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## The Constructive Trust: A Neglected Remedy in Ohio

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An express trust is a substantive law institution.<sup>1</sup> A constructive trust is a remedial device of the court of equity: "the formula," said Judge Cardozo, "through which the conscience of equity finds expression, when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. . . . A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."<sup>2</sup> In another leading case Cardozo, J., said it was "a remedial device through which preference of self is made subordinate to loyalty to others."<sup>3</sup> The technique by which the chancellor usually enforced his decrees, by direct command to the defendant, thus putting pressure upon him, provides an effective remedy in many situations. This

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<sup>1</sup> Pound, "The Progress of the Law, Equity" 33 Harv. L. Rev. 420 (1920).

<sup>2</sup> *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919); *Newton v. Taylor*, 32 Ohio St. 399 (1877).

<sup>3</sup> *Meinhard v. Salmon*, 249 N.Y. 458, 467, 164 N.E. 545, 62 A.L.R. 1 (1928); 3 Bogert, *Trusts & Trustees*, sec. 471 (1935). See dissent of Williams, J. in *Oleff v. Hodapp*, 129 Ohio St. 432, at p. 444, 195 N.E. 838 (1935) where these definitions are approved. American Law Institute, *Restatement of Restitution & Unjust Enrichment*, Proposed Final Draft, Pt. II, sec. 160 "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."

direct technique *in personam* is the method used in the constructive trust. It is very often adopted in reformation cases, in actions for specific performance, in actions to defeat fraudulent conveyances, and to affect restoration of property, and "sometimes to develop a new field of equitable interposition," for example, "specific restitution of received benefits in order to prevent unjust enrichment."<sup>4</sup> It is obvious that this is a remedial technique and in no sense a substantive law matter. When the holder of the title to property is declared to be a constructive trustee the court of equity is not in the least interested to create a trust in the sense as is the settlor in an express trust. On the contrary, the court is preparing the way for an immediate termination of an existing situation, a transfer of the property involved to the one found to be best entitled thereto. If time is required, the situation is treated as though an express trust had existed from the time of the wrongdoing of the defendant. Usually, however, the result is an order for an immediate conveyance.<sup>5</sup> In a jurisdictional sense no doubt can exist in respect to the chancellor's *power* to utilize this remedy, whether it *ought* to be exercised in a particular instance is, and should always be, a matter within the sound discretion of the chancellor. Being remedial it must be kept highly flexible and only resorted to in the interest of that quality of justice administered by the equity court.

Dean Pound has pointed out<sup>6</sup> that sometimes courts seem to reach unfortunate results because of an apparent confusion of thought as to what the nature of a constructive trust really is. In several distinct groups of cases in Ohio it seems that full and effective use of this device has not been made, and it may be that some such confusion as suggested by Dean Pound is responsible for what seems to the writer to be unfortunate results. It is proposed to examine these instances to discover the reason, if possible, and to suggest the application of the

<sup>4</sup> Pound *op. cit.*, note 1 *supra* 421 and cases there cited.

<sup>5</sup> Bogert, *op. cit.*, note 3 *supra*, p. 1462.

<sup>6</sup> Pound, *op. cit.*, note 1 *supra*.

comparatively recent concept of the constructive trust in their solution.

The time-honored classification of trusts into express trusts and implied trusts, and the latter again into resulting and constructive trusts, which is so deeply imbedded in our trust law, may in no small degree be responsible for the misconception. Implicit in this classification is the concept that these three classes, express, resulting, and constructive are all parts of the larger whole, i.e., trusts in the substantive law sense. A very much more scientific classification was developed by the late Professor Costigan,<sup>7</sup> in which the function of the different classes is made the basis for classification, and, with respect to constructive trusts, its use as a fraud and unjust enrichment preventing remedial weapon is emphasized.

#### FORGED WILLS AND THEIR PROBATE

The first group of cases to be considered involve forged wills and their probate. The Court of Appeals of this state refused to make use of the constructive trust device in a fact pattern which seemed strikingly suited to its application. In the case of *Pettit v. Morton*,<sup>8</sup> the plaintiff, in his complaint, alleged that in the genuine will of the testator he was the devisee of a valuable hotel property situated in Cleveland; that the defendant, the son of the testator, by forgery and fraud, secured the execution of a false will and thereafter, by the collusion of the witnesses to the will, his sisters, the probate of the same; that the defendant concealed the true will and destroyed it in 1923, almost twenty years after the probate of the false will; that the plaintiff discovered the fraud for the first time in 1925. The trial court refused to impress a constructive trust upon the defendant with respect to the property;

<sup>7</sup> "The Classification of Trusts as Express, Resulting and Constructive." 27 Harv. L. Rev. 437 (1914). The old classification is retained by Bogert in his recent work. Bogert, *op. cit.*, note 3 *supra*, vol. 1, sec. 1. It is abandoned by the American Law Institute Restatement Trusts.

<sup>8</sup> 28 Ohio App. 227, 162 N.E. 627 (1928). Noted in 3 Univ. of Cin. L. Rev. 107, 14 Cornell L.Q. 108, 27 Mich. L. Rev. 452.

this decision was affirmed by the Court of Appeals, and the Supreme Court overruled a motion to certify.<sup>9</sup> There was no dispute in any of these proceedings as to facts as the case came before the courts upon demurrer.

Certain statutory provisions in this state precluded the customary methods of redress. A one year statute of limitations had barred any contest of the probate proceedings.<sup>10</sup> The court of equity is without any probate jurisdiction, exclusive jurisdiction in such matters having been conferred upon the probate court.<sup>11</sup> Likewise it has no jurisdiction to set aside probate proceedings. Being a court of record<sup>12</sup> its final judgments are a verity and not subject to attack collaterally.<sup>13</sup> Furthermore, it is quite likely that the true will could not be offered for probate, and, on denial thereof, an appeal taken to the Common Pleas Court under G.C. 10532. That statute provides for a review of the refusal of the Probate Court to admit a will for probate and is not a device for the review of a proceeding already had, which in all probability such a strategy would be considered to be. Similarly the Probate Court would almost certainly refuse to set aside its own action at this late date.<sup>14</sup>

There were two possible avenues for redress open to the plaintiff. In this case he first chose the equitable one as above stated. Sullivan, P. J., forecast his conclusion in the way he presented the question of the case: "Thus the vital question is whether a court of equity, under an unprobated will, can declare a trust on the ground of fraud, and in that manner ultimately

<sup>9</sup> 28 Ohio App. 44.

<sup>10</sup> Ohio G.C. 10531 ("If, within one year after probate had, no person interested appears and contests the validity of the will, the probate shall be forever binding, saving, however, to infants, and persons of unsound mind, or in captivity, the like period after the respective disabilities are removed.") This section now changed by G.C. 10504-32 reduces the time to six months.

<sup>11</sup> Ohio G.C. 10492, 10501-53.

<sup>12</sup> Ohio Constitution, Art. IV, sec. 7.

<sup>13</sup> *Joseph Hunter's Will*, 6 Ohio 500 (1834). *Lessee of Sewasey's Heirs v. Blackman*, 8 Ohio 5 (1837); *Morningstar v. Selby*, 15 Ohio 345, 45 Am. Dec. 579 (1846).

<sup>14</sup> See 27 Mich. L. Rev. 452 (1929).

have declared invalid the will in favor of the heirs at law, duly probated under the statute. . . ."<sup>15</sup> So framed this proceeding becomes a collateral attack upon the false will and its probate.

Even so stated the plaintiff's case is not entirely hopeless. It is well settled that the court of equity has the power, in an independent action, to impeach the judgments of a law court where they are obtained by fraud and circumvention.<sup>16</sup> It seems that there is no controlling reason why the decisions of the probate court should have a greater degree of sanctity or finality than the proceedings of any other court. The fact that the judgment of that court relates to a will by which the property of the testator is directed to certain persons and that equity's decree will change that devolution seems unimportant. An attack upon the right of the fraudulent holder of the property to keep that which he has secured by a fraud on both the testator and the Probate Court does not convert the equity proceeding into a will contest.

The contrary position and theory, however, taken by Jones, J., in his dissent in the case of *Seeds v. Seeds*, viz., that the legislature, by its statutes,<sup>17</sup> had adopted a policy which "requires that the estates of deceased persons, being deprived of a master and subject to all manner of claims, should at once devolve to a new and competent ownership; . . . and that the result attained should be firm and perpetual,"<sup>18</sup> is obviously one of policy to be weighed against the other policy of fraud prevention here urged. There is, moreover, considerable au-

<sup>15</sup> *Petitt v. Morton*, note 8, *supra*, p. 230.

<sup>16</sup> *Seeds v. Seeds*, 116 Ohio St. 144, 156 N.E. 193, 52 A.L.R. 761 (1927); *McIntire v. McIntire*, 107 Ohio St. 510, 140 N.E. 328 (1923); *Darst v. Phillips*, 41 Ohio St. 514 (1885); *Coates v. Bank*, 23 Ohio St. 415 (1872); *Long v. Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638 (1867).

<sup>17</sup> Ohio G.C. 10531 now 10504-32.

