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# CONSTRUCTIVE TRUSTS: A NEW BASIS FOR TRACING EQUITIES

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In drafting the *Restatement of Restitution*, the reporters set forth the most basic and inclusive principle in Section one: “[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.”<sup>1</sup> A recent decision handed down unanimously by the New York Court of Appeals resolved an issue going to the heart of this principle.<sup>2</sup>

In 1960, Frederick Simonds and his wife of fourteen years, Mary, entered into a separation agreement which was later incorporated in a divorce decree.<sup>3</sup> As part of the agreement, Frederick promised to keep his life insurance policies in force and to keep Mary as beneficiary of no less than \$7,000 thereof. Additionally, if the insurance should lapse or be cancelled, Frederick would procure new insurance to honor his obligation to Mary.<sup>4</sup> Several months later Frederick married Reva and a daughter, Gayle, was born of this marriage. In 1962, Frederick took out two life insurance policies: one, which ultimately paid \$16,138.83, named Reva as beneficiary; the second, which finally paid \$5,566.00, named Gayle as beneficiary. In addition, Frederick changed jobs in 1967 and acquired a \$34,000.00 group life policy, naming Reva as beneficiary.<sup>5</sup>

When Frederick died insolvent in 1971, Reva and Gayle collected insurance proceeds of \$50,138.83 and \$5,566.00 respectively. Mary collected nothing, however, because the policies covered by the separation agreement were not in existence at the time of Frederick's death.<sup>6</sup> On these facts, the Court of Appeals in *Simonds v. Simonds* affirmed a summary judgment granting Mary a \$7,000 constructive trust on the proceeds of the 1962 policy collected by Reva.<sup>7</sup> Since there was no evidence that Reva induced Frederick to breach his contract with Mary so as to incur liability in tort for

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<sup>1</sup> RESTATEMENT OF RESTITUTION § 1 (1936).

<sup>2</sup> *Simonds v. Simonds*, 45 N.Y.2d 233, 380 N.E.2d 189, 408 N.Y.S.2d 359 (1978).

<sup>3</sup> *Id.* at 237, 380 N.E.2d at 191, 408 N.Y.S.2d at 361.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 238, 380 N.E.2d at 192, 408 N.Y.S.2d at 361.

<sup>6</sup> The Court noted that “it does not appear from the record why, how or when” the policies were permitted to lapse. *Id.*

<sup>7</sup> *Id.* at 241, 380 N.E.2d at 193, 408 N.Y.S.2d at 383.

Mary's loss, the sole issue was whether Reva was unjustly enriched at the expense of Mary. There was no doubt that Reva received a benefit and that Mary suffered a loss; the precise question was whether the one was "at the expense of" the other.

The best starting point for analyzing this question is to suppose hypothetically that Frederick simply changed the beneficiary of an original \$7,000 policy from Mary to Reva. Under such circumstances, it is clear that Mary could obtain specific restitution from Reva, on the ground that the holder of a prior equity in an asset prevails over a subsequent holder of the legal title who paid no value.<sup>8</sup>

Although Frederick retained the legal power to change the beneficiary by so providing in his contract of insurance, he incurred a duty not to do so by his separate contract with Mary. By this separate contract, Mary acquired not only a personal right against Frederick but also a latent equity in Frederick's contract right against the insurer.<sup>9</sup> Therefore, if Frederick later changed the beneficiary to Reva in breach of his contract with Mary, Reva, as a donee beneficiary, would take her legal rights subject to Mary's prior equity in the subject matter. Of course, Mary's equity in the contract would also carry over to the proceeds paid to Reva as the directly traceable product thereof.

