

1941

Minnesota Law of Constructive Trusts and Analogous Equitable Remedies, The

Edward G. Jennings

Irving S. Shapiro

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Jennings, Edward G. and Shapiro, Irving S., "Minnesota Law of Constructive Trusts and Analogous Equitable Remedies, The" (1941). *Minnesota Law Review*. 1204.

<https://scholarship.law.umn.edu/mlr/1204>

MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME 25

MAY, 1941

No. 6

THE MINNESOTA LAW OF CONSTRUCTIVE TRUSTS AND ANALOGOUS EQUITABLE REMEDIES

By EDWARD G. JENNINGS* AND IRVING S. SHAPIRO**

FOREWORD

IN SEVERAL recent cases the supreme court of Minnesota has had occasion to cite with apparent approval pertinent sections of the Restatement of Restitution.¹ Not all of the propositions of that Restatement can be squared with previous Minnesota authority. In some instances an apparent conflict dissolves under analysis. The present article undertakes a comparison of the Minnesota case law with some of the propositions of Part II of the Restatement, entitled "Constructive Trusts and Analogous Equitable Remedies."

I. KINDS AND NATURE OF EQUITABLE RELIEF AVAILABLE

The principal remedial devices of equity whereby a beneficial interest in misappropriated or otherwise improperly acquired property is preserved for the rightful owner are the constructive trust² and the equitable lien.³ Subrogation⁴ in a sense is a special form of constructive trust or equitable lien, and is likewise a method of following property into its product—differing from other forms of constructive trust or equitable lien, however, in that equity further preserves the product from the operation of circumstances

*Associate Professor of Law, University of Minnesota.

**Senior law student, University of Minnesota Law School; member board of student editors, MINNESOTA LAW REVIEW, 1938-1940.

¹Mehl v. Norton, (1937) 201 Minn. 203, 205, 275 N. W. 843, 844 (secs. 1, 2); Ives v. Pillsbury, (1938) 204 Minn. 142, 146, 283 N. W. 140, 142 (sec. 186); Penn Anthracite Mining Co. v. Clarkson Securities Co., (1939) 205 Minn. 517, 522, 287 N. W. 15, 18 (sec. 166); Risvold v. Gustafson, (Minn. 1941) 296 N. W. 411, (secs. 160, 190, 197).

²Restatement, Restitution (1937), sec. 160.

³Restatement, Restitution (1937), sec. 161.

⁴Restatement, Restitution (1937), sec. 162.

that otherwise would result in its destruction, for the purpose of imposing the trust or lien upon it.⁵ In the majority of instances

⁵Although Professor Bogert treats subrogation as a substitute for tracing, see 4 Bogert, *Trusts and Trustees*, (1935) sec. 930, it would seem that subrogation, as much as the constructive trust or equitable lien, is really a method of following property into its product—the product being a chose in action or a lien originally held by another, which the one subrogated thereto has unofficiously discharged, or which his property without his consent has been used to discharge. As distinguished from the usual instances of a constructive trust or an equitable lien, however, equity through subrogation in a sense also creates the product upon which it impresses the trust or lien, by keeping alive, for the benefit of the one subrogated, a chose in action or lien otherwise effectively discharged by payment. Subrogation more often accomplishes the equivalent of an equitable lien than of a constructive trust. For example, one who voluntarily but unofficiously discharges the obligation of another at a discount is not entitled to profit by the transaction, and is entitled through subrogation to enforce such obligation against the primary obligor only to the extent of the amount he paid in procuring its discharge. Restatement, *Restitution* (1937) sec. 162, comment *i*; in accord, see *Baker v. Terrell*, (1863) 8 Minn. 195 (Gil. 165, 170). As in the last preceding sentence, the word “voluntarily” was used by the court in the case cited as meaning merely that the payment was consciously willed by the payor, without duress of person or property or the immediate threat of legal proceedings. But “one who pays where legally liable,” as in the case cited, is not a “volunteer” in the sense in which that word is used categorically to describe a class of persons not entitled to subrogation. *Felton v. Bissel*, (1878) 25 Minn. 15, 20-21. In such cases, which are the most typical instances of subrogation, it accomplishes the equivalent of an equitable lien. On the other hand, “where an obligor consciously misappropriates the property of another and uses it in discharging an obligation, the other is entitled by subrogation to enforce the full amount of the obligation and is not limited to the value of his property which was used in discharging the obligation.” Restatement, *Restitution* (1937) sec. 162, comment *i*; see, also, sec. 153 and sec. 207, comment *e*; 3 Scott, *Trusts* (1939) sec. 513.1. In such cases subrogation accomplishes the equivalent of a constructive trust. As in the case of constructive trusts and equitable liens, there are instances in which subrogation is available although the beneficiary has no cause of action in personam against anyone. See, for example, *White River Township v. Dorrell*, (1901) 26 Ind. App. 538, 59 N. E. 867 (plaintiff had loaned \$500 to township which was without power to borrow, but which used the money in completing payment of contractor’s valid claim for building a schoolhouse; plaintiff held subrogated to contractor’s claim against defendant township to the extent of \$500). Subrogation to a secured or preferred claim has the same utility as a constructive trust or an equitable lien in affording security against the beneficiary’s being compelled to share with general creditors in the event of the insolvency of the one personally liable. Restatement, *Restitution* (1937) sec. 162, comments *e* and *f*. Subrogation to a chose in action that is neither secured nor preferred affords no security as against the obligor’s insolvency, any more than would an ordinary constructive trust or equitable lien imposed upon such a chose in action; but, the same as either of the latter remedies, it may afford security against the insolvency of a wrongdoer who, for example, uses misappropriated funds to discharge the obligation of another person, not a bona fide purchaser for value, who remains solvent. See Restatement, *Restitution* (1937) sec. 208 (3). While the bona fide purchaser for value rule occasionally defeats subrogation in cases wherein it would otherwise be granted, see *Ahern v. Freeman*, (1891) 46 Minn. 156, 48 N. W. 677, 24 Am. St. Rep. 206, it is not nearly so frequent an interloper as in the law of constructive trusts and equitable liens generally, for the reason that subrogation presupposes payment and discharge that normally take a chose in action out of further

the constructive trust or equitable lien is imposed for the benefit of one who was originally the legal or equitable owner of the misappropriated or otherwise improperly acquired property. Where he was the legal owner the imposition of a constructive trust or equitable lien upon the same property or its proceeds presupposes power in another either to acquire or to transfer the legal title, or else ratification by the legal owner of a conversion or an unauthorized sale—since otherwise he remains the legal owner, his possessory legal remedies are presumptively adequate, and the one withhold-

circulation except as regards the one subrogated thereto. In Minnesota, contrary to the rule of Restatement, Contracts (1932) sec. 174, and of Restatement, Restitution (1937) sec. 172, comment *b*, a bona fide purchaser for value of a nonnegotiable chose in action apparently does not take free of latent equities of third persons. *Brown v. Equitable Life Assur. Soc.*, (1899) 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 969; Restatement, Contracts, Minn. Annot. (1934) sec. 174. It is also the law in this state that a mortgage lien, although following the debt which it secures, does not partake of the negotiable qualities of a mortgage debt embodied in a negotiable instrument, so that a mortgagor who pays the mortgage debt in whole or in part to the original mortgagee, without actual knowledge of its prior assignment, is entitled to a corresponding satisfaction of the mortgage as against the assignee, *Johnson v. Carpenter*, (1862) 7 Minn. 176 (Gil. 120, 125); *First Nat'l Bank of Goodwin v. Marshall State Bank*, (1927) 172 Minn. 571, 572, 216 N. W. 231, 232; *Johnson v. Howe*, (1929) 176 Minn. 287, 290, 292, 223 N. W. 148, 149-150; *Rea v. Kelley*, (1931) 183 Minn. 194, 196-197, 235 N. W. 910, 911, although remaining personally liable upon a negotiable mortgage note to a holder in due course, *Blumenthal v. Jassoy*, (1882) 29 Minn. 177, 12 N. W. 517. It is specifically provided by statute "that the record of an assignment of a mortgage shall not in itself be notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by either of them to the mortgagee." 2 *Mason's* 1927 Minn. Stat., sec. 8225. The record of an assignment is constructive notice, however, to a subsequent grantee of the mortgagor, so that a payment made by him to the original mortgagee does not correspondingly satisfy the mortgage as against the latter's assignee. *Johnson v. Howe*, (1929) 176 Minn. 287, 223 N. W. 148. In the light of these rules it would seem that the principal situations in which the bona fide purchaser for value rule can affect the right of subrogation in Minnesota are the following: (1) Where a mortgagor conveys real or personal property, which is subject to an unrecorded mortgage to which his surety would otherwise be subrogated upon payment of the mortgage debt, to a bona fide purchaser for value; (2) Where a negotiable instrument to which one would otherwise be subrogated has been transferred before maturity to a holder in due course; and (3) Where the obligor of a chose in action gives value for its discharge by another, without notice of circumstances which would otherwise give rise to an equity of subrogation in the latter. But as regards the third situation it should be noted that the Minnesota court has not applied the bona fide purchaser for value rule as freely to the discharge of an obligation, as distinguished from its purchase, as does the rule of Restatement, Restitution (1937), sec. 14. See *Grand Lodge A. O. U. W. v. Towne*, (1917) 136 Minn. 72, 161 N. W. 403, L. R. A. 1917E, 344, noted (1918) 1 *MINNESOTA LAW REVIEW* 176; compare *Langevin v. City of St. Paul*, (1892) 49 Minn. 189, 51 N. W. 817, 15 L. R. A. 766 (in accord in result with Restatement, Restitution (1937) sec. 14 (1), illustration (2), but not decided upon the basis of the bona fide purchaser for value rule).

ing possession has nothing upon which to impose a constructive trust or an equitable lien.⁶ Where the misappropriation or otherwise improper acquisition was of property already held under an express trust, the effect may be none the less the creation of a constructive trust or an equitable lien upon the same property or its proceeds—the latter remedies arising “by operation of law without any reference to any actual or supposed intention of creating a trust and frequently directly contrary to such intention.”⁷ In some instances the constructive trust or equitable lien is imposed for the benefit of one who never previously has been either the legal or equitable owner of the property in question.⁸ But where the facts otherwise justify either remedy, the problem of subsequently following the property is the same whether the interest of the beneficiary grew out of previous legal or equitable ownership or first arose out of the very transaction giving rise to the constructive trust or equitable lien. It makes no difference whether we start out with property beneficially owned by the

⁶Restatement, Restitution (1937) sec. 160, comment *j*. Specific recovery in equity, in favor of the holder of the legal title, of the mere possession of property, is not a form of constructive trust. Compare Note, (1934) 12 North Car. L. Rev. 400, where it is suggested that the constructive trust device should be used for the protection of victims of thefts, “for a constructive trust device is merely a remedial device for preventing unjust enrichment in a given case, and not a technical concept.”

⁷*Sieger v. Sieger*, (1925) 162 Minn. 322, 324, 202 N. W. 742, 743; 3 Scott, Trusts (1939) sec. 461, p. 2311.

⁸Thus a transfer inter vivos that constitutes a wrong by either the transferor or transferee or both to a third person may result in the imposition of a constructive trust or an equitable lien upon the property in favor of the latter. Restatement, Restitution (1937) secs. 168, 169. A conveyance fraudulent as to the grantor's creditors is an illustration. See Comment, (1922) 6 MINNESOTA LAW REVIEW 170. Under the Uniform Fraudulent Conveyances Act, adopted in Minnesota, an unsecured creditor who acquired his claim prior to such a conveyance may sue to have it set aside as fraudulent without having first reduced his claim to judgment at law and had execution thereon returned unsatisfied. 2 Mason's 1927 Minn. Stat., secs. 8483-8484. So also one who acquires property by will or intestacy or as the beneficiary of an insurance policy, through fraud or an unfulfilled promise to convey such property to or hold it in trust for another to whom the decedent or insured would have left it had it not been for the fraud or unfulfilled promise, may be decreed to hold the property upon constructive trust for such other person. Restatement, Restitution (1937) secs. 184-186; *Barrett v. Thielen*, (1918) 140 Minn. 266, 270, 167 N. W. 1030, 1032, 168 N. W. 126; see, also, *Ives v. Pillsbury*, (1938) 204 Minn. 142, 146, 283 N. W. 140, 142. Similarly a fiduciary who acquires property for himself that he should have acquired for his beneficiary will be decreed to hold the same in constructive trust for the latter. Restatement, Restitution (1937) sec. 194; *City of Minneapolis v. Canterbury*, (1913) 122 Minn. 301, 142 N. W. 812; *Whitten v. Wright*, (1939) 206 Minn. 423, 429, 289 N. W. 509, 511: “He [the errant fiduciary] is held to be a trustee not because of his intent but in spite of it.”

holder of the legal title, with property held under an express trust, or with property already held subject to a constructive trust or an equitable lien—in any event the enforcement of either of the latter remedies against the property or its proceeds is a form of securing specific restitution of identifiable property or its identifiable proceeds.⁹

The chief utility that the constructive trust and the equitable lien share in common consists in affording security against the beneficiary's being compelled to share with general creditors in the event of the insolvency of the one or more persons individually liable. Where the constructive trust or equitable lien is imposed upon an ordinary chose in action that is neither secured nor preferred, it of course affords no security to the beneficiary against the insolvency of the obligor of such chose in action; but it may none the less afford security as against the insolvency of another who has become personally liable to the beneficiary, as, for example, where an insolvent wrongdoer invests the beneficiary's property or its proceeds in an unsecured and unpreferred chose in action against a perfectly solvent obligor.¹⁰ There are also some instances in which either or both of these remedies are available although the beneficiary may have no cause of action in personam against anyone.¹¹

The principal difference in the relief respectively achieved by a constructive trust and an equitable lien consists in the fact that the constructive trust preserves for the beneficiary the entire equitable ownership of the misappropriated or otherwise improperly acquired property, and its product arising from subsequent transmigrations,¹² whereas the equitable lien preserves for him merely

⁹"Hence the necessity, in order to impress a fund with a trust on this ground, to establish its identity with the property or fund which was originally subject to the trust." *Twohy Mercantile Co. v. Melbye*, (1899) 78 Minn. 357, 360, 81 N. W. 20, 21.

¹⁰See Restatement, Restitution (1937) sec. 202, illustration 9.

¹¹As where, for example, a municipal or public corporation issuing invalid bonds is held to be neither contractually nor quasi contractually liable to the holders, but a constructive trust or equitable lien for the benefit of the latter may nevertheless be imposed upon the identifiable proceeds or product of the bonds. *Shaw v. Board of Education*, (1934) 38 N. M. 298, 31 P. (2d) 993, 93 A. L. R. 432; *Nuveen v. Board of Public Instruction*, (C.C.A. 5th Cir. 1937) 88 F. (2d) 175, certiorari denied, *Board of Public Instruction v. Nuveen*, (1937) 301 U. S. 691, 57 Sup. Ct. 794, 81 L. Ed. 1347, noted (1938) 22 MINNESOTA LAW REVIEW 287; see, also, Note, (1920) 4 MINNESOTA LAW REVIEW 155, 158.

¹²For an interesting recent illustration, see *Flannery v. Flannery Bolt Co.*, (C.C.A. 3d Cir. 1939) 108 F. (2d) 531, noted (1940) 39 Mich. L. Rev. 340.

a security interest in such property or its product, limited generally by the amount of the beneficiary's personal right of restitution.¹³ Where the property or its product has been inextricably commingled with other property, the constructive trust preserves for the beneficiary a proportionate interest in the whole, whereas the equitable lien preserves for him a security interest in the whole, limited by the amount in which the original property or its product can be traced into the whole, where that is less than the total amount originally secured by the lien.¹⁴ Under some circum-

¹³In the majority of instances an equitable lien secures a personal right of restitution. But it may exist where there is no such remedy in personam. See the cases cited in note 11, above; see, also, as to existence of equitable lien upon property of another improved by the act of the wrongdoer, Restatement, Restitution (1937) sec. 208 (2), comment *b*, and Comment, (1939) 23 MINNESOTA LAW REVIEW 706.

¹⁴Restatement, Restitution (1937) sec. 212, adopting the "lowest intermediate balance" rule. In the application of this rule, confusion may readily result from failure to ascertain the specific consequences of each of successive comminglings, and of the commingled funds or a part thereof earning a profit. Consider Restatement, Restitution (1937) sec. 212, illustration 4: "A wrongfully deposits in a bank \$1,000 belonging to B together with \$1,000 of his own. He draws out and dissipates \$1,500. He invests the remaining \$500 in shares of stock which he sells for \$1,500. B is entitled to a lien on the proceeds for \$1,000. If he sells the shares for \$3,000 B is entitled at his option to enforce a constructive trust as to one-half of the proceeds, or \$1,500." These results are reached through the following steps: Through the original wrongful commingling, B acquired an undivided half-interest in the whole \$2,000 on the constructive trust theory, and a lien for \$1,000 upon the whole \$2,000 on the equitable lien theory. Therefore, when only \$500 remained, B still had only an undivided half-interest therein on the constructive trust theory, but on the equitable lien theory he had become the sole beneficial owner, for security purposes, of the entire \$500, since his lien for \$1,000, having attached to the whole, remained attached to the part still identifiable, absorbing it entirely. The shares of stock in which the \$500 was invested, and their proceeds, were entirely the product of property covered by B's lien for \$1,000. Therefore his lien attached, still for \$1,000, to all the shares of stock and their entire proceeds. He could not have claimed the entire \$1,500, or \$3,000, as the case may be, on the constructive trust theory, since that would mean a shifting from the equitable lien theory, as applied to the \$500, to the constructive trust theory as applied to its proceeds. He could not thus change horses, since it was only as security that the entire \$500 could be considered as belonging to him.

Now suppose that in the above illustration, at the stage where only \$500 remained of the original \$2,000, A had added \$500 more of his own funds. B would then have an undivided one-fourth interest in the commingled \$1,000 on the constructive trust theory, and an equitable lien for only \$500 upon the entire \$1,000 on the equitable lien theory. For the additional \$500 supplied by A is in no sense the product of the \$500 absorbed by B's lien. The consequences of another commingling attach, so that B's lien extends to the entire \$1,000, but only for \$500, since that is the extent to which the funds upon which he previously had a lien can be traced into the whole. However, they will have thereby contributed fifty per cent to any profit made by investment of the commingled \$1,000, so that the original lien for \$1,000 will carry over as against the traceable product to the extent of \$500, plus fifty per cent of such part of the

stances the beneficiary is entitled to assert either remedy, while under others he is entitled only to an equitable lien.¹⁵ Under some circumstances the two remedies may produce identical results,¹⁶ while under others they produce different results, depending upon whether the property or its product upon which the trust or lien is sought to be imposed has gone up or down in value, and upon the extent to which it has become commingled with other property or has been dissipated. By seeking to impose a constructive trust, the beneficiary thereby "adopts" the transactions of the wrongdoer with the property as having been made for his benefit, thus relinquishing a cause of action against the latter personally that he may also have had.¹⁷ By seeking to

product as may be characterized as profit. See Scott, *The Right to Follow Money Wrongfully Mingled With Other Money*, (1913) 27 Harv. L. Rev. 125, 134-135: "If after the fund is reduced by withdrawals, and after an addition is made by the wrongdoer from his own funds, the total amount is then invested, . . . the claimant should have a lien on the investment for a sum equal to the lowest amount to which the fund was reduced, plus that part of the profit which can fairly be said to be the product of that amount. . . . Thus, if A mingles \$1,000 of his own with \$1,000 of B's, and then dissipates \$1,500, and later adds \$500 of his own and invests the \$1,000 in stock which he sells for \$1,500, B should have a lien on the \$1,500 for \$750, that is for the \$500 in which he had an interest, and on the profit fairly attributable to that \$500, namely one half of the whole profit, or \$250. Of course, no matter how large the profit arising from the investment in the stock, the claimant cannot, on the lien theory, get more than \$1,000, the amount originally contributed by him. On the constructive trust theory he is entitled to one fourth of the proceeds of the stock, for he has contributed one fourth of the money with which it was purchased." But where the wrongdoer, instead of adding funds of his own, uses the funds upon which another has a constructive trust interest or an equitable lien in the purchase of stocks on margin, or otherwise in the purchase of property subject to mortgage or pledge for the balance of the purchase price, Professor Scott and the Restatement take the view that the constructive trust or equitable lien attaches in an undiminished proportion or an undiminished amount to such shares or other property or their proceeds, upon the theory that they are entirely the product of the funds to which the constructive trust interest or equitable lien had previously applied. See Scott, *The Right to Follow Money Wrongfully Mingled With Other Money*, (1913) 27 Harv. L. Rev. 125, 135, note 27, explaining the result in *City of Lincoln v. Morrison*, (1902) 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885, upon this ground; Restatement, *Restitution* (1937) sec. 210, comment f. Compare the opposite inference contained in statements by the Minnesota court in *Shearer v. Barnes*, (1912) 118 Minn. 179, 186, 136 N. W. 861, 863, and in *Martin v. Baldwin*, (1883) 30 Minn. 537, 540, 16 N. W. 449, 450, as applied to the facts of those cases, for which see below, note 39. Other aspects of the problem of tracing property held subject to constructive trust or equitable lien into its products, as illustrated by the Minnesota cases, are discussed in section III of the text.

¹⁵Restatement, *Restitution* (1937) sec. 161, comment a.

¹⁶For example, where wrongfully commingled funds have neither been dissipated in any degree nor earned any profit, it makes no difference whether the beneficiary claims a proportionate share of or a lien upon the entire funds. See Restatement, *Restitution* (1937) sec. 209, comment a.