<sup>18</sup> *Seeds v. Seeds*, note 16, *supra*, p. 166. The opinion contains a quotation from *Broderick's Will*, 88 U.S. 503, 22 L.Ed. 599 (1894). (Bradley, J., in his opinion in *Broderick's Will*, expressly recognized, however, that there were circumstances so frequently fraudulent that the policy of prompt and final settlement of estates might have to yield and one of them was admitted to be procuring of probate fraudulently by collusion between executor and legatee.) See Warren, 41 Harv. L. Rev. 309 (1928).

thority for this view.<sup>19</sup> Judge Jones insists that the adoption by the Ohio legislature of a statute of limitations by which the contest of a probate proceeding must be instituted within a year and further providing that "the probate shall be forever binding" makes it impossible to invoke the principle of concurrent jurisdiction without destroying the order of probate.

This position is predicated upon an interpretation of the legislative policy manifested in a strongly worded statute of limitations, upon a policy of stability and permanency of estate settlements, and on the desirability of the preservation of jury trials in will contest cases. Balanced against this is the policy of getting the wrong to the plaintiff righted and of preventing an impostor from reaping the fruits of his wrong.

Much can be said for either position. A court which desires to place a high value upon the security and permanency of estate settlements, may choose to turn a deaf ear to the occasional just claims of a defrauded potential devisee. Other courts, dreading more the possible danger of fraud and perjury, and less the apparent unsettling of estates finally probated, may choose to make exceptions when gross fraud and forgery have been the means whereby such settlement was secured.

This question was seemingly settled in Ohio, by the *Seeds* case, by the choice of the latter policy. A decision of the Probate Court in that case was subjected to the same scrutiny by the equity court for fraud, as is the judgment of any other court. There being then, according to this view, no manifested and ultimately controlling policy of finality and repose with respect to probate decrees, it is eminently fitting that the court of equity should permit the plaintiff, who has been grossly defrauded by the defendant, to utilize the remedial process of

<sup>19</sup> *Stowe v. Stowe*, 140 Mo. 594, 41 S.W. 951 (1897); *California v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118 (1862); *Del Campo v. Cuellarillo*, 154 Cal. 647, 98 Pac. 1059 (1908); *Langdon v. Blackburn*, 109 C. 1. 19, 41 Pac. 814 (1895); *Luther v. Luther*, 122 Ill. 558, 13 N.E. 166 (1887); *Bartlett v. Manor*, 146 Ind. 621, 45 N.E. 1060 (1897); *Mosier v. Harmon*, 29 Ohio St. 220 (1876); *McVeigh v. Fetterman*, 95 Ohio St. 292, 116 N.E. 518 (1917); *Bunce v. Galbraith*, 268 Pa. 389, 112 Atl. 143 (1920).

the constructive trust. Any person who holds the legal title to property which he acquired by the practice of fraud and circumvention not only upon the testator, but upon the probate court itself, which was induced to render a decree which would never have been made had the facts been known, will be declared by a court of equity to be a trustee of such property for the benefit of the parties who have been defrauded.<sup>20</sup> Thus in the *Seeds* case a constructive trust was impressed upon a defendant, who had secured the title to the property by means of a forged will, which, had the forgery been known, would have entirely defeated the probate of the will. The equity proceeding therefore, while seemingly a pretty direct attack upon the probate decree precisely as in the *Pettit* case, was nevertheless not sufficient to deter the Supreme Court from imposing the trust. Indeed such a situation has been held a clear case for equitable intervention.<sup>21</sup> In his recent work Professor Bogert says: "To the writer it seems likely that the public interest in expeditious and permanent settlement of estates can be adequately protected from a construction of these acts which leaves the door open for the action of equity when the probate court has been induced to move to make its probate decree by the misrepresentation and forgery of the proponent or another person."<sup>22</sup>

The facts in the *Pettit* case differ from those in the *Seeds* case only in the matter of the relationship of the plaintiff, the

<sup>20</sup> *Seeds v. Seeds*, note 16, *supra*, 158; *Long v. Mulford*, 17 Ohio St. 484, 93 Am. Dec. 638 (1867); *Barnesby v. Pozwell*, 1 Vesey Sr. 284, 27 Eng. Rep. 1034 (1749); *Broderick's Will*, 88 U.S. 503, 22 L.Ed. 599 (1874); *Grimes v. Chew*, 43 U.S. 619, 11 L.Ed. 402 (1844). ("One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust, for the rightful owner.")

<sup>21</sup> *Seeds v. Seeds*, note 16, *supra*. See also, *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832 (1907); *Rishel v. McPherson Co.*, 122 Kan. 741, 253 Pac. 586 (1927); *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98 (1902). See *Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049. Cf., *Patterson v. Dickinson*, 193 Fed. 328 (1912); 31 Col. L.Rev. 1203 (1931); *Gemmel v. Fletcher*, 76 Kan. 577, 92 Pac. 713 (1907); *Winder v. Scholey*, 83 Ohio St. 204, 93 N.E. 1089, 33 L.R.A. (N.S.) 995, 21 Ann. Cas. 1379 (1910).

<sup>22</sup> Bogert, *op. cit.*, note 5, *supra*, p. 1483.

devisee in the true will, to the testator. In the former he was a stranger, in the latter he was an heir. It is not perceived how this could make a legal difference. No court, adopting the view that the statute secures no finality or repose in probate of estates but that equity may scrutinize the decree for fraud as in any other case, and impose a constructive trust, should discriminate in favor of an heir.<sup>23</sup> Yet the Court of Appeals in the Pettit case disposes of the case on that ground, and on that ground distinguishes the Seeds case. The plaintiff is denied equitable relief, and an inquiry into the reason for refusing the exercise of its clear jurisdictional power is cogent.

The reason assigned was that the plaintiff had no capacity to sue, that he had no right on which to stand. This approach seems to be from a substantive law standpoint. When a court speaks of "rights" and "capacities," and, because of their absence, denies a remedy to a person who was defrauded by a forger, guilty of the most reprehensible conduct by which one could possibly obtain the title to property, by which not only the testator, but the court itself, was defrauded, it seems clear that the court of equity has turned conceptualist at the expense of justice. The majority rule, with which Ohio agrees, is doubtless that an unprobated will passes no title to the devisee therein.<sup>24</sup> On the probate of the will the title ordinarily is considered to relate back to the death of the testator. This rule, however, seems greatly overworked when it is declared with respect to an unprobated will, that "it is a mere scrap of paper, inert and lifeless, until it is clothed with the garment of the

<sup>23</sup> See cases note 21, *supra*.

<sup>24</sup> *Lessee of Swasey's Heirs v. Blackman*, 8 Ohio 5 (1837); *Brown v. Burdick*, 25 Ohio St. 260 (1874); *Woodbridge v. Browning*, 14 Ohio St. 328 (1863); Rockel, Complete Ohio Probate Practice (4th ed. 1924) sec. 1608 N. 74; Page, Wills, (2d. ed. 1926) sec. 525, 527. *Contra*—A will before probate *proprio vigore*, vests the title to the realty devised in the devisee simultaneously with the death of the testator and the probate is a mere formality. *Cole v. Seldon*, 169 Ark. 695, 276 S.W. 993 (1925); *Norris v. Norris*, 32 Hun. 175 (N.Y. 1884); *Cooley v. McElmeel*, 149 N.Y. 228 (1896); 2 Page, Wills, (2d. ed. 1926) sec. 1386; *Bethany Hospital Co. v. Phillips*, 82 Kan. 64, 107 Pac. 530 (1910); *Brown v. Webster*, 87 Neb. 780, 128 N.W. 638 (1910).



law. It is a mere carcass until infused with the blood of probate."<sup>25</sup> This picturesque and figurative language does not state the truth. The devisee in an unprobated will has some "interest." He may contest the probate of another's will if he acts within the statutory period.<sup>26</sup> But to make such contest it has been held that one must have "such a direct, pecuniary *interest* in the estate of the putative testator, as would be impaired or defeated by the will, or be benefited by setting it aside."<sup>27</sup> The devisee in an unprobated will has such an interest. Furthermore, as will appear presently, he had a cause of action at law. In analogous situations, later discussed, the right to relief in equity to defeat fraud has been accorded to persons whose position seemed no stronger and whose interest was no greater, than that of the devisee in an unprobated will. Thus, a devisee in a will, who secures the testacy of the deceased by fraudulent promise to hold for or convey to a stranger to the title, has been declared trustee *ex maleficio* at the instance of the stranger.<sup>28</sup> Where the will does not disclose either the trust or the intended beneficiaries and the named devisees orally promised to hold for them, a constructive trust was imposed.<sup>29</sup> A conveyance to a grantee on his oral promise to hold for a stranger where the grantee refused to carry out his promise, in some jurisdictions,

<sup>25</sup> *Pettit v. Morton*, note 8, *supra*, p. 232; Bogert, *op. cit.*, note 3, *supra*, p. 1479. ("One court has taken the position here that C" (devisee in unprobated will) "had no legal interest to enable him to get a constructive trust, since the unprobated will was now worthless and a mere scrap of paper, and hence that C could not obtain the help of equity, although possibly the heirs and next of kin of the deceased might. This seems unsound. If A" (devisee in forged will which was probated) "had not put forward his forged will, and had not suppressed the genuine will, it is practically certain that C would have offered the genuine will and have procured the aid of the court in getting the property on the basis of that will. This degree of certainty is sufficient to show that the defendants' wrong has been done to the plaintiff.")