On the actual facts in *Simonds*, however, the policies of which Reva and Gayle were the beneficiaries were different contracts from the ones in which Mary had an equitable interest. In the absence of any proof that the premiums paid for the former were from funds equitably pledged to the latter,<sup>10</sup> the most that can be said is that both sets of rights were similar in kind and both were measured by the same life—Frederick. Lest this factor be given undue weight in identifying Mary's interest in one policy with Reva's interest in another, it should be noted that life insurance is not a contract of indemnity; it is not compensation for a specific loss which, if present, might tie the two interests together. For example, if Frederick

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<sup>8</sup> *Lengel v. Lengel*, 86 Misc. 2d 460, 382 N.Y.S.2d 678 (Sup. Ct. Nassau County 1976); *Richards v. Richards*, 58 Wis. 2d 290, 206 N.W.2d 134 (1973).

<sup>9</sup> *Stronge v. Knights of Pythias*, 189 N.Y. 346, 82 N.E. 433 (1907); *Zies v. New York Life Ins. Co.* 237 App. Div. 367, 261 N.Y.S. 709 (1st Dep't 1933); *Salinas v. Salinas*, 187 Misc. 509, 62 N.Y.S. 2d 385 (1946).

<sup>10</sup> If an insured uses stolen money to pay life insurance premiums, the owner may impress a constructive trust on the proceeds in the proportion which the premiums paid with his money bear to the total amount of premiums paid. *Holmes v. Gilman*, 138 N.Y. 369, 34 N.E. 205 (1893); *Baxter House, Inc. v. Rosen*, 27 App. Div. 2d 258, 278 N.Y.S.2d 442 (2d Dep't 1967). If the insured pays premiums with his own money while insolvent, in actual fraud of his creditors, they have an equitable lien on the proceeds equal to the amount of premiums so paid. *Id.* at 260-61 & nn.1&2; see N.Y. INS. LAW § 166(4) (McKinney 1966).

had equitably assigned the right to recover proceeds from a fire insurance policy on Blackacre to Mary as security for a debt,<sup>11</sup> allowed that policy to lapse, taken out another from a different insurer and gratuitously assigned in writing the proceeds to be realized therefrom to Reva, it could then be argued that there is a nexus between the proceeds eventually realized by Reva and those previously promised to Mary. Both would have represented compensation for the same measurable loss, albeit through different contractual paths. There is no connection, however, between the "worth" of a life that is insured and the proceeds realized from any particular policy. The insurable interest may be duplicated among several persons and the insured may have as many policies as he desires, in as large amounts as he can afford. Similar to the relation between different winning tickets on the same racehorse, if one life insurance policy lapses it is wholly arbitrary to say that any other specific policy is a substitute for it, so that third-party equities in the one transfer to the other.

In summary, while Mary's equity was prior to Reva's rights, it was in respect of a different res.<sup>12</sup> Nevertheless, the Court held Reva's policy to be "a substitute" res for Mary's.<sup>13</sup> In so concluding, it must have been crucial that both were at least the same kind of property: rights in life insurance. If Frederick had simply promised Mary a \$7,000 bequest in his will, no court would translate that into an equity in Reva's life insurance proceeds. Conversely, if Mary had been promised life insurance and Reva given an annuity or trust income in Frederick's will, there could be no basis for a constructive trust.

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<sup>11</sup> See *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N.Y. 42 (1870).

<sup>12</sup> An analogy may be drawn to a line of cases beginning with *Patrick v. Metcalf*, 37 N.Y. 332 (1867), and *Butterworth v. Gould*, 41 N.Y. 450 (1869), in which a single obligor is confronted with two adverse claimants, X and Y. If the obligor chooses to pay X, Y cannot thereafter sue X for money had and received to his use even if it is established that Y had the superior right to payment. As long as Y still has his original claim against the obligor, he cannot question the sufficiency of X's entitlement to the payment he received from the obligor. See also *Smith v. Goldsborough*, 236 N.Y. 340, 140 N.E. 718 (1923); *Murphy v. Ball*, 38 Barb. 262 (N.Y. Sup. Ct. Orange County 1862).

