighth and ninth sections of the Statute of Frauds, in addition to the Fourth Section. In fact, Judge Green himself makes the distinction in *Troll v. Carter*, in laying down the rule that a conveyance from A to B on oral trust for C, at least where B pays no consideration, is enforceable by C. If B's agreement to hold for A is an agreement to convey, his agreement to hold for C is also. The only distinction which Judge Green makes is that there is more natural equity in the position of C than in the position of A, the grantor, in the corresponding

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52 Supra note 10.
case. Judge Green says\textsuperscript{37} "But this evidence fastens on the individual who has got the title without consideration the personal obligation of fulfilling his agreement whereby he procured the title, as without its enforcement by a court of equity the grantee would be allowed to avail himself of a fraud in so obtaining the deed or devise." Of course, it would be a gross moral injustice for B to keep the land from C in this case, but certainly not a grosser injustice than to allow B to keep for himself property which, upon every moral principle, belongs to A, in the other case. In fact, the resulting injustice is so great in both cases that nothing short of an express statutory provision, plainly applicable, should cause the court in either case to close its eyes to the true bargain of the parties.

Judge Green suggests, in \textit{Troll v. Carter},\textsuperscript{38} that the only case in which a use or trust could be created by parol even before the Statute of Frauds was the case of a feoffment in which the title passed by delivery of the land without writing. He relies upon \textsc{Story on Equity},\textsuperscript{39} which in turn relies upon \textsc{Gilbert on Uses}. But Judge Green himself does not follow any such doctrine, for he holds that the parol trust for C in the conveyance from A to B would be good, though the conveyance from A to B was a deed of bargain and sale under the Statute of Uses, and not a conveyance by way of transmutation of possession.

The second proposition of \textit{Troll v. Carter},\textsuperscript{40} is that where A conveys land to B without actual consideration, though a consideration be recited in the deed, and B by parol agrees to hold the land in trust for C, C may enforce the parol agreement. This conclusion is believed to be sound, and to prove quite conclusively that we do not have, in this state, any statute covering the ground covered by the seventh section of the English Statute of Frauds. This proposition has been followed in the West Virginia cases.

The third proposition of \textit{Troll v. Carter},\textsuperscript{41} that if A convey to B upon consideration paid by B, but also upon B's parol agreement to hold in trust for C, the right of C is doubtful, deserves consideration. We meet here the proposition that where one pays a consideration for a conveyance to himself, the conveyance is presumed to be for the use of the grantee himself, since that would normally be the intent of the parties. For a time the English courts held that an attempt, even in express writing, to im-

\textsuperscript{37} Supra note 10.
\textsuperscript{38} Supra note 10, at page 580.
\textsuperscript{39} \textsc{Story Equity Jurisprudence}, Vol. II, 971.
\textsuperscript{40} Supra note 10.
\textsuperscript{41} Supra note 10.
pose a second use in such a case was nugatory, and would not be enforced either at law or in Equity. Later however, they held that the second use, though not executed by the statute of uses into a legal estate, was enforceable in Equity. No question seems to have arisen in the English cases, as to the form which the second use should take, but it is submitted that, in the absence of any Statute of Frauds covering the matter of uses and trusts, the question is not one of form, but of substantial equity. Is there any equity in C in such a case to have the trust enforced? Suppose A is willing to convey Blackaere to B for $1000 if B will agree to hold the land in trust for A's children after A's death. The value of a fee in the land at the time was $5000. Should the fact that B paid a substantial consideration for the beneficial interest in the land for a time, defeat the intent of the parties that the beneficial interest in the land should be in A's children after that time. Should the fact that B paid something, give him far more than he paid for. Judge Green expressly repudiates in Troll v. Carter the idea that the mere recital of consideration in the conveyance from A to B will prevent C from proving his interest. If the court will look behind the recital of consideration for this purpose, why should it not hear evidence as to the interest for which the consideration was paid. And, in fact, if B is willing to pay the entire consideration and also to agree orally to hold the land in trust for another, why should he not be bound by his agreement? The analogy of an executory contract made between A and B for the sole benefit of C, would seem to be perfect. Yet the contract is enforceable by C and the result is not inequitable, nor would a similar decision be inequitable in the trust case. The trust arises, not out of a bare promise or declaration, but out of a promise or declaration made in connection with a conveyance, which conveyance would probably not have been made except for the promise or declaration of trust.