<sup>26</sup> Ohio G.C. 10531 now 10504-32.

<sup>27</sup> *Chilcote v. Hoffman*, 97 Ohio St. 98, 119 N.E. 364 (1918); *Kennedy's Exr. v. Wolcott*, 118 Ohio St. 443, 161 N.E. 336 (1928); *Bloor v. Platt*, 78 Ohio St. 46, 84 N.E. 604 (1908).

<sup>28</sup> *McDowell v. McDowell*, 141 Ia. 286, 119 N.W. 702 (1909); *Smulkin v. Wharton*, 73 Neb. 667, 103 N.W. 288 (1905); Bogert, *Trusts* 135 (1921).

<sup>29</sup> *Gaines v. Chew*, note 20, *supra*; *Winder v. Scholey*, note 21, *supra*.

is redressed at the instance of the intended beneficiary by imposing a constructive trust upon the grantee.<sup>30</sup> Similarly, the court of equity imposed a trust upon the heir who took by inheritance but suppressed the will by which the property was given to the younger sons until the will was produced and probated. The younger sons had the right to sue.<sup>31</sup> In the *Seeds* case, Marshall, C. J., strongly states the doctrine thus, "A court of equity will not permit any person standing in a fiduciary situation, or who, from the relation in which he stands to another, is *capable of exercising an undue influence* over his mind, to derive a profit from any transaction which takes place during the continuance of such fiduciary character in the one case, or which may be supposed to have taken place by reason of such opportunities of undue influence in the other."<sup>32</sup> It is submitted that the court may have denied relief due to a misconception of the constructive trust. It is seemingly considered a substantive legal institution instead of a remedial device.<sup>33</sup>

The subsequent history of the litigation will perhaps make this point clearer. On being denied a review by the Supreme Court of Ohio the plaintiff instituted a law action for damages, his second possibility for redress. This case also came before the Court of Appeals, on a ruling on demurrer, thereby raising no question of fact.<sup>34</sup> It is obvious that this action is founded on the same fraudulent conduct of the defendant, and, being brought within four years of his discovery of the wrong, it was within the time prescribed by the statute of limitations applicable in such cases.<sup>35</sup>

It may be noted parenthetically that there was a more ob-

<sup>30</sup> Bogert, *op. cit.*, note 3, *supra*, p. 1478. Also see sections 495 and 496, and cases cited therein.

<sup>31</sup> *Hampden v. Hampden*, 3 Bro. P.C. 550, 1 Eng. Rep. 1492 (1709).

<sup>32</sup> (*Italics Mine*). *Seeds v. Seeds*, note 16, *supra*, quoting *Long v. White*, 17 Ohio St. 484 at 509. See 14 Cornell L.Q. 108 (1928).

<sup>33</sup> See 48 Harv. L.Rev. 986 (1935); 27 Mich. L.Rev. 452 (1929); 30 Mich. L. Rev. 478 (1932); 3 Cinn. L. Rev. 107 (1929); 14 Cornell L.Q. 108 (1928); 31 Col. L.Q. 1203 (1931).

<sup>34</sup> *Pettit v. Morton*, 38 Ohio App. 348, 176 N.E. 494 (1930).

<sup>35</sup> Ohio G.C. 11224 (3).

vious tort remedy, rarely used however, provided by statute against one who "intentionally conceals or withholds it (a will) or neglects or refuses to produce it for probate. . . . He shall be liable to the action of any party *aggrieved* for the damages sustained by such neglect or refusal."<sup>36</sup>

The court, pointing out that there was no equitable relief for the plaintiff, and confessing to a belief that he had been grossly wronged declared: "We take the broad view that upon the principle of justice there is no wrong without a remedy, unless it be inhibited by statute or well defined public policy," and this broad policy is discovered in the Ohio constitution,<sup>37</sup> which provides, "All courts shall be open and every person, for an injury done to his lands, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Examining the plaintiff's position it was decided that an unprobated will was not a "mere nullity," and it afforded a basis for a cause of action in tort. Hence the law court is more sensitive to fraud than the court of equity. The court is clear that this cause of action at law, being remedial, did not attack the probate proceedings. Why, it may be asked, if this be true, was the remedial process of equity, the constructive trust, an attack on the probate proceedings? It is insisted by the court that in the law action a judgment for damages results and it in no way disturbs the property in defendant's hands, even though the measure of damages is the value of the property.<sup>38</sup> The opinion states, however, "It is this fact that distinguishes the case at bar from the earlier case in equity between the same parties already referred to." Is

<sup>36</sup> Ohio G.C. 10514 now 10504-13. See 48 Harv. L. Rev. 986 (1935); *Dulin v. Bailey*, 172 N.C. 608 (1916); *Creek v. Lasky*, 248 Mich. 425 (1929). See also, 30 Col. L. Rev. 409, 14 Minn. L. Rev. 704.

<sup>37</sup> Ohio Constitution, Art. I, sec. 16.

<sup>38</sup> *Pettit v. Morton*, note 34, *supra*, p. 355. See, 48 Harv. L. Rev. 986 (1935). *Creek v. Lasky*, 248 Mich. 425, 227 N.W. 817 (1929); *Dulin v. Bailey*, 172 N.C. 608, 90 S.E. 689 (1916); *Taylor v. Bennett*, 1 Ohio C.C. 95 (1885); *Lewis v. Corbin*, 185 Mass. 520, 81 N.E. 248 (1907). Cf. *Hall v. Hall*, 91 Conn. 514, 100 Atl. 441 (1917); *Hutchins v. Hutchins*, 7 Hill (N.Y.) 104 (1845).

not the court again considering the constructive trust as a substantive institution, one in which a plaintiff to succeed must have a property interest to stand upon? In fact it is merely a remedial device of the court of equity by which this defendant is told that although you have the title to the hotel property, because of the means used to secure it, we consider it inequitable that you should retain it and from this point on you are trustee of it for the one injured by your fraud. It is believed that this is in no sense an attack upon the probate of the forged will. The case at law was affirmed by the Supreme Court.<sup>39</sup>

In the Seeds case Marshall, C. J., very clearly states the true view: "This controversy can be disposed of on broad principles of chancery jurisprudence, without disturbing the will or its probate or the subsequent proceedings for transfer of legal title." Furthermore, it is submitted that this is a situation which requires the specific relief available only in equity.<sup>40</sup>

#### CONSTRUCTIVE TRUSTS AND THE WILLS ACT

There is no requirement of a writing in the Ohio Statute of Frauds<sup>41</sup> for the creation of an express trust, with the result

<sup>39</sup> *Morton v. Pettit*, 124 Ohio St. 241, 177 N.E. 581 (1930). The following comments on this series of cases all declare that the const. trust should have been allowed. See note 33, *supra*. "It would seem that a clearer case could not have been found for the application of the principles that equity will not permit a statute to be used as an instrument for fraud." Quoted from 27 Mich. L. Rev. 452 (1929).

<sup>40</sup> *Dulin v. Bailey*, 172 N.C. 608, 90 S.E. 689 (1916); 3 Cin. L. Rev. 107 (1929). ("Equity should assume jurisdiction at the request of one obviously defrauded who has no adequate remedy at law, particularly where there has been fraud upon the court and the intention of a testator has been intercepted by one guilty of violating several penal statutes.")

See *Dye v. Parker*, 108 Kan. 304 (1921). The case refused relief of reformation asked for obvious reasons, but the judge said in his opinion, "If the petition had alleged that the person who profited by the deceit practiced upon the testator had been a party to its perpetration, a remedy could doubtless be provided by impressing a trust upon the property acquired through the fraud in the hands of the beneficiary."

<sup>41</sup> Besides Ohio the following states have no appreciable statute of frauds: Arizona, Connecticut, Delaware, Kentucky, Louisiana, New Mexico, North Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming. See Scott, *Cases on Trusts*, (2d.) ed. 143 (1931); 1 Bogert, *op. cit.*, note 3, *supra*, sec. 64.

that our courts have escaped a most prolific and bothersome series of questions in which the constructive trust has played a considerable role. These cases fall into one or the other of two fact patterns: (1) A conveys land to B, who pays no consideration and who orally agrees to hold for and reconvey to A; (2) A conveys land to B, who pays no consideration and B orally agrees to hold for and convey to C. In England,<sup>42</sup> and by some decisions in the United States,<sup>43</sup> in cases of the first type, the rule is established that specific restoration will be made for A, or his estate, because "it is not honest for him (B) to keep."<sup>44</sup> The decided weight of authority in the country is contra, however, on the theory that to allow restoration is to enforce the oral trust contra to the statute of frauds, and B is allowed to keep the property.<sup>45</sup> This majority view is so unfortunate and affords a result so undesirable that it has met with severe criticism,<sup>46</sup> and the courts themselves have loaded it with many exceptions or avenues of escape.<sup>47</sup> In the second fact pattern if B were guilty of *actual fraud* at the time of making the oral promise, all agree that a constructive trust may be imposed upon him at the instance of C and for his benefit. But for the actual fraud of B, C in all probability would have received the property directly from A. C is then a defrauded party and equity can give specific reparation for the tort by putting the parties

<sup>42</sup> *Davies v. Otty*, 35 Beav. 208 (1865).