The rule applies only where Y's claim is independent in its origin from that of X. This is the point of analogy to the reference in the text to a different res. In contrast, if X and Y both trace their claims, through assignment, inheritance or otherwise, to the same original debt, then the courts have been willing to identify the money in the hands of X with the unsatisfied claim of Y and allow the action for money had and received. *Casey v. Lincoln Nat'l Bank*, 83 App. Div. 91, 82 N.Y.S. 525 (2d Dep't 1903); *Brown v. Brown*, 40 Hun 418 (N.Y. 3d Dep't 1886); *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 Misc. 452, 122 N.Y.S. 697 (Sup. Ct. App. T. 1st Dep't 1910); *Webb v. Myers*, 64 Hun 11, 18 N.Y.S.711 (1st Dep't 1892).

<sup>13</sup> 45 N.Y.2d at 239-40, 380 N.E.2d at 193, 408 N.Y.S.2d at 362.

Yet what is the magic in similar *kinds* of property if there is no other connection between what was promised to Mary and what was given to Reva? Surely, if Frederick had promised to bequeath a specific block of stock in his portfolio to Mary but disposed of it during his lifetime, Mary would have no right to a constructive trust upon different stock left to other legatees. Similarly, if Mary had been promised a devise of Blackacre, which Frederick later sold, she would stand only as a general estate creditor with respect to Whiteacre and Greenacre devised to Reva and Gayle. Indeed, to disclaim a rule of substituted equities with respect to other forms of property and adopt it with respect to different life insurance policies creates a paradox. At least one who is contractually entitled to a legacy of securities or a parcel of land would have a cause of action for breach of contract enforceable against estate assets in priority to the rights of the legatees under the will. In the case of life insurance, the beneficiary's rights are exempt from the claims of creditors of the deceased.<sup>14</sup> As a simple contract creditor of Frederick, therefore, Mary could not reach the life insurance proceeds paid to Reva and Gayle.

#### *The Significance of Frederick's Promise to Replace Lapsed Policies*

In the 1960 separation agreement, Frederick not only promised Mary that he would keep his existing insurance in effect, but additionally agreed to "procure additional insurance" should the existing policies ever lapse. The Court of Appeals relied on this clause to fortify its conclusion that Mary's interest in the lapsed policy "transferred" to the "substituted policies."<sup>15</sup> Whether the supplementary promise has such significance in turn depends on what the Court meant by characterizing the policies in effect at Frederick's death as "substitutes" for the original ones.

The Court acknowledged that Mary's equity would be "easier to trace" if the policies payable to Reva were "quid pro quo" replacements for the original policies.<sup>16</sup> Expanding the concept of substitution, the Court reasoned that inability to trace in the traditional sense might be excused "much as in the instance of damages difficult to prove."<sup>17</sup> Yet if the issuance of one policy is unconnected

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<sup>14</sup> N.Y. INS. LAW § 166 (McKinney 1966).

<sup>15</sup> 45 N.Y.2d at 239-40, 380 N.E.2d at 193, 408 N.Y.S.2d at 362.

<sup>16</sup> *Id.*; see *Dixon v. Dixon*, 184 So. 2d 478 (Dist. Ct. App. 1966), *aff'd*, 194 So. 2d 897 (Fla. 1967); *Locomotive Eng'r Mut. Life & Accident Ins. Ass'n v. Locke*, 251 App. Div. 146, 295 N.Y.S. 689 (4th Dep't 1937), *aff'd*, 277 N.Y. 584, 13 N.E.2d 781 (1938).

<sup>17</sup> 45 N.Y.2d at 240, 380 N.E.2d at 193, 408 N.Y.S.2d at 362 (citation omitted). The Court

in time and motive from the lapse of another, in what sense is the one a "substitute" for the other? The difficulty is not so much with the burden of proof as with what it is that is to be proved. As to this, the Court's holding is that Frederick's continuing contractual obligation to Mary to "procure additional insurance" translated per se into a joint and several equity in any and all life insurance he took out during his lifetime.<sup>18</sup> It rests on the idea that one should be just before he is generous. While Frederick had an unperformed duty to constitute Mary as creditor beneficiary of the life insurance, he had no power in equity to constitute anyone else as donee beneficiary. Additionally, the Court apparently was willing to have the equity spring backward in time as well as forward, since there was no evidence of the chronology between the policies payable to Reva and the lapse of the policy originally payable to Mary.

