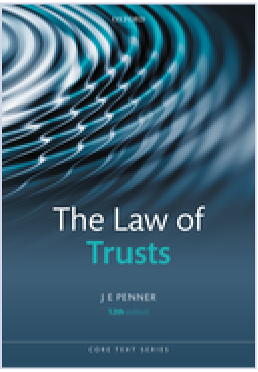

The Law of Trusts (12th edn)

J E Penner

p. 237 # 10. Resulting trusts

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter considers resulting trusts. It first considers the history of resulting trusts. Then it discusses the two basic kinds of resulting trusts: presumed resulting trusts (PRTs) and 'automatic' resulting trusts (ARTs). The content of the presumption of resulting trusts and the presumption of advancement are discussed. Lastly, the nature of resulting trusteeship is considered.

Keywords: resulting trust, automatic resulting trust, presumed resulting trust, presumption of resulting trust, presumption of advancement, Law of Property Act 1925

Summary

Resulting uses

10.1 Resulting trusts are something of an oddity, which cannot be understood without returning to the history of the law of trusts, in particular the way that uses (**1.20** et seq) were originally employed. Recall (**1.26**) the typical use of land, to grant land to feoffees 'to the use of my will', which were typically created without any express terms besides the term that the settlor would give future directions, and where the settlor continued to occupy the land. Thus the feoffees to use received the bare legal title, in essence just the 'paper' title, which they held without having to do anything until such time as the settlor gave them further directions. Now, of course, nothing prevents the modern day settlor from creating a trust in which the trustee holds the property for the settlor for the time being, and at some time later on trust for others when the settlor so directs eg *Grey v IRC* (1960), but this is not typical today (for various, including tax, reasons). Yet it was absolutely standard in the fourteenth, fifteenth, and sixteenth centuries.

10.2 So standard and common was this means of holding land that it led to a particular development in the law which has, somewhat surprisingly, survived to the present day. Because feoffments to use were so p. 238 common, equity began to assume that this was the normal basis upon which land was conveyed. Therefore, in circumstances where the evidence was insufficient to determine the circumstances of a transfer of land from A to B, equity would hold that B held the land to A's use. This use was called a 'presumed resulting use'. Where evidence was insufficient to determine the real terms of the transaction, B would be presumed by equity to hold to the use of A. 'Resulting' in this context means 'jumping back' or 'rebounding'; the benefit of the property would 'jump back' to A. As we shall see (**10.41**), the colourful language of 'jumping back' probably misconceives what the judges understood to be going on, but the name has stuck: these days, rather than presumed resulting uses we have presumed resulting trusts, which do the same thing. Apart from certain exceptions, where A transfers property to B and there is insufficient evidence to determine what the actual circumstances of the transaction were, equity will require B to hold the property on trust for A.

10.3 As you can imagine, these days the most common reason why there is such a lack of evidence is that A or B are both dead, so the dispute often involves A's or B's personal representatives. A good example is the Canadian case *Mehta Estate v Mehta Estate* (1993) where the court had to discern the truth of the circumstances of various investment transactions involving a husband and wife where both had died in a plane crash. Now you would be right to find it surprising that even today this presumption is still applied. Many think the presumption is simply anachronistic and should be abolished. The probable reason why it has not is that, in special contexts apart, it does not generally affect the result in a dispute, since in most cases there is sufficient evidence for the court to find on the balance of probabilities what the actual intentions of the parties were.

10.4 So far I have only described presumed resulting trusts (PRTs). But resulting trusts are generally considered to be of two basic kinds, presumed resulting trusts and 'automatic' resulting trusts (ARTs) (**2.14**). An ART will arise where the dispositive provisions in an express trust fail, or fail in part, for some reason. For example, a settlor may transfer Blackacre to trustees on trust for Barbara for life and then for her children in equal shares. Assume that when the trust is constituted, Barbara has no children. The trustee will hold the remainder interest on resulting trust for the settlor until such time as a child is born, and if Barbara dies without children, then the trustee will hold Blackacre absolutely for the settlor. These trusts are said to arise 'automatically', which basically means that they arise independently of any actual intentions of the settlor (**10.61**).

10.5 ARTs are just as ancient as PRTs. That is, just as much as presumed resulting uses there were 'automatic' resulting uses, though the use of the word 'automatic' is obviously modern. But given the history of uses, they make obvious sense. Since the standard way of disposing of property in favour of others was first to transfer the property to the feoffee to use, and only later for the settlor to express intentions about who should have it after the settlor, it is obvious that the 'use' or 'benefit' would be regarded as remaining with the settlor until he had effectively directed it elsewhere (Mee (2010, 2014, 2017); for a modern example, see *Van der Merwe v Goldman* (2016), [34]). The modern ART just does the same thing with the modern trust where the dispositions are intended to take effect from the outset. Thus in the example just given, the settlor retains the
p. 239 remainder interest in Blackacre (which will fall into possession when Barbara dies) under an ART until the intended gift to her children operates, if it ever does. Well-drawn trust instruments usually provide for the possibility of failures of this kind, so ARTs should, in principle, rarely arise where a trust is created with the benefit of legal advice.

10.6 The explicit terminological distinction between 'automatic' and 'presumed' resulting trusts was originally drawn by Megarry J in *Re Vandervell (No 2)* (1974) (although it was clearly foreshadowed by Lord Upjohn in *Vandervell v IRC* (1967), at 313F–G, 314A–B). According to Megarry J, the distinction turns on one essential difference between the two cases. In the presumed resulting trusts cases both the existence of the trust and the content of the trust need to be established (at 294F):

> *The presumption thus establishes both that B is to take on trust and also what that trust is.*

In the automatic resulting trust case by contrast (at 294G–H):

> *The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. Since* ex hypothesi *the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of.*

Presumed resulting trusts (PRTs)

10.7 PRTs fall into two categories: voluntary transfer PRTs and purchase contribution PRTs. As to the first, if A simply transfers property he owns to B, then that will raise the presumption that B holds the property on resulting trust for A. As to the second, purchase contribution resulting trusts involve at least three parties. If A pays C to transfer title to property to B, ie buys property to be put in B's name, then there will be a presumption that B holds the property on resulting trust for A. This again makes perfect sense given the history. Since at the time the presumptions were developed, a person would naturally want to have all his lands held by feoffees to his use, it is entirely understandable, if he were to acquire new lands, that rather than buying the lands in his own name, and then later having to transfer the title to them to feoffees to use, he would just buy them in the names of his feoffees to begin with. It thus made just as much sense to apply the presumption in such a case as it did with the voluntary transfer case.

10.8 The rule also takes into account multiple parties contributing to the purchase of an asset. Thus, if two or more persons put their money together to buy property, equity will normally hold that they share the equitable title to the property in proportion to the amount of money each contributed regardless of the way the title is held, whether in both of their names, in one of their names, or in the name of a third party. Whoever the title holders are, they will hold the property on resulting trust for the contributors in proportion to their contributions. Thus if A contributes 30 per cent and B 70 per cent of the purchase price of Blackacre, p. 240 and C is registered as the owner, C will hold Blackacre on resulting trust for A and B as equitable tenants in common, A having a 30 per cent interest, B a 70 per cent interest.