<sup>43</sup> See Bogert, *op. cit.*, note 3, *supra*, sec. 495, p. 1587.

<sup>44</sup> *Davis v. Otty*, note 42, *supra*.

<sup>45</sup> See Bogert, *op. cit.*, note 3, *supra*, p. 1591, for a list of cases, and Scott, "Conveyances not Properly Declared," 37 Harv. L. Rev. 652, 658 n. 23 (1924). A leading case, *Titcomb v. Morrill*, 10 Allen (Mass.) 15 (1865) was decided the same year as *Davies v. Otty*.

<sup>46</sup> Ames, "Constructive Trusts Based upon the Breach of an Express Oral Trust of Land," 20 Harv. L. Rev. 549 (1927); Stone, "Resulting Trusts and the Statute of Frauds," 6 Col. L. Rev. 326 (1906); Costigan, "Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantees," 12 Mich. L. Rev. 423, 515 (1914); Costigan, "Constructive Trusts Based upon Promises to Secure Bequests, Devises or Intestate Succession," 28 Harv. L. Rev. 237, 366 (1915); Scott, "Conveyances upon Trusts not Properly Declared," 37 Harv. L. Rev. 653 (1924); McWilliams, "The Doctrine of Constructive Trusts as Laid Down in *Curdy v. Breton*," 16 Cal. L. Rev. 19 (1927).

<sup>47</sup> See 3 Bogert, *op. cit.*, note 3, *supra*, sec. 496.

where they would have been had the wrong not been committed.<sup>48</sup> If, however, B was in good faith when he orally promised to hold for C but subsequently breached his agreement there is a sharp conflict on the question whether the statute prevents a trust in C's favor. One view is that the statute of frauds prevents the court of equity going forward with the oral promise to establish a constructive trust for C, but that the trust should be imposed for the grantor or his estate.<sup>49</sup> The second view considers that the oral promise created in C an equitable interest and since B's breach prevented his receiving it that C is thereby defrauded and the constructive trust should be imposed for him.<sup>50</sup> A considerable group of cases favors this view.<sup>51</sup>

A similar situation is presented where a testator made his will devising property to B upon his oral promise to give the property to C. If the devise was secured by actual fraud, duress or undue influence, the court of equity will impose a trust upon B for the benefit of C although the will is an absolute devise and B's promise was oral and in no sense executed in accordance with the will's act. C is the defrauded person at whose expense B was unjustly enriched.<sup>52</sup> The existence at the time of the promise of an intention not to carry out the promise is a fraud on C because it prevented effective action on the testator's part to carry out his purpose with respect to C.<sup>53</sup> It is believed that

<sup>48</sup> *Huffine v. Lincoln*, 52 Mont. 585, 160 Pac. 820 (1916); *McDonald v. Tynner*, 84 Ark. 189, 105 S.W. 74 (1907); *McKinney v. Burns*, 31 Ga. 295 (1860); *Stout v. Stout*, 165 Ia. 552, 146 N.W. 474 (1914); *Reardon v. Reardon*, 219 Mass. 594, 107 N.E. 522 (1914). See 3 Bogert, *op. cit.*, note 3, *supra*, sec. 495, notes 34 and 35 for long list of cases.

<sup>49</sup> Scott, *op. cit.*, note 46, *supra*; Ames, *op. cit.*, note 46, *supra*.

<sup>50</sup> Costigan, *op. cit.*, note 46, *supra*.

<sup>51</sup> *Becker v. Newrath*, 149 Ky. 421, 149 S.W. 857 (1912); *Androscoggin Co. v. Tracy*, 115 Me. 433, 99 Atl. 257 (1916); *Huffine v. Lincoln*, note 47, *supra*.

<sup>52</sup> *Lewis v. Corbin*, 195 Mass. 520, 81 N.E. 248 (1907); *Arnston v. First National Bank*, 39 N.D. 408, 167 N.W. 760, L.R.A. 1918 Fed. 1038 (1918); 3 Bogert, *op. cit.*, note 3, *supra*, p. 1616. But see dictum, *contra*, *Kent v. McHaffey*, 10 Ohio St. 204 (1859).

<sup>53</sup> *Dowd v. Tucker*, 41 Conn. 197 (1874); *Baron v. Stuart*, 136 Ark. 481, 207 S.W. 22 (1918); Am. Law Inst., *op. cit.*, note 59, post, sec. 186.

the Ohio court might accept this view.<sup>54</sup> The same result should be reached where by actual fraud, testacy is secured, the testator being prevented by the promise of the devisee therein to hold for C from revoking his will or where intestacy is secured by an heir on his oral promise to give the property inherited to a third person, C. In both of these situations, however, our supreme court has declared against any constructive trust for C. In the case of *Kent v. Mahaffey*,<sup>55</sup> a blind testator was prevented, by the deception of an interested person, from burning his will, and on the death of the testator it was probated. The court held that none of the statutory methods of revocation had been satisfied, and declared that "it would be of little purpose to prescribe formalities for the making and authentication of wills if persons interested in setting the same aside, were permitted to do so by parol proof of an intention to revoke." In support of this main thesis, that equity could not impose a trust upon the devisee or legatees for those who would have taken by descent or succession had the will been revoked, the court strongly denies the other case, also by dictum, of course. The opinion states, "If one who fraudulently prevents the revocation of a will, may be treated as a trustee for the heir at law, it would seem to follow, by a parity of reasoning, that where an heir at law, by force or fraud, prevents the execution of a will, he should also be held as a trustee for the intended beneficiary of the unexecuted will. No lawyer would, I think, hazard the opinion, that the heir at law could, in any such case, be declared a trustee." As pointed out by Olney, J., of the case of *Brazil v. Silva*,<sup>56</sup> this is precisely what Lord Thurlow had done years before,<sup>57</sup> and it has received the approval of Lord Eldon,<sup>58</sup> and of many writers and judges since.<sup>59</sup> With attention fixed

<sup>54</sup> *Winder v. Scholey*, 83 Ohio St. 204, 33 L.R.A. (N.S.) 995, 93 N.E. 1098, 21 Ann. Cas. 1379 (1910).

<sup>55</sup> *Kent v. Mahaffey*, note 52, *supra*.

<sup>56</sup> *Brazil v. Silva*, 181 Cal. 490, 496, 185 Pac. 174 (1919).

<sup>57</sup> *Dixon v. Olintus*, 1 Cox 414, 29 Eng. Rep. 1227 (1787).

<sup>58</sup> *Mestover v. Gillespie*, 11 Ves. 638, 32 Eng. Rep. 1230 (1805).

<sup>59</sup> Scott, *op. cit.*, note 46, *supra*, p. 671; Bogert, *op. cit.*, note 3, *supra*, p. 1616; *Brazil v. Silva*, note 56, *supra*; *Bulkley v. Wilford*, 2 Clark & Finn,

upon the statute of wills, or the statute of revocation of wills, the Supreme Court of Ohio has wholly neglected the remedial possibilities of the constructive trust and in yet another instance permitted fraudulent acts to go unredressed. In *In re O'Hara*,<sup>60</sup> Finch, J., of the New York Court of Appeals strongly stated the position contended for in this paper as follows: "Equity acts, in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which he secured the devise and bequest is to perpetrate a fraud upon the devisor which equity will not endure. . . . All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matters lying in parol or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered *that the devise was untouched; that it was not at all modified; that the property passed under it but the law dealt with the holder for his fraud and out of the facts raised a trust ex maleficio* instead of resting upon one as created by the testator."<sup>60a</sup> (Italics mine). Judge Olney<sup>61</sup> concluded that "*Kent v. Mahaffey*, . . . proceeded upon a failure to recognize and appreciate a fundamental principle of equity jurisprudence, and one, as we have said, characteristic of the peculiar province of equity. We hardly need point out that equity does not in such a case grant relief simply because there has been an abortive attempt to comply with the statute. . . . It grants relief only in case and because of a wrong done by the defendant of which he seeks to reap the fruit." It is submitted that the existence of a diabolical fraudulent intent and act on

102, 6 Eng. Rep. 1094 (1834); *In re Stirk's Est.*, 232 Pa. 98, 81 Atl. 187 (1911); *Bennett v. Harper*, 36 W. Va. 546, 15 S.E. 143 (1892). See American Law Institute, R.S. of Restitution & Unjust Enrichment, Proposed Final Draft, sec. 184, 185 (1936).

<sup>60</sup> 95 N.Y. 403, 47 Am. Rep. 53 (1884).

<sup>60a</sup> *Amherst College v. Retch*, 151 N.Y. 282 (1897) dictum; *Blackwell v. Blackwell*, A.C. 318 (1929); *Gilpatrick v. Glidden*, 81 Me. 137 (1888).

<sup>61</sup> *Brazil v. Sylvia*, note 56, *supra*.



the part of the devisee, whereby he secures testacy, or prevents revocation of a will and thereby acquires the property intended for another or such conduct on the part of an heir who induces his ancestor to die intestate on his promise to give the property inherited to one intended is sufficient and indeed precisely the sort of case to call forth from the chancellor his most effective remedial device—the constructive trust.