Insofar as the executory promise to name Mary as beneficiary of a \$7,000 insurance policy is comparable to a promise to assign one, the analogy is unfavorable to the Court's conclusion. While equity will give effect to an assignment of a fund to arise in the future, the subject-matter of the equitable assignment must be capable of specific ascertainment, such as the proceeds of a particular lawsuit,<sup>19</sup> money to be earned under an identified contract,<sup>20</sup> or an inheritance from a named testator.<sup>21</sup> But where the assignment is

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did not identify particular difficulties of tracing and it is not apparent what they might be. The cases of change of beneficiary and replacement of policies by the insurer have been easily established by conventional proofs. Even a scheme of "substitution" engineered by the insured himself, in which he might cancel a policy with one company and take out a new policy with another, would not seem particularly resistant to proof. An examination of company records could establish unities upon which to base an inference of substitution. Where the changed circumstances of years separate the lapse of one policy from the acquisition of another, however, or where the other is acquired even years prior to the lapse of an older policy, then it is impossible to conclude that motives of substitution were at work.

<sup>18</sup> Although the Court affirmed a lower court judgment impressing a \$7,000 "constructive trust" (perhaps more appropriately styled an equitable lien) on the proceeds of one particular policy payable to Reva, the Court stated unequivocally that the plaintiffs equity attached to "all the substituted insurance policies, whether they named the second wife or daughter as beneficiary. . . . The beneficiaries are jointly and severally liable, if the analogy applicable to constructive trusts be applied." 45 N.Y.2d at 243, 380 N.E.2d at 195, 408 N.Y.S.2d at 364 (citation omitted).

<sup>19</sup> See *Law Research Serv., Inc. v. Martin Lutz Appellate Printers, Inc.*, 498 F.2d 836 (2d Cir. 1974); *Williams v. Ingersoll*, 89 N.Y. 508 (1882); *Stathos v. Murphy*, 26 App. Div. 2d 500, 276 N.Y.S.2d 727 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 883, 227 N.E.2d 880, 281 N.Y.S.2d 81 (1967).

<sup>20</sup> *Downs v. American Mut. Liab. Ins. Co.*, 14 N.Y.2d 266, 200 N.E.2d 204, 251 N.Y.S.2d 19 (1964); *Hinkle Iron Co. v. Kohn*, 229 N.Y. 179, 128 N.E. 113 (1920); *Field v. City of New York*, 6 N.Y. 179 (1852).

<sup>21</sup> *In re Leonhouser's Will*, 183 Misc. 863, 51 N.Y.S.2d 335 (Sur. Ct. Bronx County 1944); *In re Cornell's Will*, 170 Misc. 638, 12 N.Y.S.2d 162 (Sur. Ct. Queens County 1939). See also

unrelated to any identified source, it adds nothing to the assignor's personal promise to pay and gives the creditor no security for his claim.<sup>22</sup> Consequently, if Frederick had attempted to make an assignment of \$7,000 worth of future insurance to Mary, and had subsequently acquired specific policies payable to his own estate, Mary would have no preference over any other general creditor.

The Court's expanded idea of substitution also finds little support in the analogy of debtor-creditor law. One who is under an unperformed obligation may indeed be generous before he is just—as long as he is not insolvent.<sup>23</sup> If the creditor sits on his rights until his debtor is insolvent, he cannot seek to set aside gifts made during solvency.