¹⁷*Shearer v. Barnes*, (1912) 118 Minn. 179, 189, 136 N. W. 861, 864.

impose an equitable lien he loses no rights that he may have against the wrongdoer personally, except to the extent that he secures satisfaction by the enforcement of the lien.¹⁸ Choosing the more advantageous of the two remedies, where both are available and may produce different measures of recovery, obviously presupposes an understanding of the peculiar incidents of each in their application to specific factual situations. As to these basic distinctions between the constructive trust and equitable lien remedies, the Minnesota cases are generally in accord with the propositions of the Restatement, although in some cases the court has confused the two in terminology,¹⁹ while in others counsel apparently have failed to utilize the right remedy to its most advantageous extent.²⁰

With respect to the specific enforceability of the constructive trust remedy the Restatement has taken the position that

"The constructive trust arises apart from the insolvency of the constructive trustee, although a court of equity may refuse to enforce it specifically if the remedy at law is adequate; but if the constructive trustee is insolvent, so that a judgment or decree for money would not be an adequate remedy, the constructive trust then becomes specifically enforceable."²¹

Of course if the misappropriation or other wrongful acquisition was by a trustee of an express trust or by one otherwise occupy-

The mutually exclusive character of the two remedies is implicit in the phraseology of the propositions of the Restatement. See, for example, section 211, subsections (1) and (2). The rule there stated is that where a conscious wrongdoer "mingles money of another with money of his own and subsequently makes withdrawals from the mingled fund, the other is entitled to an equitable lien upon the part which remains and the part which is withdrawn or upon their product," or "at his option to a proportionate share both of the part which remains and of the part which is withdrawn or of their product." It would seem clear by the rule as stated that the beneficiary may not impose an equitable lien upon one part, and a constructive trust upon the other part, as might best suit his interest. See Comment, (1936) 14 Tex. L. Rev. 125.

¹⁸See, for example, *American Railway Express Co. v. Houle*, (1926) 169 Minn. 209, 210 N. W. 889, 48 A. L. R. 1266; Restatement, Restitution (1937), sec. 202, comment *d*.

¹⁹See, for example, where the court has talked the language of constructive trust although apparently imposing only an equitable lien, *Ramsden v. O'Keefe*, (1864) 9 Minn. 74 (Gil. 63, 66-67); *Kiefer v. Rogers*, (1872) 19 Minn. 32 (Gil. 14, 23); *American Railway Express Co. v. Houle*, (1926) 169 Minn. 209, 210 N. W. 889, 48 A. L. R. 1266.

²⁰See, for example, *Sieger v. Sieger*, (1925) 162 Minn. 322, 202 N. W. 742.

²¹Restatement, Restitution (1937) sec. 160, comment *f*. Compare 3 Bogert, *Trusts and Trustees*, (1935) sec. 472, p. 1458: "In a suit to obtain a constructive trust, it is not necessary to prove the inadequacy of the remedy at law. The complainant may freely elect between the relief which the law can give him and the constructive trust device."

ing a fiduciary position, the beneficiary may follow the property under an ancient and accepted form of equity jurisdiction without regard to the adequacy of the remedy at law.²² Yet even where one is defrauded of his property by a nonfiduciary, the position of the Restatement seems logically untenable. If, immediately upon the occurrence of the wrong, a constructive trust arises with its concomitant beneficial interest in the person wronged,²³ is it not illogical to conclude that such a beneficial property interest need not be legitimized by specific enforceability unless the wrongdoer is insolvent, so that a concurrent legal remedy is of no avail? The late Professor Gray's philosophy of a right resulting from an available remedy is a decidedly practical one, and in accord with historical sequence.²⁴ Without entering upon a discussion of the true character of the constructive trust device as "purely a remedial institution" as distinguished from a "substantive" one such as an express trust²⁵ suffice it to say that its specific performance after insolvency presupposes the prior existence of something in the nature of a genuine property interest in the beneficiary, else its specific enforcement after insolvency would constitute an improper preference.²⁶

In cases of contracts to sell land or unique chattels it is of

²²Restatement, Trusts (1935), sec. 202.

²³"The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created." 3 Scott, Trusts (1939) sec. 462.4, p. 2320; see, also, *Cann v. Barry*, (1937) 299 Mass. 186, 188, 10 N. E. (2d) 88, 89.

²⁴Gray, *The Nature and Sources of the Law* (1909).

²⁵See Pound, *Progress of the Law, 1918-1919: Equity*, (1920) 33 Harv. L. Rev. 420-421; Cardozo, J., in *Beatty v. Guggenheim Exploration Co.*, (1919) 225 N. Y. 380, 386, 122 N. E. 378, 380: "A constructive trust is the formula 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." In accord with the "remedial" character of the constructive trust device, the Minnesota court has differentiated between a constructive and an express trust in respect of the commencement of the applicable statutory period of limitations, which does not require a repudiation of his trust by the constructive trustee as in the case of the trustee of an express trust. See *Stillwater & St. Paul R. R. Co. v. City of Stillwater*, (1896) 66 Minn. 176, 178, 68 N. W. 836, 837.

²⁶See Restatement, *Restitution* (1937) sec. 160, comment f: "The situation which arises where a constructive trustee is insolvent is to be contrasted with the situation where a person who is under a merely personal liability becomes insolvent. In the latter case a claimant having no beneficial interest in any property held by the defendant is not entitled to specific enforcement of his claim, since the other claimants are in the same situation and it is impossible specifically to enforce all the claims against an insolvent person." McClintock, *Equity* (1936) 68.

course the right of specific performance, based upon a presumed inadequacy of the legal remedies, that creates an equitable property interest in the vendee from the date of the contract. But in the case of misappropriated or otherwise improperly acquired property, it can hardly be the possibility of the legal remedies becoming inadequate through the insolvency of the wrongdoer that creates an equitable property interest as of a time when the legal remedies are perfectly adequate and may never become otherwise. It seems logically impossible to limit the equitable remedy to the event of the wrongdoer's insolvency, and at the same time to say it is the existence of the equitable remedy that creates the prior property interest that the fact of insolvency alone could not create. Equity is not in the habit of creating preferences solely by virtue of the only circumstances that result in their enforcement being prejudicial to the interests of others. It follows that in the present connection the inadequacy of the legal remedies cannot possibly be the basis of equitable interposition to create the beneficiary's equitable property interest, and that, unless the remedy of specific enforcement is available from the beginning, regardless of the wrongdoer's solvency, the progression of reasoning necessarily must be from the creation of the interest to its specific enforcement, rather than from the possibility of its specific enforcement to its creation. As the Minnesota court has pointed out, the principle of the constructive trust device "has its basis in the right of property."²⁷ Equity thereby preserves the rightful owner's beneficial interest from destruction through the improper acquisition of the legal title by another, and in certain instances transfers such interest to a third person.²⁸ Its specific enforcement in the event of the legal remedies becoming inadequate through the wrongdoer's insolvency obviously presupposes that equity created the interest at the time of the original improper acquisition, regardless of the then adequacy of the legal remedies and upon some other ground of equity than the inadequacy of such legal remedies.

Is it not anomalous for equity to create an interest that it refuses to enforce until the circumstances of its creation have changed? Why preserve a conception so foreign to realistic jurisprudence as that of an equitable property interest without a pres-

²⁷*Twohy Mercantile Co. v. Melbye*, (1899) 78 Minn. 357, 360, 81 N. W. 20, 21; see also, *Shearer v. Barnes*, (1912) 118 Minn. 179, 188, 136 N. W. 861, 864 ("born of and contemporaneously with the wrongful diversion of the beneficiary's funds").

²⁸See above, note 8.

ently enforceable equitable remedy? A requirement that the legal remedies have become inadequate through the constructive trustee's insolvency as a condition of the specific enforcement of a constructive trust is in no way supported by the cases denying specific recovery in equity of the mere possession of nonunique chattels²⁹ where the legal title has never left the rightful owner and equity is being asked not to enforce an interest of its own creation but merely to lend its extraordinary remedy in aid of a strictly legal right. Neither is it supported by the cases holding that fraud alone is not an adequate basis of equitable jurisdiction where the only relief sought is in the form of money damages available at law.³⁰ Logically a requirement that the legal remedies have become inadequate can have no application where the equitable interest sought to be enforced has had its origin independently of a right of specific performance based solely on the inadequacy of the legal remedies. Consistently with the argument that has been advanced, the New York court of appeals has held that one defrauded of his property by a nonfiduciary may specifically enforce a constructive trust of the proceeds although there is a remedy at law available against a still solvent wrongdoer, the theory of the court being that in the light of the more effective character of equitable relief the less adequate legal remedy becomes substantially inadequate.³¹ Such reasoning is sound wherever the only basis of the equitable right sought to be enforced is not the inadequacy of the legal remedies. Otherwise it is question-begging. The same reasoning is equally applicable where the constructive trust is sought to be imposed upon the still available misappropriated property itself as distinguished from its proceeds. While the Minnesota court has not determined the precise point under discussion,³² it has been liberal in dispensing

²⁹See McClintock, *Adequacy of Ineffective Remedy at Law*, (1932) 16 MINNESOTA LAW REVIEW 233, 250-251; McClintock, *Equity* (1936) 67-68.

³⁰See, for Example, *Mackintosh v. Tracy*, (1868) 4 Brewst. (Pa.) 59.

³¹*Falk v. Hoffman*, (1922) 233 N. Y. 199, 201-202, 135 N. E. 243, 244; "Some remedy at law there is. It is not so complete or effective as the remedy in equity. . . . Suing in equity, he may reach the proceeds of the resale, securities and cash, though the price upon resale is found to be greater than the value. . . . Equity will not be overnice in balancing the efficacy of one remedy against the efficacy of another, when action will baffle, and inaction may confirm, the purpose of the wrongdoer." See, also, *Jno. Dunlop's Sons, Inc., v. Dunlop*, (1939) 172 Misc. Rep. 66, 68, 14 N. Y. S. 452, 456; *Brown v. Father Divine*, (1940) 173 Misc. Rep. 1029, 1030, 18 N. Y. S. 544, 546: "If the case is one of constructive trust, an ancient ground of equity jurisdiction is invoked."

³²In *Shearer v. Barnes*, (1912) 118 Minn. 179, 188, 136 N. W. 861, 864, involving a breach of a fiduciary relation, the court stated: "The

equity without a very meticulous inquiry into the adequacy of legal remedies.³³ It is submitted that the New York view is sound and should be followed in this state.

With respect to the availability of relief by way of a constructive trust or an equitable lien upon wrongfully acquired property or its proceeds, the Restatement has taken the position that as against a conscious wrongdoer the two remedies are available in the alternative,³⁴ except where the wrongdoer has used such property or its proceeds in making improvements upon other property already owned by himself, in which case an equitable lien is the only one of the two remedies available.³⁵ In some Minnesota cases, wherein by reference to this proposition either remedy would have been available, counsel apparently were content with a personal recovery secured by equitable lien, without pressing the point of whether the circumstances were such that a constructive trust would have produced a more advantageous result.³⁶ But entirely in accord with the forepart of the above proposition are *Shearer v. Barnes*³⁷ and *Cisewski v. Cisewski*.³⁸ In the former the president of a trust company had made an improper loan to himself of \$10,000 of its funds, which, along with \$2,000 of his own money, he had expended in purchasing two lots for \$28,000, giving a purchase money mortgage for the balance. Title was

court may or may not enforce the trust, according to the equities of the parties when its aid is sought; but the trust itself is a creature of equity, born of and contemporaneously with the wrongful diversion of the beneficiary's funds."

³³See *Fryberger v. Berven*, (1903) 88 Minn. 311, 92 N. W. 1125; *Lloyd v. Simons*, (1906) 97 Minn. 315, 105 N. W. 902; *McClintock, Adequacy of Ineffective Remedy at Law*, (1932) 16 MINNESOTA LAW REVIEW 233, 251. In no Minnesota case has the court in any way suggested a specific requirement of the wrongdoer's insolvency as a condition of imposing a constructive trust.

³⁴Restatement, Restitution (1937) secs. 202, 210, 211. The option of the beneficiary to pursue either remedy continues as against one who acquires the property or its proceeds from the wrongdoer but is not a bona fide purchaser for value, unless he has disposed of the property without notice of the beneficiary's interest, in which case he "is under a duty either (a) to surrender the property which he acquired in exchange, or, at his option, (b) to pay the value of the property which he originally received, the property which he acquired in exchange being subject to an equitable lien for such payment." Restatement, Restitution (1937) sec. 204; see, also, sec. 208 (1), applying the forepart of the same proposition to a third person receiving the consideration for a conscious wrongdoer's disposition of property belonging to another, and sec. 178, for a change of position rule of somewhat broader application than the latter part.

³⁵Restatement, Restitution (1937) sec. 206.

³⁶See cases cited in note 19, above.

³⁷(1912) 118 Minn. 179, 136 N. W. 861.

³⁸(1915) 129 Minn. 284, 152 N. W. 642.

taken in the names of the wrongdoer and his wife, and the property became their homestead. The court held that by virtue of the acquisition of the property in part with misappropriated funds "a constructive trust then and there arose in favor of the trust company, and the latter then and there became vested with a pro tanto equitable estate in the property."³⁹ It further stated that

"Undoubtedly the beneficiary of a constructive trust may elect to reclaim his money, with interest, and, for this purpose, also to pursue the property with a lien, instead of claiming a proportionate interest therein; and it is equally well settled that, if he so elects, he thereby waives the right to pursue the res as such."⁴⁰

However, the court held that there had been no such election by virtue of the disposal by the trust company's receiver of certain securities deposited by the wrongdoer at the time of making the improper loan, which securities it was claimed had also been purchased with the trust company's funds.⁴¹ It concluded by sug-

³⁹(1912) 118 Minn. 179, 186, 136 N. W. 861, 863. The court did not state whether by a "pro tanto" interest it meant a five-sixths or a ten-twenty-eighths interest, nor did it so much as consider the point, its decision being in reversal of the trial court's refusal to impose any constructive trust interest at all. Presumably it meant a ten-twenty-eighths interest. In the previous case of *Martin v. Baldwin*, (1883) 30 Minn. 537, 540, 16 N. W. 449, 450, where the entire down payment on the purchase price of real estate had been made with the beneficiary's funds, the balance being secured by a purchase-money mortgage, the court, although holding that the beneficiary's constructive trust interest in the land had been destroyed through subsequent conveyance to a bona fide purchaser for value, stated obiter that it had never extended "to the entire interest in the land, but only to the proportion represented by that which her money put into the purchase bore to the entire consideration." The rule adopted by the Restatement would have justified giving a five-sixths interest to the beneficiary in *Shearer v. Barnes* and the whole interest to the beneficiary in *Martin v. Baldwin*, subject in each case to the mortgage and the duty of indemnifying the constructive trustee from personal liability for a corresponding proportion of the mortgage indebtedness. Restatement, Restitution (1937) sec. 210, comment *f*; see also note 14, above. Since the question was not specifically considered by the court in either case, and was entirely immaterial to the decision in *Martin v. Baldwin*, the Minnesota law cannot be said on the basis of these cases to be contrary to the position of the Restatement in this respect. The question remains open for determination.

⁴⁰(1912) 118 Minn. 179, 189, 136 N. W. 861, 864.

⁴¹In respect of the holding that there had been no election, Professor Bogert apparently regards the case as somewhat lenient toward the beneficiary. See 4 Bogert, *Trusts and Trustees* (1935) sec. 867, p. 2519, note 89. But the affairs between Barnes and the trust company were so scrambled that perhaps all the case stands for in this respect is that a constructive trust interest in specific property is not precluded by the state of the general account between the parties. Both Professor Bogert and the Minnesota court are in agreement that for an election to be conclusive "it must have been made with full appreciation of the facts of the situation, and not under mistake." 4 Bogert, *Trusts and Trustees* (1935) sec. 867, pp. 2518-2519; *Shearer v. Barnes*, (1912) 118 Minn. 179, 189, 136 N. W. 861, 864.

gesting something in the nature of an equitable lien for the amount of a constructive trust interest, thus enabling the constructive trustee to retain the whole property and preserve it from sale or partition by paying the value of the constructive trust interest in money. For it pointed out that

"It is entirely possible that upon a final adjustment of accounts between the defendant Joseph U. Barnes and the corporation, and the final settlement of the receivership, the defendants' home may be left untouched, or at least preserved from sale, subject to a charge or lien; such charge, however, to be for the value of the corporation's interest therein, with rents and profits,⁴² as distinguished from the mere amount of the funds diverted with interest."⁴³

Such a suggestion no doubt was motivated by solicitude for the interest of the wrongdoer's wife in preserving their homestead, rather than meant to enunciate a general principle applicable equally to a proportionate constructive trust interest in business property, where the beneficiary may desire to retain a proportionate interest in future profits not adequately included in the present value of the trust res.⁴⁴ In *Cisewski v. Cisewski*⁴⁵ the

⁴²The inclusion of rents and profits would have to be on the theory that they are the direct product of the property held in constructive trust. A person holding property subject to a constructive trust also "holds upon a constructive trust anything received as a result of his holding the property. . . . Thus, if a person obtains shares of stock from the owner by fraud, and gives the shares to a person who has no notice of the fraud, the latter holds upon a constructive trust not only the shares but any dividends on the shares received by him, whether in cash or in shares or other property." Restatement, Restitution (1937) sec. 205, comment *a*. In *Shearer v. Barnes*, had there been rents and profits from the property in the form of rentals received by the defendants from a third person, which were still traceable in their original or a substituted form, a constructive trust could thus have been imposed upon such rents and profits in the same proportion as upon the property producing them; but the constructive trust interest in the original property should not, it would seem, be increased by the amount of the beneficiary's interest in such rents and profits. If by "rents and profits" the court meant, as in all probability it did, merely the amount of the rental value by which the defendants had been benefited, but which they had not received in cash or other property, there would be no basis for either enlarging the constructive trust interest in the original property or extending it to include anything else. At the most the plaintiff would have had a personal claim for such rental value, upon a principle similar to that whereby one cotenant excluding the other from the premises owned in common is personally liable to the latter for the reasonable rental value of his interest. See *Sons v. Sons*, (1922) 151 Minn. 360, 362-363, 186 N. W. 811, 812.

⁴³(1912) 118 Minn. 179, 198, 136 N. W. 861, 868.

⁴⁴In the principal case, when confronted with the suggested inequity of driving the defendants from their home, the court said, (1912) 118 Minn. 179, 197, 136 N. W. 861, 867-868: "But the question of the existence of a constructive trust is entirely unaffected by the use which a trustee *ex maleficio* makes of the property. . . . The very claim of a

plaintiff's wife without his knowledge or consent had used a fund of \$4,337 in which he had a half interest in the purchase of an hotel property. In a suit by plaintiff to impose a constructive trust upon the property in his favor to the extent of an undivided one-half interest, the Supreme Court reversed a decree limiting him to a money judgment for \$2,168.50, secured by an equitable lien upon the whole property for that amount, stating that "plaintiff had the absolute right to choose his own remedy, and . . . having elected to reclaim the property in its substituted form, the court was without power to deny him this relief and compel him to take a remedy that he did not elect."^{45a} But the beneficiary's absolute right of choosing between the two remedies in such a situation is not necessarily inconsistent with the final suggestion in *Shearer v. Barnes* even as applied to business property.

The argument of the defendant in *Cisewski v. Cisewski* was that a permanent estrangement between the parties had made a holding of the property as tenants in common "inconvenient and provocative of additional dissension." To this the court replied that if the parties should "find it inconvenient or impossible to own real estate in common, the courts could afford relief, probably in a partition sale."⁴⁶ It is obvious that the aftermath of a decree for a proportionate constructive trust interest, forcing the constructive trustee and the beneficiary upon each other as tenants in common, will frequently be the necessity of partition, which may be feasible only by sale and partition of the proceeds. It would seem that in many situations the same result might be best accomplished in the decree imposing the constructive trust, by permitting the trustee to retain the whole interest in the property upon payment to the beneficiary of the present fair value, as found by the court, of the latter's interest.⁴⁷ Since the beneficiary is seeking equity, even

homestead in the property is a breach of the trust which arose out of the manner of its acquisition." Compare *Treacy v. Power*, (1910) 112 Minn. 226, 239, 127 N. W. 936, 940: "In this state, for reasons of public policy, the rule is positive and general that the trustee cannot mingle the trust estate with his own, and deny to the cestui que trust the option of following the joint affairs, and availing himself of the proceeds the trustee may have realized from his improper conduct."

⁴⁵(1915) 129 Minn. 284, 152 N. W. 642.

^{45a}(1915) 129 Minn. 284, 286, 152 N. W. 642, 643.

⁴⁶(1915) 129 Minn. 284, 287, 152 N. W. 642, 643. But partition could not be had of homestead property such as was involved in *Shearer v. Barnes*, (1912) 118 Minn. 179, 136 N. W. 861. See *Leach v. Leach*, (1926) 167 Minn. 489, 491, 209 N. W. 636, 637.

⁴⁷As, for example, wherever the property is of the type, such as homestead property, that is not subject to partition, or where partition would not prove feasible.

though in the protection of a property interest, the court should have considerable discretion as to the form of the relief afforded.⁴⁸ The alternative suggested would not seem to be permissible where the beneficiary has the whole interest in property held subject to a constructive trust, or perhaps where his is the predominant interest, or where the constructive trustee is precluded from acquiring the beneficiary's interest, even at a judicial sale, by virtue of the continuing existence of a fiduciary relation between them.⁴⁹ But such a type of equitable lien as was suggested by the Minnesota court in *Shearer v. Barnes* as an alternative method of enforcing a constructive trust interest should not be confused, however, with the ordinary type of equitable lien that is the alternative of a constructive trust.