When we turn from cases of *actual fraud* to another class of will cases, wherein at the time the devisee promised the testator that he would hold the property for another, he fully intending to do so, and there was no actual fraud, and after the death of the testator, and the probate of the will, the legatee decided not to carry out his promise, one is surprised to find in the case of *Winder v. Scholey*,<sup>62</sup> one of the strongest cases favoring and applying the constructive trust remedy, quite refreshingly out of line with the Ohio cases previously noted. Counsel for the defendant in this case was probably right in his contention that “there was no reported case in Ohio, in which a trust has been engrafted on a will by parol.” To reach this result the court had to decide, as it did, that a subsequent breach of a promise is fraud just as much as the existence of an intent not to abide by the promise when it was made. There is strong objection to this position.<sup>63</sup> It is going quite far to decide that a breach of a promise or agreement constitutes fraudulent conduct. This position is a striking contrast to that announced by Johnson, C. J., in *Watson v. Erb*,<sup>64</sup> when he said, “The fraud which will give jurisdiction to compel a performance of the parol trust, must consist in something more than a mere breach of parol undertaking.” Furthermore, the court must decide as it did, that the statute of wills did not preclude the raising of the constructive trust for the intended person though certainly the parol promise did not comply with the wills act. Had there been a statute of frauds applicable to the creation of trusts in

<sup>62</sup> Note 54, *supra*.

<sup>63</sup> Scott, *op. cit.*, note 46, *supra*, p. 671.

<sup>64</sup> 33 Ohio St. 35 (1877).

this state, from the tone of this opinion, one is inclined to conclude that it would not have altered the result. In short, *Winder v. Scholey*, is one of the strongest cases favorable to the imposition of the constructive trust. The authorities for this view are numerous.<sup>65</sup> The court in its opinion gives full support to the thesis of this paper. Summers, C. J., quoted at great length from Finch's, J. opinion in the O'Hara case, but no mention is made of *Kent v. Mahaffey*, or the statement above quoted from *Watson v. Erb*.

#### ACQUISITION OF PROPERTY BY A MURDERER

A troublesome question often produces conflicting decisions and theories. This has happened in the several fact patterns in which a beneficiary murders his benefactor, thereby hastening the acquisition of the property. Had the remedial characteristic of the constructive trust been understood it seems incredible that it should not have been more generally utilized for it furnishes precisely the effective remedy needed. The following are the situations in which the problem most frequently arises; an heir murders his ancestor, a legatee or devisee murders his testator, a joint depositor, joint tenant, or tenant by the entirety murders his co-owner, a remainderman murders the intervening life tenant, and the beneficiary in a policy of life insurance murders the insured.

In their attempts to give justice in the above cases the courts have developed three theories, two of which are conceived to be wrong. There seems to be general agreement that a strong public policy exists against allowing a murderer to enjoy the benefits of the property formerly owned or made available by

<sup>65</sup> Scott, *op. cit.*, note 46, *supra*, p. 671 n. 57; Bogert, *op. cit.*, note 3, *supra*, sec. 498; 66 A.L.R. 156; American Law Institute, Restatement, Trusts, sec. 55 (1) "Where a testator devises or bequeaths property to a person in reliance upon his agreement to hold the property in trust, the devisee or legatee holds the property upon a constructive trust for the person for whom he agreed to hold it. (2) When a person dies intestate in reliance upon an agreement by his heir or next of kin to hold the property which he acquires by such intestacy upon a trust, the heir or next of kin holds the property upon a constructive trust for the person for whom he agreed to hold it."

his victim.<sup>66</sup> Even those courts, which decide that under the law they cannot avoid the result, often express regret. By the first theory it is concluded that the wrongdoer cannot profit by his wrong and therefore he does not take legal or equitable title to the property by descent or by the will, and, in the insurance cases, that he cannot enforce the policy.<sup>67</sup> Since the statutes of descent, unless recently amended, quite generally do not make any exception to the descent of property on the death of the owner, and the wills act fails to exclude the devisee or legatee, who inconsiderately hastens the death of the testator, it seems clear that by the law of descent and of wills that the murderer does succeed to the title to the property. In *Riggs v. Palmer*,<sup>68</sup> which is the leading case supporting the first view, the court found it necessary to legislate an exception into the succession statute. Judicial legislation is avoided where possible, and the court was hardly justified, in its technique of "statutory construction," in deciding that they must read into the positive enactment of the statute only that connotation which reasonable men, men like themselves, would accept, and exclude all else. Hence, the court held that the statute did not mean that in *all* cases property would descend as provided, but only in *all reasonable* cases, and it was not a reasonable case for a mur-

<sup>66</sup> *Cleaver v. Mutual Life Fund Assoc.*, 1 Q.B. 147 (1892); *Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, Field J. "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a person whose life he had feloniously taken."

<sup>67</sup> *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340, 12 Am. St. Rep. 819 (1889). Reversed, *Ellerson v. Westcott*, 148 N.Y. 149, 42 N.E. 540 (1895); *Shellenberger v. Ransom*, 31 Neb. 61, 47 N.W. 700 (1896). Reversed, 41 Neb. 631, 59 N.W. 935 (1894); *Perry v. Strawbridge*, 209 Mo. 621, 108 S.W. 641 (1907); *Wall v. Pfauschmidt*, 265 Ill. 180, 106 N.E. 785 (1914); *Box v. Lanier*, 112 Tenn. 393, 79 S.W. 1042 (1903); *In re Santourian*, 125 Misc. 668, 212 N.Y.S. 116 (1925); *In re Tyler's Est.* 140 Wash. 679, 250 Pac. 456 (1926); *Est. of Wilkins*, 192 Wis. 111, 211 N.W. 652 (1927); *Garwols v. Banker's Trust Co.*, 251 Mich. 420, 232 N.W. 239 (1930); *Slocum v. Met. Life Ins. Co.*, 245 Mass. 565, 139 N.E. 816 (1923); *De Zotell v. Mutual Life Ins. Co.*, 60 S.D. 532, 245 N.W. 58 (1932).

<sup>68</sup> Note 67, *supra*.

derer to succeed to his victim's property. The Judge in *Deems v. Milliken*,<sup>69</sup> quite convincingly answers this argument.

In the insurance cases there is no statutory necessity for deciding that the property in the policy passed to the murderer. When, therefore, the beneficiary sues on a policy the courts can, and quite generally do, hold that he has no rights under the policy, that he has sacrificed them by his wrongdoing.<sup>70</sup> Apparently, it is not essential to prove that the killing was done with the purpose of hastening enjoyment by the beneficiary. It is enough to allege and prove the murder.<sup>71</sup> The policy, however, is not rendered void and the insurance company excused from liability thereunder in the absence of an express stipulation so providing.<sup>72</sup> A clause in the policy excluding the beneficiary who thus hastens the maturity thereof from any rights therein does not affect the rights of the children of the insured, or his estate.<sup>73</sup> It has been held that the beneficiary-murderer might, however, participate in the benefits of the policy as a distributee of the insured's estate.<sup>74</sup>

A second theory, adopted by the Ohio courts,<sup>75</sup> and by the

<sup>69</sup> 6 Ohio C.C. 357 (1892).

<sup>70</sup> *Filmore v. Metropolitan Life Ins. Co.*, 82 Ohio St. 208, 92 N.E. 23, 28 L.R.A. (N.S.) 675, 137 Am. St. Rep. 778 (1910); *Polish v. National Alliance Co. v. Crowley*, 38 Ohio App. 327, 176 N.E. 492 (1930); *National Benefit Life Ins. Co. v. Davis*, 38 Ohio App. 454, 176 N.E. 490, 30 Ohio L. Rep. 270 (1929); *Cook's Adm. v. W. & S. Life Ins. Co.*, 30 Ohio N.P. (N.S.) 247 (1932). (Recent statute later discussed.) See cases collected and annotated in 7 A.L.R. 828, 27 A.L.R. 521, 70 A.L.R. 1539, 91 A.L.R. 1486; Am. Law Institute, Restatement of Restitution and Unjust Enrichment (P.F.D.) Sec. 189 and comments (1936).

<sup>71</sup> *Filmore v. Metropolitan Life Ins. Co.*, note 70, *supra*.

<sup>72</sup> A.L.R. notes. Note 70, *supra*.

<sup>73</sup> *Polish National Alliance Co. v. Crowley*, note 70, *supra*.

<sup>74</sup> *National Benefit Life Insurance Co. v. Davis*, note 70, *supra*. *Contra*, *DeLotell v. Mutual Life Ins. Co.*, note 67, *supra*. ("It seems fair and reasonable to treat the matter, so far as concerns the insurer, substantially as though the named beneficiary had died prior to the death of the insured and no successor had been designed." It was thought "absurd" to permit the murderer to share.) *Merrity v. Prudential Ins. Co.*, 110 N.J.L. 414, 166 Atl. 335 (1933). Am. Law Institute, note 70, *supra*, sec. 189.