The implicit principle of laches has additional relevance to the *Simonds* decision. Mary had enforceable rights against Frederick during his lifetime. His duty to maintain her as beneficiary of existing insurance was not only arguably subject to specific performance, but also was enforceable at law. Mary could have sued for breach or even kept the policy alive herself, with a claim against Frederick for restitution of the premium payments.<sup>24</sup> It should be noted, however, that unless Frederick was insolvent when he allowed Mary's policy to lapse, a fact which nowhere appears, Mary had no grounds for an objection during Frederick's lifetime to his payment of premiums on other insurance in favor of Reva and Gayle. Thus, if Frederick's provision of insurance protection for his wife and child would not have been considered a wrong to Mary during Frederick's lifetime, it is a dubious analysis which makes the avails thereof subject to Mary's claim after Frederick's death. Stated differently, if prompt and diligent pursuit of Mary's remedies during Frederick's lifetime would not have included a right to set aside or cancel his other policies, it is difficult to accept the conclusion that a constructive trust on the avails is the added re-

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Williams Press v. Flovin, 35 N.Y.2d 499, 323 N.E.2d 693, 364 N.Y.S.2d 154 (1974).

<sup>22</sup> Jules-Wallace & Co. v. R.A. Management, Inc., 148 Misc. 180, 265 N.Y.S. 202 (Sup. Ct. App. T. 1st Dep't 1933); Cooper v. Douglass, 44 Barb. 409 (N.Y. Sup. Ct. Kings County 1864) (attempted assignment of wages to become due for services on any voyage on any ship); RESTATEMENT OF CONTRACTS § 166, Illustration 2 (1932).

A similar requirement of specificity applies to the corpus of an express trust. For example, where one who owns securities in a named company declares that shares now owned, and to be purchased in the future, are to be held in trust, the trust will fail for uncertainty in the subject matter. Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964); A. SCOTT, THE LAW OF TRUSTS § 76 (1967).

<sup>23</sup> N.Y. DEBT. & CRED. LAW § 273 (McKinnney 1925).

<sup>24</sup> *In re Montgomery's Estate*, 299 Pa. 452, 149 A. 705 (1930); G. PALMER, THE LAW OF RESTITUTION § 10.5 (1978).

ward for procrastination until Frederick's death—especially when the widow and child presumably have relied on the unchallenged existence of certain insurance for their future support and it is now too late to supplement the estate plan with additional insurance.<sup>25</sup>

The notion of a floating equity unrooted in traceable substitutions of the asset subject thereto, capable of being held in suspension and attaching to property similar in kind subsequently, or even previously, acquired by the obligor is an unprecedented and dubious doctrine. For example, to extend an analogy given earlier, suppose that Frederick had agreed with Mary to bequeath specific General Motors (GM) stock which he promised to retain in his portfolio and, moreover, to acquire and bequeath other stock of equal value if the GM stock should somehow be disposed of. If Frederick sold the GM stock and breached his promise to bequeath Mary a substitute stock, would her remedies include a constructive trust against GM stock, or other stock, subsequently acquired and bequeathed to Reva and Gayle? It is suggested that the answer must be no. Were Frederick's estate solvent at the time of his death, Mary's remedy at law would be adequate. If the estate were insolvent, to give Mary specific restitution against the legatees of stock would arbitrarily prefer her over other creditors.<sup>26</sup>

Among competing creditors of an insolvent obligor, no preference can be obtained by invoking the technique of involuntary substitution without tracing. If the obligor dissipates an asset which is subject to an equity, the equity is lost and the claimant retains only an *in personam* claim as a general creditor. As Judge Andrews summarized it in the leading case of *Fur & Wool Trading Co. v. Fox*:<sup>27</sup> "No identification—no lien."<sup>28</sup> Even where the obligor acquires new

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<sup>25</sup> On the potential for irrevocable change of position in reliance on having received payment, see *Picksley v. Starr*, 149 N.Y. 432, 44 N.E. 163 (1896); *Haviland v. Willets*, 141 N.Y. 35, 35 N.E. 958 (1894). It does not appear in the facts in *Simonds* when Mary learned that the policy in her favor had lapsed, but as between her and Reva she was in the best position to protect herself by diligence. Her laxity in this respect may be traced to the original separation agreement, in which she relied solely on Frederick's promise without obtaining an assignment of the policy.