In the subsequent case of *Sieger v. Sieger*⁵⁰ the Minnesota court delivered an opinion, through Wilson, C. J., that may be somewhat misleading. The plaintiff's former wife, from whom he was divorced at the time of the trial, had used \$2,000 of plaintiff's money in the purchase for \$3,400, she supplying the balance, of property which was found to be worth \$5,000 at the time of the trial. The trial court imposed a constructive trust interest in favor of the plaintiff to the extent of an undivided *two-fifths* of the property.⁵¹ On such facts a constructive trust should obvi-

⁴⁸It should have still more discretion than in a subsequent partition suit, in which it would be entitled, where the circumstances so demand, to adjudge compensation in lieu of strict equality of partition. 2 Mason's 1927 Minn. Stat., sec. 9534. Where the property is of the type subject to a partition suit, it would seem the court should be able to decree partition or the equivalent thereof in the same proceeding in which the constructive trust is first imposed. The beneficiary of a resulting trust has been permitted to maintain partition, see *Prow v. Prow*, (1893) 133 Ind. 340, 32 N. E. 1121, "on the apparent theory that the trust was passive, executed by the statute of uses, and that therefore the plaintiff had an absolute interest and right to possession." 2 Bogert, Trusts and Trustees (1935) 1426-1427.

⁴⁹For the extent to which a fiduciary is precluded from acquiring the interest of his beneficiary at a judicial sale, see the discussion below, at pp. 699-701 of the text. But a constructive trustee is not a fiduciary, unless the trust grew out of the breach of a previously existing fiduciary relation between him and the beneficiary, and a co-owner of property subject to partition is entitled to purchase the entire interest at a partition sale. 2 Mason's 1927 Minn. Stat., sec. 9542.

⁵⁰(1925) 162 Minn. 322, 202 N. W. 742.

⁵¹The trial court's decree cannot be rationalized as in reality imposing an equitable lien rather than a constructive trust, since it specifically provided that "said defendant holds the title to such interest in said premises in trust for plaintiff and that it be, and it is hereby, decreed that defendant convey to said plaintiff such interest in said premises and, in case of her failure so to do, that this decree stand in lieu thereof as a conveyance of such interest by said defendant to said plaintiff." See page 109, Record of *Sieger v. Sieger*, (1925) 162 Minn. 322, 202 N. W. 742.

ously have been for an undivided ten-seventeenths interest,⁵² whereas an equitable lien would have subjected the entire property to a security interest for \$2,000.⁵³ But the defendant alone appealed, on the untenable ground that a constructive trust will not be imposed upon property that is only partially the product of the misappropriation. The supreme court's opinion in affirmance is likely to prove misleading, both through its failure to point out the error in the proportion used by the trial court, and through its statement that "a trust exists pro tanto the amount of the funds used when the amount thereof is definite or *constitutes an aliquot part of the whole consideration.*"⁵⁴ That the amount of the funds wrongfully used must be definite is implied in the requirement that they must be traceable into the product;⁵⁵ but that they must constitute an aliquot part of the whole consideration for the product of commingled funds is neither in accord with the Restatement nor suggested by any other Minnesota case.⁵⁶ It seems most probable that the phrase italicized in the above quotation was used loosely by the court as illustrative of the term "definite," and not as requiring that the amount of the misappropriated funds be contained in the entire amount of the commingled funds an even number of times. Only by adopting such a construction of the language used is it believed correctly to represent the Minnesota law.

In *American Railway Express Co. v. Houle*⁵⁷ the Minnesota court seems to have confused a constructive trust with an equitable

⁵²Restatement, Restitution (1937) sec. 210 (2); in accord, *Martin v. Baldwin*, (1883) 30 Minn. 537, 540, 16 N. W. 449, 450; *Bitzer v. Bobo*, (1888) 39 Minn. 18, 21, 38 N. W. 609, 610; *Shearer v. Barnes*, (1912) 118 Minn. 179, 186, 136 N. W. 861, 863; *Cisewski v. Cisewski*, (1915) 129 Minn. 284, 152 N. W. 642.

⁵³Restatement, Restitution (1937) sec. 210 (1); see note 14, above.

⁵⁴(1925) 162 Minn. 322, 325, 202 N. W. 742, 744 (italics supplied).

⁵⁵See below, section III of the text.

⁵⁶Where a person voluntarily contributes money to a fund to be used in the purchase of property, the fact that he contributes one-third or one-fourth or some similar proportion of the total may tend to evidence his intention to acquire a beneficial interest in the property when purchased. An *aliquot part* rule may therefore have some legitimate application in the law of resulting as distinguished from constructive trusts. "On the other hand, where his money is wrongfully used in acquiring property, the constructive trust which is imposed is imposed without regard to the intention of the parties. It is entirely immaterial therefore that the fraction representing the proportion of the claimant's money in the total fund is one with a large numerator and a large denominator." Restatement, Restitution (1937) sec. 210, comment *e*. In *Bitzer v. Bobo*, (1888) 39 Minn. 18, 38 N. W. 609, the lowest fraction to which the constructive trust interest decreed by the court could be reduced had a numerator of thirty-three and a denominator of forty-one.

⁵⁷(1926) 169 Minn. 209, 210 N. W. 889, 48 A. L. R. 1266.

lien, and to have reached a result involving some difficulty of reconciliation with the propositions of the Restatement. In this case a wrongdoer had embezzled \$8,756.53 from the plaintiff and had commingled that amount with his own funds in a proportion not stated. Thereafter he built a house, at a cost of \$5,577.48, upon a lot already owned by himself and his wife as tenants in common. The cost of the house was defrayed by the giving of a mortgage on the improved property for \$2,575 and by payment of the balance, \$3,002.48, from the commingled funds. From the same funds he subsequently paid \$1,075 upon the principal of the mortgage and \$380.93 as interest, \$60 for taxes upon the property, and \$167 in the building of a sidewalk.⁵⁸ The trial court, after rendering a personal judgment against the wrongdoer for \$9,904.62, the total amount of the embezzlement with interest and costs, further decreed that there be held "in trust for plaintiff the title to the dwelling, together with an undivided one-half interest in the land," to be sold by a receiver subject to the mortgage "and subject, further, to the interest by right of subrogation which said Josephine Houle [the wife of the wrongdoer] may acquire in said trust property if and when she shall pay said mortgage."⁵⁹ The unsatisfactory character of the supreme court's opinion in affirmance no doubt is partially attributable to the fact that an appeal was taken only by the wife of the wrongdoer, and the only issue presented was Mrs. Houle's claim to a one-half interest in the homestead on the ground that she was in the position of an innocent purchaser in good faith.

Although both the trial and supreme court talked the language of constructive trust, it seems clear that what was really imposed was an equitable lien, and that the result, by relying upon some apparent probabilities, may be reconciled upon the facts, although not in the form of the decree, with the propositions of the Restatement. The Minnesota court had previously recognized that the remedies of constructive trust and personal recovery against the wrongdoer secured by equitable lien are mutually inconsistent and mutually exclusive remedies, even where alternatively available.⁶⁰ Therefore purporting to impose a constructive trust was entirely inconsistent, under the prior Minnesota doctrine, with the fact of a

⁵⁸Pages 11-12 of Record of American Railway Express Co. v. Houle, (1926) 169 Minn. 209, 210 N. W. 889.

⁵⁹Page 17 of Record of American Railway Express Co. v. Houle, (1926) 169 Minn. 209, 210 N. W. 889.

⁶⁰Shearer v. Barnes, (1912) 118 Minn 179, 189, 136 N. W. 861, 864.

personal judgment having been rendered against the wrongdoer for the full amount of the embezzlement. The Minnesota court had also previously recognized that a constructive trust interest in property acquired with wrongfully commingled funds is limited to the proportion of the beneficiary's enforced contribution to such commingled funds.⁶¹ Yet in the case under discussion the trial court had made no finding as to the amount of such proportion. Neither the trial nor the appellate court can therefore be credited with acquaintance with previous Minnesota decisions and at the same time with the intent to impose a genuine constructive trust as distinguished from an equitable lien. Furthermore, apart from such decisions, since the court regarded the house as separable from the land for the purpose of preserving the wife's interest in the land, it would seem that it also remained separable from the husband's interest in the land;⁶² and if this be true, there would be no basis for imposing a constructive trust upon the latter, to the purchase price of which the commingled funds had in no way contributed.

But if the value of the house and the husband's half interest in the lot did not exceed the amount of the security interest to which the plaintiff was entitled on an equitable lien theory, it would follow that the court did not achieve an improper result by incorrectly using the language of constructive trust. Considering the case as imposing an equitable lien as distinguished from a true constructive trust, under the rules of the Restatement such lien should have attached to the entire property as a unit, subject to the mortgage, for the amount of the commingled funds used in the building of the house and the sidewalk, or for \$3,169.48.⁶³ In addition, through the analogous equitable doctrine of subrogation, the plaintiff should have been held entitled to the benefit of a tax lien, superior to that of the mortgage, in the amount of \$60, and to the benefit of the mortgage, to the extent of \$1,455.93, as soon as the mortgagee should be paid the principal and interest remaining due thereon.⁶⁴ Both of the liens thus acquired by

⁶¹Martin v. Baldwin, (1883) 30 Minn. 537, 540, 16 N. W. 449, 450; Bitzer v. Bobo, (1888) 39 Minn. 18, 21, 38 N. W. 609, 610; Shearer v. Barnes, (1912) 118 Minn. 179, 186, 136 N. W. 861, 863; Cisewski v. Cisewski, (1915) 129 Minn. 284, 152 N. W. 642.

⁶²Compare Hamlin v. Parsons, (1866) 12 Minn. 108 (Gil. 59), holding that a mortgage lien upon a house and lot follows the house after its removal, without the consent of the mortgagee, to another lot, but does not attach to such other lot.

⁶³Restatement, Restitution (1937) secs. 206, 208 (2).

⁶⁴Restatement, Restitution (1937) sec. 162, comment c, and 207; in accord, as to subrogation to tax lien, Emmert v. Thompson, (1892) 49

subrogation should attach equally to the wife's interest in the land. The maximum amount of the plaintiff's security interest in the property, acquired through equitable lien and subrogation, would therefore not have exceeded \$4,685.41.⁶⁵ It is practically certain that a forced sale of the house and the husband's half-interest in the land would not have produced more than this amount.⁶⁶ But it would have been far more satisfactory had the court not left us to rely on probabilities for the reconciliation of the apparent inconsistency with the rules of the Restatement. Furthermore, the form of the decree, by imposing a lien upon the house and the husband's half-interest in the land for the full amount of the personal judgment for \$9,904.62, may have accomplished an injustice by preventing the wife from preserving their homestead from sale by paying from her own funds the correct amount of the plaintiff's lien.⁶⁷

The court specifically found that the wife had no knowledge of her husband's wrongful use of the plaintiff's funds, but refused to treat her as a bona fide purchaser of a half-interest in the house for the reason that she had given no value therefor. Where the wrongdoer uses misappropriated funds in making improvements

Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; *Elliott v. Tainter*, (1903) 88 Minn. 377, 93 N. W. 124; see, also, Comment, (1937) 21 MINNESOTA LAW REVIEW 218. To the extent of the tax lien the plaintiff by subrogation should have acquired priority to the mortgage.

⁶⁵By the trial court's findings \$4,891.73 was the total amount of the commingled funds used in improving the property, paying the taxes, and paying part of the principal and interest on the mortgage, but no other individual items appear than those stated in the text, which total \$4,685.41. See pages 10-12 of Record of *American Railway Express Co. v. Houle*, (1926) 169 Minn. 209, 210 N. W. 889.

⁶⁶The total cost of the improved property was apparently \$6,669.48, arrived at by adding \$925 as the cost of the naked lot, \$5,577.48 as the cost of the house, and \$167 as the cost of the sidewalk. It is probable that its fair market value, unincumbered, would not have exceeded that amount at the time of the trial, although no finding was made as to its value. From such amount there would have to be deducted the \$1,500 still due on the mortgage, with accrued interest. The value of the wife's interest in the land, based on cost, would be \$462.50, less the proportion of the mortgage properly attributable to such interest. Taking into consideration also the costs of sale, it is therefore practically certain, even with cost as the basis of valuation and assuming that the forced sale of the house and the husband's one-half interest in the land would realize their full proportionate value, that the plaintiff could not have received more than the amount to which it was entitled through an equitable lien and subrogation in accordance with the rules of the Restatement.

⁶⁷So long as there were no other higher bidders, the wife of course could have protected her interest by purchasing the property at judicial sale for the proper amount of plaintiff's lien, or less.

upon the property of a third person who is not a bona fide purchaser for value, the position of the Restatement is that if the third person had notice an equitable lien for the full amount expended attaches to the property upon which the improvements are made, whereas if the third person was without notice but also gave no value, such property "is subject to an equitable lien for the amount by which the value of the property is increased but not in any case for more than the amount expended."⁶⁸ The trial court's failure in the *Houle Case* to impose an equitable lien upon the wife's undivided half-interest in the land may therefore perhaps be reconciled with the rule of the Restatement by virtue of the fact that any increase in the value of her half-interest owing to the improvements was no doubt entirely wiped out by the imposition of a lien calculated to absorb the full value of the improvements in addition to that of the husband's half-interest in the land.⁶⁹ It is also arguable that since the improvements subject to the mortgage were entirely the product of the commingled funds, the plaintiff was entitled in any event to the entire amount of the realized sale value attributable to the improvements, even on the equitable lien theory, so long as it did not exceed the entire amount of the original embezzlement.⁷⁰ But the separate sale of the dwelling together with the husband's undivided half-interest in the land, as ordered by the trial court, was a method poorly calculated either to realize their full value for the plaintiff or to preserve for the wife the full value of her own original undivided half-interest in the land. It is submitted that it would have been much more satisfactory had the court, in accord with the rule of the Restatement, imposed an equitable lien upon the entire lot as improved and ordered its sale as a unit, apportioning the price realized as accurately as possible between the value attributable to the land and the value attributable to the improvements, and awarding one-half of the portion of the price thus ascertained to be attributable to the land without the improvements to the wife in lieu of her former interest in the land.⁷¹

⁶⁸Restatement, Restitution (1937), sec. 208 (2), comment *b*.

⁶⁹The court apparently permitted her to retain a half-interest in the sidewalk built with the commingled funds.

⁷⁰See the discussion of tracing principles in note 14, above.

⁷¹For further discussion see Comment, (1939) 23 MINNESOTA LAW REVIEW 706, 707, where the *Houle* case is cited, improperly it is believed, for a proposition, contrary to that of the Restatement, that where in such a situation "the defrauded party requests the constructive trust remedy, there is no logical basis for denying him such relief."

II. SPECIFIC CATEGORIES OF CIRCUMSTANCES JUSTIFYING THE IMPOSITION OF A CONSTRUCTIVE TRUST OR AN EQUITABLE LIEN

A. BREACH OF FIDUCIARY RELATIONS.—According to the Minnesota court, "The doctrine of constructive trust arising from abuse of fiduciary relations is too familiar to require exposition."⁷² The existence of such a relation dispenses with any requirement that the constructive trustee shall have been a conscious wrongdoer,⁷³ or that there have been any fraud, duress, mistake, or undue influence;⁷⁴ but the beneficiary is still entitled at his option to impose an equitable lien where that, coupled with a cause of action in personam, will secure a larger measure of recovery.⁷⁵ There are of course varying degrees of fiduciary relations, and that which constitutes a violation of one does not necessarily constitute a violation of another of lesser degree. At the top of the hierarchy of such relations are those which exist between the trustee and beneficiary of an express trust,⁷⁶ or between a principal and an agent;⁷⁷ at the bottom are those which, strictly speaking, are not fiduciary at all, but involve a degree of confidence, justifiable reliance, or inequality, the taking advantage of which may be

⁷²City of Minneapolis v. Canterbury, (1913) 122 Minn. 301, 307, 142 N. W. 812, 814. See, also, Scott, *The Trustee's Duty of Loyalty*, (1936) 49 Harv. L. Rev. 521.

⁷³Owing to its liberality of cross-reference the Restatement may appear to be somewhat misleading in this respect. For example, in section 190, comment *c*, it is stated that where a fiduciary exchanges property held subject to constructive trust for other property, "the beneficiary is entitled to enforce a constructive trust or equitable lien upon the property so acquired in exchange, under the rules stated in secs. 202-215." The sections referred to, however, do not permit the constructive trust remedy as distinguished from an equitable lien as against one who has disposed of the property of another without knowledge that the disposition was wrongful (see section 203), or as against an innocent donee of property subject to a constructive trust, who has disposed of it without notice of the trust interest (see section 204). But section 198 adopts a broad rule, apparently in no way dependent upon wrongful intent, that "Where a fiduciary in violation of his duty to the beneficiary disposes of property entrusted to him as fiduciary, he holds any property received in exchange upon a constructive trust for the beneficiary;" and under section 201 (1) the constructive trust continues to attach to the property improperly transferred to a third person "if he gave no value or if he had notice of the violation of duty."

⁷⁴See *Tilley v. Wolverton*, (1891) 46 Minn. 256, 257-258, 48 N. W. 908.

⁷⁵Restatement, *Trusts* (1935) sec. 202 (1), comment *a*; in accord, *Shearer v. Barnes*, (1912) 118 Minn. 179, 189, 136 N. W. 861, 864; Restatement, *Agency* (1933) sec. 407, comment *d*.

⁷⁶So far as the law of fiduciary relations is concerned, the relation of an administrator or executor to the beneficiaries of his estate, or of a guardian to his ward, may be regarded for practical purposes as one of express trust. See 3 Scott, *Trusts* (1939) sec. 495.

⁷⁷Restatement, *Agency* (1933) secs. 387-398.

held to produce the same consequences as though they were truly fiduciary.⁷⁸ The general principle that a violation of any such relation justifies the imposition of a constructive trust or an equitable lien does not vary, but the circumstances that constitute a violation may vary with the nature and degree of fiduciary character of the particular relation involved.

Cases of the type already considered, where one person's property without his consent has been wrongfully appropriated or used for the benefit of another, may involve the breach of a fiduciary relation,⁷⁹ but in those and other similar cases the existence of such a relation is not essential to the imposition of a constructive trust or an equitable lien. In particular instances it may be the existence of such a relation that enables the wrongdoer to acquire or to transfer the legal title to the misappropriated property,⁸⁰ but the general principle enunciated by the decisions is of broader application. For the present we shall be considering cases in which a constructive trust or an equitable lien would not be imposed but for the existence of a relation of a fiduciary or otherwise confidential character.

A fiduciary may not deal at arm's length with his beneficiary in respect of matters within the scope of the relation. The principle is equally applicable to situations in which there is no res to be pursued by the constructive trust or equitable lien device. Thus an attorney may not validly contract with one already his client for more than a reasonable compensation for his services.⁸¹ If by overreaching the fiduciary character of the relation the attorney has procured anything from the client that can be traced, the

⁷⁸"Nor is the application of the rule confined to a particular class of persons, as guardians, solicitors, attorneys, etc. It applies universally to all who come within its principles. . . . The duty in relation to the property need not be a legal one such as the law will enforce a performance of. If it be a moral duty, growing out of confidence and trust reposed by one and accepted by another in business relations and transactions, it is enough." *King v. Remington*, (1886) 36 Minn. 15, 26, 29 N. W. 352, 358.

⁷⁹As in *Shearer v. Barnes*, (1912) 118 Minn. 179, 136 N. W. 861. For other instances of the misappropriation of trust funds in which, however, the existence of the fiduciary relation would seem not to have been essential for the imposition of a constructive trust, see *Rich v. Rich*, (1867) 12 Minn. 468 (Gil. 369); *Martin v. Baldwin*, (1883) 30 Minn. 537, 16 N. W. 449.

⁸⁰As in *American Railway Express Co. v. Houle*, (1926) 169 Minn. 209, 210 N. W. 889, 48 A. L. R. 1266, but the same result would have been reached in that case had the funds of the plaintiff been larcenously taken by one not occupying a fiduciary relation to it.

⁸¹See Comment, (1936) 20 MINNESOTA LAW REVIEW 429. As to right of client to discharge attorney with or without cause, subject to liability for reasonable value of attorney's services, see *Krippner v. Matz*, (1939) 205 Minn. 497, 287 N. W. 19.

latter is entitled to have a constructive trust or an equitable lien imposed thereon.⁸² In general it may be said that for dealings between a fiduciary and his beneficiary to be entirely valid, the latter must have been of competent age and understanding, his consent must have been freely given, uninfluenced by the fiduciary and after full disclosure of all pertinent facts, and the transaction must have been fair and reasonable.⁸³ In all the instances "where the law infers from the relations of the parties the probability of undue influence on the part of the party having dominion or ascendancy over another, it requires that the influence in fact exercised shall be exerted for the benefit of the person subject to it, and not for the benefit of the party possessing it."⁸⁴ The purpose is to remove temptation from a fiduciary's path.⁸⁵

The most frequent instances of the violations of fiduciary relations have involved the sale by a fiduciary, to his trust estate or to his beneficiary, of property that belonged to himself individually,⁸⁶ or, conversely, the purchase by a fiduciary individually of property that belonged to his trust estate or to his beneficiary.⁸⁷ Where the fiduciary is the seller and remains solvent, and the beneficiary or trust estate has parted merely with money, the beneficiary is frequently content with personal recovery of the purchase price, so that many of such cases fall under the head of ordinary rescission. They are nevertheless illustrative of the circumstances under which a constructive trust or an equitable lien are equally available remedies so long as the purchase price or consideration paid by the beneficiary is traceable either in specie or into its identifiable proceeds.⁸⁸ Upon ordinary principles of rescission the beneficiary is also entitled to a lien upon the property received by him from the fiduciary, which he must otherwise restore, until he has received repayment of the purchase price.⁸⁹

Thus a guardian may not unload upon his ward's estate a mortgage held by himself,⁹⁰ nor one held by a bank of which he

⁸²Compare *Tancre v. Reynolds*, (1886) 35 Minn. 476, 29 N. W. 171 (replevin action proceeding upon theory of rescission).