<sup>75</sup> *Deems v. Milliken*, 6 Ohio C.C. 357 (1892) (affd. without opinion) 53 Ohio St. 668 (1895) (Descent); *Hodapp v. Oleff*, 17 Ohio Abs. (1934).

majority of states,<sup>76</sup> although recently modified by statute,<sup>77</sup> recognizes that the legislature has made no exception in the descent and will statutes and refuses power in the courts to inject exceptions by judicial legislation, and thus the murderer inherits the land, takes by devise, by survivorship, and shares in the proceeds of an insurance policy as distributee of the estate. Many courts seem to consider that this view is compelled by the constitutional provisions against forfeitures and corruption of blood,<sup>78</sup> quite overlooking the vast difference in the purpose of this plank in the bill of rights and the cases involved before them. Moreover, no instance has been discovered of the use of this constitutional provision to prevent restitution of property obtained by fraud or theft.<sup>79</sup>

See comment 7 Ohio Bar 661, 543, Aff. *Oleff v. Hodapp*, 129 Ohio St. 432 (1935). *National Benefit Life Ins. Co. v. Davis*, note 70 *supra*.

<sup>76</sup> *Hagan v. Cone*, 21 Ga. Ann. 416, 94 S.E. 602 (1917); *Wall v. Pfau-schmidt*, 265 Ill. 180, 106 N.E. 785, L.R.A. 1915 C. 328, Ann. Cas. 1916 A. 674 (1914); *Kuhn v. Kuhn*, 125 Ia. 449, 101 N.W. 151, 2 Ann. Cas. 657 (1904); Estate of Emerson, 191 Ia. 900, 183 N.W. 327 (1921); *McAllister v. Fair*, 72 Kan. 533, 84 Pac. 112, 3 L.R.A. (N.S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973 (1906); *Eversole v. Eversole*, 169 Ky. 793, 185 S.W. 487, L.R.A. 1916 E 593 (1916); *Wellner v. Eckstein*, 105 Minn. 444, 117 N.W. 830 (1908); *Gollinck v. Mengel*, 112 Minn. 349, 128 N.W. 292 (1910); *Schellenberger v. Ransom*, note 67 *supra*; *Wilson v. Randolph*, 50 Nev. 371, 261 Pac. 654 (1927); *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794 (1888); *Johnson's Estate*, 29 Pa. Super. 255 (1905); *Carpenter's Estate*, 170 Pa. 203, 32 Atl. 637, 29 L.R.A. 145, 50 Am. St. Rep. 765 (1895); *Hill v. Noland*, 149 S.W. 288 (Tex. 1912); *Murchison v. Murchison*, 203 S.W. 423 (Tex. 1918).

<sup>77</sup> Note 80 *post*.

<sup>78</sup> Ohio Constitution, Art. VII, sec. 16 "No conviction shall work corruption of blood or forfeiture of estate." The court in *Deems v. Milliken*, note 69 *supra*, indicated that the section was not applicable. This position is approved by the Am. Law Institute, *op. cit.* note 70 *supra*, sec. 187, comment C. ("Even in states in which the rules stated in this section are rejected, statutes which provide that a murderer shall not inherit property from his victim are not unconstitutional.") The majority of the Ohio Supreme Court, however, recently seemed to consider this constitutional provision an obstacle. *Oleff v. Hodapp*, note 75 *post*. ("We have no power to attain Tego in any way, shape, or form.") See further cases note 77, *supra*. See Costigan, 7 Ill., L. Rev. 505 (1915).

<sup>79</sup> *Luttrell v. Olinius*, 11 Ves. 638, 14 Ves. 290 (1807); *Hausen v. Hausen*, 110 Wash. 276, 188 Pac. 460 (1920); *Fox v. Hubbard*, 79 Mo. 390 (1883); *Nebraska Nat'l Bank v. Johnson*, 51 Neb. 546, 71 N.W. 294 (1897).

So shocking a result has led to legislative modifications of the descent statutes. The provision in Ohio<sup>80</sup> is "No person finally adjudged guilty, either as principal or accessory, of murder in the first or second degree, shall be entitled to inherit or take any part of the real or personal estate of the person killed, whether under the provisions of this act relating to intestate succession, or as devisee or legatee or otherwise under the will of such person, nor shall such person inherit or take any real or personal estate of any other person as to which such homicide terminated an intermediate estate, or hastened the time of enjoyment. With respect to inheritance from or participation under the will of the person killed, the person so finally adjudged guilty of murder in the first or second degree shall be considered as though he had preceded in death the person killed." The statute of Ohio, it will be observed, prevents the murderer from succeeding to the property of the victim in case of *conviction* of first or second degree murder. If the murderer should commit suicide before his conviction,<sup>81</sup> or if he were convicted in a foreign state of being the "moral author of the crime," a conviction not within the terms of the statute,<sup>82</sup> or his

<sup>80</sup> Ohio G.C. 10503-17. "Statutes in conformity with this view have been passed in at least 23 jurisdictions," 29 Mich. L. Rev. 745 at 749 (1931), citing following: Cal. Civ. Code 1923, sec. 1409; Colo. Sess. Laws 1923 C 195; Ind. Ann. Stat. 1926, sec. 3376; Iowa Code 1927, sec. 12032-4; Kan. Rev. St. 1923, sec. 22-133; La. Rev. Civil Code, 1924, sec. 966, 1560, 1710; Minn. Mason's Stat. 1927, sec. 8734; Miss. Code 1927, sec. 3580; Neb. Comp. Stat. 1922, sec. 1238; N.C. Cons. Stat. 1919, sec. 10, 4099; N.D. Comp. Laws 1913, sec. 5683; Okla. Comp. Stat. 1921, sec. 11319; Pa. Stat. 1920, sec. 8334; S.C. Laws 1924, No. 726; Tenn. Shannon's Code 1917, sec. 4171a; Utah Comp. Laws 1917 sec. 6403; Va. Code 1924 sec. 5274; Wyoming Comp. Stat. 1920, sec. 7010. To this list four more states must be added (1932). Ohio G.C. 10503-17; Ark. Dig. St. 1927, 3514 a & b; Florida, Comp. Gen. Laws Ann. (1934) sec. 5480; Ore. Code Ann. (1930) C. 10 sec. 213; W. Va. Code Ann. (Michie 1932) C. 42, art. 4, sec. 2. See 44 Yale L.J. 164.

<sup>81</sup> *In re Tarlo's Estate*, 315 Pa. 321, 172 Atl. 139 (1934).

<sup>82</sup> *Hodapp v. Oleff*, note 75, *supra*; *Oleff v. Hodapp*, note 75, *supra*. See *Metropolitan Life Ins. Co. v. Hill*, 115 W. Va. 515, 177 S.E. 188 (A wife who had killed her husband whose life was insured, was convicted of involuntary manslaughter. The statute excluded from the succession law a "feloneous" killer, which the wife was not. Held common law rule obtained and descent not changed.) See comment 41 W. Va. L. Rev. 287 (1935).

conviction was not of first or second degree murder the statute would not prevent the killer from taking, and would seemingly fall short of accomplishing the thoroughgoing change needed in the law. Similarly, since this statute is probably penal in character it would have no extraterritorial effect.<sup>83</sup> It seems obvious that the second theory produces an undesirable result and that the attempted statutory corrections are at best very inadequate. It is submitted that the courts in announcing this theory, in the first instance, have had their thought fixedly centered on the statutes involved and have apparently considered that to decree that the murderer, after the property comes to him, could be deprived thereof would be doing violence to the statute of descent. Had they imposed a constructive trust upon him, in such cases as justice required, there would have been no need for the legislature to attempt to meet the problem by a general exception statute. Furthermore, the equitable remedial device of constructive trust has the distinct advantage over the statute in that it is a flexible remedy in the hands of the chancellor usable as and if the exigencies of the particular case may require in the exercise of a sound judicial discretion.

Years ago Dean Ames urged the splendid efficacy of the constructive trust to meet the difficulty and this solution has met with the unanimous approval of law writers<sup>84</sup> but the courts have shown surprising reluctance to apply that remedy to the facts under consideration. Recently, however, this view has

<sup>83</sup> *Harrison v. Moncravia*, 264 Fed. 776 (1920).