<sup>26</sup> Preferring Mary over other creditors would be in contravention of N.Y. Surr. Ct. Proc. Acr § 1811 (McKinney 1966). See *Woodruff v. H.B. Clafin Co.*, 198 N.Y. 470, 91 N.E. 1103 (1910). Indeed, it is arguable that Mary's rights against estate assets would be subordinate to the claims of general creditors. "The breach of this obligation to make a testamentary provision would not constitute the wife a true creditor; it would merely give rise to a right in equity to enforce the obligation of the husband." *In re Tanenbaum's Estate*, 258 App. Div. 285, 289, 16 N.Y.S.2d 507, 510 (2d Dep't 1939). See also *In re Hoyt's Estate*, 174 Misc. 512, 21 N.Y.S.2d 107 (1940).

<sup>27</sup> 245 N.Y. 215, 156 N.E. 670 (1927).

<sup>28</sup> *Id.* at 218, 156 N.E. at 671.



assets of the same type as those dissipated, unless he did so with the intent to make restitution,<sup>29</sup> they do not become subject to the previous equity on a theory of involuntary substitution. For example, if an embezzler deposits stolen money in his bank account and thereafter depletes the balance below the amount owed to his victim, subsequent deposits of his own money do not become subject to the equitable lien.<sup>30</sup> Although the wrongdoer in such a case has as compelling a duty toward his victim as Frederick did toward Mary, the law views the new deposits as simply part of the wrongdoer's general assets, as to which the embezzlement victim has no claim superior to that of any other general creditor. Moreover, the Court of Appeals has stated that, unless the claimant's money or property can be traced into a particular fund or piece of property in the obligor's estate, "[t]he equitable doctrine that as between creditors equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt . . . or that its loss involves greater apparent hardship in one case than in another."<sup>31</sup>

It is of course true that *Simonds* did not involve a dispute between competing creditors in an insolvent's estate, although such a problem doubtless lurked in the background. The contest on appeal was between Mary, a contract creditor, and Reva, a donee beneficiary. But the beneficiary of life insurance, particularly the widow, is no ordinary donee beneficiary, because her rights are exempt from the claims of general estate creditors. Consequently, the refusal of the law to dilute the requirements of tracing in the one case might point the way to wisdom in the other.

Paradoxically, it is hard to resist the temptation to suspect that it was the very fact that Reva's insurance proceeds were exempt from Mary's claim as a contract creditor of Frederick that led the Court to search for another theory whereby she could share. After all, Mary gave consideration and Reva gave none; Mary's contract right to receive insurance protection was a valueless claim against Frederick's insolvent estate; so why should Reva collect in full while Mary goes empty-handed? From each according to her ability and to each according to her need may represent the new equity of redistribution, but it hardly represents the traditional equity of entitlement.

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<sup>29</sup> See, e.g., *In re Gottfried Baking Co.*, 312 F. Supp. 643 (S.D.N.Y. 1970).

<sup>30</sup> RESTATEMENT OF RESTITUTION § 212 (1936); RESTATEMENT (SECOND) OF TRUSTS § 202, comment j (1959); G. PALMER, *THE LAW OF RESTITUTION* § 2.16 (1978).

<sup>31</sup> *Cavin v. Gleason*, 105 N.Y. 256, 262, 11 N.E. 504, 506 (1887).

Whatever the Court's reasons, its result was to prefer one kind of estate creditor above others of presumably equal merit and concurrently subordinate the one kind of disposition on death which normally enjoys an exemption not given to others. More specifically, with respect to no other asset passing on death would Mary have a claim superior to any other creditor of Frederick; and with respect to no other creditor of Frederick would Reva's insurance proceeds be in any way subject to a claim.