Law of Property Act 1925, s 60(3)

10.9 The presumption underlying voluntary transfer PRTs applied equally to transfers of land and personal property ('personalty') like chattels or company shares before 1926. Before 1926, if a gift of land was intended, it was necessary to state expressly in the deed of conveyance that the land was conveyed to the use and benefit of the donee in order to displace the presumption. Section 60(3) of the Law of Property Act 1925 provides, however, that a resulting trust is not to be implied merely because there is no express statement of this kind. Does this section effectively abolish voluntary conveyance PRTs of land? The case law is divided (*Lohia v Lohia* (2007); *Ali v Khan* (2002); *National Crime Agency v Dong* (2017); *Prest v Petrodel Resources* [2013] UKSC 34, [49]; see also Lewin (2020), [10-012]; Chambers (1997), 16–19; Chambers (2001)), and we await a clear determination by a higher court. NB: The section has no relevance to, and so does not abolish, the presumption in purchase contribution PRT cases. There it remains.

10.10 Regarding personalty, the presumption applies to both tangible property, chattels or goods, and intangible assets like company shares. Since most gratuitous transfers of chattels are intended to be gifts, the presumption should give way to the slightest contrary evidence, including evidence of the surrounding circumstances and common-sense inferences to be drawn therefrom—the presumption fully applies when it is my round and I buy you a pint, but no judge in his right mind would say that you hold that pint on trust for me. More generally, it has been said on many occasions that the presumption is 'easily rebutted' by contrary evidence (see, eg, *Westdeutsche Bank v. Islington LBC* (1996), 708; *Aroso v. Coutts & Company* (2001), [22]).

10.11 Nevertheless, *Fowkes v Pascoe* (1875) and *Re Vinogradoff* (1935) nicely contrast the wildly varying effects that can result when different judges apply the presumption. In *Fowkes* a woman of substantial means purchased stock in the name of a son of her former daughter-in-law; the only evidence of the woman's intentions were the surrounding circumstances; since there was no conceivable reason for her transferring the stock to him to hold as her nominee, she must have intended to give it to him; thus the presumption of resulting trust was rebutted.

10.12 In contrast to *Fowkes*, *Re Vinogradoff* is an atrocity of a decision. There a woman had transferred £800 of War Loan stock into the joint names of herself and her 4-year-old granddaughter. Following her death, it was successfully claimed that the child held the stock on resulting trust, there being no evidence to establish an intention to make a gift. Given that her granddaughter was aged 4, the probability that the donor intended to make her a gift, not make her trustee in this way, is about as close to one as probabilities get in this life. Furthermore, any express attempt to have made her a trustee (as opposed to a passive nominee under the
p. 241 normal understanding of the transaction) would have been ineffective, since under the Law of Property Act 1925 an infant (ie a person under the age of majority) cannot be a trustee. Undaunted, Farwell J held that the granddaughter held the stock on resulting trust, so the executors of the grandmother's estate were entitled to it.

10.13 The idea that sensible inferences may be drawn from all the circumstances is the approach taken nowadays. As Lord UpJohn explained (*Vandervell v IRC* (1967), at 313D):

> *In reality 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.*

(See also *Pettitt v Pettitt* (1970); *McGrath v Wallis* (1995); *Gany Holdings v Khan* (2018), [17].) As Raynor QC said in *Karsten v Markham* (2009, at 122):

> *Of course in this case I have heard the sworn evidence of both parties and I do not need to decide the case on the basis of presumptions. I decide it on the basis of my findings of fact.*

10.14 The 'contribution' in purchase contribution PRTs should be read as 'purchase contribution in money or money's worth'. In *Springette v Defoe* (1992) the sitting tenant of a house was entitled to a discount from the market price; when she purchased the property with her cohabitee, the value of the discount was treated as a contribution she made to the purchase price in determining her equitable share. (This case was followed in the CA decision in *Laskar v Laskar* (2008).) In Singapore, where it is very common to buy a property and refurbish it before moving in, it has been held (*Tan Chui Lian v Neo Liew Eng* (2007)) that contributions to the 'total cost' of buying a property, both purchase money and renovation money, should be treated equally in determining the shares of the co-owners on a proportional contribution basis. This make perfect sense, for when a couple buy a residential property it hardly makes sense for them to trouble about who is paying for the property and who is paying the builders—both should equally be treated as contributions to the property they acquire.

Mortgage loans

10.15 In the case of land purchased with the aid of a mortgage the person(s) raising money on a mortgage, and therefore liable to repay the loan, will be credited with a corresponding contribution. For example, assume A and B purchase a house in their joint names for £50,000, A contributing £10,000 in cash, the remaining £40,000 coming from a mortgage loan under which both A and B are liable. A will therefore have an equitable share of (10 + 20 (half the loan)/50 = 60 per cent, and B a 20/50 = 40 per cent share). Note that one's equitable share is determined by the share of one's liability to repay the loan, not by the value of the money one actually repays (*Cowcher v Cowcher* (1972); *Re Gorman* (1990)).

10.16 The result of this is that if the house A and B bought doubles in value in a year to £100,000, and they sell, B will acquire a much better return on the money he has actually paid than A (but note, this 'leveraging'
p. 242 or 'gearing up' effect is the general (and usually intended) effect of borrowing to purchase a successful investment). Assume that following the sale and the repayment of the outstanding mortgage, the profit comes to £40,000: A will receive a 60 per cent share, £24,000, in return for a £10,000 deposit and paying half the mortgage premiums for a year, while B will receive a 40 per cent share, £16,000, for having paid half the premiums.

10.17 It may not even be the case that A and B have split the premium payments in half; even if A were to have paid all the premiums, B would acquire the same £16,000 share, since it is his joint mortgage *liability* that determines his contribution under the PRT (see further Matthews (1994)). The joint mortgage analysis will not be applied, however, if the evidence shows that B was never intended to pay any of the mortgage instalments, was only a co-mortgagor to allow A to obtain a mortgage because A could not do so on her own, and B in fact never made any payments (*Carlton v Goodman* (2002); *Stewart v Watkin* (2019)). Even where the joint mortgage liability analysis does apply, A may have a claim against B if the property is later sold, under the principle of 'equitable accounting' (**17.40**),

10.18 Following *Stack v Dowden* (2007), the purchase contribution PRT no longer operates in the family home context. That is, by establishing, say, a 20 per cent contribution to the purchase price one is thereby no longer entitled to a 20 per cent interest in the absence of proof to the contrary; rather, that contribution will be treated as one of perhaps many factors that together determine the beneficial interests of the parties (**17.19** et seq).

10.19 Occasionally the presumption is used as a bogus problem solver where it has no application. This happened in *Abrahams v Abraham's Trustee in Bankruptcy* (1999). A couple were each members of a syndicate, each paying a pound a week to buy lottery tickets and share the winnings. Following their break-up, the wife continued to contribute two pounds a week, initially out of habit to cover the membership shares of both her and her husband, but later with no such intention. When the syndicate had a big win, the wife took a double share of the winnings in proportion to her contributions, and the husband's trustee in bankruptcy claimed one of the shares. The court decided that since the wife contributed the money, she held the right to the husband's share on resulting trust for herself, he being unable to prove that the wife had intended to pay one of the weekly one-pound contributions for his benefit. But the presumption of resulting trust was simply not relevant here. The question simply could not turn on whether she held her second share against him under a purchase contribution PRT, because the money came from her, not him; he contributed nothing to the

purchase price of the tickets. The only proper way to have framed the question was: given that the wife was entitled to two shares in the syndicate's winnings, could the husband establish that the wife had gratuitously made contributions for the second share on his behalf? And it was clear that by the time of the win, she had no such intention. The husband, in other words, simply failed to establish an express trust on his behalf. Resulting trusts do not come into it. Perhaps the court confused itself because the wife's right to the proceeds
p. 243 was itself equitable (a right to her share of the winnings, legal title to which was held by the 'treasurer' for the syndicate), and so, once ensconced in the consideration of equitable rights, it hastily reached for the presumption. But the husband's claim would have been the same if the wife and husband had regularly purchased second-hand books for their joint collection and, following their break-up, the wife had bought some more, one of which turned out to be a rare first edition worth £500,000. She would not defend her legal ownership of that book by claiming she held it for herself in equity under a purchase contribution PRT. She would just say she bought it for herself, and would put her husband to the strict proof of any supposed trust of the book under which he had an interest.