<sup>84</sup> Ames, "Can a Murderer Acquire Title by His Crime and Keep It?" 36 Am. L. Reg. (N.S. 225) (1897). Lectures on Legal History, 310 (1913). Bogert, Trusts, 120 (1921). Clark, Equity, p. 293 (1919). 3 Pomeroy, Eq. Jur. sec. 1044. Bordwell, "Statute Law of Wills, 14 Ia. L.R. 304 (1928). Comments: 9 Ill. L. Rev. 505 (1915); 7 Mich. L. Rev. 160 (1908); 3 L.R.A. (N.S.) 726; 39 id. 1089; L.R.A. 1915 C. 328. See 51 A.L.R. 1096 (1927); 71 A.L.R. 288 (1931); 4 Harv. L. Rev. 394 (1891), 8 id. 170 (1894); 24 id. 227 (1914); 27 id. 280 (1914); 30 id. 622 (1917); 44 Harv. L. Rev. 125 (1929); 4 Mich. L. Rev. 653 (1906); 7 id. 71 (1908); 13 id. 336 (1915); 16 id. 561 (1918); 29 id. 745 (1931); 64 U. of Pa. L. Rev. 307 (1916); 27 Yale L.J. 964 (1918); 44 id. 164 (1934); 8 N.Y. U.L.Q. Rev. 492 (1930); 5 N.C.L. Rev. 373; 3 L.Q. Rev. 411; 7 O. Bas. Rep. 661. Cardozo, "The Nature of the Judicial Process," 40-42 (1921). Am. Law Inst. *op. cit.* note 70 *supra*, sec. 187, 188, 189.

been meeting a more favorable reception by the courts.<sup>85</sup> The theory assumes that the murderer does succeed to the property either by descent, by devise, by survivorship, or by termination of the intervening life estate, and, in the insurance cases, by distribution of victim's estate. But equity has power and ought to determine whether the murderer, having become the absolute owner of the property, shall because of his wrongdoing and his consequent unjust enrichment, be permitted to keep it. In *Hodapp v. Oleff*,<sup>86</sup> Sherick, J., after holding that the co-depositor in a joint account should take and keep a joint deposit declared, "It is not the pleasure of this court to have reached the conclusion arrived at," and Stephenson, J., in affirming the case, *Oleff v. Hodapp*,<sup>87</sup> said: "We experience no satisfaction in holding that Tego is entitled to this account; but that is the law and we must so find." It is interesting to discover the following explanation by the learned judge of the reason he was forced to this unhappy position, — "We have heretofore stated that there is no statutory law in Ohio that deprives Tego of his right to this account. Counsel insist that Tego's right should be denied him because to allow it would be in contravention of sound public policy and place a premium on murder. We are not subscribing to the righteousness of Tego's legal status; but this is a court of law and not a theological institution. We have no power to attain Tego in any way, shape, or form. Property cannot be taken from an individual who is legally entitled to it because he violates a public policy. Property rights are too sacred to be subjected to a danger of that character."

The following from Williams', J., dissenting opinion places the matter in sharp contrast. After quoting Cardozo's definition of a constructive trust, he said: "It is the modern device resorted to in equity to prevent the murderer from profiting by his own crime, though acquiring an interest in property by his

<sup>85</sup> *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927); *Barnett v. Coney*, 224 Mo. App. 913, 27 S.W. (2d) 757 (1930); *Hall v. Knight*, 135 L.T.J. 550 (1913).

<sup>86</sup> Note 75, *supra*.

<sup>87</sup> Note 75, *supra*.



victim's death." To declare the murderer-owner of the property a constructive trustee does no violence to the statute of descent, the wills act, the law of survivorship in joint ownership, or the law of distribution; nor, it is believed, to the sacredness of property. Those laws have performed their function and now equity simply declares that from this point forward the owner shall hold for another. It is decreeing a constructive trust and thereby establishing the rights of a cestui que trust on the one best entitled. This conclusion finds support in the Proposed Final Draft of the Restatement of Restitution and Unjust Enrichment,<sup>88</sup> "Unless it is otherwise provided by statute, a devisee or legatee or heir or next of kin who murders his testator or intestate, acquires the legal title to the property by testate or intestate succession, but he will be compelled to hold it upon a constructive trust. By a proceeding in equity he will be compelled to surrender the property to the persons who are equitably entitled to it." No idea of punishment of the murderer, or the working of a corruption of blood, contrary to the constitution, exists at all.

An objection might be urged that since this remedial device is operative to prevent a person who fraudulently obtains property from enjoying the beneficial interest that it should be limited to the cases in which the murderer was motivated by the property interest and that it was inapplicable to cases of immediate suicide or where the crime was committed for other reasons.<sup>89</sup> The constructive trust is designed to prevent unjust enrichment and the murderer will be so enriched even though he has been punished for the crime which he committed with no thought of property in mind. There is no satisfactory reason here for refusing the equitable relief.<sup>90</sup>

<sup>88</sup> Sec. 187 comment d.

<sup>89</sup> Costigan, 9 Ill. L. Rev. 505 at 507 (1915); 30 Harv. L. Rev. 622 (1917).

<sup>90</sup> *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927) (Crime committed with property motive); *Van Alstyne v. Tuffy*, 103 Misc. 455, 169 N.Y.S. 173 (1918) (id.) See *contra* overruled case, *In re Wolf*, 88 Misc. 433, 150 N.Y.S. 738 (1914); *Sherman v. Weber*, 113 N.J.E. 451, 167 Atl. 517 (1933).

There being then strong reasons for declaring the constructive trust, for whom shall it be declared? In the answer to this question the virtue of the flexible quality of the remedy herein contended for is apparent. The chancellor is governed not by rule but is free to choose the one best entitled, considering always the facts of the particular case. Where the heir murders his ancestor the court will probably select the second heir, that is, the person who would have inherited from the victim had the murderer predeceased him.<sup>91</sup> The predisposition of the courts to keep estates in families and under private ownership would preclude naming charities, or the state, as cestui que trust. The statutes of descent would doubtless be of considerable aid. A somewhat easier selection is presented where the devisee murders the testator. A residuary devise is the first and most obvious solution. If the will carries no residuary clause the court would likely prefer the heir and after him resort to the statute of descent.<sup>92</sup> The same solution would seem obvious for the disposition of the insurance money received by the murderer as distributee of the victim's estate,<sup>93</sup> while the joint ownership cases would likely be resolved in a way not very different from that adopted in the descent-devise cases.<sup>94</sup>

Where one joint owner kills the other and the doctrine of survivorship thus places the entire property in the murderer and the court declares him constructive trustee for a cestui que trust there is some controversy in cases where the murderer's existing interest is enlarged with respect to the extent of the trust declared. It would seem that the murderer by his act had deprived his co-owner of the possibility of surviving him. Logically, therefore, a constructive trust should extend to and include the entire property. It is no longer jointly owned. It has been held, however, in a case in which the husband killed his wife and immediately committed suicide that the tenancy by

<sup>91</sup> Am. Law Inst. *op. cit.* note 70, *supra*, sec. 187 (2).

<sup>92</sup> Costigan, note 89, *supra*.

<sup>93</sup> Am. Law Inst. *op. cit.* note 70, *supra*, sec. 189.

<sup>94</sup> Am. Law Inst. *op. cit.* note 70, *supra*, sec. 188. See Costigan, *op. cit.* note 78, *supra*, also, 30 Harv. L.Rev. 622 (1915).

entirety ceased and tenancy in common arose in a joint bank account, and the murderer was constructive trustee of only half.<sup>95</sup> In another case of tenancy by entirety the court imposed a constructive trust only for the wife's interest. The court felt bound to preserve in the husband his own interest.<sup>96</sup> It has often been thought proper to resort to the mortality tables to determine the life expectancies of the joint owners presumably to discover if the murderer really deprived the victim of anything. Mortality tables will give averages, but it is believed that no one claims for them a prophecy of life for an individual. Such use seems unwarranted.<sup>97</sup> All that equity should require is proof of the facts in the case and having found that the murderer by survivorship is now the owner, declare a trust in all the property against him,<sup>98</sup> saving to him only his rights during his life. The most that can be said, in the event his expectancy was greater than that of his victim, is that by his wrongful act he has made a probability into a certainty in his own favor. But for his wrongful act his victim might have outlived him. Likewise, as stated by Judge Williams, in the joint account case,<sup>99</sup> "To allow the nephew's guardian to recover would be to allow him to gain something he did not have before his uncle's death. Before the act of homicide the nephew had a relative right to the deposit. If he did not withdraw it before the uncle did, he had no right therein. . . . The nephew killed his uncle and made it impossible for the uncle to withdraw the deposit and the nephew now claims his right to withdraw it was made exclusive and absolute in him by his uncle's murder." It is submitted that the constructive trust, a remedy in the

<sup>95</sup> *Barnett v. Coney*, note 85, *supra*, approved in 29 Mich. L.Rev. 745 at 752. But see 44 Harv. L. Rev. 125.

<sup>96</sup> *Bryant v. Bryant*, note 90, *supra*. See criticism 5 N.C.L. Rev. 373 (1927).

<sup>97</sup> See 44 Harv. L. Rev. 125 (Rather full consideration of problem.) *Sherman v. Weber*, 113 N.J. Eq. 451 (1933).

<sup>98</sup> *Beddingfield v. Estill & Newman*, 118 Tenn. 39, 100 S.W. 108 (1907). *Contra*, *Sherman v. Weber*, 113 N.J. Eq. 451, 167 Atl. 517 (1933); 30 Harv. L. Rev. 622 at 625.

<sup>99</sup> *Oleff v. Hodapp*, note 75, *supra*.

arsenal of equity, which like all remedies, accepts the situation as it finds it and works out the justice and the equity of that situation, always flexible, within the control and discretion of the chancellor, is by far the most satisfactory solution of this vexing problem. It avoids all statutory lapses and gaps and is remarkably effective in achieving complete justice.