There remains the question of the declaration of trust not accompanied by any conveyance. Suppose A, owner of Blackaere, by parol and without consideration declares himself trustee for B. B's position might be attacked upon two grounds. First, the lack of consideration would seem to put B in the position of a volunteer, with no standing in equity. Of course if this position be sound, B would be equally without remedy even though he had a writing. But some courts have applied Lord Eldon's aberration

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in the case of *Ex parte Pye* to trusts of land, and have held such trusts enforceable without consideration. The simplest solution in a state such as ours where the question has not been decided would be to refuse to apply Lord Eldon's doctrine, at least in the case of land, and hold the declaration of trust unenforceable. But if a consideration were paid, then if we have no statute of frauds, would the trust be enforceable? It might be urged that this case is so closely analogous to the case of a parol agreement by A to convey to B, which would not be enforceable, that it could be treated as substantially an agreement to convey an equitable interest, and therefore within the provisions of Ch. 98 of our code. Here is no conveyance, no change of title, nothing tangible to which to attach the proposed trust. To treat it as an executory contract to convey would not be unthinkable, though of course there is an essential difference between a present declaration of trust and an agreement to convey a legal title in the future.

**Trusts Created by Operation of Law**

The views of the West Virginia courts with reference to trusts created by operation of law seem to be quite orthodox. The English Statute of Frauds expressly left such trusts to be proved as they had been proved before the statute. Therefore our law, in the absence of a statute relating to trusts, is, as might be expected, substantially the same as that of the English courts. In several West Virginia cases it has been held that where one pays for land, the title to which is taken in the name of another, there is a presumption of a resulting trust in favor of the one who pays. As to whether a promise on the part of C to pay B if B shall buy land from A and pay for it himself, would create a resulting trust in favor of C, there is doubt. In one case our court has said "There must be an actual payment from a man's own money, or what is equivalent to his own money to create a resulting trust." In the case last cited the proof of the alleged agreement was highly unsatisfactory, so that the court might well have refused relief upon that ground. Some cases in other jurisdictions have held that even though the one who takes the legal title pays for the land, yet his payment may be substan-

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46 See Sec. VIII, Supra page 165.
47 Pumphry v. Brown, 5 W. Va. 107 (1872); Shaffer v. Foshy, 30 W. Va. 248, 6 S. E. 278 (1874); Seller v. Mohm, 37 W. Va. 507, 16 S. E. 496 (1892); Casseday v. Casseday, 74 W. Va. 53, 81 S. E. 829 (1914) (semble).
tially a loan to a third person, and the case will be treated as if the land had been paid for with the money of that third person. The consequence, of course, is a resulting trust for the third person. Our courts hold that an instrument which, on its face, is a deed may be held to be a mortgage upon a showing that the conveyance was made as security for a debt owed by the grantee to the grantor. One cannot help comparing the decisions in the mortgage cases with those hereinbefore discussed, in which it is held that if A conveys to B without consideration on B’s oral agreement to hold in trust for A, A has no enforceable rights whatever. In the mortgage cases, if A conveys to B by absolute deed and B pays to A three-fourths of the value of the land, by way of loan, and orally agrees to allow A to redeem upon repayment, B is not permitted to keep the land, even though he is willing to waive the repayment of the loan. The result is that the much smaller interest of A in this case is fully protected, while the much greater interest in the case of the conveyance made wholly without consideration is completely unprotected. The distinction seems to the writer to be wholly indefensible.