Joint ownership of shares and joint bank accounts

10.20 A special case of the application of the presumption arises with transfers of shares to joint owners, as in *Fowkes* (**10.11**) and *Re Vinogradoff* (**10.12**), or when A is the sole contributor to funds into a joint bank account with B, or adds B as a joint account holder where A has contributed all the funds. Under the rules of survivorship (**1.24**) if A dies before B, B will be solely entitled in law to the shares or the money in the account. Because A provided all the money for the assets, the presumption of resulting trust applies. In the case of shares, James LJ said in *Fowkes* (at 351, emphasis added):

> *It was obviously the intent and meaning of the transactions in this case* (as it may be taken to be universally in like gifts) *that the donor should receive the income during her life, [and the absolute interest in the shares pass to the joint owner on her death.]*

So in *Fowkes* and like cases the idea is that there is only a 'resulting trust' of the interest in the shares for A for A's life, creating a trust where A essentially has a life interest and B acquires an interest in the remainder upon A's death. (See also *Young v Sealey* (1949); Mee (2014), 99.) The Singapore Court of Appeal in *Lau Siew Kim v Yeo Guan Chye Terence* (2008) explained such a case as one where:

> *[105] ... the intention may be that the contributing party should receive the income from the purchased property during his life – to this extent the resulting trust prevails, but the property should belong to the benefiting party after his death, ie, the resulting trust is rebutted as to the remainder.*

10.21 Joint bank accounts give rise to a further issue. Where A is the contributor of all the funds to a joint account with B, or adds B to the account which A has funded, the presumption of resulting trust applies. But there are generally two different reasons that A might do this. The first is that the account is opened with B, or B is added as an account holder, out of convenience to A. A, for example, may be frail and finds paying their bills a nuisance or something they are apt to forget doing. In this case A might ask her sister or neighbour to be added to the account to write cheques on it to pay for her expenses and so on. The second reason A might do this is because A really does want B to acquire the sole title to the money in the account on A's death, just as

in the case of *Fowkes* with regard to the shares. In the Singapore case *Lim Chen Yeow Kelvin v Goh Chin Peng*
p. 244 (2008) the evidence was sufficient for the judge to make a factual finding on a balance of probability that the depositor had intended to give the moneys in the joint account to the volunteer. In this instance, the case was decided without the aid of the presumption of resulting trust.

10.22 It has become a matter of controversy what role should be played by the bank documents signed by A and B when the account was created or B was added to the account in determining A's intentions. In *Pecore v Pecore* (2007), the Canadian Supreme Court acknowledged that previous Canadian cases characterised bank documents setting up a joint account as agreements between the account holders and the bank about legal title, not evidence of an agreement between the account holders as to beneficial title. However, *Pecore* took the step of observing ([61]) that while bank documents:

> *do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death.*

Similarly, in *Lim Chen Yeow*, it was held ([117]) that:

> *bank documents including the survivorship clause governing in part the operation of the joint bank account should simply be regarded as one aspect of the overall evidence in the court's determination of the likely intention of the deceased with respect to the beneficial interest in the moneys that the deceased had contributed to the joint account in his lifetime.*

(See also *Aroso v Coutts & Co* (2001); Lau (2018).)

10.23 In the UKPC decision of *Whitlock v Moree (Bahamas)* (2017) the majority held that there was a clause in the account opening agreement that dealt with the beneficial ownership of the joint account, and that this was determinative of the beneficial ownership of the account. Rejecting the view that account opening agreements only relate to the legal title to the funds, not the beneficial interests therein, Lord Briggs said:

> *[42] ... In the Board's view, there can be no general rule that account agreements are only about legal title, or only about the relationship between the account holders and the bank, rather than their relationship as beneficial owners inter se. In each case it will depend upon the true construction of the relevant agreement.*

10.24 In other words, the Board found that there was no need to investigate the subjective intention of the depositor in a resulting trust analysis, something the Board considered to be part of the 'ordinary equitable toolbox', but not needed in this case:

> *[50] This is, therefore, a case in which the two holders of a joint account have, by an agreement with the bank to which they were both parties, expressly set out above their signature a declaration as to the beneficial interests in that joint account which, on its true construction, provides for any balance on the account to be the beneficial property of the survivor, upon the death of the other account holder, regardless who contributed* p. 245 ↵ *the money to the credit of the account before that date. It is, in the Board's view, a case in which there was no need to conduct an open-ended factual analysis as to the subjective intention of Mr Lennard, since the account opening forms signed by him and Mr Moree were, by themselves, dispositive of the beneficial interest in that account, subject to any contrary agreement or later variation, and there was none.*

10.25 The majority's view can be read as an avoidance of the vagaries associated with looking for the subjective intention of the depositor, who is often deceased in these cases. The obvious objection to this approach, however, was set out by Lord Carnwath in dissent:

> *[88] the clause was part of a standard form prepared by the bank, with no input from the customers. The natural assumption is that it was designed to deal with matters in which the bank was concerned, that is in legal not beneficial interests. … it is difficult to see any reason for the bank to use its standard terms to dictate to its customers how to dispose of the beneficial interests in funds held in its accounts. From the customers' point of view the primary purpose of a bank account is as a mechanism to hold and handle money. As I have said, it is not the sort of instrument one would expect to be used to make a very generous gift (in this case a half share in a fund of some $190,000) to a personal friend.*

The 'content' of the presumption of resulting trust: what must be proved to invoke it and rebut it

10.26 The discerning reader will have noticed that so far I have carefully spoken of a presumption of resulting trust, which will determine the result of a dispute between A or B (or their personal representatives) in the absence of sufficient evidence of the circumstances of the transfer, or of the contribution to the purchase price of property in the name of another. Take the simple case of A transferring his Rembrandt to B. The way the presumption applies is as follows. In order to get the benefit of the presumption, all A has to do is provide evidence of the transfer itself. If B leads no evidence, then the presumption will determine the case, and the court will hold that B holds the property on bare trust for A. B, of course, will lead contrary evidence if he can. The most obvious way of countering the presumption is if B can show that he paid for the Rembrandt, that is bought it from A. If B can show that, say by showing a written contract of sale, then there would be no reason to find that B held the painting on trust for A. Rather, it would establish that A just sold it to B. By leading this evidence, then, B can effectively 'rebut' the presumption of resulting trust.