⁸³Restatement, Restitution (1937), sec. 191; in accord, *Turner v. Fryberger*, (1906) 99 Minn. 236, 107 N. W. 1133, 109 N. W. 229.

⁸⁴*Ashton v. Thompson*, (1884) 32 Minn. 25, 42, 18 N. W. 918, 923.

⁸⁵*King v. Remington*, (1886) 36 Minn. 15, 26, 29 N. W. 352, 358.

⁸⁶Restatement, Restitution (1937), sec. 193.

⁸⁷Restatement, Restitution (1937), sec. 192.

⁸⁸For the interrelation of the law of rescission and reformation with the doctrine of constructive trusts, see Restatement, Restitution (1937), sec. 160, comment *k*.

⁸⁹Restatement, Contracts (1932), sec. 482; see, also, Note, (1923) 7 MINNESOTA LAW REVIEW 231.

⁹⁰*In re Granstrand*, (1892) 49 Minn. 438, 52 N. W. 41.

was "president and general manager" and "altogether in control."⁹¹ By the common law in this state a trust company cannot lawfully transfer securities owned by itself to an estate of which it is trustee, even though such securities are of the kind that would otherwise constitute proper trust investments;⁹² and the statutes regulating trust companies and trust investments⁹³ have been held not to have changed the common law in this respect.⁹⁴ In *Bjorngaard v. Goodhue County Bank*,⁹⁵ it was held that a sale by corporate directors of their own property to their corporation is voidable regardless of the absence of any element of unfairness, but may be ratified by the votes, constituting a majority, of the same individuals as shareholders, provided the transaction is fair and reasonable.⁹⁶ It is probably the present Minnesota law, however, that most transactions between a private corporation and its directors are valid even without shareholder ratification provided they are fair and reasonable, with the burden of proving this essential prerequisite of validity upon the interested directors.⁹⁷ Where a contract with a public corporation is void because of the personal interest therein of a member of its governing body,⁹⁸ the corporation is held in this state to be quasi contractually liable for the reasonable value of benefits re-

⁹¹*Ottawa Banking & Trust Co. v. Crookston State Bank*, (1931) 185 Minn. 22, 239 N. W. 666, noted (1932) 30 Mich. L. Rev. 982.

⁹²*St. Paul Trust Co. v. Strong*, (1901) 85 Minn. 1, 88 N. W. 256; *Smith v. Tolversen*, (1934) 190 Minn. 410, 252 N. W. 423; *Malcolmsen v. Goodhue County Nat'l Bank*, (1936) 198 Minn. 562, 272 N. W. 157, noted (1937) 21 MINNESOTA LAW REVIEW 737.

⁹³2 Mason's 1927 Minn. Stat., secs. 7735-7736, 7738.

⁹⁴*Larson v. Security Bank & Trust Co.*, (1929) 178 Minn. 209, 224 N. W. 235, 226 N. W. 697; *Kelly v. First Minneapolis Trust Co.*, (1929) 178 Minn. 215, 226 N. W. 696, noted (1930) 14 MINNESOTA LAW REVIEW 308. It is now specifically provided by statute, however, that corporate trustees may invest trust funds in fractional parts of securities and may commingle funds of separate trusts for investment purposes. 3 Mason's Minn. Stat. (1940 Supp.) sec. 7735; sec. Note, Minnesota Legislation of 1936 and 1937, (1938) 22 MINNESOTA LAW REVIEW 219, 249.

⁹⁵(1892) 49 Minn. 483, 52 N. W. 48.

⁹⁶While the majority shareholders of a corporation are not subject to the same fiduciary obligation as the directors, they may not oppress the minority. See *Seitz v. Union Brass & Metal Mfg. Co.*, (1922) 152 Minn. 460, 462, 189 N. W. 586, 587.

⁹⁷*Minnesota Loan & Trust Co. v. Peteler Car Co.*, (1916) 132 Minn. 277, 282-285, 156 N. W. 255, 257-259. The statement in *Jones v. Morrison*, (1883) 31 Minn. 140, 148, 16 N. W. 854, 858, that the salaries of officers of a corporation fixed by themselves as directors are "prima facie voidable at the election of the corporation or of a stockholder," can mean nothing more than that the burden of proving them to be reasonable in amount is upon the interested directors. On salaries of corporate officers, see, also, *Barrett v. Smith*, (1932) 185 Minn. 596, 242 N. W. 392; *Keough v. St. Paul Milk Co.*, (1939) 205 Minn. 96, 285 N. W. 809.

⁹⁸2 Mason's 1927 Minn. Stat., sec. 10305.

ceived and not restored, so that, to whatever extent it would be quasi contractually liable it obviously may not recover the purchase price already paid by it.⁹⁹

An agent authorized to purchase property for his principal may not purchase property of his own for that purpose, in the absence of the principal's consent after full disclosure of the facts.¹⁰⁰ Nor may he in respect of the same transaction act as agent for both buyer and seller.¹⁰¹ In *Donnelly v. Cunningham*,¹⁰² the situation was complicated by the interposition of a third party. Cunningham, an agent to buy property for Donnelly, selected a lot that he honestly believed to belong entirely to one Wentworth, and procured a deed to Donnelly from the latter. In fact Cunningham was himself the equitable owner of an undivided half-interest in the whole lot, and the record holder of the legal title of a part. Upon discovery of this fact Donnelly refused to accept a deed tendered by Cunningham of his interest, and sued both him and Wentworth to recover the purchase price already paid, which apparently had been divided equally between Cunningham and Wentworth. The court held him entitled to recover one-half of the purchase price from Cunningham, but nothing from Wentworth, on the ground that the latter was not a partner of Cunningham and did not otherwise share the fiduciary relation toward Donnelly. Canty, J., in a separate opinion, refused to concur in the reason given for exempting Wentworth from liability. He contended that if "the title to the whole lot was in Wentworth, as he had supposed it was," Wentworth alone and not plaintiff would have been charged with notice of Cunningham's interest, so that the "transaction, on its face, would show a sale by Wentworth

⁹⁹*Mares v. Janutka*, (1936) 196 Minn. 87, 264 N. W. 222, noted (1936) 20 MINNESOTA LAW REVIEW 564; see, also, Comment, (1939) 23 MINNESOTA LAW REVIEW 239. The Minnesota court has been more liberal than the majority in allowing quasi contractual recovery against municipal corporations. See, particularly, *Wakely v. County of St. Louis*, (1931) 184 Minn. 613, 240 N. W. 103, noted (1932) 17 MINNESOTA LAW REVIEW 101.

¹⁰⁰Restatement, Restitution (1937) sec. 193; in accord, *Friesenhahn v. Bushnell*, (1891) 47 Minn. 443, 50 N. W. 597; *Donnelly v. Cunningham*, (1894) 58 Minn. 376, 59 N. W. 1052. For similar reasons an agent's general authority to bind his principal does not permit him, without his principal's express consent, to effect a novation of obligors whereby the principal is substituted for the agent as the obligor of a prior contract, *Williams v. Journal Printing Co.*, (1890) 43 Minn. 537, 45 N. W. 1133; and the president of a corporation may not properly execute in its name an accommodation note for the benefit of a firm of which he is a member. *Third Nat'l Bank of St. Paul v. Marine Lumber Co.*, (1890) 44 Minn. 65, 46 N. W. 145.

¹⁰¹See *Crump v. Ingersoll*, (1890) 44 Minn. 84, 46 N. W. 141, same case (1891) 47 Minn. 179, 49 N. W. 739.

¹⁰²(1894) 58 Minn. 376, 59 N. W. 1052.

alone to plaintiff, and Wentworth would have no right to presume that plaintiff understood it to be anything else."¹⁰³ He concurred specially in the result, however, on the ground that since the record title to a part of the land had been in Cunningham, the plaintiff likewise was charged with notice of Cunningham's interest, and that therefore the fact that Wentworth had "supposed the transaction to be such as in law would constitute a constructive fraud will not make it such, or make him liable."¹⁰⁴ But if the record title being in the fiduciary is not the equivalent of such full disclosure as will validate the transaction as against the fiduciary, as it obviously was properly held not to be, it is difficult to discover any reason why it should have that effect as against a third person charged with notice both of the fiduciary relation and of the fiduciary's interest. The refusal of rescission as against Wentworth seems inconsistent with the theory underlying the rules of the Restatement.¹⁰⁵ The result of partial rescission was a judicial making of a new contract for the parties, whereby a single indivisible contract for the sale of the whole interest in the lot was transformed into one for the sale of an undivided half-interest. No element of consideration for Wentworth justified a result so out of accord with equitable principles generally, and so fraught with the likelihood of future inconvenience and litigation as is the average enforced cotenancy. Had Donnelly paid an indivisible property consideration the result of decreeing only partial rescission would have been the creation of a forced cotenancy in both properties.

In the converse situation where the fiduciary is the purchaser, the Minnesota court has stated, in accord with the Restatement,¹⁰⁶ that the "rule which disables one occupying a confidential or fiduciary relation, in respect to property the subject of a sale, from purchasing for his own benefit, and regarding him as a trustee if he do purchase, is absolute, and looks to no other facts than the relation and the purchase."¹⁰⁷ Thus an agent to sell property for the owner may not become his own undisclosed principal in its purchase,¹⁰⁸ or an undisclosed member of a purchasing

¹⁰³(1894) 58 Minn. 376, 380, 59 N. W. 1052, 1054.

¹⁰⁴(1894) 58 Minn. 376, 381, 59 N. W. 1052, 1054.

¹⁰⁵See Restatement, Restitution (1937), sec. 201 (1), which would clearly seem to call for a different result had Donnelly sought to impose a constructive trust upon the purchase money paid by him to Cunningham and Wentworth.

¹⁰⁶Restatement, Restitution (1937) sec. 192; Restatement, Agency (1933), sec. 389.

¹⁰⁷King v. Remington, (1886) 36 Minn. 15, 25, 29 N. W. 352, 358.

¹⁰⁸See *Smitz v. Leopold*, (1892) 51 Minn. 455, 53 N. W. 719.

syndicate.¹⁰⁹ It is of no consequence that the identity of the purchaser is otherwise immaterial to the seller, or that the latter may have specifically authorized the agent to sell to anyone at a fixed price which has in fact been paid.¹¹⁰ The consequences of such a violation of a fiduciary relation are that the agent is not entitled to a commission for the sale, whether the principal affirms or disaffirms it,¹¹¹ and that the principal is entitled, at his option, to (a) recover the specific property or its identifiable proceeds except as against bona fide purchasers for value or others who have innocently received and disposed of the property or its proceeds without notice of the principal's constructive trust interest therein;¹¹² or (b) hold the agent personally accountable for its value as a converter,¹¹³ with an equitable lien upon the property or its proceeds in the agent's hands;¹¹⁴ or (c) impose a constructive trust upon, or hold the agent personally accountable for, any profits that may have been derived by him from the transaction¹¹⁵ or from subsequent dealings with the property.¹¹⁶

The availability of and an advantageous choice from among the above alternatives depends in the first place upon a combination of such variable factors as the extent to which the original property is still traceable, whether it has gone up or down in value, whether subsequent dealings with it by the fiduciary have proved profitable, the extent to which his profits are still traceable, and whether he is

¹⁰⁹Tilleny v. Wolverton, (1891) 46 Minn. 256, 48 N. W. 908.

¹¹⁰See Hegenmyer v. Marks, (1897) 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

¹¹¹Restatement, Agency (1933) sec. 469; in accord, see Webb v. Paxton, (1887) 36 Minn. 532, 32 N. W. 749; cf. Darrt v. Sonnesyn, (1902) 86 Minn. 55, 90 N. W. 115.

¹¹²Restatement, Restitution (1937) secs. 201 (1), 204.

¹¹³Farrand v. Hurlburt, (1862) 7 Minn. 477 (Gil. 383, 385) (an agent, in whose hands money is placed by the principal to be located or invested in the name of the principal, is guilty of conversion if he invests it in his own name). Such an action of course is limited to misdealings with personal property. But the agent is also contractually liable for a breach of the implied obligations of the relation. Restatement, Agency (1933) sec. 399 (a).

¹¹⁴Restatement, Agency (1933) sec. 407, comment *d*.

¹¹⁵Schick v. Suttle, (1905) 94 Minn. 135, 136-137, 102 N. W. 217: "It is elementary, and a rule of universal application, that all profits and benefits accruing from the act of an agent, whether resulting from the performance or violation of his duty, belong to the principal, and not to the agent." Recovery from a third person of the property wrongfully disposed of or its proceeds or value is not inconsistent with further recovery from the agent of his profits. Restatement, Agency (1933) sec. 407 (2), comment *e*: "If an agent has violated a duty of loyalty to the principal so that the principal is entitled to profits which the agent has thereby made, the fact that the principal has brought an action against a third person and has been made whole by such action does not prevent the principal from recovering from the agent the profits which the agent has made."

personally solvent. But it apparently may depend also, in this state, upon whether third persons, even though not bona fide purchasers for value, have entered the picture. This is well illustrated by the Minnesota case of *Newell v. Cochran*.¹¹⁷ In the prior case of *Hegenmyer v. Marks*¹¹⁸ the court had held, in accord with the Restatement, that a third person acquiring the property of a principal through an agent's breach of his fiduciary obligation, with notice thereof, is in no better position than the agent.¹¹⁹ So long as the transaction constitutes a violation of the agent's fiduciary obligation of which the third person has notice, it matters not whether the latter acquires the property directly from the principal, as in *Hegenmyer v. Marks*, or from the agent who has first wrongfully acquired it for himself.¹²⁰ If such a third person subsequently disposes of the property, a constructive trust will attach to its identifiable proceeds in his hands.¹²¹

The significant facts of *Newell v. Cochran* were as follows: The two plaintiffs and defendant Holdridge had purchased a tract of land for \$70,000 for the purpose of reselling it at a profit. Title was taken in the name of plaintiff Newell, but each member of the venture was to have a one-third interest in the property and in the profits derived from its resale. Thereafter defendants Cochran & Walsh and one Moore formed a syndicate for the purpose of purchasing the land. They first negotiated secretly with Holdridge, and an arrangement was made whereby \$74,000 should be offered for the property, but that, if the offer were accepted by the plaintiffs, Holdridge, in lieu of one-third of the named price at which he was unwilling to sell his interest, "should then, at his option, either take a one-third interest in the syndicate, or sell his one-third interest in the land to the syndicate for such higher price as should thereafter be agreed upon."¹²² The plaintiffs accepted the offer, urged strongly to do so by Holdridge, who concealed

¹¹⁶See *Smitz v. Leopold*, (1892) 51 Minn. 455, 53 N. W. 719.

¹¹⁷(1889) 41 Minn. 374, 43 N. W. 84.

¹¹⁸(1887) 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

¹¹⁹Restatement, Restitution (1937) sec. 201 (1); compare *Risvold v. Gustafson*, (1940) 207 Minn. 359, 292 N. W. 103 (third person, although participating in breach of a fiduciary relation, allowed to retain legitimate benefits arising from his own antecedent and independently acquired interest in the subject-matter) with *Risvold v. Gustafson*, (Minn. 1941) 296 N. W. 411 (third person, who was not a director, "held because, without value and with knowledge of the facts, he shared in the 'rake-off' improperly taken by" the directors).

¹²⁰Restatement, Restitution (1937) sec. 201 (1), comment *a*.

¹²¹Restatement, Restitution (1937) sec. 204, comment *c*; sec. 208 (1), comment *a*; and see 3 *Scott, Trusts* (1939) sec. 508.

¹²²(1889) 41 Minn. 374, 376, 43 N. W. 84.

from them his secret agreement with the purchasing syndicate. Thereafter Holdridge sold to the syndicate his one-third interest "at a price in excess of that for which the interests of the plaintiffs were thus procured."¹²³ As of the time of the original purchase by the syndicate, the property was found to have been worth no more than the \$74,000. It was later "sold by the syndicate at a profit, some other improvements having tended to increase its value."¹²⁴ Holdridge did not share in such profit. The court held him personally liable to his two associates in the first venture "to the extent of two-thirds of the price realized by him upon the sale to the syndicate in excess of his proper share of the price for which the sale by Newell was made."¹²⁵ Cochran & Walsh were held to be subject to no liability at all—neither for the profits they had reaped nor for the proper accounting by Holdridge to the plaintiffs. The court stated, through Dickinson, J.:¹²⁶

"In no view of this case could Cochran & Walsh have been held responsible to the plaintiffs for the sum for which the syndicate afterwards sold the property in excess of that for which they purchased it. To such a claim it would be enough to answer that the property was actually sold to the syndicate; that this action is predicated upon the fact of such a sale having been made; and that damages for any fraudulent conduct inducing the plaintiffs to sell would be measured by the difference between the price for which the sale was made by the plaintiffs and the actual value of the property.¹²⁷ . . . We will assume—what the plaintiffs claim should have been found by the court as a fact in the case—that Cochran & Walsh knew of the relations subsisting between Holdridge and the plaintiffs with respect to the property.¹²⁸ It must

¹²³(1889) 41 Minn. 374, 377, 43 N. W. 84, 85.

¹²⁴(1889) 41 Minn. 374, 377, 43 N. W. 84, 85. Restatement, Trusts (1935) sec. 291 (3), comment *p*, takes the position that a third person is not entitled to reimbursement for the value of improvements made by him upon property acquired through the breach of an express trust with knowledge thereof. The same rule would seem to be applicable to a similar transferee of property acquired through the breach of any strictly fiduciary relation. See Restatement, Restitution (1937) sec. 177, comment *c*.

¹²⁵(1889) 41 Minn. 374, 377, 43 N. W. 84, 85.

¹²⁶(1889) 41 Minn. 374, 380-381, 43 N. W. 84, 86.

¹²⁷The court apparently assumed that the liability of Cochran & Walsh depended upon the ordinary principles of fraud applicable to transactions between parties dealing at arm's length, and that therefore the "out of pocket loss" measure of damages of the tort action of deceit in this state would govern. Compare Restatement, Agency (1933) sec. 314: "A person who receives from an agent of another the principal's things, with notice that the agent is thereby committing a breach of a fiduciary duty to the principal, holds the things thus acquired as a constructive trustee or, at the election of the principal, is subject to liability to him for their value."

¹²⁸By the trial court's finding "Cochran & Walsh knew that Holdridge was interested with the plaintiffs in the land, but . . . it does not appear that they knew the precise character of his relation with the plaintiffs, whether as a partner or tenant in common." (1889) 41 Minn. 374, 377, 43 N. W. 84, 85.

be borne in mind that, since the plaintiffs realized all that the property was worth, so that they can recover no substantial damages upon the ground that the sale was induced by fraud, their right of recovery is necessarily *limited to the excess of the price received by Holdridge over that received by the plaintiffs.*¹²⁹ . . . But Cochran & Walsh and their associates were purchasers only. They stood in no relation of trust towards the common owners of the property, nor were they bound to see to it that Holdridge accounted to the plaintiffs for what he received, and that he paid to them their proper shares. . . . It can hardly be that the very fact that the purchasers paid this larger sum to Holdridge as the price of the property than they had paid to the others, creates a liability to pay so much of the purchase price a second time to the plaintiffs, or that by reason of having made such payment they are answerable for the equitable distribution of the fund by Holdridge."

It would seem that the court, as in *Donnelly v. Cunningham*,¹³⁰ overlooked the fact that a third person need not share a fiduciary relation in order to be subjected to liabilities as a consequence of his participation with notice in the fiduciary's breach of trust, or to be precluded from profiting therefrom. Assuming, as the court did, that "Cochran & Walsh knew of the relations subsisting between Holdridge and the plaintiffs with respect to the property,"¹³¹ it is impossible to agree with the court's sweeping assertion that in no view of the case could Cochran & Walsh "have been held responsible to the plaintiffs for the sum for which the syndicate afterwards sold the property in excess of that for which they purchased it." It was specifically found that the sale by the plaintiffs of their two-thirds interest was induced by the advice of Holdridge and his violation of his fiduciary obligation. The relief asked by the plaintiffs' complaint was that the sale to the syndicate "be adjudged fraudulent and void as to these plaintiffs," that "as to the undivided two-thirds of said land said defendants be adjudged to have acquired and held the same as trustees for these plaintiffs," and that "said defendants be adjudged to account

¹²⁹Italics supplied.

¹³⁰(1894) 58 Minn. 376, 59 N. W. 1052 (for facts and discussion see above, at pp. 692-693 of the text).

