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## UNJUST ENRICHMENT AS THE PRIMARY BASIS FOR RAISING A CONSTRUCTIVE TRUST

In *Pope v. Garrett*<sup>1</sup> two of the several heirs of one Carrie Green, the deceased owner of certain realty, had forcibly prevented the execution of her will. As a result the realty went to the eight heirs at law instead of to the sole devisee. The court imposed a constructive trust in favor of the sole devisee on the heirs who participated in the illegal and fraudulent acts. However, the court refused to hold the non-participating heirs as constructive trustees for the reason that they had not been guilty of such misconduct, fraud, or illegal acts as to warrant the raising of a constructive trust.

The court's view, that one who acquired title to land through his own fraud will be declared a constructive trustee of the property so acquired, is well supported. It is probably true that the decision as to the non-participating heirs is the general rule, but due to the paucity of cases with similar fact situations, this problem is not necessarily well settled. *Dye v. Parker*<sup>2</sup> is one of the few cases which presents a relation of facts to law comparable to that of the principal case. Here the draftsman who had been directed by the testator to insert a legacy for the plaintiff fraudulently left it out. The court refused to make the heir, wife of the draftsman, in whom the property vested, a constructive trustee on the basis of the fact that she was ignorant of the fraud.

Although not discussed by the court in this case, it seems that it would be possible, as an alternative remedy, for the devisee to bring an action in tort against the draftsman for destroying his expectancy. The devisee in the principal case might have recovered in tort against the participating heirs damages based on the value of property that would have passed by will except for the wrongful act.<sup>4</sup> However, the relief in such a case might still be financially inadequate so this is substantial reason to consider whether a court in its equitable powers could impose a constructive trust.

Although it appears to be the general rule that in order to raise a constructive trust there must exist fraud or some illegal act on the part of the person who receives the benefit, this is not necessarily the better view. It is the purpose of this note to suggest as a better view that unjust enrichment alone is enough to impress a constructive trust on the person accidentally benefited as a result of the

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<sup>1</sup>—Texas—, 204 S.W. 2d 867 (1947).

<sup>2</sup> *Wrla v. Wrla*, 342 Ill. 31, 173 N.E. 768 (1930), *Tate v. Emery*, 139 Ore. 214, 9 P. 2d 136 (1932)

<sup>3</sup> 108 Kan. 304, 194 Pac. 640, *rehearing denied*, 195 Pac. 599 (1921).

<sup>4</sup> *Pope v. Garrett*, —Texas—, 204 S.W. 2d 867, 871 (1947).

fraud of a third person. It seems only just that property should vest as the testator intended, in preference to vesting in one who received it by chance and who in reality has no right to it where the proposed settlor has done all he fairly could do to carry out his purpose. This theory has received the support of some of the foremost authorities. For instance, Scott says in a discussion of the problem:

"Thus if A is induced by the fraud of B to make a legacy to C, C should not be permitted to keep the legacy although he was not a party to the fraud. The same is true where by the wrongful act of a third person a testator is induced to revoke his will or is prevented from revoking his will or is prevented from making a will."<sup>3</sup>

It seems the fact situation of *Pope v. Garrett* should fall under the last one of these general categories although in that case the testator was merely prevented from executing her will and not from making it. The intention of the testator is, of course, plainer when the will itself is in existence.

Another well-known authority in discussing the companion case of *Dye v. Parker* says, "there seems to be no adequate reason why a trust should not be raised to prevent the heir or legatee from being unjustly enriched."<sup>4</sup> It is true the principal case makes the statement, not only that there must be fraud or an illegal act, but that there is no unjust enrichment under these facts. The reasoning is this: "The fact that the wrongful act caused the non-participating appellants to become vested with undivided interest in the land resulted from the laws of descent and distribution. And what the law gives a party can never be called unjust enrichment."<sup>5</sup> This apparently plausible statement does not seem to reach a desirable result. It is certainly possible to arrive at the opposite conclusion. Unjust enrichment has been defined as "Acquisition of property under such circumstances that one is legally or equitably bound to make a return of it."<sup>6</sup> It is not conclusive that when the law incidentally gives a benefit to a party that he is also equitably entitled to keep it. In direct conflict with the case it has been stated:

"There is no doubt that a person who acquires property through his own wrong, or even through the wrong of a third person, is unjustly enriched if he is permitted to keep the property. If there is never any question as to the facts, there is no doubt that a constructive trust should be imposed."<sup>7</sup>

<sup>3</sup> 3 SCOTT, TRUSTS (1939) sec. 489.5.

<sup>4</sup> Evans, *Torts to Expectancies in Decedents' Estates* (1944) 93 U. OF PA. L. REV. 187, 192.

<sup>5</sup> *Pope v. Garrett*, —Texas—, 204 S.W. 2d 867, 871 (1947).

<sup>6</sup> WEBSTER, NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1944) 2783.

<sup>7</sup> 3 SCOTT, TRUSTS (1939) sec. 489.6.