10.27 Now you can see why the presumption, though it exists, is in fact rarely determinative of any dispute as to who is entitled to property. In the case of property transactions there is normally sufficient evidence so that the presumption is displaced and no reliance on the presumption is needed. In the example just mentioned, assuming A and B are alive they will give evidence, produce documents and so on, and this evidence will be the basis upon which the court will determine what the nature of the transaction actually is, whether a sale, a transfer on trust, a pawn by A of his Rembrandt to secure the repayment of money he owes B, whatever.

p. 246 **10.28** All A needs to do to plead the benefit of the presumption is provide evidence of a transfer or of a contribution to the purchase price of property in the name of another. Though it is often put this way, A does not have to show it was a 'gratuitous' transfer or 'gratuitous' contribution. That is, A does not have to prove that B provided no consideration for the transfer or contribution. As Sir Francis Bacon put it, 'the Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof upon the purchaser'. The modern cases show the same (see *The Venture* (1908); *Mehta Estate v Mehta Estate* (1993); *Tinsley v Milligan* (1994); Re Sharpe (1980), where the whole question was whether a contribution to the purchase price of land was a gift or a loan; see also Penner (2010a); for a contrary view see Mee (2020), 326–330). Of course, judges do refer to the presumption arising in the case of a gratuitous transfer or a transfer without consideration (eg *Re Vandervell (No 2)* (1974) per Megarry J at 58–68), but this is understandable; only an ill-advised claimant would advance the resulting trust argument where the transfer or contribution was obviously to fulfil a contractual obligation or on express trust, since there the presumption would be trivially easy to rebut.

10.29 But there is also a very practical point to be emphasised here. The presumption is most relevant in cases where the transferor or contributor to the purchase price is dead, and it is his personal representative who brings the claim. Consider the following example: A dies, and his executor discovers that A transferred £100k worth of shares to his brother B six weeks before his death, shares which under the will were to go to C. The executor will have to figure out what the nature of this transaction was, and he has no means to prove that B did or did not give consideration for the transfer, whether A was paying a debt owed to B, whether A transferred the shares on trust, whatever. If B refuses to provide any information to the executor, then A will have to bring a claim against B, and if the benefit of the presumption is only available for those who can *prove* that B provided no consideration—and remember it is often impossible to prove a negative, that something *did not happen*—then the executor's claim would fail at the outset, which cannot be right. So if it were true that the claimant had to establish a transfer or contribution for no consideration, then the presumption would not be available in the cases where it is most needed.

10.30 We must now address a thorny issue which has created a great deal of controversy (Swadling (2008); Chambers (1997, 2006, 2010a); Mee (2010, 2014); Penner (2010a)): what is the 'content' of the presumption of resulting trust, and what evidence is therefore sufficient to 'rebut' it? There are essentially three alternatives: that when the presumption applies, the law presumes (1) that the transferor/contributor A declared an express trust over the property now in B's hands (the view defended by Swadling); (2) that A 'had no intention' to benefit the transferee or the recipient of property purchased where A contributed to the purchase price (the view defended in Chambers (1997, 2006)); and (3) that A intended that B should not take the property for his own benefit/should hold it for the benefit of A, the view of Mee and your author (of Mee and me, if you like).
p. 247 Chambers (2010a) now endorses a different view, which does not turn on any presumption as to the intention in respect of a trust. We shall discuss this latter view in **Chapter 16**, because this view presents a rather revolutionary view that resulting trusts are an unrecognised species of 'unjust enrichment' trusts.

10.31 The problem with (1) is that there are too many cases which are inexplicable if this is the presumption. (We shall deal with the modern cases here; for a historical survey, see Mee (2014).) Consider *Re Vinogradoff* (1935). Here a resulting trust arose even though an effective declaration of trust was clearly impossible on the facts, since the resulting trustee was four years old, and any express declaration that the property was transferred to her to hold on trust would have been ineffective by virtue of s 20 of the Law of Property Act 1925. Farwell J specifically held that the section 'did not operate to make any difference to the presumption'. While it is easy to criticise the case for relying upon the presumption rather than finding it was rebutted on any realistic appraisal of the facts, if the presumption is what Swadling says it is then the case simply could not have been decided as it was.

10.32 But what causes the most problems for (1) is the court's understanding of the way the presumed resulting trust operated in the run-of-the-mill 'family home' cases where a resulting trust arises on the basis of a contribution to the purchase price made by one or both cohabitees. In a number of decisions the CA considered the relevance of the intentions of a contributor to the purchase price of a shared home and in none can it realistically be argued that the presumption which gives rise to a resulting trust was that the contributor made an effective declaration of trust, much less a provable and thus enforceable declaration of trust, ie one in writing so as to comply with s 53(1)(b) of the Law of Property Act 1925 (**10.46**).

10.33 In *Springette v Defoe* the CA held that there was no discussion between the parties of any kind, thus no declaration of trust by the contributor. Nevertheless, this did not rebut the presumption of resulting trust, which it would have done if the presumption was that an actual trust was declared. Dillon LJ put the point this way:

> *[I]n the absence of an express declaration of the beneficial interests, the court will hold that the joint purchasers hold the property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly to the purchase price.*

Nevertheless, Dillon LJ concluded, in terms, that the presumption of resulting trust was not displaced, and therefore the presumption cannot be one of effective declaration of trust, for if that were the presumption, it would clearly have been rebutted on the facts.

10.34 In *Midland Bank plc v Cooke* the CA similarly held that a wife took a proportionate beneficial interest in the house by way of purchase-contribution resulting trust even though it was accepted both by the trial judge and the CA that there was no expression by the parties to each other in respect of their beneficial interests in the house whatsoever. Both of these cases were considered by the CA in detail and approved in *Oxley v Hiscock*
p. 248 (2004) and the CA's reasoning in Oxley was approved in its essentials by the HL in *Stack v Dowden* (2007) (see also *McGrath v Wallis* (1995); *Lavelle v Lavelle* (2004)). It is, of course, open to Swadling to argue that in these cases the court was not really applying the presumption of resulting trust, but rather finding a constructive trust along the lines explained by Baroness Hale in *Stack* (**17.25** et seq), where a contribution to the purchase price is regarded simply as a factor in finding a constructive trust. But given that these cases seem to suggest that simply showing that A did not effectively declare a trust does not rebut the presumption strongly suggests that this cannot be the content of the presumption.

10.35 Swadling may have a riposte (set out in personal conversation with the author). Both (1) and (3) accept that the presumption refers to the transferor or contributor's intentions. So (1) and (3) both accept that PRT's are intentional trusts in that sense. Given that, one might argue that in the recent cases, and the historical cases, A 'expressed' his intentions, ie declared his intentions, by his conduct given the background circumstances, common understandings, and context. If this is correct, there would be no real difference between alternatives (1) and (3).

10.36 Alternative (3) says that the presumption is that A had a positive intention that B should not treat the property received (or the entirety of it if A contributed part of the purchase price) as beneficially his own. This is essentially an intention that B should hold the property on trust for A. A does not have to know what a trust is in legal terms to have this intention (**5.4**)—he just has to intend that B does not take the property free to deal with it as his own. Alternative (2) takes a 'negative' formulation of this sort of intention: it says the presumption is that A had no intention to benefit B. The question posed by these different formulations is whether they are really any different in substance. What, in practical terms, is the difference between the statement 'Frank did not intend Margo to have the benefit of the property he transferred to her' and 'Frank intended to retain the benefit of the property he transferred to Margo, ie Frank transferred it to Margo intending that she would hold it for him'? If a person transfers property he must necessarily have intentions as to who is to benefit from the property transferred. And, if he has those intentions, why on earth should the court, in the absence of evidence, act on a presumption as to what was absent from his mind ('no intention to benefit Margo'), rather than what was positively there (Frank's intention to benefit himself)? This sort of consideration favours the positive intention formulation in (3).