#### ORAL AGENCIES TO BUY LAND

The Statute of Frauds provides that no action shall be brought to charge the defendant upon any contract concerning an interest in land unless the agreement upon which the action is brought or some note or memorandum thereof shall be in writing. If P, the principal, desires to purchase a tract of land from the owner through an agent, A, and orally agrees with A that the latter shall purchase said land for him, he, P, to furnish the money, and A decides to purchase for himself and does so with his own money, without informing P, or terminating the agency, and A refuses either to accept P's money or convey the land to him, a problem of fraud and the statute of frauds." Had the oral agreement been that A would purchase For the most part the Ohio courts have again taken the more conservative view, at least with respect to the use of the constructive trust remedy.<sup>100</sup> This conservative view, in the first place, considers such an agency contract as one concerning a conveyance of an interest in lands and thus one which should not afford a basis for any action either at law or in equity, be-

<sup>100</sup> 42 A.L.R. 10 at 28, 54 A.L.R. 1195; *Watson v. Erb*, 33 Ohio St. 35 (dictum); *Newman v. Taylor*, 32 Ohio St. 399, 409 (dictum); *Newman v. Newman*, 103 Ohio St. 230 (1921). But see, *Topper Bros. v. Bohn*, 12 Ohio N.P. (N.S.) 177 (1911); *James v. Smith*, 1 Ch. 384; *Bibb v. Hunter*, 79 Ala. 351 (1885); *Mitchell v. Wright*, 155 Ala. 458, 46 So. 473 (1908); *Burden v. Sheridan*, 36 Ia. 125, 14 Am. Rep. 505 (1872); *Day v. Amburgey*, 147 Ky. 123, 143 S.W. 1033 (1912); *Fischlis v. Dumaresky*, 3 A.K. Marsh (Ky.) 23 (1920); *Kimmons v. Barnes*, 205 Ky. 502 (1924); *Dougan v. Bennis*, 95 Minn. 220, 103 N.W. 882, 5 Ann. Cas. 253 (1905); *Farnham v. Clements*, 51 Me. 426 (1863); *Emerson v. Galloupe*, 158 Mass. 146 (1893); *Cann v. Berry*, 199 N.E. 905 (Mass. 1936); dictum; *Cushing v. Heuston*, 53 Wash. 379, 102 Pac. 29 (1909); Bogert, *op. cit.* note 3, *supra*, sec. 487; 1 Perry, Trusts, sec. 135 (1929).

cause of the fourth section of the statute of frauds. Not infrequently the courts in denying relief rely upon Sugden,<sup>101</sup> where he declares that under the circumstances outlined above the principal "cannot compel the agent to convey the estate to him, as it would be directly in the teeth of the statute of frauds". Had the oral agreement been that A would purchase the land and then convey it to P, there could be no doubt that the contract is within the statute of frauds.<sup>102</sup> But if the agreement is as postulated, A is not contracting to do anything with respect to an interest in land, but to procure another, viz., the land owner, to do something with the land. It would seem then that the first assumption that it was a contract within the statute might be questioned.<sup>103</sup> In the second place, the courts adopting this view, assuming the contract to be within the statute must consider that such conduct on the part of the agent does not constitute fraud sufficient to warrant an imposition of a constructive trust upon him, or, if sufficient, that the constructive trust may not be imposed because somehow that would be doing violence to the statute of frauds. Mr. Perry, who supports this view, says, "the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement and not from the transaction, and where a trust arises from an agreement, it is within the statute of frauds and must be in writing."<sup>104</sup>

In respect to the first proposition the Ohio Supreme Court took the strongest possible position. Johnson, C. J., said: "If the case taken as a whole is one of fraud, the verbal promise may be received in evidence as one of the steps by which the fraud was accomplished. To deduce the fraud from the contract and then give effect to the contract on the score of fraud, is reasoning in a circle. The fraud which will give jurisdiction to *com-*

<sup>101</sup> *Vendors & Purchasers*, (14th ed. 703).

<sup>102</sup> *Watson v. Erb*, note 100, *supra* (That was probably what the facts were in this case). *Stockton v. Watson*, 15 Ohio C.C. N.S. 12 (1912); *McDonald v. Conway*, 254 Mass. 429 (1926).

<sup>103</sup> Bogert, *op. cit.* note 3, *supra*, p. 1535.

<sup>104</sup> Perry, *op. cit.* note 103, *supra*, sec. 135

pel a performance of a parol trust, must consist in something more than a mere breach of a parol undertaking."<sup>105</sup> To suppose that the court of equity is so tender of the statute of frauds that it should not do violence by declaring the agent a constructive trustee is to forget equity's history. Within a decade of its passage equity began "doing violence" to the statute of frauds in a fact pattern which has had almost unbroken following from that day to this. The doctrine of part performance in specific performance of contracts to remove the bar of the statute of frauds speaks eloquently of equity's regard for that statute. Moreover, it is believed that the part performance doctrine did disregard the statute, and where it has been put upon a sound basis it has been the prevention or frustration of fraud. The court was seeking to prevent the statute, passed to prevent fraud, from itself becoming a device for fraud. To impose a constructive trust, as hereinbefore pointed out, does no violence to the statute, but prevents a person who is guilty of wrongdoing from retaining the fruits of his wrongful conduct. The action is prospective, and the court of equity is in no sense attempting "to compel a performance of an oral trust," but by its remedial process is defeating the results of fraudulent conduct and preventing unjust enrichment.

While there is a conflict, as noted above, an equal, if not somewhat larger, number of states adopt the view suggested, and, in not a few instances, courts originally adopting the first view have reversed their former holdings and now embrace this second view.<sup>106</sup> These cases reveal a thoroughly different atti-

<sup>105</sup> *Watson v. Erb*, note 100, *supra*, p. 48.

<sup>106</sup> *Massie v. Watts*, 6 Cranch 148, 3 L.Ed. 181 (1910); *Irwin v. Phipps*, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1193 (1927); *Colt v. Clapp*, 127 Mass., 476 (1879). But see Mass. cases *contra*, note 100, *supra*. *Vallette v. Tedens*, 122 Ill. 607, 14 N.E. 52, 3 Am. St. Rep. 502 (1887); *Nester v. Gross*, 66 Minn. 371, 69 N.W. 39 (1896). (Perhaps overruled); *Wein v. Dillon*, 27 Miss. 494 (1854); *Havner Land Co. v. MacGregor*, 169 Ia. 5, 149 N.W. 617 (1914); *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N.W. 839 (1913); *Rogers v. Genung*, 76 N.J. Eq. 306 (1909); *Harrop v. Cole*, 85 N.J. Eq. 32 (1914), *affd.* 86 N.J. Eq. 250; *Kern v. Smith*, 290 Pa. 566, 139 Atl. 450 (1927); *Kruzyisko v. Gandynski*, 207 Wis. 608, 242 N.W. 186

tude with respect to the agent's conduct and its effect. There is no mistaking the theory of these decisions. The requirements of a *resulting* trust are not sought, as was done in *Watson v. Erb*. For example, Stevenson, V. C., said: "A trust which is more correctly classified as a constructive trust—than as a resulting trust—is established by proof of the betrayal of confidence, of the violation of duties arising out of a fiduciary relation. The fiduciary relation may be established in a number of ways. It is a mere accident that in this particular case, and in a large number of others, the fiduciary relation grows out of a verbal promise. As the authorities abundantly show, equity will not tolerate the betrayal of confidence and it makes no difference how this confidence has been obtained. . . . The agency may be established by a written contract or a verbal contract, or no formal contract whatever. . . ."<sup>107</sup> The controlling question is whether the agent in violation of his agreement with his principal in the abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The constructive trust springs from the transaction not the contract. It was in a somewhat similar agency situation that Cardozo, J., gave one of his telling definitions or descriptions of a constructive trust quoted at the outset.<sup>108</sup> A fiduciary relationship should be safeguarded by equity, and the fixing of a trust

(1932) noted, 8 Wis. L. Rev. 90 (1933). The above cases and others are cited by Prof. Bogert in *op. cit.* note 3, *supra*, p. 1534. See other cases 42 A.L.R. 70 at p. 29. *Topper Bros. v. Bohn*, 12 Ohio N.P. N.S. 177 (1911). (Constructive trust imposed, court does not cite *Watson v. Erb*.) Browns, St. Frauds, sec. 96 (1895).

<sup>107</sup> *Harrop v. Cole*, note 106, *supra*. See *Rose v. Hayden*, 35 Kan. 106, at 118, 10 Pac. 554, 57 Am. St. Rep. 145 (1886); Bogert, *op. cit.* note 3, *supra*, p. 1535 approves this line of cases. See Feezer, "Constructive Trusts in Cases of Agency to Buy Real Estate," 17 Minn. L. Rev. 734 (1933); 63 U. of Pa. L. Rev. 580 (1915); 79 *id.* 1155 (1931); 1 Mechem, Agency, secs. 1192 *et seq.* (1914); 14 Mich. L. Rev. 238 (1916); 3 Va. L. Rev. 398 (1916); Am. Law Inst. Restatement, Restitution and Unjust Enrichment, P.F.D. sec. 194 d. (1936). Scott, The Trustee's Duty of Loyalty, 49 Harv. L. Rev. 521 at 558 (1936) ". . . it is improper for him to purchase for himself individually other property which it is his duty to purchase for the principal." See cases cited note 131.

<sup>108</sup> *Beatty v. Guggenheim Exploration Co.*, note 2, *supra*.

teeship upon the one who seeks to gain advantage by his wrongful conduct with respect to the property thus acquired is a policy the extension of which should be persistently urged. There is strong evidence of a trend in that direction.<sup>109</sup>

<sup>109</sup> See an interesting comment, 13 Minn. L. Rev. 711 (1929); Williams J. dissenting, *Oleff v. Hodapp*, note 75, *supra*.