It has often been held that no one can claim an interest resulting from a fraud committed by another person.<sup>10</sup>

Because cases with similar fact situations are so rare, analogies are presented in order to give strength to the view that unjust enrichment alone should be enough to allow the non-participating heirs in the principal case to be declared trustees. Scott suggests this example:

"Where property is devised to two persons as tenants in common and one of them promises to hold the property in trust for a third person, a constructive trust is enforceable only against the person making the promise; yet where a person by actual fraud procures a devise to others, neither he nor the others will be permitted to retain the property."<sup>11</sup>

It is important to note the similarity here to the facts in *Pope v. Garrett*. In each case we have property benefiting an innocent person as a result of the fraud of a third person—yet, in the example a constructive trust is imposed on the innocent person.

There is another analogy which supports the theory proposed, in which the owner of property is induced by the fraud of a third person to transfer property to the grantee. The transfer can be set aside as long as the holder is not a bona fide purchaser.<sup>12</sup> It is thought that the situation is similar to one where the person who obtained the property through fraud had made a gift to another. If so the gratuitous transfer would not prevent raising a constructive trust upon property when it was in the hands of one who would lose nothing to which he would otherwise have been entitled.<sup>13</sup> Here again, the innocent grantee's situation parallels that of the innocent devisee, since each receives a benefit as the result of the fraud of a third person.

In a third example, although fraud does not exist there is unjust enrichment and an innocent grantee. For instance: When the owner of property transfers a greater interest in property than he intended, even though the transferee sells the property, the grantor is held to be entitled to the proceeds of the sale.<sup>14</sup> Where the owner of property intending to transfer it to one person, by mistake of fact<sup>15</sup> or law<sup>16</sup> transfers it to another, there is no doubt that the grantee cannot keep the property if he is not in the position of a

<sup>10</sup> *O'Connor v. O'Connor*, 291 Pa. 175, 139 Atl. 734 (1927), *Stirk's Estate*, 232 Pa. 98, 110, 81 Atl. 187, 192 (1911)

<sup>11</sup> 3 SCOTT, TRUSTS (1939) sec. 489.5.

<sup>12</sup> See *Ruhe v Ruhe*, 113 Md. 595, 77 Atl. 797, 800 (1910) 3 SCOTT, TRUSTS (1939) sec. 469.

<sup>13</sup> 3 SCOTT, TRUSTS (1939) sec. 469.

<sup>14</sup> *Andrews v. Andrews*, 12 Ind. 348 (1859)

<sup>15</sup> *In re Berry*, 147 Fed. 208 (C.C.A. 2d, 1906).

<sup>16</sup> *Knight Newspapers v. Commissioner of Internal Revenue*, 143 Fed. 2d, 1007, 1011 (C.C.A. 6th, 1944).

bona fide purchaser.<sup>17</sup> "The grantee having acquired the property by a mistake holds it upon a constructive trust."<sup>18</sup>

Although the court in the principal case requires actual fraud on the part of a constructive trustee—some courts require for the creation of a constructive trust either actual or only what they term constructive fraud.<sup>19</sup> The term constructive fraud is deceptive. It has been stated that "constructive fraud has been evolved to designate, what is, in its essence, nothing more than the receipt and retention of unmerited benefits."<sup>20</sup> This definition of constructive fraud seems actually to define unjust enrichment. The theory submitted that unjust enrichment is enough to raise a constructive trust does not seem too radical in view of the fact that the term constructive fraud, which has been used to declare constructive trusts, is a mere fiction which is sometimes based on the receipt and retention of unmerited benefits or in other words unjust enrichment.<sup>21</sup> It appears that the courts by using the fiction of constructive fraud have tried to disguise the fact that they have in reality created constructive trusts based on unjust enrichment. It would seem far more logical where the fact situations create unjust enrichment to use that term instead of the ambiguous one of constructive fraud. In conclusion it seems that in the case of *Pope v. Garrett* not only a better but a far more feasible result would have been reached if the "receipt and retention" of the property by the non-participating heirs had been held to be such an "unjust enrichment" as to require the raising of a constructive trust.

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<sup>17</sup> 3 SCOTT, TRUSTS (1939) sec. 467.

<sup>18</sup> See 2 BOCERT, TRUSTS AND TRUSTEES (1935) sec. 474.

<sup>19</sup> *Kester v. Amon*, 81 Mont. 1, 261 Pac. 288 (1927). See *Markworth v. State Sav. Bank of Woden*, 212 Iowa 754, 237 N.W. 471, 474 (1931).

<sup>20</sup> See *Hernig v. Harris*, 117 N.J. Eq. 146, 175 Atl. 169, 172 (1934) (citing 2 LAWRENCE, EQUITY JURISPRUDENCE 724).

<sup>21</sup> In cases where the testator intending to devise land to A is induced by B to devise it to B on the promise (express or implied) of B that A should either use it jointly with B or that B would devise it to A on B's death, courts have impressed a constructive trust on B in favor of A on the basis of constructive fraud. The term constructive fraud in this situation, in reality consists only of the unjust enrichment of B. The promise of B is not conclusively fraudulent since he may have meant to carry it out at the time of the testator's death and for some reason later have changed his plan. *Rudd v. Gates*, 191 Ky. 456, 230 S.W. 906 (1921), *Taylor v. Fox's Ex'rs*, 162 Ky. 804, 173 S.W. 154 (1915), *Chapman's Ex'r v. Chapman*, 152 Ky. 344, 153 S.W. 434 (1913).