¹³¹On the basis of such an assumption it could well be inferred that the syndicate was cognizant of Holdridge's intent not to account to the plaintiffs for their proper share of the additional profits realized by him from the secret agreement for the subsequent sale of his one-third interest. Thus on ordinary trust principles it should follow that Cochran & Walsh ought to have been held liable to plaintiffs for a proper accounting by Holdridge to them. See Restatement, Trusts (1935) sec. 321; 2 Mechem, Agency (2d ed. 1914) sec. 2137.

to these plaintiffs of and concerning said lands."¹³² On the other hand the complaint did not specifically ask for the type of relief awarded by the court as against Holdridge. Therefore the action obviously was not in affirmance of the sale to the syndicate, or predicated upon the fact of a valid sale to it having been made. The syndicate acquired the legal title to the plaintiffs' two-thirds interest subject to a constructive trust in their favor.¹³³ Legal title to the specific property apparently could not have been restored to the plaintiffs, for the reason that in all probability the resale by the syndicate had been to bona fide purchasers for value. But for the sale to stand so far as the passage of legal title is concerned is not dissonant with an impugment of its propriety for the purpose of imposing a constructive trust upon the proceeds of the specific property, or of securing an accounting for the profits of resale.¹³⁴

Furthermore, since it was through Holdridge's breach of his fiduciary obligation that the property was conveyed to the syndicate, and since it is well settled that all profits arising from the acts of the agent, whether resulting from a proper performance of his duties or a violation thereof, belong to the principal,¹³⁵ it would seem that the relief awarded against Holdridge for a two-thirds share of the additional price realized from the sale of his one-third interest to the syndicate, was not necessarily inconsistent with the relief asked against Cochran & Walsh for an accounting of their profits derived from the resale of plaintiffs' two-thirds interest. It was through Holdridge's breach of his fiduciary obligation that the plaintiffs' two-thirds interest was improperly acquired by the syndicate, and the sale of his own one-third interest to the syndicate was separately effected. Cochran & Walsh were therefore not further concerned with the adjustment of the equities between the plaintiffs and Holdridge,¹³⁶ and it was no concern of the plaintiffs that Holdridge had no claim to the share of the profits derived by Cochran & Walsh from the resale of his one-third interest. Cochran & Walsh were obviously entitled to a credit for the

¹³²Newell v. Cochran, (1889) 41 Minn. 374, 43 N. W. 84, Paper Book, Appellant's Brief, p. 11.

¹³³Restatement, Restitution (1937) sec. 201 (1).

¹³⁴Restatement, Restitution (1937) sec. 160, comment *h*; see, also, 3 Scott, Trusts (1939) sec. 508.2.

¹³⁵Restatement, Restitution (1937) sec. 197; this section was expressly adopted by the Minnesota court in Risvold v. Gustafson, (Minn. 1941) 296 N. W. 411; see, also, Snell v. Goodlander, (1903) 90 Minn. 533, 97 N. W. 421.

¹³⁶Except possibly as a guarantor of Holdridge's accounting for his excess share of the profits. See footnote 131, above.

amount they had paid for any interest for which they should be held accountable.¹³⁷ A result whereby the plaintiffs received two-thirds of the profits of the sale to the syndicate of Holdridge's one-third interest, and also might have secured all the profits of the resale by the syndicate of their two-thirds interest, could have been avoided by deducting the amount actually recovered from Holdridge from the amount otherwise recoverable from Cochran & Walsh. No injustice would thereby have been done Holdridge, since on no theory was he entitled to a share in the profits derived by Cochran & Walsh from the resale by the syndicate of any part of the land. In any event, such dilemma as may have been thought by the court to exist as between the two forms of relief was presented not by the plaintiffs' complaint, but by the court's awarding them a form of relief for which they did not specifically ask, in place of that for which they did ask and to which, it is submitted, they were properly entitled. The decision as to Cochran & Walsh is supportable only on the theory that the state of their knowledge of Holdridge's violation of his fiduciary obligation was not in fact such as the appellate court assumed it to be.¹³⁸ The case is the third illustration thus far in the discussion of confusion in the Minnesota law and lack of entire accord with the Restatement as to the availability of the equitable remedies here being considered, as against third persons who are not bona fide purchasers for value.¹³⁹

The principle that a fiduciary may not purchase for himself property belonging to his trust estate or to his beneficiary applies also, with some modifications, to execution, foreclosure, and judicial sales.¹⁴⁰ Thus the administrator of an estate, foreclosing a mortgage belonging to the estate, is not entitled to purchase the mortgaged property for himself at the foreclosure sale.¹⁴¹ A mortgagee by deed absolute, who had taken conveyances of an embarrassed debtor's property as security for advances to be made in paying off prior incumbrances, may not acquire the absolute interest in such property by purchase from the subsequent as-

¹³⁷Restatement, Restitution (1937) sec. 177; in accord, *Brown v. Fischer*, (1899) 77 Minn. 1, 79 N. W. 494.

¹³⁸For the trial court's finding, see note 128 above.

¹³⁹The others being *American Railway Express Co. v. Houle*, (1926) 169 Minn. 209, 210 N. W. 889, 48 A. L. R. 1266, (discussed at pp. 683-687 above), and *Donnelly v. Cunningham*, (1894) 58 Minn. 376, 59 N. W. 1052 (discussed at pp. 692-693 above).

¹⁴⁰Restatement, Restitution (1937) sec. 192, comments *b* and *c*.

¹⁴¹*Baldwin v. Allison*, (1860) 4 Minn. 25 (Gil. 11, 13).

signee in bankruptcy of the mortgagor.¹⁴² The same underlying principle is behind the maxim "once a mortgage always a mortgage."¹⁴³ A receiver purchasing property of his estate at an execution sale under a judgment against the debtor holds the same upon constructive trust for the latter.¹⁴⁴

A statute in this state specifically provides with respect to the representative of a decedent's estate that he "shall not purchase any claim against the estate, nor shall he purchase directly or indirectly or be interested in the purchase of any property sold by him."¹⁴⁵ In *Cain v. McGeenty*¹⁴⁶ the court affirmed a decree refusing to set aside a sale of real estate belonging to an estate by the administrator to his adult son, pointing out that the relation between the administrator and the purchaser "was a circumstance to be considered, with the others in the case, in determining the question of actual fraud in the sale; but the law would not infer fraud from it."¹⁴⁷ On the other hand a sale by a mother, as guardian of her infant children, of the property of their estate to their step-father, was set aside, on the ground of indirect interest, in *Brown v. Fischer*.¹⁴⁸ Similarly, in *In re Estate of Sprain*,¹⁴⁹ the court apparently regarded a sale of real estate belonging to an estate by the administrator to his wife as being one in which he was "directly or indirectly" interested within the meaning of the controlling statute, but held that the sale, having been confirmed by an order of the probate court, could not be attacked on an appeal from an order refusing to vacate the order of confirmation, but only, if at all, by a separate proceeding in the district court in which all interested parties were joined.¹⁵⁰ The Restatement takes the position that where the particular rela-

¹⁴²King v. Remington, (1886) 36 Minn. 15, 29 N. W. 352.

¹⁴³By virtue of 2 Mason's 1927 Minn. Stat., sec. 9573, it is no longer the law in this state as formerly that a conveyance by a mortgagor to his mortgagee of the equity of redemption will be presumed to be by way of further security. See *Roehrs v. Thompson*, (1929) 179 Minn. 73, 76, 228 N. W. 340, 341: "The mortgagee may always purchase that right for a fair consideration if the transaction is untainted by any oppression or advantage taken of the necessities or distress of the mortgagor." (Italics supplied.)

¹⁴⁴Donahue v. Quackenbush, (1895) 62 Minn. 132, 64 N. W. 141.

¹⁴⁵3 Mason's Minn. Stat. (1940 Supp.) sec. 8992-90, superseding 2 Mason's 1927 Minn. Stat., sec. 8847. Although the cases herein discussed refer to the latter section, the principles they enunciate should remain valid under the new statutory provision, the substance of which is the same.

¹⁴⁶(1889) 41 Minn. 194, 42 N. W. 933.

¹⁴⁷(1889) 41 Minn. 194, 195, 42 N. W. 933; in accord, see Restatement,

Restitution (1937), sec. 192, comment e.

¹⁴⁸(1899) 77 Minn. 1, 79 N. W. 494.

¹⁴⁹(1937) 199 Minn. 511, 272 N. W. 779.

¹⁵⁰(1937) 199 Minn. 511, 518, 272 N. W. 779, 783.

tion "is one over the administration of which a court has power of supervision, the fiduciary can properly purchase property entrusted to him as fiduciary for sale if the court permits him to do so."¹⁵¹ The Minnesota law is probably in accord, although the statute previously cited does not expressly admit of any such modification. It would seem in any event that for the court's order of approval to be conclusive, it must have been based upon full disclosure of all pertinent facts and the consideration for the sale must have been adequate.¹⁵²

In *Barber v. Bowen*,¹⁵³ the fact that a sale by an administrator to a third person, otherwise valid, was followed by a conveyance of the property by the third person to the administrator's wife, for the same consideration paid by the former, was not deemed of itself to be a sufficiently material circumstance to justify setting aside the sale. But where property that has once become subject to a constructive trust interest is conveyed to a bona fide purchaser for value and subsequently reacquired by the former trustee, the constructive trust revives.¹⁵⁴ *Barber v. Bowen* also illustrates another modification of the disability of a fiduciary to purchase the property of his beneficiary at either private or public sales—namely, that the disability does not apply with respect to property outside the scope of the fiduciary relation or survive the termination of the relation, unless the fiduciary makes use of information or of a continuing dominance over the beneficiary acquired by virtue of his fiduciary character.¹⁵⁵ In that case the third person who purchased property of the estate from the administrator was the mother and guardian of the infant heirs of the estate. She purchased property, appraised at \$2,700, with a valid claim of her own for \$3,300 against the estate. In re-

¹⁵¹Restatement, Restitution (1937), sec. 192, comment *g*.

¹⁵²See *In re Estate of Fiske*, (1940) 207 Minn. 44, 49, 291 N. W. 289, 291 (investment by trust company of trust funds in shares of corporate affiliate upheld where approved by probate court in proceeding in which infant beneficiary was represented by independent counsel). In cases which appear to deny the right of a court to authorize a trustee's purchase from himself the facts show unfair dealing or inadequate consideration. See Comment, (1931) 15 MINNESOTA LAW REVIEW 842. The opinion in *In re Estate of Sprain*, (1937) 199 Minn. 511, 272 N. W. 779, indicates that the mere fact of confirmation by the probate court may not of itself completely immunize the purchase from attack in the district court.

¹⁵³(1891) 47 Minn. 118, 49 N. W. 684.

¹⁵⁴Restatement, Restitution (1937), sec. 176 (1); Restatement, Trusts (1935), secs. 170, comment *e*, and 317; *Independent Coal and Coke Co. v. United States*, (1927) 274 U. S. 640, 648, 47 Sup. Ct. 714, 717, 71 L. Ed. 1270; see *Arnold v. Smith*, (1913) 121 Minn. 116, 132, 140 N. W. 748.

¹⁵⁵Restatement, Restitution (1937) sec. 191, comment *f*, sec. 192, comment *f*; Restatement, Trusts (1935) sec. 170, comment *g*.

fusing to set aside the sale, the court pointed out that the appellants had "confounded two distinct estates, that of the deceased intestate and that of his minor sons, and the representatives of each, one being the administrator, the other a guardian," and that the latter was entirely powerless "to interfere with or control the property, which was to be sold in pursuance of the order of the court, and not in the execution of any trust which she had assumed."¹⁵⁶ It continued:

"It is only when power and duty, the constituent elements of a trust, towards a specific subject-matter, are conferred, that fiduciary character and responsibility begins [sic]; and the relation which disables and prohibits must be one in which knowledge, by reason of the confidence reposed, might be acquired, or power exists, to affect injuriously the interests of the beneficiary or advance that of the trustee. But the rule referred to is not pertinent or applicable to a case like this, where a sale is made by an administrator, or any other public officer, under proceedings adverse to the interest of the cestui que trust, and the trustee has not the means in his power to prevent the sale. . . . The purchaser owed no duty to her wards in respect to the real property at the time she bought. It was no part of the trust estate which had come into her possession or within her control, and, for obvious reasons, it never would."¹⁵⁷

But in *Arnold v. Smith*,¹⁵⁸ the acquisition of property of an estate by its former administrator was set aside under circumstances showing that it was the culmination of a series of acts, begun while administrator, having the deliberate intent to acquire the property for himself. And in *Ashton v. Thompson*,¹⁵⁹ where the court set aside a conveyance, that amounted practically to a donation, from a daughter to her mother made after the daughter had attained her majority and the relation of guardian had terminated but she nevertheless continued to reside with her mother, it pointed out that

"Substantially the same rules [as are applicable to the relation of guardian and ward] are applied to the case of an ex guardian, where, notwithstanding the termination of the formal fiduciary relation between him and his ward, he still retains his dominion in fact and his position of influence as respects the ward or his property."¹⁶⁰

A fiduciary's disability as a purchaser is by no means re-

¹⁵⁶(1891) 47 Minn. 118, 122, 49 N. W. 684, 685.

¹⁵⁷(1891) 47 Minn. 118, 123, 49 N. W. 684, 685.

¹⁵⁸(1913) 121 Minn. 116, 140 N. W. 748.

¹⁵⁹(1884) 32 Minn. 25, 18 N. W. 918.

¹⁶⁰(1884) 32 Minn. 25, 42, 18 N. W. 918, 922.

stricted, however, to property already owned by the fiduciary in trust for, or by, the beneficiary. Other property, or particular transactions concerning it, may be within the scope of and subject to the fiduciary relation. Thus a fiduciary is precluded from acquiring for himself property which it is his duty to acquire for the beneficiary, or which, if acquired for himself, will create a conflict of interest between him and the beneficiary.¹⁶¹ In *Turner v. Fryberger*,¹⁶² the attorney for the administrator of an estate had purchased the life interest of the surviving husband in premises whereof the reversion belonged to the estate. In its first decision holding the administrator chargeable in his final account with the profits realized from a resale of the life interest, the court stated:

"It was apparent that the property would sell more advantageously when the two interests were united than when sold separately, as neither interest would command its real value if offered for sale separately. It therefore became incumbent upon the administrator to use all reasonable means to unite with the owner of the life estate in disposing of the property. . . . No party can be permitted to purchase an interest in property and hold it for his own benefit where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use. . . . The attorney is simply the representative or the agent, and the administrator the principal. It necessarily follows that, if the administrator were himself prohibited from dealing in the life estate for his own profit, so must his representative and attorney be likewise prohibited. The position is not changed by the fact that the life estate was property not belonging to the estate, but existed as an independent right in the surviving husband, who had the power of disposing of it to whomsoever he would. The point is that there were conflicting interests between the two estates. If the administrator was required to realize the greatest amount which he reasonably could in the execution of his trust, in so doing he necessarily would come in conflict with the owner of the life estate, and his attorney could not represent the life estate owned by himself, and at the same time, as attorney, the reversionary interest under control of the administrator."¹⁶³

Without in any way impugning the principles so well stated in the first opinion, the decision in the above case was reversed upon reargument, and a new trial ordered, because of the trial court's failure to have made any finding as to whether the cestui

¹⁶¹Restatement, Restitution (1937) sec. 194. As to disabilities of corporate directors and officers in this respect, see Riley, Corporation's Right to Profits Made by Directors, (1920) 4 MINNESOTA LAW REVIEW 513.

¹⁶²(1905) 94 Minn. 433, 103 N. W. 217.

¹⁶³(1905) 94 Minn. 433, 436, 103 N. W. 217, 218.

que trust had precluded himself from questioning the legality of the purchase of the life estate by having consented thereto or ratified the same.¹⁶⁴ In *Rogers v. Gaston*,¹⁶⁵ an attorney employed to foreclose a mortgage upon premises in which he found the mortgagor to own only an undivided half-interest, and who properly advised the mortgagee to bid in the property for only half its value, as a result of which, however, the mortgage debt was fully satisfied, was held not to have violated his fiduciary obligation by purchasing, more than two years after foreclosure, the other undivided half-interest. The court added, however, the following words of caution:

"But, since the information as to the title came out in the course of his professional employment, it was undoubtedly his duty to notify the plaintiff or his agent, and give him sufficient time and opportunity to protect his interest by purchasing the outstanding title, if he desired to do so. We cannot say that this was not done in this case, or that ample time and opportunity had not been given plaintiff to act in the premises. The courts, however, will scrutinize such transactions closely, and an attorney cannot well be too cautious and scrupulous in his conduct in making a purchase under such circumstances."¹⁶⁶

It is also a general principle that a fiduciary may not acquire the property of his beneficiary within the scope of the relation by the purchase from a third person of a paramount title or outstanding incumbrance.¹⁶⁷ Where the relation is truly fiduciary in respect of the property in question, the disability is not limited to the situations in which it is the duty of the fiduciary to acquire or discharge the outstanding title or incumbrance on behalf of the beneficiary.¹⁶⁸ Where such a duty exists the disability is obvious, but even where it does not exist, the disability still results from the necessity of avoiding a conflict of interests inconsistent with the relation. The same disability may also result from a strictly contractual as distinguished from a truly fiduciary duty to protect another's title or discharge an incumbrance upon prop-

¹⁶⁴*Turner v. Fryberger*, (1906) 99 Minn. 236, 109 N. W. 229. The fact that the life estate had been purchased by the fiduciary for \$250 and resold for \$700 apparently was not regarded by the court as rendering the transaction so unreasonable or unfair as to preclude ratification by an adult beneficiary.

¹⁶⁵(1890) 43 Minn. 189, 45 N. W. 427.

¹⁶⁶(1890) 43 Minn. 189, 191, 45 N. W. 427, 428.

¹⁶⁷Restatement, Restitution (1937) sec. 196.

¹⁶⁸The intent of the law is that no conflict of interest shall arise. Restatement, Trusts (1935), sec. 170, comment *j*; 3 Bogert, Trusts and Trustees (1935) sec. 485; 3 Scott, Trusts (1939) sec. 501; in accord, see *Conkey v. Dike*, (1871) 17 Minn. 457 (Gil. 434).

erty in which another has an interest. Thus a mortgagor in a deed with covenants of warranty may not acquire a paramount title as against his mortgagee, nor may he acquire by subrogation or otherwise, as against the mortgagee, a tax lien or other incumbrance that it was his own duty to discharge.¹⁶⁹ On the other hand, where neither a fiduciary relation nor a contractual duty existed, it was properly held in *Wilson v. Jamison*¹⁷⁰ that "the judgment creditor of the mortgagor, having by his judgment a lien upon the property junior to the mortgage, could, by purchasing at tax sale, acquire, as against the mortgagee, a title divesting the lien of the mortgage. . . ."¹⁷¹ Although the Minnesota court once stated that a mortgagee "stood in the relation of a trustee to . . . the mortgagor, in respect to the mortgaged premises, but with the statutory qualification that she could have purchased the trust property at the sale,"¹⁷² it would seem that it meant nothing more than that a court of equity will carefully scrutinize dealings between them in respect of the equity of redemption, and that there is nothing in the relation as such, in the absence of special circumstances of trust and confidence,¹⁷³ to prevent the mortgagee from acquiring the mortgagor's remaining interest from a third person, or acquiring for his own benefit an outstanding paramount title or incumbrance.¹⁷⁴

It is said to be the established doctrine "that a tenant for life in possession, in the purchase of an incumbrance upon, or an adverse title to, the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainder-man."¹⁷⁵ Such a rule does not necessarily presuppose

¹⁶⁹See *MacEwen v. Beard*, (1894) 58 Minn. 176, 59 N. W. 942.

¹⁷⁰(1886) 36 Minn. 59, 29 N. W. 887, 1 Am. St. Rep. 635.

¹⁷¹(1886) 36 Minn. 59, 62, 29 N. W. 887, 888, 1 Am. St. Rep. 635. It should be noted, however, that the appellate court, being evenly divided, merely affirmed the lower court's decision without discussion of the problem.

¹⁷²*Baldwin v. Allison*, (1860) 4 Minn. 25 (Gil. 11, 14).

¹⁷³In *King v. Remington*, (1886) 36 Minn. 15, 29, 29 N. W. 352, 360, the court in finding such special circumstances described the relationship of the parties as follows: "King placed himself wholly in the hands of Remington, not only by conveying to him, by deeds absolute in terms, so large an amount of property, which thus passed beyond his power to use it in procuring money from anyone else for the purpose in view, but because the application of the advances in money and notes was left to the judgment and discretion of the latter, and also because of the power given to encumber the property conveyed as security with mortgages."

¹⁷⁴*Bartean v. Merriam*, (1893) 52 Minn. 222, 53 N. W. 1061; *Fleming v. McCutcheon*, (1902) 85 Minn. 152, 88 N. W. 433 (mortgagee is not barred from foreclosing his mortgage by becoming administrator of his mortgagor's estate, provided he acts fairly and in good faith); see, also, note 143, above.

¹⁷⁵*Whitney v. Salter*, (1886) 36 Minn. 103, 105, 30 N. W. 755, 1 Am. St. Rep. 656; see, also, *Kreuscher v. Roth*, (1922) 152 Minn. 320, 188 N. W.

either a fiduciary relation or an affirmative duty upon the life tenant to protect the title of the entire estate against adverse claims or incumbrances, but would seem to rest rather upon the general negative duty of the life tenant while in possession to do nothing to prejudice the interest of the remainderman or reversioner without the latter's consent.¹⁷⁶ In Minnesota there is said to be "a fiduciary relation between cotenants,"¹⁷⁷ so that if one cotenant redeems the premises from foreclosure sale, or acquires a tax title, he is trustee of the other cotenant's share, with a right of proportionate reimbursement secured by an equitable lien upon the share thus held in trust.¹⁷⁸ But the law governing the liabilities of cotenants to each other is not in all respects consistent with the existence of a truly fiduciary relation between them,¹⁷⁹ and it has been suggested that the real ground of the disability of one to acquire a tax title as against another is that the obligation to pay the taxes rests equally upon each.¹⁸⁰ Consistently therewith, it has been held by some courts that the disability does not attach to a cotenant acquiring a tax title based upon a default occurring prior to the time he acquired his interest.¹⁸¹ In this state it apparently makes no difference when the default occurred, or whether the interests of the cotenants are derived from separate instruments.¹⁸² In *Easton v. Scofield*,¹⁸³ where the interests of cotenants had been separately assessed for

996; *Faulkenburg v. Windorf*, (1935) 194 Minn. 154, 160, 259 N. W. 802, 806.