10.37 If (2) is the correct formulation, it will, of course, encompass all those cases covered by (3). But as Mee (2014) shows in detail, the courts regularly articulate variants of both (2) and (3) without seeing any difference between them. The basic judicial thought seems to work like this (see also **10.70** et seq) with respect to this kind of thinking in respect of ARTs: here is a transaction by A in which B receives title to property from A, or purchased by A. The presumption is that A intended to keep or retain the beneficial interest (recall the basic feoffment to uses (**10.1**), that is, that B was to receive just the 'paper' title). This brings (2) and (3) together in
p. 249 the sense that intending to keep the beneficial interest by conferring a mere paper title is the same thing as not intending a gift/intending a trust. Mee (2014), 102–103, puts the point this way:

> *[I]t is misconceived to regard the statements in the case law as reflecting two competing paradigms as to the fact being presumed. Because the courts are making a choice between the two categories of 'gift' and 'trust', a conclusion that the transferor did not intend a gift (or, to use the language of retention, did not intend to pass the beneficial interest to the transferee) is equivalent to a conclusion that the transferor did intend to create a trust ... [T]he equivalence of the positive and negative formulations explains why the courts appear to vacillate between them.*

10.38 Lord Millett has accepted the alternative (2) 'no intention to benefit' formulation both in his extrajudicial writing (Millett (1998a, 2000, 2005)) and in *Air Jamaica v Charlton* (1999) and *Twinsectra v Yardley* (2002).

10.39 Under the present law, the presumption will be rebutted by actual evidence of any intention which is inconsistent with the presumption, for example, that A paid the money to B to discharge a contractual obligation (*Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996)) even if, as a matter of fact, he had no contractual obligation to discharge; that A made an express declaration of trust which determines the beneficial interests (*Pettitt v Pettitt* (1970) per Lord Upjohn; *Goodman v Gallant* (1986)); or, in the case of purchase money contribution, that A loaned the money to B (*Re Sharpe* (1980); *Levi v Levi* (2008)).

The strength of the presumption

10.40 All judges and commentators agree that the 'strength' of the presumption, and therefore the strength of the evidence required to rebut it, varies according to the circumstances. As Mellish LJ put it (at 352–353) in *Fowkes*:

> *[T]he presumption must, beyond all question, be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift.*

The retention model of PRTs

10.41 Where the presumption is not rebutted, equity regards the beneficial interest as not having moved from A to B. As we have seen, it is a mistake to confuse the idea of a beneficial interest with an equitable interest. (**2.8**–**2.9**, **2.39**). A retains the same benefit as before, though now it is just secured via his equitable title, rather
p. 250 than through his prior outright legal title. A beneficial interest is not the same as a legal or equitable interest, and so the retention idea—did A intend to keep the beneficial interest or give it to B—is a perfectly sensible way of framing the presumption, the presumption of resulting trust on this formulation being that A intended to retain or keep the beneficial interest.

10.42 The 'retention' model of presumed resulting trusts has been criticised. Chambers (1997), Swadling (2008), and Mee (2017) all reject it. Mee (2017), 6–7, shows that, historically, the word 'use' had two meanings, one of which was equivalent to the notion of beneficial—not equitable—interest. This 'use' was retained by A when she transferred his property to B on bare trust for herself. Mee (2017), 9 (emphasis added) puts the objection to this view in this way:

> *[T]he interest which the claimant holds under a resulting trust is not, strictly speaking, something that he or she previously held. Before the creation of the resulting trust, he or she held the legal title to the property, giving him or her inter alia the right to sue anyone who interferes with the property and to transfer the property to whomever he or she chooses. After the creation of the resulting trust, he or she lost these rights but gained instead inter alia the right to insist that the trustee should sue anyone who interferes with the property and to compel the trustee to transfer the property to whomever the claimant chooses. Notwithstanding the rhetoric of retention, the rights that the claimant holds under the resulting trust are of a different nature to, and not 'part of', the legal title that he or she held before.*

10.43 In reply one might say that, as we have seen with the historic situation of the presumed resulting trust (**10.1**), A never gives up possession of the property to B, giving B only a paper title. In such a case A retains the right to sue trespassors simply in virtue of her continuing possession. As regards the power to transfer title, B must exercise this only in the way A directs. Although operating through B in this way may be inconvenient, on what basis can it be said that A has lost the power to transfer the title? What has A lost, and to whom has it gone? It certainly has not gone to B, who has no right to exercise the powers of title for his own benefit.

10.44 For another example, consider the case of a resulting trust of company shares that A transferred to B. True, A does not directly receive any dividends from the company, nor is she allowed to vote the shares in a general meeting of shareholders. But B is obliged to transfer the dividends to A and vote the shares as A directs. Though A's means to get the benefit of the shares, now via a trust, are different than her means before the transfer, how has the transfer diminished her entitlement to get all the benefit of the shares that there is?

10.45 Mee is, however, on much firmer ground when we consider the purchase contribution resulting trust, for in these cases it is clear that A does not retain the interest she had before. When A contributes 50 per cent of the purchase price of land, title to which is put in B's name, A does not 'retain' the same beneficial interest she had before. Prior to the transaction, A had a right to her money, afterwards, to a equitable half-share in the p. 251 title to a house. At this point, the 'retention' idea must be extended, but it can be. As we have seen (**2.69** et seq), the law of tracing works on the basis that A's rights to one title, say to cash, can be realised by exchanging it for something else, say a car. The car is the 'exchange product' of the cash, and it belongs to A because it was A's title to the cash that was used to buy the car. Thus, A's beneficial interest in the cash, her title to the cash, is now, via the exchange, her beneficial interest in, her title to, the car. The beneficial interest in these several rights never leaves A. They never become an interest of B's. So even in the case of the purchase contribution resulting trust, the retention model holds good in the sense that the entire benefit of the transaction as regards A's actual contribution, whether 100 per cent, 50 per cent, whatever, is retained by her, even though the beneficial interest is not the same beneficial interest with which A began.

Law of Property Act 1925, ss 53(1)(b) and 53(2)

10.46 Recall (**9.8**, **9.10**) that s 53(1)(b) of the Law of Property Act 1925 provides:

> *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 his will.*

And that s 53(2) of the Act provides:

> *This section does not affect the creation or operation of resulting, implied or constructive trusts.*

The interesting question that arises here is how we apply these sections in the case of presumed resulting trusts. ARTs clearly fall within s 53(2) because these are not declared—they arise by operation of law (**10.4**).

10.47 This question is best pursued by way of examples. A transfers Blackacre to B to hold on trust for A, but A only declares this trust orally. This is clearly an express, if informally declared, trust. So s 53(1)(b) seems to stand in A's way, and if B pleads the section A's only recourse is to argue, on *Rochefoucauld* principles (**9.14** et seq), that B's reliance on the statute is fraudulent. But as all the informal family cases seem to show, A brings his claim by merely proving the transfer, and then the ball is in B's court, for he must rebut the presumption. As Swadling (2016) makes clear (at 7–8), where B cannot rebut the presumption, the *presumption* determines the result, and so s 53(1) should not apply because the trust in this case is not proved by A's informal declaration.