In general, it may be concluded from the West Virginia cases that a resulting or constructive trust will not arise out of an oral agreement concerning lands, except in the purchase money cases and the mortgage cases, unless the person asserting the existence of the trust had some “antecedent interest in the land,” prior to the parol agreement. In the case last cited there was a verbal agreement between two bidders for land at a judicial sale, each desiring a portion of the land. The agreement was to the effect that the successful bidder would allow the other to take and pay for the portion he desired. The court held that the verbal agreement was, in substance and effect, a mere contract for the sale of land, unenforceable because of the statute of frauds. Judge Poffenbarger, in his opinion, said “The basis of the cause of action, as disclosed by this inquiry and analysis, seems to be the oral agreement and nothing more. We perceive nothing of a collateral nature consisting an independent equity such as payment.

50 Supra page 174.
51 The probable explanation of the mortgage cases lies in the historical fact that the courts of equity, in applying their favorite invention, the equity of redemption, were obliged to nullify devices for the destruction of the equity redemption, whenever they encountered them.
of purchase money; a prior interest in the land, not released; lack of consideration, moving from the grantee, accompanied by an agreement to take mere legal title as a necessary step in the execution of some plan or purpose, previously agreed upon; or a co-partnership, covering the subject matter of the conveyance. Such an equity seems to be essential to the establishment of a trust or immunity of a contract of sale of land from the inhibition of the statute of frauds."

Some examples of such preexisting equities, taken from the West Virginia cases are as follows: where one agrees with the judgment debtor to purchase land sold under a judgment and hold the land for the benefit of the judgment debtor;54 where there was a preexisting partnership,55 or joint adventure56 between the one who took the title and paid for the land and the one who asserts the existence of the trust;57 where one joint tenant purchases at a sale under a vendor's lien, or deed of trust, he is held to have redeemed for the benefit of his cotenants and each may have his former interest by paying his proportion;58 where one of several joint owners of a lease, to cure a defect therein, takes an additional lease in his own name, he will be presumed to be acting for the common benefit of all the owners, and will hold such additional lease in trust for them;59 where a debtor has made a deed of trust to secure the debt and afterwards one X and the debtor agree that X shall purchase the land and hold it as security for the purchase money he pays and X does accordingly purchase the land, he holds the land in trust for the debtor.60 It is difficult to prophesy the extent to which the doctrine of constructive trusts arising out of a wrongful attempt to deprive one of an antecedent interest in land will be carried. In the case of Henderson v. Henrie,61 Judge Robinson quotes with approval this very broad language from a well-known text,62 "If one party obtains the legal title to property not only by fraud or by violation of confidence, or of fiduciary relations, but in any other unconscionable manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double

54 Currence v. Ward, supra note 11.
57 Kersey v. Kersey, 76 W. Va. 70, 85 S. E. 22 (1913).
58 Preston v. Dixon, 59 W. Va. 539; Reed v. Bachman, 61 W. Va. 452. (In this case the sale under the deed of trust was caused by the failure of the joint tenant who bought at the sale to pay his share of the debt.
59 Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600.
60 Nease v. Capeheart, 8 W. Va. 95.
61 68 W. Va. 562, 71 S. E. 172.
62 1 PomEROY'S EQ. JURISP., (3d Ed.) § 155.
ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.” This is indeed broad language, but it is probable that the courts will seize readily upon any sort of an antecedent interest or equity in order to avoid a question as to whether the statute of frauds would or would not apply to the mere oral agreement if that agreement stood alone.

In conclusion, it is submitted that in the case of trusts in land, the West Virginia decisions which have required that the trusts be embodied in any particular form have frequently resulted in grave injustice without any corresponding benefit. The distinction between the cases where the formal requirement has been held to apply and in cases where the opposite conclusions was reached have been arbitrary and based upon a merely formal logic. Even those rules which have been stated with some degree of definiteness are honeycombed with exceptions based upon the doctrines of resulting and constructive trusts. The trust being what its name implies, an arrangement arising out of confidence, it will never be possible to develop in the community the habit of careful, formal conveyancing with relation to it. Those who are careful will make their arrangements in writing, but the penalty of irretrievably losing ones land merely for failure to fulfill a formal requisite is too great. It is more than a lesson. It is often a tragedy.