¹⁷⁶But compare *Turner v. Edwards*, (1940) 207 Minn. 455, 462, 292 N. W. 257, where the court rested its decision, holding that a third person may not in collusion with a life tenant acquire the interests of remaindermen by purchase at tax sale for the life tenant's default in payment of taxes, in part upon "the principle that parties cannot void a fiduciary disability by collusive arrangements with third persons." *Stone and Peterson, J.J.*, dissented from the court's refusal even to allow the purchaser a lien for reimbursement as against the remainder interest, on the ground that a part of the taxes in default had been due at the time the life tenant acquired her interest and therefore were properly chargeable against the entire estate.

¹⁷⁷*Slagle v. Slagle*, (1932) 187 Minn. 1, 5, 244 N. W. 79, 80-81, noted (1933) 17 MINNESOTA LAW REVIEW 344.

¹⁷⁸*Oliver v. Hedderly*, (1884) 32 Minn. 455, 21 N. W. 478; *Slagle v. Slagle*, (1932) 187 Minn. 1, 244 N. W. 79; see *Holmes v. Campbell*, (1865) 10 Minn. 401 (Gil. 320); cf. *Holterhoff v. Mead*, (1886) 36 Minn. 42, 29 N. W. 675; *Comment*, (1921) 5 MINNESOTA LAW REVIEW 134.

¹⁷⁹Compare, for example, *Kean v. Connelly*, (1878) 25 Minn. 222, 224; *Murray v. Murray*, (1924) 159 Minn. 111, 114, 198 N. W. 307, 308; *Sons v. Sons*, (1922) 151 Minn. 360, 362, 186 N. W. 811, 812.

¹⁸⁰*Comment*, (1917) 1 MINNESOTA LAW REVIEW 466.

¹⁸¹See *Comment*, (1922) 6 MINNESOTA LAW REVIEW 530.

¹⁸²*Hoyt v. Lightbody*, (1906) 98 Minn. 189, 108 N. W. 843.

¹⁸³(1896) 66 Minn. 425, 69 N. W. 326.

tax purposes, Mr. Justice Mitchell, in a concurring opinion, contended that "when the purchasing cotenant is himself free from any default in the payment of his own taxes," there is no "good reason why he may not bid in at tax sale the interests of his cotenants for his own use, there being in such case nothing in the relations of the parties imposing any obligation on any tenant in common to pay the taxes upon the moieties of the others."¹⁸⁴ But his position has been expressly disapproved,¹⁸⁵ and the consequences of an assumed fiduciary basis of this particular disability of a cotenant consistently applied by the Minnesota court. The mortgagee of a cotenant's interest, however, does not share his mortgagor's relation to the other cotenant, so that there is nothing to prevent him from acquiring for his own exclusive benefit an outstanding prior lien upon the entire estate.¹⁸⁶

It follows finally from the character of fiduciary relations that the beneficiary is entitled to any bonus or commission improperly received by the fiduciary from another,¹⁸⁷ to any profits secretly retained by the fiduciary,¹⁸⁸ and to any profits or property acquired by the fiduciary through improper competition with the beneficiary,¹⁸⁹ through the use of the latter's facilities,¹⁹⁰ or through the use of confidential information received in the course of the fiduciary relation.¹⁹¹ In all these respects the Minnesota cases seem to be entirely in accord with the propositions of the Restatement. "It is elementary, and a rule of universal application, that all profits and benefits accruing from the act of an agent, whether resulting from the performance or violation of his duty, belong to the principal, and not to the agent."¹⁹² An assignee for the benefit of creditors, who buys up claims against the assignor, is not entitled to enforce them for more than the amount he paid.¹⁹³ In *Gilbert v. Hewetson*,¹⁹⁴ the confidential

¹⁸⁴(1896) 66 Minn. 425, 431, 69 N. W. 326, 329.

¹⁸⁵See *Hoyt v. Lightbody*, (1906) 98 Minn. 189, 192, 108 N. W. 843.

¹⁸⁶*Barteau v. Merriam*, (1893) 52 Minn. 222, 53 N. W. 1061.

¹⁸⁷Restatement, Restitution (1937), sec. 197; Restatement, Trusts (1935), sec. 170, comment *n*; see *Risvold v. Gustafson*, (Minn. 1941) 296 N. W. 411.

¹⁸⁸Restatement, Restitution (1937), sec. 197.

¹⁸⁹Restatement, Restitution (1937), sec. 199; Restatement, Trusts (1935), sec. 170, comment *o*.

¹⁹⁰Restatement, Restitution (1937) sec. 198; 3 Scott, Trusts (1939), sec. 503.

¹⁹¹Restatement, Restitution (1937) sec. 200.

¹⁹²*Schick v. Suttle*, (1905) 94 Minn. 135, 136-137, 102 N. W. 217.

¹⁹³Restatement, Restitution (1937), sec. 196, comment *d*; in accord, *Clark v. Stanton*, (1877) 24 Minn. 232.

¹⁹⁴(1900) 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486.

clerk of a receiver entered into an arrangement with some attorneys to take assignments of claims against the estate in receivership, to use in garnishing a party against whom the estate had a doubtful claim, for the purpose of forcing a settlement. The plan having succeeded, the clerk was held accountable to the estate for his share of the proceeds of the settlement, with an equitable lien imposed upon the land in which he had invested such proceeds. It was held to be entirely immaterial that the claim of the estate upon which settlement was thus forced may have been invalid, so that the estate was in fact deprived of no genuine asset. In *Chicago Flexotile Floor Co. v. Lane*,¹⁹⁵ the defendant, a vice president and director of the plaintiff corporation, after negotiating two contracts on its behalf had, instead of transmitting them to it, resigned his offices and, by representing to the other parties that the plaintiff had become unable to perform such contracts, induced a transfer of them to another corporation with which he had become associated. He was held liable for all profits derived by him from such contracts, and also for the amount of secret commissions received by him from the other company upon sales of materials by it to the plaintiff.¹⁹⁶ In *Goodhue Farmers Warehouse Co. v. Davis*,¹⁹⁷ the defendant, a salaried agent of the plaintiff cooperative association, was held accountable to it for the profits derived by him from the use of its warehouse, name, and credit in dealings in grain on his own account. There is a much more extensive protection of the economic interest in mere ideas in the field of fiduciary relations than elsewhere.¹⁹⁸

There are situations in which the beneficiary's right to secret profits of the fiduciary may be defeated by a third person's right to rescind the transaction from whence the profits were derived. Thus where an agent represents both buyer and seller without disclosure to either of his representation of the other, either may wholly rescind the transaction and the one who paid the agent's commission or secret profits has a paramount right to their re-

¹⁹⁵(1933) 188 Minn. 422, 247 N. W. 517.

¹⁹⁶See Riley, Corporation's Right to Profits Made by Directors, (1921) 4 MINNESOTA LAW REVIEW 513.

¹⁹⁷(1900) 81 Minn. 210, 83 N. W. 531.

¹⁹⁸See Note, (1930) 14 MINNESOTA LAW REVIEW 537, 539: "Although the courts speak of a property right in a trade secret or secret process which equity will protect against one who acquires knowledge of it in violation of contract or confidence, it is the breach of trust, confidence, or contract which is the true ground of the interference of the equity court."

turn.¹⁹⁹ In *Lum v. McEwen*,²⁰⁰ the plaintiff sued to cancel a note for \$5,000 which he had given to induce McEwen, as superintendent and general manager of a mill company, to use his influence to have the company remove its mill to Brainerd. The mill was in fact so removed. Cancellation was decreed on the ground that the consideration was illegal, regardless of the fact "that no actual injury to the company resulted, or that the policy recommended may have been for its best interest."²⁰¹ In view of the guilty connection of the plaintiff with the transaction the court expressed doubt as to whether he was entitled to affirmative relief, but the defendant did not raise the point and the court adverted to it only "in order that this case may not be considered an authority on the point."²⁰² The mill company was not made a party to the suit. Had the consideration been in cash, or had the note been paid to or transferred by McEwen to a holder in due course, it would seem clear that the plaintiff would not have been entitled to rescission and that the mill company would have been entitled to recover the proceeds of payment to or transfer by McEwen. Does the fact that the bribe was still in the form of an executory obligation make a difference? It was obviously unenforceable by the agent. It would seem clear that a principal should not be entitled to enforce for his own benefit an executory obligation, unenforceable by the agent, which would be equally unenforceable if made directly to the principal, as might have been the case had the note been given by the town of Brainerd instead of by a private individual. But the note of the plaintiff would have been perfectly valid and enforceable had it been given directly to the mill company in consideration of its removing to Brainerd. The theory of the Restatement seems to be that the principal is entitled to adopt or ratify such a transaction with the agent as having been made for the principal's benefit.²⁰³ But the principal's constructive trust interest in the note would seem to precede its affirmative act of adoption or ratification, which is sufficiently evidenced by the mere bringing of suit. It is therefore submitted that the court should have regarded the mill company as the equit-

¹⁹⁹*Crump v. Ingersoll*, (1890) 44 Minn. 84, 46 N. W. 141, same case (1891) 47 Minn. 179, 49 N. W. 739.

²⁰⁰(1894) 56 Minn. 278, 57 N. W. 662.

²⁰¹*Lum v. McEwen*, (1894) 56 Minn. 278, 282, 57 N. W. 662, 663.

²⁰²*Lum v. McEwen*, (1894) 56 Minn. 278, 283, 57 N. W. 662, 663.

²⁰³Restatement, Restitution (1937) sec. 197, comment *a*; Restatement, Agency (1933) sec. 388, comment *a*.

able owner of the note, and dismissed the suit for cancellation for nonjoinder of an indispensable party defendant.

B. FRAUD, DURESS, UNDUE INFLUENCE, AND MISTAKE.—Violations of fiduciary relations are frequently referred to by the courts as forms of "constructive fraud" or legally inferred undue influence,²⁰⁴ which means merely that the same results follow although in fact there may have been none of the basic elements of real fraud or undue influence present. Of course, in the lesser degrees of fiduciary relations, and in determining whether a beneficiary has validly consented to or ratified a transaction in which his fiduciary is adversely interested, the significance of such factors as the extent of disclosure of pertinent facts, the presence or absence of actual influence upon the beneficiary by the fiduciary, and the fairness and reasonableness of the transaction, causes the law of fiduciary relations to shade imperceptibly into the law of actual fraud and undue influence. Furthermore, undue influence is seldom dissociated from a close personal relationship of some sort, which in turn, although not strictly fiduciary, renders actual fraud so much the easier to establish.²⁰⁵ Consequently the break between the subject-matter of the preceding section and that of the present is gradual rather than sharp, with an overlapping middle ground.

The Minnesota court has expressed its full approval of the rule of the Restatement that "where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor."²⁰⁶ We are not here dealing with the elements in point of substance of fraud, duress, undue influence, or mistake, but rather with their consequences on the assumption that they have been found to be present. Particularly in cases of mistake alone, the right to restitution from a transferee who has given value or is otherwise a party to a bargain transaction, even though not a bona fide purchaser for value, is usually of a much

²⁰⁴See *Ashton v. Thompson*, (1884) 32 Minn. 25, 41-42, 18 N. W. 918, 922: "In such cases the undue influence is, on grounds of public policy, prima facie presumed from the peculiar relations subsisting between the parties."

²⁰⁵Restatement, Restitution (1937) sec. 8 (3, a); *Adan v. Steinbrecher*, (1911) 116 Minn. 174, 133 N. W. 477; *Voss v. Scott*, (1930) 180 Minn. 88, 230 N. W. 262; *Hassman v. First State Bank of Swatara*, (1931) 183 Minn. 453, 236 N. W. 921; *Scheele v. Union Loan & Finance Co.*, (1937) 200 Minn. 554, 561-562, 274 N. W. 673, 677.

²⁰⁶Restatement, Restitution (1937) sec. 166, quoted with approval in *Penn Anthracite Mining Co. v. Clarkson Securities Co.*, (1939) 205 Minn. 517, 522, 287 N. W. 15, 18.

more restricted character than the right to restitution from a donee or one occupying substantially the position of a donee.²⁰⁷ The nature of the transaction may likewise determine the question of who, as between a transferor or transferee on the one hand and a third person on the other, is the one entitled to enforce a constructive trust.

If a transfer of title to property is effected by virtue of a mistake of the parties of such a nature as to entitle the transferor to restitutionary relief, the transferee may be held as constructive trustee of the property so transferred.²⁰⁸ Conversely, if such a transfer is ineffective because of mistake, or conveys less or different property than intended by both parties, the would-be transferee, unless a donee, will normally have a right of reformation equivalent to a constructive trust interest in the property intended to be conveyed.²⁰⁹ Where in the course of a gratuitous transfer the donor by mistake fails effectively to convey the property, he holds it in most cases free of trust for the reason that he has not been unjustly enriched.²¹⁰ If on the other hand the

²⁰⁷The Restatement takes the position, for example, that rescission for unilateral mistake, with its concomitant constructive trust interest where property has been transferred as a consequence of such mistake, can be had only as against a donee or one who knows or suspects the existence of the mistake. Restatement, Restitution (1937), secs. 12 and 163, comment *b*. But the Minnesota court has been much more liberal in allowing relief for unilateral mistake. *St. Nicholas Church v. Kropp*, (1916) 135 Minn. 115, 160 N. W. 500, L. R. A. 1917D 741; *Olson v. Shephard*, (1926) 165 Minn. 433, 436-437, 206 N. W. 711, 712-713; *Hatcher v. Union Trust Co. of Maryland*, (1928) 174 Minn. 241, 246, 219 N. W. 76, 78. But a transaction need not have been one of intended gift in order to bring the one profiting by a unilateral mistake within the rules allowing more extensive relief as against those in the position of donees. See Restatement, Restitution (1937) sec. 49, comment *a* ("as where a person surrenders a lien against property believing that he is the owner thereof, or surrenders a claim believing that it has been satisfied;") in accord, *Benson v. Markoe*, (1887) 37 Minn. 30, 38, 33 N. W. 38, 42; *Gerdine v. Menage*, (1889) 41 Minn. 417, 43 N. W. 931; *Hirleman v. Nichols*, (1934) 193 Minn. 51, 258 N. W. 13.

²⁰⁸Restatement, Restitution (1937) sec. 163. Compare the cases granting reformation to the grantor under similar circumstances, with the same effect as that of a constructive trust. *Christman v. Colbert*, (1885) 33 Minn. 509, 24 N. W. 301; *Crookston v. Marshall* (1894) 57 Minn. 333, 59 N. W. 294; *Goode v. Riley*, (1891) 153 Mass. 585, 28 N. E. 228.

²⁰⁹In this state a deed or contract to convey real estate may be reformed "as well by including in it the description of a subject-matter omitted as by excluding from it a subject already in it." *Olson v. Erickson*, (1890) 42 Minn. 440, 443, 44 N. W. 317, 318, where the court referred to but expressly rejected the view of *Glass v. Hulbert*, (1869) 102 Mass. 24, 3 Am. Rep. 418, that reformation is precluded in such a case by the statute of frauds. Compare Restatement, Contracts (1932) sec. 509.

²¹⁰Restatement, Restitution (1937) sec. 164, comment *a*. Seemingly in accord in principle, see *Leach v. Leach*, (1925) 162 Minn. 159, 202 N. W. 448, noted (1925) 9 MINNESOTA LAW REVIEW 482. Under the rule of the Restatement change of position on the donee's part may entitle him to the

donor effectively makes a conveyance, but to a different person than the one intended, the transferee will be held as constructive trustee for the donor, unless the intended transferee has given value or is a natural object of the bounty of a donor since deceased, in which cases the intended transferee may be held to be the beneficiary of the trust.²¹¹ Thus in *MacDonald v. Kneeland*,²¹² where a debtor without notice of an assignment paid the assignor, it was said that "the latter will be held to have received the same as trustee for the assignee."

Although a transferee who acquires title to property through the fraud, duress, or undue influence of himself²¹³ or a third party,²¹⁴ or through a mistake of the type justifying restitutionary

property, and the doctrine whereby certain parol gifts of land are removed from the statute of frauds seems to rest in this state upon a somewhat analogous principle. See *Trebesch v. Trebesch*, (1915) 130 Minn. 368, 153 N. W. 754; *Atwood v. Frye*, (1937) 199 Minn. 596, 273 N. W. 85. The Restatement and some cases likewise favor the donee where he is a natural object of the donor's bounty and the latter has died believing he has made an effective conveyance. *M'Call v. M'Call*, (1809) 3 Day (Conn.) 402; *Mason v. Moulden*, (1877) 58 Ind. 1; contra in result, *Miller v. Beardslee*, (1913) 175 Mich. 414, 141 N. W. 566. See, also, Comment, (1930) 14 MINNESOTA LAW REVIEW 425, indicating that probably the weight of authority favors the view that since equity will not aid a volunteer it will not aid the intended donee even under such circumstances.

²¹¹Restatement, Restitution (1937) sec. 165; see *Johnson v. Carpenter*, (1862) 7 Minn. 176 (Gil. 120): "If the mortgagor pays the mortgage to the mortgagee after it has been assigned, without notice of the assignment, the lien is extinguished and the land cleared of the encumbrance, and the mortgagee becomes a trustee of the sum paid for the benefit of the owners of the debt;" *Winona & St. Peter R. R. v. St. Paul & Sioux City R. R.*, (1879) 26 Minn. 179, 182, 2 N. W. 489, 491; *Kolars v. Brown*, (1909) 108 Minn. 60, 121 N. W. 229.

²¹²(1861) 5 Minn. 352 (Gil. 283).

²¹³Restatement, Restitution (1937) sec. 166. For cases of fraudulent conduct by the transferee entitling the transferor to equitable relief, see *Kiefer v. Rogers*, (1872) 19 Minn. 32 (Gil. 14); *Hegenmeyer v. Marks*, (1887) 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808; *Gaetke v. The Ebar Co., Inc.*, (1935) 195 Minn. 393, 263 N. W. 448. For illustrative cases of duress and undue influence, see *Ashton v. Thompson*, (1884) 32 Minn. 25, 18 N. W. 918; *Graham v. Burch*, (1890) 44 Minn. 33, 46 N. W. 148; *Claggett v. Claggett*, (1939) 204 Minn. 568, 284 N. W. 363. Compare *Allen v. Allen*, (1939) 204 Minn. 395, 397, 283 N. W. 558, 559, where in an action for specific restitution for breach by the transferee of a contract to care for the transferor, the court in granting relief stated: "Contracts to care for and support another are regarded differently from ordinary commercial agreements. . . . Family discord and disruptions, such as we have here, render performance impractical if not impossible. Equitable powers must of necessity be resorted to in order to remedy the situation resulting from breach. Restoration of the property to the grantor generally has been approved as the proper form of relief."

²¹⁴Restatement, Restitution (1937) sec. 167; in accord, *Graham v. Burch*, (1890) 44 Minn. 33, 36, 41 N. W. 148 (holding that where fraud or undue influence has been established "it should be deemed to avoid the conveyance, not merely to the grantee who procured it by such means, but also in the absence of valuable consideration paid, as to the innocent grantees not chargeable with such fault"); *Claggett v. Claggett*, (1939) 204 Minn. 568, 572, 284 N. W. 363.

relief, is deemed to hold the property upon a constructive trust for the benefit of the transferor, there of course will normally exist in the transferee a power to pass a valid title to a bona fide purchaser for value.²¹⁵ Upon such a further transfer the consideration received by the wrongdoer is substituted as the res upon which the constructive trust is imposed.²¹⁶ In *Penn Anthracite Mining Co., v. Clarkson Securities Co.*,²¹⁷ the Minnesota court properly held, however, that the transferee of the wrongdoer, taking with notice of the wrong, is as much subject to the constructive trust as the wrongdoer himself. So likewise, in *Tapley v. Tapley*,²¹⁸ a wife's deed executed under the duress of her husband was set aside as against a transferee who was not a bona fide purchaser for value.

The constructive trust interest of a third person may result from the commission of a wrong by either the transferor or the transferee in the making or procuring of the transfer. Thus where a debtor conveys property in fraud of his creditors, a transferee not a bona fide purchaser for value holds it subject to their claims.²¹⁹ In *Farwell v. St. Paul Trust Co.*,²²⁰ the creditor

²¹⁵The statement of Mitchell, J., in *Third Nat'l Bank of St. Paul v. Stillwater Gas Co.*, (1886) 36 Minn. 75, 78, 30 N. W. 440, that "It is elementary that a person obtaining property by fraud acquires no title to it, but it is held by him and all persons claiming under him with notice in trust for the original owner," is incorrect if literally construed. For if the fraud is of such a nature that it goes to the execution rather than the inducement of the transaction so that legal title does not pass, the transferee has nothing upon which to impose a constructive trust and nothing to transfer even to a bona fide purchaser for value in the absence of the elements of estoppel operating against the original would-be transferor. Restatement, Restitution (1937) sec. 160, comment *j*, sec. 166, comment *f*; Restatement, Contracts (1932) sec. 475; in accord, *Shell Petroleum Corp. v. Anderson*, (1934) 191 Minn. 275, 253 N. W. 885.

²¹⁶Restatement, Restitution (1937) secs. 166, comment *f*, and 202; *Third Nat'l Bank of St. Paul v. Stillwater Gas Co.*, (1886) 36 Minn. 75, 30 N. W. 440.

²¹⁷(1939) 205 Minn. 517, 287 N. W. 15.

²¹⁸(1865) 10 Minn. 448 (Gil. 360).