10.48 So far so good. But what if B provides sufficient evidence of, say a gift, that A must now lead evidence in reply. A gives evidence of his oral declaration of trust, and the court prefers A's evidence to B's, finding B an untrustworthy witness—and the resolution of these sorts of disputes turns very commonly on this sort of finding—and the court finds B holds Blackacre on trust for A on the totality of the evidence on the balance of probabilities. It is hard not to conclude that s 53(1)(b) should apply here because what is being proved is A's
p. 252 oral declaration of trust. But there seems to be no case in which this question has been considered. Perhaps because the claimant is relying first upon the presumption, the legal thinking is that this brings the case within s 53(2), and once this has been done, any reference to s 53(1)(b) is necessarily displaced.

10.49 Here's the sort of case where this issue might clearly be raised, though again, your author knows of no case where this has occurred. We start with the same fact situation, and A again brings a claim against B *pleading the presumption*. In his defence, B claims A transferred Blackacre on oral trust to him, and pleads s 53(1)(b). What should the court do now? It seems difficult to say that B's evidence does not rebut the presumption. If that is correct, then the court has only A's oral declaration as evidence upon which to find for A, but this seems to be contrary to s 53(1)(b)—note that the section is *not* an enforcement section like the old s 40(1) LPA 1925—it is a *proof* section, so it doesn't matter that it is B who provides evidence of the fact that A orally declared the trust. It is, to say the least, difficult to determine how the court should resolve this issue, but in your author's opinion the court is likely to allow A to plead the doctrine of *Rochefoucauld*.

The presumption of advancement

10.50 The presumption does not operate in all cases of transfers or contributions to purchases in another's name. As Freud might have said, sometimes a gift is just a gift. In these circumstances, it is said that a 'presumption of advancement' or a presumption of gift operates. Traditionally the presumption only applied where A transferred property to B or contributed to a purchase in the name of B where A was B's husband, or B's fiancé (*Moate v Moate* (1948)), or B's father, or someone to whom A stood in *loco parentis* (*Re Paradise Motor Co Ltd* (1968)). There was no presumption of advancement in the case of a gift from mother to child (*Sekhon v Alissa* (1989)) unless the mother (eg as a widow) stood in *loco parentis* to the child (*Crown Prosecution Service v Malik* (2003)). The underlying rationale for the presumption of advancement varied (see Glister (2010a)) but the basic idea was, given a man's duty to support his wife and children, it was assumed he meant to benefit them by these transactions, so the presumption of resulting trust should not apply.

10.51 Founding an evidentiary inference on the theory that, in general, a husband intends to make gifts to his wife but not vice versa, and that, in general, fathers, but not mothers, intend gifts to their children, has long struck commentators and judges as unrealistic and exorbitantly sexist. In Australia the presumption now applies to gifts from mother to child (*Nelson v Nelson* (1995)), but has not been extended to de facto relationships (*Ryan v Ryan* (2012)). The SCC decided in *Pecore v Pecore* (2007) that the presumption of advancement would apply only between a parent (of either sex) and a minor child or children.

10.52 Based on recent cases (*Close Investment Finance v Abaowa* (2010); *Re Camerson* (1999); *Musson v Bonner* (2010)), Lewin (2020), 10-019, opines that it is now 'tolerably clear' that the presumption applies when a woman benefits her husband or child. This view is supported by *Stewart v Watkin* (2019) where Barber J
p. 253 accepted that the presumption applies between spouses and between both parents and children. Even so, in *Smith v Crawshay* (2019) Matthews HHJ said ([65]): 'Whether the equitable presumption operates at all as between mother and child is a difficult question.' But there is a sense in which this may all remain an academic question, since any presumption is only a starting point in terms of placing the burden of proof, and a last resort where the evidence is exiguous, and judges are typically able to rely on the available evidence to determine the real intentions of the parties, which is how both Barber J and Matthews HHJ reached their decisions. In your humble author's opinion, this issue will only be determined conclusively when a higher court has to decide a case on the basis of the presumption alone, as occurred in *Mehta Estate* (**10.3**) where the only evidence was of the husband's transfers to his wife and no evidence of their actual intentions was available, as both had died.

10.53 The presumption appears not to apply to partners in a *de facto* relationship, but should in principle apply to married same-sex couples (Lewin (2020), 10-033).

The strength of the presumption

10.54 Just as with the presumption of resulting trust (**10.40**), the strength of the presumption of advancement varies according to the circumstance. For example, in the Singapore case *Lau Siew Kim v Yeo Guan Chye Terence* (2007) the court said:

> *[68] One possible factor within the parent-child category which could affect the weight of the presumption of advancement may be the number of children the parent (or person standing in loco parentis) has;* ceteris paribus, *the greater the number of children one has, the less likely that a transfer of property of substantial value to a single child without similar provision for the other children would be intended as a pure gift to that child. Of course, the presumption of advancement should still operate in such a case, but it is likely that less weighty evidence would be required to rebut the presumption of a gift as compared to a case where the recipient child was the only child of the transferor parent.*

Section 199(1) Equality Act 2010, s 199(1)

10.55 Section 199(1) of the Equality Act 2010 provides:

> *199 Abolition of presumption of advancement*
>
> (1) *The presumption of advancement (by which, for example, a husband is presumed to be making a gift to his wife if he transfers property to her, or purchases property in her name) is abolished.*

It is not clear whether the parenthetical examples are intended to restrict the abolition to the presumption as it applies between wives and husbands only, or whether the presumption is abolished in all other cases (eg of a transfer from father to child). Section 199(2)(a) provides that the presumption will remain in cases involving things done before the commencement of the section, which will mean that the preceding law will be relevant
p. 254 ↵ for many years after the coming into force of the section. Glister (2010b) is a scathing analysis of the legislative reasoning lying behind the provision and its problematic aspects, and repays reading in full. One obvious criticism is simply that by abolishing the presumption of advancement, the presumption of resulting trust will now operate in these cases. The law will thus be taking a step backward into unreality: is it really to be presumed nowadays, where the evidence is unsatisfactory, that all interfamilial transfers are transfers on trust? This is the sort of oddball thinking that would prefer the result in *Re Vinogradoff* to that in *Fowkes v Pascoe* (**10.11**–**10.12**). Happily, the provision has not been brought into force and it seems unlikely that it will.

The nature of the presumption of advancement

10.56 The terminology 'presumption' of advancement may be misleading (*Pettitt* per Lord Upjohn):

> *Though normally referred to as a presumption of advancement it is no more than a circumstance of evidence which may rebut the presumption of resulting trust.*

In other words, if the recipient is a man's wife or child, this fact counts as evidence that may be, and normally is, sufficient evidence to meet the evidentiary hurdle posed by the presumption of resulting trust. In view of that, in these cases if the father wishes to show that the property was not a gift but was intended to be held on trust, then it will be necessary for him to lead evidence that establishes this trust. According to this view, then, the presumption of advancement works on the basis of a standard inference from the facts where it applies; the courts, without any more evidence before them, will infer that the man is making a gift. Seen in this way, the presumption of advancement is as much an evidentiary presumption as is the presumption of resulting trust.