#### CONCLUSION: BEYOND TRACING

The central theme of the Court's opinion in *Simonds* is found in the statement: "Had the husband kept his promise, the beneficiaries would have collected \$7,000 less in proceeds. To that extent, the beneficiaries have been unjustly enriched, and the proceeds should be subjected to a constructive trust."<sup>32</sup>

If these statements were demonstrably true, the holding could be justified on the basic principle of restitution set forth at the beginning of this comment, whatever doubts might exist concerning the Court's use of tracing principles. The difficulty is that, on the evidence as the Court set it forth, the statement is an unproved and gratuitous assumption.<sup>33</sup> In contrast to the case of a promise to make a will, in which any legacy in derogation of that promise is necessarily at the expense of the promisee, the provision of insurance in favor of Reva and Gayle was not necessarily at the expense of Frederick's commitment to Mary. Although he was insolvent when he died in 1971, we do not know how long that condition

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<sup>32</sup> 45 N.Y.2d at 243, 380 N.E.2d at 195, 408 N.Y.S.2d at 364.

<sup>33</sup> The nearest approach to support for such an assumption was made by the Appellate Division in *Simonds*, when it cited the situation of a contract to make a will. 58 App. Div. 2d 305, 311, 396 N.Y.S.2d 547, 552 (4th Dep't 1977). Although such contracts are not specifically enforced during the lifetime of the promisor, the same end result is achieved by impressing a constructive trust on the inheritance of donee legatees. *Ludwicki v. Guerin*, 57 Cal. 2d 127, 367 P.2d 415, 17 Cal. Rptr. 823 (1961); *Winne v. Winne*, 166 N.Y. 263, 59 N.E. 832 (1901); *Colby v. Colby*, 81 Hun 221, 30 N.Y.S. 677 (5th Dep't 1894); *Schweizer v. Schweizer*, 16 Misc. 2d 592, 184 N.Y.S.2d 84 (Sup. Ct. Suffolk County), *aff'd*, 8 App. Div. 2d 946, 190 N.Y.S.2d 481 (2d Dep't 1959); 1 PAGE, LAW OF WILLS §§ 10.27-.37 (W. Bowe & D. Parker ed. 1960). Although this rule goes beyond conventional tracing of specifically identified assets, it does lie within the requirement that the defendant's enrichment must be at the expense of the plaintiff. Where the testator has contractually promised to leave the whole or a specific proportion of his property at death to P, when the promisor dies his estate forms a defined quantity, unwarranted bequests of which necessarily diminish the subject-matter of P's prior contractual right. Even here, P's right more nearly resembles those of a general creditor than the holder of an equitable title to a specific asset. There is no case giving the contract-legatee priority over other general creditors of the promisor, as would be so with a constructive trust based on traceable equitable ownership of specific assets of the estate.

existed. Nor do we know when he allowed the policies payable to Mary to lapse, or even if they lapsed before he obtained the insurance payable to Reva and Gayle. Indeed, Frederick may have been financially capable of keeping all of the policies in force at all times. How, then, could the Court reasonably assume that Reva and Gayle would have been beneficiaries of less insurance had Frederick not breached his duty to Mary? The injury to the one has no necessary economic or other connection with the benefit to the other. According to the basic principle of restitution, it was not shown that the defendant's enrichment was at the expense of the plaintiff.

Deprecating sister state cases to the contrary, the *Simonds* Court appealed to general principles of equity from Aristotle to Cardozo to rise above "legal formalisms" and grasp the "equity of the transaction," which the Court described as "clear."<sup>34</sup> It is questionable whether the Court's departure from received forms of law led to the achievement of the elusive quality of justice. If not, the result was simply a confiscation of the widow's exempt assets to satisfy a duty owed by the deceased husband to his former wife.

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<sup>34</sup> Gegan's Law: The tendency for any conclusion to be called clear is in inverse ratio to the reasons available to support it. Corollary: Clarity tends to obscure and absolute clarity obscures absolutely.