²¹⁹Restatement, Restitution (1937) sec. 168 (2), comment *c*. Minnesota has adopted the Uniform Fraudulent Conveyances Act. 2 Mason's 1927 Minn. Stat., secs. 8475-8489; see *Lind v. O. N. Johnson Co.*, (1938) 204 Minn. 30, 282 N. W. 661; *Bridgman, The Uniform Fraudulent Conveyances Act*, (1923) 7 MINNESOTA LAW REVIEW 530; Note, (1939) 23 MINNESOTA LAW REVIEW 616. Certain common law and statutory "badges of fraud" play an important role in the Minnesota law of fraudulent conveyances. See Note, (1940) 24 MINNESOTA LAW REVIEW 832. In *Doland v. Burns Lumber Co.*, (1923) 156 Minn. 238, 240, 194 N. W. 636, 637, it is said that property fraudulently conveyed "may be levied upon and sold the same as if the conveyance had not been made." See, also, Comment, Effect of Renunciation by a Donee as a Fraud Upon His Creditors, (1930) 14 MINNESOTA LAW REVIEW 570.

²²⁰(1891) 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742.

of an individual partner, who with knowledge accepted payment of his claim from partnership funds, was not permitted to retain the amount received. Where it is the transferee who by fraud, duress, or undue influence procures a transfer causing harm to a third person, the latter is entitled to be placed in the position he would have been in but for the wrongful conduct of the transferee.²²¹ Thus, in *Rollins v. Mitchell*,²²² where the plaintiff, a stranger to the title, had secured a conveyance of real estate from the defendant's grantor by leading her to believe that it was in support of her original defective deed to the defendant, the court treated the plaintiff as constructive trustee for the benefit of the defendant and expressly stated that it was unnecessary that the plaintiff have occupied a fiduciary relation toward the defendant or that the latter should have had an antecedent claim to the land that could have been enforced as against the grantor. For as the court said,²²³

"The rights of the third person in such cases depend not upon the fact that he had some legal or equitable claim to the property before the constructive trust was created, but upon the fact that he acquired such right by the trust, as being the party for whose benefit it was intended by the former owner."²²⁴

The mere breach by the transferee, however, of a contract or promise to convey the property to the third person or to hold it in trust for his benefit, is not the type of wrong that will result in the imposition of a constructive trust in his favor,²²⁵ unless the transfer was procured in such manner by a transferee occupying a confidential relation to the transferor,²²⁶ or was made by the

²²¹Restatement, Restitution (1937) sec. 169.

²²²(1892) 52 Minn. 41, 53 N. W. 1020.

²²³*Rollins v. Mitchell*, (1892) 52 Minn. 41, 49, 53 N. W. 1020, 1022.

²²⁴The correct basis of the decision in *Rollins v. Mitchell* was overlooked by the Minnesota court in the later case of *Wunder v. Wunder*, (1932) 187 Minn. 108, 114, 244 N. W. 682, 685, where, in a decision not inconsistent on the facts, *Rollins v. Mitchell* was unnecessarily distinguished on the ground that "Mitchell had once bought and paid for the land in controversy, so the holder of the fraudulently obtained deed was adjudged a trustee of the title for his benefit."

²²⁵*Towlerton v. Davidson*, (1862) 7 Minn. 408 (Gil. 322); *Connelly v. Sheridan*, (1889) 41 Minn. 18, 42 N. W. 595. The same is true of the mere breach of a contract to reconvey the property to or hold it in trust for the transferor. *Tatge v. Tatge*, (1885) 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; *Pillsbury-Washburn Flour-Mills Co. v. Kistler*, (1893) 53 Minn. 123, 54 N. W. 1063.

²²⁶Restatement, Restitution (1937) sec. 183 (b). But the Minnesota court has indicated the view that the grantor rather than the third person will be the beneficiary of the constructive trust in such a situation. See *Harney v. Harney*, (1927) 170 Minn. 479, 480-481, 213 N. W. 38, 39, noted (1927) 12 MINNESOTA LAW REVIEW 88. A transferee occupying a fiduciary or confidential relation with the transferor will likewise be held as

transferor in contemplation of death.²²⁷ The contemplation of death exception includes cases of transfers, procured by such a promise of the transferee, which take effect subsequently by will or intestacy.²²⁸

The so-called "occupying claimants law" in this state provides that one who "under color of title in fee and in good faith, has peaceably taken possession of land for which he has given a valuable consideration, or . . . under the official deed of any person or officer empowered by law or by any court of competent jurisdiction to sell land," shall not be ejected therefrom "until compensation is tendered him . . . for such improvement which he or they have made upon such land previous to actual notice of the claim upon which the action is founded, or, in case of possession under an official deed, previous to actual notice of defects invalidating the same."²²⁹ The Restatement has adopted a similar principle to the effect that where one, through a reasonable mistake, puts improvements upon the land of another,

"The owner is entitled to obtain judgment in an equitable proceeding or in an action of trespass or other action for the mesne profits only on condition that he makes restitution to the extent that the land has been increased in value by such improvements, or for the value of the labor and materials employed in making such improvements, whichever is least."²³⁰

A person who by mistake alone, however, makes improvements upon the land of another, has no affirmative right either to recover a personal judgment or to impose an equitable lien.²³¹ But if he is induced to do so by the fraud, duress, or undue influence of the owner, he "is entitled to recover the value of his services or

constructive trustee for a transferor who was himself the beneficiary of the intended oral trust. Restatement, Restitution (1937) sec. 182 (b); in accord, *Henderson v. Murray*, (1909) 108 Minn. 76, 79, 121 N. W. 214, 216.

²²⁷Restatement, Restitution (1937) sec. 183 (c).

²²⁸Restatement, Restitution (1937) sec. 186; in accord, *Barrett v. Thielen*, (1918) 140 Minn. 266, 270, 167 N. W. 1030, 1032, 168 N. W. 126; *Ives v. Pillsbury*, (1938) 204 Minn. 142, 146, 283 N. W. 140, 142 (citing this section of the Restatement with approval but finding insufficient evidence of an agreement). Although no Minnesota cases in point have been found, it would seem that the same principle is applicable to like transfers through the payment of the proceeds of insurance policies.

²²⁹2 Mason's 1927 Minn. Stat., sec. 9565. Compare the liberal construction put upon the mechanics' lien statute, 2 Mason's 1927 Minn. Stat., sec. 8490, in *Lamoreaux v. Anderson*, (1915) 128 Minn. 261, 267, 150 N. W. 908; and see *Burner v. Northwestern Bible and M. T. School*, (1925) 161 Minn. 480, 485, 201 N. W. 939.

²³⁰Restatement, Restitution (1937) sec. 42 (1); cf. *Mehl v. Norton*, (1937) 201 Minn. 203, 275 N. W. 843.

²³¹Unless the mistake was caused by or known to the other. Restatement, Restitution (1937) sec. 40 (a) (c). Cf. *Stanton v. Morris Const. Co.*, (1924) 159 Minn. 380, 199 N. W. 104.

expenditures . . . and has an equitable lien upon the property for the amount of his claim."²³² A somewhat different approach to the problem was made by the Minnesota court in *Karpik v. Robinson*,²³³ where, in an action for the conversion of a log house, the evidence showed that the plaintiff, by a mistake as to boundary shared and probably caused by the defendant's vendee in possession, had built the house on the defendant's side of the true boundary line between their respective properties. The court, speaking through Stone, J., worked out an implied agreement between the parties that the structure should remain the personal property of the one erecting it, so as to prevent the defendant from being unjustly enriched. The decision is in accord with justice and recognized equitable principles,²³⁴ but to found the plaintiff's right on an implied agreement, between two parties both of whom are acting under a mistaken apprehension as to an essential fact, seems entirely fictitious.²³⁵

C. APPLICATION OF THE FOREGOING PRINCIPLES TO INTERESTS IN LAND.—Where a proper basis for the imposition of a constructive trust or an equitable lien exists, in facts falling within the previously stated principles, it makes no difference that the property upon which the trust or lien is sought to be imposed is an interest in land, or homestead property, or property which otherwise, if beneficially owned by the titleholder, would be exempt from the claims of his creditors.²³⁶ The trust or lien being imposed by operation of law, neither the statute of frauds, the statute of uses and trusts, nor the parol evidence rule have anything to do with the matter. The statute of frauds does not

²³²Restatement, Restitution (1937) sec. 170, comment *b*.

²³³(1927) 171 Minn. 318, 214 N. W. 59.

²³⁴See McClintock, Equity (1936) 216; Comment, (1930) 14 MINNESOTA LAW REVIEW 565. Although the court in *Karpik v. Robinson* did not discuss the measure of damages, its language indicates that recovery was had on the basis of the value of the house treated as having remained personalty. The Minnesota court in granting restitution for improvements made by a purchaser under a land sale contract that the seller has refused to perform apparently has limited the measure of recovery to the enhanced value of the land, or the cost of the improvements, whichever is less. *Lancoure v. Dupre*, (1893) 53 Minn. 301, 307, 55 N. W. 129, 130; *Schultz v. Thompson*, (1923) 156 Minn. 357, 360, 194 N. W. 884, 885; *Lepak v. Lepak*, (1935) 195 Minn. 24, 25, 261 N. W. 484.

²³⁵Mr. Justice Stone has stated in another connection that "Fiction has its useful place elsewhere, but not on the bench." In *re Trust Under Will of Clark*, (1939) 204 Minn. 574, 578, 284 N. W. 876.

²³⁶Restatement, Restitution (1937) sec. 202, comments *h* and *k*; in accord, *Shearer v. Barnes*, (1912) 118 Minn. 179, 197, 136 N. W. 861, 868: "The very claim of a homestead in the property is a breach of the trust which arose out of the manner of its acquisition."

preclude restitution in favor of one performing an oral contract which the other party thereto refuses to perform on his part;²³⁷ and it likewise does not preclude the imposition of a constructive trust upon the subject-matter of the performance rendered under such circumstances, although an interest in land.²³⁸ One who refrains from protecting an interest in land from involuntary sale, in reliance on the prior promise of the purchaser to hold it for or reconvey it to the owner, is entitled to hold the purchaser as constructive trustee if he fails to fulfill his promise.²³⁹ A misunderstanding of the correct basis of this principle led to an incorrect result in the early Minnesota case of *Williams v. Stewart*.²⁴⁰ There the court assumed that a mortgagor's reliance on the foreclosure purchaser's oral promise to reconvey to the mortgagor constituted such a "part performance" as would take the promise out of the statute of frauds, but held that the terms of the oral agreement, as to the time of repayment of the purchase price by the mortgagor, were too indefinite to permit of enforcement of the purchaser's promise. The theory of the rule as stated, however, is not that the contract is being enforced, but rather that because of its very failure a constructive trust is imposed for the benefit of one who has relinquished antecedent rights in the property in reliance on the promise and its anticipated fulfillment.²⁴¹ The sufficiency of the agreement, in connection with which such promise was made, to constitute a contract apart from the effect of the statute of frauds should therefore have been entirely immaterial.

The Minnesota court has also been somewhat influenced in its attitude toward constructive trust interests in land by the express statutory abolition of oral trusts in land, including purchase-money resulting trusts.²⁴² Thus the court in *Connelly v. Sheri-*

²³⁷*Todd v. Bettingen*, (1910) 109 Minn. 493, 124 N. W. 443; *Spinney v. Hill*, (1900) 81 Minn. 316, 84 N. W. 116; *Lally v. Crookston Lumber Co.*, (1902) 85 Minn. 257, 88 N. W. 846; *Oxborough v. St. Martin*, (1926) 169 Minn. 72, 210 N. W. 854; see, also, Comment, (1932) 16 MINNESOTA LAW REVIEW 875.

²³⁸Restatement, Restitution (1937) sec. 180.

²³⁹Restatement, Restitution (1937) sec. 181; in accord, *Janochosky v. Kurr*, (1913) 120 Minn. 471, 139 N. W. 944.

²⁴⁰(1879) 25 Minn. 516.

²⁴¹As to necessity of reliance, see *Jacoby v. Crowe*, (1886) 36 Minn. 93, 30 N. W. 441 (constructive trust held precluded because bona fide purchaser for value had intervened and also because there was no finding "that but for this understanding or agreement Crowe would have redeemed, or that he refrained from redeeming in reliance thereon").

²⁴²Mason's 1927 Minn. Stat., secs. 8086-8088, 8459.

*dan*²⁴³ purported to construe the Minnesota statutes of uses and trusts "as abolishing all trusts in lands paid for by one person, where the conveyance is to another absolutely, whether for the benefit of the person paying the money, or for some other person, excepting in cases where the conveyance is so taken without the knowledge or consent of the person whose money has been so used, or where the alienee, in violation of some trust, has purchased the land so conveyed with moneys belonging to another person; and excepting, also, the trust in favor of creditors."²⁴⁴ Although the exceptions as stated by the court are true instances of constructive trusts, they are by no means all-inclusive of the proper situations for application of the constructive trust doctrine. While the Minnesota court itself has applied the constructive trust device to other situations,²⁴⁵ so that the language quoted above should not be regarded as accurately stating the law of this state, it has not yet recognized, in the case of agencies to buy real estate, that a fiduciary relation, justifying the imposition of a constructive trust upon an interest in land that the agent is to buy for his principal but buys for himself instead, may result from the very transaction authorizing or directing such purchase.²⁴⁶ The language of the court in *Dougan v. Bemis*,²⁴⁷ to the effect that "if the agent in such a case buys with his own money [instead of with the principal's] . . . and the rights of the principal rest upon a verbal agreement, which is denied, . . . the case will fall within the statute of frauds," has now been repudiated in *Whitten v. Wright*,²⁴⁸ where a constructive trust was imposed under circumstances similar except for the fact of a previously and independently existing fiduciary relation. The court distinguished *Dougan v. Bemis*²⁴⁹ on the ground that in that case, "Apart from the oral agreement, no relation of trust and confidence existed between the parties,"²⁵⁰ but unfortunately failed to recognize that the necessary fiduciary relationship may result from the very oral agreement itself.²⁵¹

²⁴³ (1889) 41 Minn. 18, 20, 42 N. W. 595.

²⁴⁴ See, also, *Petzold v. Petzold*, (1893) 53 Minn. 39, 54 N. W. 933.

²⁴⁵ See, for example, *Henderson v. Murray*, (1909) 108 Minn. 76, 121 N. W. 214, note 226 above; *Barrett v. Thielen*, (1918) 140 Minn. 266, 167 N. W. 1030, 168 N. W. 126, note 228 above.

²⁴⁶ Restatement, Restitution (1937) sec. 194 (2).

²⁴⁷ (1905) 95 Minn. 220, 223-224, 103 N. W. 882, 884.

²⁴⁸ (1939) 206 Minn. 423, 429, 289 N. W. 508, 511.

²⁴⁹ (1905) 95 Minn. 220, 103 N. W. 882.

²⁵⁰ (1939) 206 Minn. 423, 429, 289 N. W. 508, 511.

²⁵¹ See Feezer, *Constructive Trusts in Cases of Agency to Buy Real Estate*, (1933) 17 MINNESOTA LAW REVIEW 734.

III. NECESSITY OF TRACING THE ORIGINAL PROPERTY OR ITS PROCEEDS

In the discussion so far it has been seen that where one wrongfully acquires the legal title to property of another, the latter or in some instances a third person may, under specified circumstances, resort to the constructive trust or equitable lien devices for aid in securing such property. But the beneficiary's interest in the original property secured by these devices may be terminated in either of two ways:²⁵² (1) As before mentioned, by its transfer to a bona fide purchaser for value; and (2) By its dissipation in a manner to preclude the application of tracing principles. The latter event alone, however, entirely terminates the constructive trust and equitable lien remedies. In most situations, of course, the beneficiary will retain a cause of action in personam against the wrongdoer;²⁵³ but if the latter is financially irresponsible so that the beneficiary can be made whole, if at all, only by being allowed to come in ahead of the general creditors, or if the wrongdoer has realized a profit on his subsequent disposition of the original property, it is to the beneficiary's interest to proceed against the consideration received from such disposition. It is with the availability of the constructive trust and equitable lien remedies against the product of the original property—through successive changes of ownership or transmutations of form—with which we are now primarily concerned.²⁵⁴ The same as in the case of the original property, when once the trust or lien attaches to a specific product on the tracing principles here developed, it remains so attached until such particular product reaches a bona fide purchaser for value or itself is dissipated in a manner to preclude further tracing.

Although the Minnesota court, in dealing with the problem of following property into its product, has not expressly drawn

²⁵²The right to enforce the interest may of course be terminated in other ways, as by the expiration of the statutory period of limitations or the application of the equitable doctrine of laches. See *Stillwater & St. Paul R. R. Co. v. City of Stillwater*, (1896) 66 Minn. 176, 178, 68 N. W. 836, 837; *Duxbury v. Boice*, (1897) 70 Minn. 113, 119-120, 72 N. W. 838, 839-840.

²⁵³For exceptions see note 11 above.

²⁵⁴*Third Nat'l Bank of St. Paul v. Stillwater Gas Co.*, (1886) 36 Minn. 75, 78, 30 N. W. 440, 441: "So long as the property can be identified in its original or in a substituted form, it belongs to the original owner, if he elects to reclaim it; and, if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner, at his option, at once attaches to the avails, so long as their identity is preserved, no matter how many transmutations of form the property has passed through."

a distinction based on the conscious character of the wrong, or recognized in this connection a distinction between knowledge and notice of the beneficiary's interest,²⁵⁵ it has clearly recognized that the beneficiary's right of election between the constructive trust and equitable lien remedies extends as well to the product in the wrongdoer's hands as to the originally misappropriated property itself.²⁵⁶ Of course the granting of such relief to the beneficiary places him in a better position than that of the general creditors of the constructive trustee or equitable lienee. But his advantageous position is not the result of a preference accorded him by the court. Instead, the beneficiary never was in the same position as the general creditors. For, as previously pointed out,²⁵⁷ the trust or lien arises immediately upon the commission of the wrong, thus leaving an equitable property interest in the beneficiary. And the doctrine whereby such property subsequently disposed of may be followed into its product is based generally "upon the theory that the product or avails of the property have imparted to them the nature of the original property, and belong to the same party."²⁵⁸ It is this specific property interest that enables the beneficiary to come in ahead of the general creditors. Through the constructive trust device he is merely taking legal title to property of which he is already the equitable owner.²⁵⁹ Hence to speak, as many courts have, of according the beneficiary a preference, is clearly a misnomer, unless they refer to a right that is not founded upon an equitable property interest.

Although the courts are in agreement upon the general principles as stated above, they have differed considerably in their determination of the question whether the property disposed of has been sufficiently identified with its purported product to enable the beneficiary to reach the latter. Thus there is today a well recognized "majority doctrine" and an equally as well recognized

²⁵⁵Compare Restatement, Restitution (1937) sec. 202, comment *a*.

²⁵⁶Shearer v. Barnes, (1912) 118 Minn. 179, 189, 136 N. W. 861, 864; Cisewski v. Cisewski, (1915) 129 Minn. 284, 286, 152 N. W. 642, 643.

²⁵⁷See above, at pp. 677-678 of the text.

²⁵⁸Twohy Mercantile Co. v. Melbye, (1899) 78 Minn. 357, 360, 81 N. W. 20, 21; see, also, Third Nat'l Bank of St. Paul v. Stillwater Gas Co., (1886) 36 Minn. 75, 30 N. W. 440.

²⁵⁹Restatement, Restitution (1937) sec. 215, comment *a*; in accord, Twohy Mercantile Co. v. Melbye, (1899) 78 Minn. 357, 360, 81 N. W. 20, 21: "This doctrine has its basis in the right of property, and not in any theory of a preference to the owner of the property over creditors of the tortfeasor;" see, also, Forsythe v. First State Bank of Mentor, (1932) 185 Minn. 255, 241 N. W. 66.

"minority doctrine."²⁶⁰ Most jurisdictions, including Minnesota, profess to place upon the beneficiary the burden of proving the identity between the property disposed of and that sought to be reached in its stead.²⁶¹ However, the nature of the evidence that will satisfy such burden varies among the different courts in accordance with the substantive law principles they have developed for the tracing of misappropriated property. The problem is heightened in complexity where the property sought to be reached is not wholly the product of that originally misappropriated, or is the product of a combination of such property with the wrongdoer's own or with a third person's. The problem most frequently arises with its greatest complications in banking cases where funds held subject to a trust have been commingled with the bank's other funds and thereafter, upon the bank's insolvency, the beneficiary seeks to trace such funds into those passing into the hands of the bank's receiver.

In the early law there was a good deal of difficulty with respect to tracing money that had been commingled with other money, for it was said²⁶² that "money has no earmark" and hence cannot be specifically identified. Although the decision in *Knatchbull v. Hallett*²⁶³ has generally been regarded as having ended the "earmark doctrine" and established in its stead the modern rule whereby it is possible to trace trust moneys into commingled funds, the Minnesota court as late as 1897 had not definitely committed itself on the subject. Instead, in *Bishop v. Mahoney*,²⁶⁴ Cauty, J., summarized the four main lines of decisions relating to the problem, but failed to express a preference for any one for the reason that the facts of the case did not necessitate it. In later cases, however, the Minnesota court has recognized both explicitly and implicitly the principle that the commingling of trust moneys does not of itself preclude the beneficiary from reclaiming a proportionate

²⁶⁰See Note, (1929) 13 MINNESOTA LAW REVIEW 39, 40-41: "The majority view is that the trust fund, to be allowed as a preferred claim although commingled with other funds of the trustee, must be traced into a specific fund in the hands of the receiver, to the augmentation of the trustee's estate." (1932) 30 Mich. L. Rev. 441, 442.

²⁶¹See *Blythe v. Kujawa*, (1928) 175 Minn. 88, 92, 220 N. W. 168; *Bishop v. Mahoney*, (1897) 70 Minn. 238, 242, 73 N. W. 6; *Blumenfeld v. Union Nat'l Bank*, (C.C.A. 10th Cir. 1930) 38 F. (2d) 455, 457; *Rugger v. Hammond*, (1917) 95 Wash. 85, 96, 163 Pac. 408.