10.57 However, there are two ways of understanding the relationship between the presumptions. On the first, the presumption of advancement is both historically and conceptually dependent upon the existence of the presumption of resulting trust; it serves as a 'second-step' exception to the general presumption of resulting trust which first applies to any case where a father transfers property to, or purchases property in the name of, his wife or child. The wife or child can then plead the presumption of advancement in order to rebut the presumption of resulting trust. The importance of conceiving the relationship between the presumptions in this way is as follows. Recall again the formalities issue (**10.46** et seq) in cases where A transfers *land* to, or buys land in the name of, B. By tagging the presumption of advancement on to the presumption of resulting trust as a second-order presumption, the analysis is that when the father leads evidence to successfully overcome the presumption of advancement, the presumption of resulting trust, *which applied but whose* *operation was suspended while the presumption of advancement operated*, now falls back into place. He may then simply rely upon the fact that he contributed to the purchase price to establish his beneficial ownership share under a resulting trust, and therefore the reasoning of **10.47** and **10.48** should apply.

10.58 The other way of regarding the presumption of advancement is this: all the 'presumption of p. 255 advancement' means is that there is no presumption of resulting trust in cases where it applies. On this view, there are certain cases where contribution to the purchase in the name of another attracts the presumption of resulting trust, and others where it does not. On this understanding, where a father leads evidence to 'rebut' the presumption of advancement, he has more difficulty avoiding the effect of the formality statute. Because no presumptions operate at all, what the father does when he leads evidence of the trust is to try to establish an express, albeit informal, trust. And then s 53(1)(b) must necessarily apply.

10.59 Which of these views is right is actually rather difficult to determine. Swadling (2008) (73) prefers the latter, as does your author, but the judges seem not regularly to clearly distinguish between the two cases, and you will find both articulated. It may again be the case that judges and lawyers more or less unconsciously think that in a case where the presumption of advancement applies, we are in 'resulting trust' territory, which takes the case into s 53(2), on the reasoning of **10.47**, even if this way of thinking is rightly criticised for being analytically weak.

10.60 In *McGrath v Wallis* (1995), the weak presumption of advancement of a share in a family house between father and son who both contributed to the purchase price of a house in the son's name was rebutted and a trust in favour of a father was established, on a number of factual bases. First, putting the house in the son's name could be explained because it allowed the purchase to be assisted with a mortgage the father could not on his own obtain. Second, at one stage a declaration of trust formally expressing the father's and son's ownership shares in proportion to their contributions was drawn up by the father's solicitors. Although it was never executed there was no evidence that he had later given his solicitors contrary instructions. Finally, as the father was only 63 years old and in good health, there was no obvious reason to make a gift to his son of an 80 per cent share in the house where he would himself live. However, once the court determined that the father had not intended a gift, it did not declare that the property was held on trust by the son for himself and his father in shares proportionate to their contribution to the purchase price; it did not, in other words, find a purchase contribution PRT. The court, as is common, made its decision on the evidence of the overall intentions of the parties, so neither presumption was determinative.

Automatic resulting trusts (ARTs)

The relevance of the settlor's intentions to ARTs

10.61 In *Re Vandervell (No 2)* (1974) Megarry J stated that ARTs arose by operation of law independently of the settlor's intention. Lord Browne-Wilkinson doubted this in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) (at 708):

> *Megarry J … suggests that [such a trust] does not depend on intention but operates automatically. I am not convinced this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial*
> p. 256 *interest in the trust property, there is in my ↵ view no resulting trust; the undisposed-of equitable interest vests in the Crown as bona vacantia [ie goods without an owner]: see In Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts.*

There are two ways of understanding this. The first is that, despite appearances, in the vast majority of cases where resulting trusts arise on the failure of an express trust to dispose in whole or in part of the beneficial interest in the trust property, the court really does inquire into and assess whether the settlor intended a resulting trust to arise, and finds that he did. But this is just not true on the cases.

10.62 On the other hand, Lord Browne-Wilkinson may only be saying that despite the normal, 'intention-independent', operation of the resulting trust in these circumstances, there are cases where (1) the facts show that the settlor did actually intend to abandon any interest in the trust property if the trust failed, and (2) he did not express this intention as a term of the trust he created, ie he did not declare as he did the other terms of the trust that if the trust failed in whole or in part that he abandoned his interest, but (3), nevertheless, because of these 'collateral' intentions to abandon, the court treats the undisposed of trust property as *bona vacantia*. This does not upset Megarry J's characterisation, but only modifies it in a very minor way as follows: the ART is not wholly 'intention-independent' in that it may be displaced by a settlor's actual intentions to abandon to the Crown all interest in the trust property that might otherwise result to him. It is not clear that there have ever been any cases of this kind, and to the extent his Lordship relies on *Re West Sussex*, as we shall see, that case turns on a view of unincorporated associations as akin to anomalous valid purpose trusts which is no longer good law (**11.73** et seq).

10.63 The complicated way in which an ART can arise is shown by *Vandervell v IRC* (1967). Recall the facts of that case (**9.43** et seq). Given the relative simplicity of the facts, it is somewhat startling how difficult the different judges in the CA and the HL found it to characterise adequately the transaction in which the RCS received the shares and granted the option to the trust company in a way that explains their decision. In *Re Vandervell (No 2)* (1974), where he closely analysed *Vandervell v IRC*, Megarry J gives the gist of what the judges appeared to think (at 61):

> *[Quite] apart from mechanism or motive, there is the fact, of paramount importance in relation to any concept of resulting or implied trust, that it was Mr. Vandervell alone who was providing the property in question. The option was an option over shares of which Mr. Vandervell was the sole beneficial owner. If Mr. Vandervell disposed of those shares in such a way that he brought about the vesting of a major benefit in the college and a minor benefit in the defendant company, then it seems to me that Mr. Vandervell was providing both those benefits, even if his provision of the minor benefit was indirect and not made under compulsion.*

10.64 Now, when a judge in a trust case says things like 'Quite apart from mechanism or motive', start to worry, because if the law of trusts is about anything, it is about mechanism and motive—in other words, it
p. 257 concerns whether or not individuals have effectively exercised various powers of ownership, and the consequences of having done so or having failed to do so. That is what this case concerned, and so mechanism

and motive are all-important. Different legal mechanisms might account for the transaction in *Vandervell* (for details see Penner (2019a), 5.55–5.59), but the only analysis that really seems to work given the court's ultimate finding is that Vandervell transferred the shares to the RCS on trust to (a) set up a chair in pharmacology and (b) grant an option to VTL.

10.65 Now, here's the crucial point that arises from this analysis. Using strict 'follow the money' PRT principles, Vandervell gave an asset to RCS on trust to grant VTL a valuable right to that asset, the option. But, in the absence of any evidence of Vandervell's actual intentions VTL would hold that option on a purchase contribution PRT for him. In other words, Vandervell provided value in the form of shares to the RCS but imposed upon RCS the trust obligation to grant the option over those shares to VTL. In consequence, we must look to see if there was any evidence to rebut the presumption of resulting trust in Vandervell's favour.

10.66 There was, in fact, sufficient evidence of Vandervell's intentions to rebut the presumption of resulting trust. Apparently, the main rationale for requiring the RCS to grant the option was simply to ensure that the shares could be retrieved from the RCS to forestall problems in pursuing a public flotation of Vandervell's company. It was not clear that Vandervell entertained any specific intentions as to who should have the beneficial interest in the option the trustee company was to acquire, except that he did not want to retain or reacquire any interest for himself in the shares. Save for Lords Reid and Donovan, all the judges found it inconceivable that Vandervell intended VTL to take the option beneficially (and quite right too: unless specified as a beneficiary, a person taking property as a trustee is never beneficially entitled to it); in other words, he must have intended that VTL was to hold the option on trust for somebody. But what trust?

10.67 The majority found that the intended trust was simply too vague and undefined to be valid. Both the CA and Lords Upjohn and Donovan considered the possibility that the option was transferred upon trust for the children's or employees' trust in such proportions as the settlor or VTL might declare, but this could not have helped either, for until such trusts are declared the trustee would hold the assets on trust for the settlor (**10.5**). The result, then, was an ART.

10.68 Most ARTs arise when the settlor transfers property directly to the trustee on trusts that fail to dispose of the beneficial interest, not in the rather complicated way in which Vandervell provided the option for VTL. Because of that, the judgments in the HL can be confusing, and Megarry J's review of them in his judgment in *Re Vandervell (No 2)*, while somewhat tedious, is preferable. One rule of law that comes out clearly in *Vandervell v IRC* is that simply having a positive intention not to retain any beneficial ownership in property transferred to another, as Vandervell had, will not prevent the transferor from ending up with the beneficial title under an ART, since if the transferor not only has that intention but has also the intention that the transferee is to hold
p. 258 on trust, and the trust fails, then the only possible result is an undefined express trust, which leads to an ART (see also *Re Flower's Settlement Trusts* (1957)). As Plowman J said in *Vandervell* at first instance (at 275):

> *As I see it, 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?*

This statement was cited with approval by Lord Upjohn in the HL's decision (at 317) and by Lord Millett giving the advice of the PC in *Air Jamaica Ltd v Charlton* (1999) (at 1412).

Why do ARTs arise?

10.69 Before pursuing this question, it should be pointed out that we could abolish PRTs tomorrow, in essence leaving any person who transferred property to another or purchased property in the name of another to prove on the evidence any trust he intended to create, without the benefit of any presumption. That might be a good or bad move, but it would be a perfectly feasible new rule. But the situation cannot be the same with ARTs. The law must give some answer to the case where A transfers property to B on express trust and the trusts declared fail to exhaust the benefit of the property transferred. Perhaps we could stick with the present position, where the undisposed of property results to A or his estate if he has died; alternatively, we could choose that the property goes to the Crown as *bona vacantia* (goods without an owner); or we could say the trustee can keep it (in the case of certain property prior to the 1925 property law reforms, that was in fact the case if the settlor had died with no legal successors; see Tham (2017), 83–85). But we cannot just leave the beneficial interest in the property 'up in the air'.

10.70 As we have just seen (**10.66**), the traditional reason why the ART is seen to arise is that 'what the settlor fails to give away, he keeps', and seems best to be explained as the obvious 'implied rule' which deals with cases where a settlor fails to dispose of the entire beneficial interest in property he transfers on trust (Millett (2005); Mee (2010)). This rationale for the ART is found throughout its history. Mee (2010) shows that this understanding of the matter was crucial for the application of certain laws of succession at the time, and so as a matter of history the 'retention' model of the ART best captures the centuries-long understanding of the judges which, as we have seen, continues to this day.

10.71 Yet, as we have also already discussed, the 'retention' model of the resulting trust in the case of PRTs has been doubted (**10.41**). Whatever force the criticism has in the case of PRTs, it seems especially misplaced in the case of ARTs. As we have seen (**10.5**), originally the most common way of disposing of assets via the use was first to transfer the title to the property to the feoffee to use, and only then declare intentions as to the beneficial interests in the property. Thus, at the outset, when an intending settlor's disposition failed, it really did just fail, leaving him exactly as he was before. The equitable interests he did not dispose of, he just retained.

p. 259 **10.72** The modern rule concerning dispositions that fail at the outset—where A transfers property to B on trust for C where the trust for C fails because, for instance, C, unbeknownst to A, has died, B will hold the property on ART for A—just seems like a sensible extension of the rule, which now forms one of the 'implied terms' which go with transferring property on trust, ie that any beneficial interest in the property one fails to dispose of is held on trust for one (see also Mee (2017), 33–35). Consider this: to undertake a trust obligation is not: 'I undertake to hold these assets just in so far as you have effectively disposed of the entire interest in them, and anything not so disposed of belongs to me.' Any trustee who spelled this out as his 'trustee undertaking' to a would-be settlor (think in particular of professional trust companies) would never be accepted as a trustee, and so it would be fanciful to build a theory of ARTs on such a misunderstanding. Another way of putting the same point is that on the equitable understanding of what it means to undertake to receive property on trust, the trustee is not the 'residual claimant'; the settlor is (**2.14**).

An ART can always arise in theory

10.73 As we have seen, gifts on trust can fail for any number of reasons, such as uncertainty (**Chapter 5**), or because against public policy (**3.77** et seq), and Parliament could conceivably alter the law so as to make certain gifts on trust that are valid at the time the trust is settled void for various reasons. Furthermore human objects can always disclaim gifts, giving rise to an ART (**9.60**), and even charities can, in certain circumstances, disclaim gifts (*Re Leek* (1969)).

Resulting trusteeship

10.74 The resulting trustee of a PRT is a bare trustee, who essentially holds the property to give effect to the resulting beneficiary's ownership interest in equity, or her co-ownership interest where, for instance, she contributed part of the purchase price of the property transferred into the name of the resulting trustee. In the case of a partial ART, for example where the trust is for Barbara's life and then to her children in equal shares, until such time as a child is born the capital interest is held on resulting trust for the settlor, but the trust is still a valid special trust (**5.70**) and the trustee must carry out the trust for Barbara as income beneficiary and the settlor as capital beneficiary. Where the trust fails in its entirety, the resulting trustee will hold the assets on bare trust for the settlor.

10.75 As we have seen, judges often determine the intentions of the parties on all the evidence, so that they do not rely on any presumption to make their findings. Because of this, they may find a trust relationship between the parties with further terms of an intentional trust besides just the allocation of ownership or co-ownership shares. If the court does so find, then the trust will not properly be called a PRT, because the proof of that more complex trust will amount to the proof of an express trust.

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Further reading

Chambers (1997), especially ch 1, and (2006, 2009, 2010a)

Glister (2010a, 2010b)

Matthews (1994)

Mee (2010, 2014, 2017, 2020)

Penner (2009b, 2010a)

Swadling (1996a, 2008, 2016)

Must-read cases: *Vandervell v IRC* (1966); *Re Vandervell (No 2)* (1974); *Pettitt v Pettitt* (1971); *Air Jamaica v Charlton* (1999); *Stewart v Watkin* (2019)

Self-test questions

1. What are ‘presumed resulting trusts’ (PRTs) and ‘automatic resulting trusts’ (ARTs), and what distinguishes them?
2. ‘The automatic resulting trust is a necessary feature of any legal system that recognises transfers of property on trust, but the recognition of presumed intention resulting trusts is inessential, and in the case of English law the presumed intention resulting trust has outlived any possible usefulness it might once have had and should be abolished.’ Discuss.
3. What distinguishes ‘voluntary transfer’ and ‘purchase contribution’ PRTs?
4. What intention(s) of the voluntary transferor or contributor must be proved for a PRT to arise? How do these intentions relate to the case where the presumption of advancement applies?
5. What must a litigant prove to rebut the presumption of resulting trust or the presumption of advancement?
6. On what basis to ARTs arise, and of what relevance is the settlor’s intention?

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