²⁶²For discussion, see 3 Scott, *Trusts* (1939) sec. 515; (1937) 35 Mich. L. Rev. 1203; *Bishop v. Mahoney*, (1897) 70 Minn. 238, 240, 73 N. W. 6.

²⁶³(1879) 13 Ch. Div. 696.

²⁶⁴(1897) 70 Minn. 238, 73 N. W. 6.

amount from the commingled fund.²⁶⁵ It has also gone a long way further than the doctrine as stated necessitates, since first recognizing that "some cases go so far as to hold that the trust character still adheres to money even though it cannot be traced into any specific property,"²⁶⁶ and then for the time being refusing to accept or reject the view of such cases.

In *In re Seven Corners Bank*,²⁶⁷ the defendant bank, when insolvent and known by its officers to be so, had accepted a check for collection and sent it to the clearing house where it was used in balancing the bank's own account. Afterwards, on the same day, the bank made an assignment for the benefit of creditors, none of the proceeds of the check coming to the hands of the assignee. The decision of the court denying a preference to the claimant because none of the proceeds of the check had come to the hands of the assignee is entirely sound and in accord with logical concepts underlying the doctrine of tracing funds.²⁶⁸ In *Bishop v. Mahoney*,²⁶⁹ while failing to take a definite position among the divergent lines of authority summarized in the opinion, the court did suggest, as the outermost limits of permissible tracing, the proposition of some cases that "If the trust funds went to augment the estate of the trustee (and not to pay his other debts) the cestui que trust has a lien on the general assets of the estate."²⁷⁰ A few years later the court concluded that such a proposition "now has little or no support in any well considered cases, and would not be followed or adopted by this court."²⁷¹ Subsequent cases, however, have brought about that very result that "would

²⁶⁵See *Blythe v. Kujawa*, (1928) 175 Minn. 88, 220 N. W. 168; *Eastman v. Farmers' State Bank of Olivia*, (1928) 175 Minn. 336, 221 N. W. 236; *Forsythe v. First State Bank of Mentor*, (1932) 185 Minn. 255, 241 N. W. 66; Restatement, Restitution (1937) sec. 215, comment c.

²⁶⁶*Third Nat'l Bank of St. Paul v. Stillwater Gas Co.*, (1886) 36 Minn. 75, 78, 30 N. W. 440, 441. See Note, (1929) 13 MINNESOTA LAW REVIEW 39.

²⁶⁷(1894) 58 Minn. 5, 59 N. W. 633.

²⁶⁸In accord, see Restatement, Restitution (1937) sec. 215.

²⁶⁹(1897) 70 Minn. 238, 73 N. W. 6.

²⁷⁰*Bishop v. Mahoney*, (1897) 70 Minn. 238, 241, 73 N. W. 6. The court distinguished these cases referred to from *In re Seven Corners Bank*, (1894) 58 Minn. 5, 59 N. W. 633, on the ground that there "it affirmatively appeared that the fund sought to be pursued had been paid out by the insolvent on other debts." Thus in 1897 the doctrine of the Seven Corners Bank Case was still considered to be law in Minnesota. Similarly in *City of St. Paul v. Seymour*, (1898) 71 Minn. 303, 74 N. W. 336, the claimant was denied a preference for the reason that the trust funds never went directly to augment assets of the insolvent trustee, but instead were used in payment of other debts.

²⁷¹*Twohy Mercantile Co. v. Melbye*, (1899) 78 Minn. 357, 360, 81 N. W. 20, 21.

not be followed or adopted by this court." The first departure was taken in *Stein v. Kemp*,²⁷² where one who had made what the court termed a special deposit²⁷³ was allowed a preference on the basis of facts merely showing that his money came into the possession of the bank, without any evidence that it had reached the hands of the bank's receiver. The court applied a presumption, recognized in *Third National Bank of St. Paul v. Stillwater Gas Co.*,²⁷⁴ that money traced into the hands of the bank is still there and the burden of showing otherwise is on the defendant. The effect of such a presumption is of course in many cases to allow the claimant to recover money without ever tracing it to the hands of the receiver or assignee of the insolvent depository. But the final evolution of the fundamental aspects of the present Minnesota law occurred in *Blythe v. Kujawa*,²⁷⁵ where a bank had accepted a check for \$4,500 as a "special deposit." The check was collected in the form of a credit to its account with a correspondent bank and such credit was subsequently dissipated by payment of the bank's obligations. The bank had on hand at the time of its insolvency, and turned over to its receiver, cash in a sum exceeding the amount of the check, but not including the proceeds thereof.²⁷⁶ After holding that the plaintiff's burden of proof went no further than to require him to show that the proceeds of the check actually came into the hands of the bank, the court further stated:²⁷⁷

²⁷²(1916) 132 Minn. 44, 155 N. W. 1052.

²⁷³The Minnesota court has been most "liberal" in finding deposits to have been special. See *Blummer v. Scandinavian American State Bank of Badger*, (1926) 169 Minn. 89, 91, 210 N. W. 865, 866: "The money having been received for the particular purpose the relation of debtor and creditor did not exist but rather that of trustee and cestui que trust. The bank had no title to the money." The juxtaposition of the two sentences quoted speaks for itself. See, also, *City of Canby v. Bank of Canby*, (1934) 192 Minn. 571, 257 N. W. 520; Note, *Distinction Between Special Deposits and Deposits for a Specific Purpose*, (1922) 6 MINNESOTA LAW REVIEW 306; Comment, (1926) 10 MINNESOTA LAW REVIEW 178.

²⁷⁴(1886) 36 Minn. 75, 30 N. W. 440.

²⁷⁵(1928) 175 Minn. 88, 220 N. W. 168.

²⁷⁶The bank had at all times had cash on hand in an amount exceeding the amount of the check in question.

²⁷⁷*Blythe v. Kujawa*, (1928) 175 Minn. 88, 92, 220 N. W. 168, 169. The court attempted to distinguish the decision in *In re Seven Corners Bank*, (1894) 58 Minn. 5, 59 N. W. 633, on two grounds: first, that the earlier case had involved a constructive trust rather than an express trust as in *Blythe v. Kujawa*; and second, that the opinion therein did "not show that the bank accepted the check and gave credit therefor, and the bank received no credit in any other bank therefor." In answer to the first ground of distinction, the claimant's right to acquire the property rested in both cases upon equitable ownership, which exists in the case of a constructive trust just as much as in the case of an express trust. Such

"The old rule that one seeking to recover trust funds or property from the receiver of an insolvent bank or person must trace the identical fund or property into the hands of the receiver has largely been departed from. . . . The present rule . . . is that the identical fund or proceeds need not be traced, it being sufficient to show that the assets in the hands of the receiver were necessarily increased by the commingling of the proceeds with the general funds of the bank."

The Minnesota court apparently failed to see a distinction between gross and net assets. As the supreme court of Rhode Island has aptly remarked, "How the satisfaction of a debt by incurring another of equal amount either decreases one's liabilities or increases his assets can only be comprehended by the philosophic mind of a Micawber."²⁷⁸ But on the reasoning of *Blythe v. Kujawa* the so-called "intermediate balance rule"²⁷⁹ would have no application, and the trust or lien can be impressed as readily upon any other assets as upon a cash balance. This is exactly the result of the subsequent case of *Eastman v. Farmers State Bank of Olivia*,²⁸⁰ where the augmentation of assets argument was reaffirmed. The effect of these cases is that really all the claimant need show is that his funds came into the hands of the bank, and that there are assets in the hands of the receiver sufficient to pay

a distinction is therefore without merit. With respect to the second ground of distinction, the opinion in the earlier case did expressly show that the check was used to balance off the bank's account with the clearing house. The second ground of distinction is therefore likewise without merit. See *Bauk v. First State Bank of New York Mills*, (1929) 178 Minn. 64, 67, 225 N. W. 916, 917, where it is admitted that the rule of the *Seven Corners Bank* case has been modified by these later decisions.

²⁷⁸*Slater v. Oriental Mills*, (1893) 18 R. I. 352, 355, 27 Atl. 443, 444. See also Note, (1928) 13 MINNESOTA LAW REVIEW 39, 44-45, pointing out, in reply to the argument that paying a debt or current expenses increases the assets pro tanto, that "the assets are not increased pro tanto, but are only increased by the amount which that paid creditor would have received upon distribution of the bank's assets."

²⁷⁹Restatement, Restitution (1937) sec. 212. The Minnesota court on one occasion has used language recognizing such "lowest intermediate balance" rule. *Village of Monticello v. Citizens State Bank of Monticello*, (1930) 180 Minn. 418, 419-422, 230 N. W. 889-890. But the court did not purport thereby to overrule the decision in *Eastman v. Farmers State Bank of Olivia*, (1928) 175 Minn. 336, 221 N. W. 236, which is entirely inconsistent with the "lowest intermediate balance" rule.

²⁸⁰(1928) 175 Minn. 336, 221 N. W. 236, adversely noted (1929) 27 Mich. L. Rev. 945. See, also, *Forsythe v. First State Bank of Mentor*, (1932) 185 Minn. 255, 257, 241 N. W. 66, 67: "The right of the owner to follow the money into the hands of the bank receiving it formerly depended on his ability to identify it; but the modern rule is that the confusion does not destroy the equity entirely, but converts it into a charge on the general mass, giving to the party injured by the unlawful diversion a priority over the general creditors of the bank;" *Henton v. Renville State Bank*, (1935) 194 Minn. 524, 261 N. W. 8.

his claim or a part thereof. Thereupon the defendant has the burden of proof, which it is difficult to see how he can carry except by showing that the claimant's specific moneys have been given away or otherwise used for a purpose from which no reduction of other liabilities or increase in gross assets has been derived.²⁸¹ In other words the Minnesota court has enunciated a doctrine of tracing that, practically speaking, defies dissipation except by total annihilation of the constructive trustee's assets or their prior appropriation to the claim of others. Such a concept of tracing does not in fact require tracing at all, but is a doctrine whereby the court itself creates a preference at the expense of other creditors of the insolvent.²⁸² For the very foundation of the doctrine of tracing—equitable ownership of specific assets—is today presumed by the Minnesota court.

In still other cases the Minnesota court has ignored the fact that there never has been at any time a specific res capable of being the subject-matter of a trust or lien of any sort. In *Winkler v. Veigel*²⁸³ it was alleged that the plaintiff, having a checking account in the defunct bank, had drawn a check upon that account payable to the bank, requesting that it pay, as his agent, certain real estate taxes. The bank accepted the check, charged the drawer's account, agreed to make payment to the tax collector, and then closed before doing so. In allowing the plaintiff's claim to a preference the court stated:²⁸⁴

"The initial question presented is whether the giving of the check by plaintiffs upon their deposit account in the bank, and the bank's charging the amount of the check against the account amounts to the same thing as the payment of that much cash to the bank. . . . We think it does. A well reasoned opinion so holding and affirming the next proposition, that a reduction of the deposit

²⁸¹In *Stein v. Kemp*, (1916) 132 Minn. 44, 47, 155 N. W. 1052, 1053, the court stated that "It will not be presumed that the bank or its officers committed a wrong or fraud by converting this fund to their own use or to the use of any of them," apparently under the impression that for a special deposit to have been dissipated it must have been used for the personal benefit of the officers.

²⁸²In a number of Minnesota cases a preference has been allowed without discussing or even suggesting a necessity for tracing. See *Eifel v. Veigel*, (1926) 169 Minn. 281, 211 N. W. 332; *Adams v. Farmers State Bank of Olivia*, (1928) 176 Minn. 108, 222 N. W. 576; *Emerson v. Citizens State Bank of Mahanomen*, (1929) 176 Minn. 584, 224 N. W. 239; *County of Traverse v. Veigel*, (1929) 176 Minn. 594, 224 N. W. 159; *Hurley v. Markville State Bank*, (1931) 185 Minn. 56, 239 N. W. 769; *Benson v. Albert Lea State Bank*, (1932) 185 Minn. 541, 241 N. W. 794, noted (1932) 16 MINNESOTA LAW REVIEW 848.

²⁸³(1929) 176 Minn. 384, 223 N. W. 622.

²⁸⁴*Winkler v. Veigel*, (1929) 176 Minn. 384, 386, 223 N. W. 622-623.

account of the maker of the check augments the assets of the bank is *Northwest Lbr. Co. v. Scandinavian Am. Bank*. . . .²⁸⁵

On the assumption that the above transaction was the same as a cash deposit or a withdrawal and redeposit, the still illogical conclusion that the bank's assets were thereby augmented followed from the previously decided Minnesota cases. But to reason from the fact that, as against a solvent bank, such a transaction merely omits the useless act of a prior withdrawal followed by a redeposit for a special purpose, ignores the total absence from the beginning of a trust res that becomes crucial only in the event of the bank's insolvency. It ignores also the fact that a mere breach of contract, even of one to create a trust, does not create the trust. In the above transaction the bank in fact had sent a check to the county treasurer for the purpose of paying plaintiff's taxes before its doors were closed, and as a result of the entire transaction the bank had simply exchanged its creditors, its assets and liabilities remaining exactly the same as before. There was obviously at no time any segregation of specific funds capable of becoming a trust res. The Minnesota decision ignores both banking practice and the fundamental basis of the trust concept. On the premise that a res must have existed at some time before there is any occasion for the application of tracing principles, it must follow that the plaintiff in the above case was not entitled to a preference over the general creditors of the bank.

The same problem has arisen under somewhat different circumstances with a like result. In *Bauck v. First State Bank of New York Mills*,²⁸⁶ the defendant bank received from the plaintiff for collection a check for \$1,800 drawn on the X Bank. It presented that check along with others drawn on the X Bank which in turn presented all the checks it held that were drawn on the defendant. By a process of balancing it was found that the X Bank was indebted to the defendant in the sum of approximately \$600, which it promptly paid. Subsequently the defendant received another check for collection in the amount of \$600 drawn on X Bank and payable to the plaintiff. This time, after a similar process of balancing, the balance was found to be in favor of the X Bank in the sum of approximately \$700,²⁸⁷ and the defendant

²⁸⁵(1924) 130 Wash. 33, 225 Pac. 825, 39 A. L. R. 922.

²⁸⁶(1929) 178 Minn. 64, 225 N. W. 916.

²⁸⁷This phase of the transaction is essentially the same as that involved in *In re Seven Corners Bank*, (1894) 58 Minn. 5, 59 N. W. 633, where the court had denied the claim of a preference on the ground that "it stands on the same footing as any other claim."

paid that amount to the X Bank. But before the plaintiff received payment, the defendant bank was closed. The court allowed the plaintiff a preference to the full amount of both checks on the same reasoning previously developed in *Winkler v. Veigel*. Again the same criticism suggests itself. To the extent that the defendant bank had received payment of its first credit balance with the X Bank, the plaintiff was properly entitled to such amount as the proceeds of a check presented for collection.²⁸⁸ But as to the remainder, there was nothing more than a process of debiting and crediting, and in such a process the necessary initial res cannot be found. Except for the payment of the credit balance actually received, there was not even an augmentation of the defendant bank's assets.

On the basis of these and other cases²⁸⁹ it must be recognized that the logical structure underlying the common law doctrines of tracing trust assets has been substantially ignored by the Minnesota court in the cases involving claims of preferences against insolvent banks, and the judicial creation of arbitrary preferences substituted. Mr. Justice Stone has seen that it is time to call a halt, dissenting in *City of Canby v. Bank of Canby*,²⁹⁰

"I have been forced to the opinion that we have gone altogether too far in ignoring the fundamental fact that a 'debt is not a trust,'"

and again in *Schendel v. Peyton*,²⁹¹

²⁸⁸The Bank Collection Code provides in effect that "where an agent collecting bank other than the drawee or payor fails after it has received the proceeds of collection and before it has remitted them or so credited them that it has become a debtor, its assets shall be impressed with a trust in favor of the owner of the items sent to it for collection, and that the owner shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such items can be traced and identified as part of such assets." See Restatement, Restitution (1937) sec. 215, comment *j*. While Minnesota has not adopted the Bank Collection Code, it apparently is in judicial accord therewith. *Eifel v. Veigel*, (1926) 169 Minn. 281, 211 N. W. 332; and see Comment, (1930) 14 MINNESOTA LAW REVIEW 407.

²⁸⁹See, also, for example, *First Nat'l Bank of Milaca v. Benson*, (1934) 192 Minn. 90, 255 N. W. 482 (contra to Restatement, Restitution (1937) sec. 215, comment *h*); *Schendel v. Peyton*, (1935) 194 Minn. 162, 259 N. W. 692 (apparently contra to Restatement, Restitution (1937) sec 215, comment *f*); Comment, (1939) 23 MINNESOTA LAW REVIEW 217. Curiously the court held correctly, in *County of Lincoln v. Farmers State Bank of Arco*, (1931) 182 Minn. 291, 234 N. W. 449, that a trust is not created by a bank's acceptance of its customer's check and issuance of its own cashier's check for the specific purpose of transferring the customer's deposit to another bank, although admitting that, just as much as in *Winkler v. Veigel*, (1929) 176 Minn. 384, 223 N. W. 622, the bank's assets "were augmented because the check did not complete its clearance journey" prior to the bank's failure.

²⁹⁰(1934) 192 Minn. 571, 581, 257 N. W. 520, 525.

²⁹¹(1935) 194 Minn. 162, 166, 259 N. W. 692, 694.

"I protest against what seems to me to be an artificial preference. We have too many already. The loss to depositors is large enough now without this new category of preferences."

In line with the last preceding sentence of Mr. Justice Stone's, the following pertinent comments by Professor Scott cannot be recommended too highly to the Minnesota court:²⁹²

"Most of the writers of monographs on the subject of priorities and many of the judges appear to think that there is something essentially commendable in giving one claimant priority over others. This is a peculiar psychological phenomenon. It is doubtless due to a comfortable feeling of generosity to the victim, and it has the peculiar advantage that the generosity is wholly vicarious. It is not the writer of the monograph or the judge who pays the bill, but the general creditors of the wrongdoer. The writer or judge constantly refers to his view as 'liberal.' It is liberal in that it is a wider rule than the rule which requires some form of tracing. It is liberal in that the money to which the general creditors would otherwise be entitled is given to the claimant. It is liberal in the same sense in which the broader a rule is as to imposing a liability upon defendants, the more liberal the rule. A rule which imposes liability without fault is more liberal than one which imposes liability only if there is fault; but it may or may not be a more just rule. Juries often have the same feeling, when they hold a defendant liable regardless of the evidence and fix the damages at a large figure. The point which I am making is that to be liberal is not always to be just, particularly where someone other than the liberal-minded person foots the bill. . . . I believe that the general principle that equality is equity is a sound one. If one claimant in the distribution of an estate of an insolvent seeks to be paid ahead of the other claimants, it is for him to show a good reason. When a rascal is insolvent all his victims including his general creditors should share their losses ratably unless there is a pretty strong reason why one should come ahead of the others. Justice between the insolvent and his creditors would require that all the creditors should be paid in full. This, however, is impossible as long as blood cannot be obtained from a turnip. It is impossible to give every claimant priority over every other claimant. Unless a particular claimant can show that the wrongdoer still has his property, in one form or another, he should share ratably with the other creditors."

It has been pointed out that where "there is more than one valid claim to a preference and the total of these claims results in there being a lien on the property subject to these claims for a sum greater than its value, the general rule is to prorate these claims; but there is at least one case holding that if any of the preferred depositors can show that his identical coins are there, he

²⁹²3 Scott, *Trusts* (1939) 2499-2500.

should be paid in full and the rest paid pro rata from the residue.²⁹³ This is the rule of the Restatement,²⁹⁴ and the one supported by Professor Scott.²⁹⁵ Some cases have applied the rule in *Clayton's Case* that the first money in is the first out and thus have paid the claimants in the inverse order of their deposits.²⁹⁶ But such a rule is founded on a purely fictional intent that has no proper application to the present situation.²⁹⁷ Although there are no Minnesota cases directly in point, it is deemed likely from past utterances of the Minnesota court that it will follow the Restatement and majority rule in this respect when the occasion arises. It should be noted, however, that the court has awarded preferences to the particular claimants before the court without inquiry into whether there may be other claimants similarly situated. Where the insolvent's assets do not even equal the total amount of the preferred claims, such a procedure results in a race in diligence among the claimants. Here again the Minnesota court would do well to heed the words of caution of Professor Scott that

"Where a claimant seeks a preference and it is not certain whether there are other claimants in the same situation, the court should withhold payment by the receiver until it can be ascertained whether the total amount of such claims exceeds the amount of such assets with respect to which the preferences are awarded."²⁹⁸

²⁹³Note, (1929) 13 MINNESOTA LAW REVIEW 39, 45. The case referred to is *Boyle v. Northwestern Nat'l Bank of Superior*, (1905) 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N.S.) 1110, 110 Am. St. Rep. 844. See, also, Comment (1937) 35 Mich. L. Rev. 1203.

²⁹⁴Restatement, Restitution (1937) secs. 213, 215, comment *d*.

²⁹⁵3 Scott, Trusts (1939) sec. 519.

²⁹⁶See *Boyle v. Northwestern Nat'l Bank of Superior*, (1905) 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N.S.) 1110, 110 Am. St. Rep. 844; *Hewitt v. Hayes*, (1910) 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; cf. *In re Walter J. Schmidt Co.*, (D. N.Y. 1923) 298 Fed. 314, 316.

²⁹⁷Restatement, Restitution (1937) sec. 213, comment *c*; 3 Scott, Trusts (1939) sec. 519; Note, (1929) 13 MINNESOTA LAW REVIEW 39, 45.

²⁹⁸3 Scott, Trusts (1939) 2583.