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ing has never been held to be in this category. The choice of program and set and the failure or success of a broadcaster has been left to the public. The approval or rejection of the Commission's decision will decide whether or not these same principles will apply to color telecasts.

Whatever the decision of the court, and whichever system of color television broadcasting is finally approved, the controversy will at last have the finality of a decision of the United States Supreme Court. There will have been a substantial contribution to a new field of law—television law. Under this law the industry will grow and perfect itself. In this way there will best be served the "public interest, convenience, or necessity."



MUST THE REMEDY AT LAW BE INADEQUATE BEFORE A CONSTRUCTIVE TRUST WILL BE IMPRESSED?

Introduction

Generally speaking, a constructive trust is a trust by operation of law, which arises contrary to intention¹ against one, who by fraud, commission of wrong, abuse of confidential relationship or by any form of unconscionable conduct, or who in any way against the rules of equity and good conscience has either obtained or holds and enjoys the legal title to property, which in justice he ought not hold and enjoy.² It is a procedural device raised by equity in order to administer complete justice between the parties.³

¹ In an illuminating article classifying trusts according to intent, the "*in invitum*" quality of constructive trusts is employed as grounds for labeling such trusts "fraud—rectifying" as distinguished from "intention enforcing" express and resulting trusts. Costigan, *The Classification of Trusts as Express, Resulting, and Constructive*, 27 HARV. L. REV. 437, 462 (1914).

² "A constructive trust bears much the same relation to an express trust that a quasi-contractual obligation bears to a contract. In the case of a constructive trust, as in the case of quasi-contract, an obligation is imposed not because of the intention of the parties but in order to prevent unjust enrichment." 3 SCOTT ON TRUSTS § 462.1 (1939) (hereafter cited as SCOTT). RESTATEMENT, RESTITUTION § 160, comment a (1937) (hereafter cited as RESTATEMENT), makes the same analogy.

³ "Generally speaking, the *constructive trusts* . . . are not trusts at all in the strict and proper signification of the word 'trusts'; but . . . courts are agreed in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts, and . . . courts and the profession have concurred in calling such frauds constructive trusts . . ." 1 PERRY ON TRUSTS AND TRUSTEES § 166 (6th ed. 1911) (hereafter cited as PERRY).

Cardozo, J., in his customary aphoristic manner, expresses the same thought in the following ways: "A constructive trust is, then, the remedial device through which preference of self is made subordinate to loyalty to others."

It is long established and has been often repeated that where the legal title to property has been obtained by any of the above means, equity will impress a constructive trust on the property in favor of the one beneficially entitled thereto.⁴ However, it is the purpose of this note to determine whether that court, before acting, will require a showing that the damages at law are, for some reason, inadequate. From the start it is plain that we are not and cannot be concerned with cases involving land, for it has long been settled that merely because it is land, it is ipso facto unique and legal damages are inadequate.⁵ Thus, this discussion will be confined to personal property and will be directed towards analyzing the conflict between the two leading text writers on the subject.⁶

To facilitate a convenient approach to the problem, it is deemed desirable to begin by considering it in the sequence suggested in a note by Dean Ames.⁷ Briefly stated, Ames feels that: (1) There is no question as to the enforcement of express trusts in equity;

Meinhard v. Salmon, 249 N. Y. 458, 467, 164 N. E. 545, 548 (1928); "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 . . ." *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 386, 122 N. E. 378, 380 (1919).

⁴ See, e.g., KEETON, LAW OF TRUSTS 210 (5th ed. 1949); 4 POMEROY, EQUITY JURISPRUDENCE § 1053 (5th ed. 1941) (hereafter cited as POMEROY); WALSH ON EQUITY § 106 (1930).

⁵ *Kitchen v. Herring*, 42 N. C. 191 (1851); CLARK ON EQUITY § 42 (1948).

⁶ Professor Scott feels that while a constructive trust may exist, the presence of an adequate remedy at law precludes its enforcement, 3 SCOTT § 462.3. Professor Bogert is of the contrary opinion, and asserts that, "In a suit to obtain a constructive trust, it is not necessary to prove the inadequacy of the remedy at law." 3 BOGERT, TRUSTS AND TRUSTEES § 472 (1946) (hereafter cited as BOGERT).

⁷ AMES, CASES IN EQUITY JURISDICTION 44 (1904); also may be found in CHAFEE & SIMPSON, CASES ON EQUITY 156-7 (2d ed. 1946):

"TRUSTS OF CHATTELS.—

An express trust of a chattel is, of course, enforceable in equity. Indeed, since the trustee has the legal title, and there is no common law contract, the jurisdiction of equity is exclusive.

As to constructive trusts a distinction must be made.

If one acquires from the plaintiff by a tort the title to a chattel, or unconscionably retains a title, honestly acquired from the plaintiff, equity might, with propriety, compel him, as a constructive trustee, to reconvey the chattel. . . . But at the present day the defrauded person must seek his relief at law, unless damages for the deceit would be an inadequate remedy, either because of the peculiar nature of the chattel, or because of the insolvency of the defendant. . . .

If, on the other hand, a wrongdoer acquires the title to a chattel from a third person by the misuse of the plaintiff's property; if, for example, a fiduciary, a fraudulent purchaser, or a converter, by a breach of trust or a wrongful transfer of the fraudulently acquired or converted property, acquires in exchange the legal title to a chattel, equity will compel him to hold the newly acquired chattel in trust for the plaintiff."

(2) no constructive trust will be impressed on goods while in the hands of the wrongful acquirer unless the owner's remedy at law is inadequate; (3) but if the goods have been parted with, equity will follow the res into the hands of all but a bona fide purchaser, or if the goods are no longer traceable, or the owner's equity has been cut off by such innocent purchaser, chancery will compel the wrongdoer to hold the substituted res in trust for the owner.

Allowing the aforementioned three categories to serve as a rough classification, the matter will be considered in each of its parts.

Express Trusts

It may be broadly stated that there is no question but that courts of equity have original and inherent jurisdiction over trusts created by acts of the parties and the claims of the beneficiary which were at first purely moral have by reason of the historical development of trusts become an integral portion of equitable jurisprudence.⁸

As to such trusts, it must be noted that Dean Ames felt that the jurisdiction of equity was exclusive.⁹ "In many instances it has happened that the law courts, by abandoning their old arbitrary rules, and by adopting notions which originated in the court of chancery, and by enlarging the scope and effect of the common-law actions, have in process of time obtained the power of giving even adequate relief in cases and under circumstances which formerly came within the exclusive domain of equity. In all such instances, the courts of equity have continued to assert and to exercise their own jurisdiction, for the reason that it could not be destroyed, or abridged, or even limited by any action of the common-law courts alone. The enlargement of the jurisdiction at law, by the ordinary process of legal development, has not, in general, affected the pre-existing jurisdiction of equity."¹⁰

⁸ See, e.g., NEWMAN, LAW OF TRUSTS c. 2 where at p. 13 the author speaking of the chancery courts states: "Of the early cases those involving trusts were the most numerous and the most important, and the law of trusts may well be said therefore to be the fountainhead of equity . . ."; 1 POMEROY § 151; 3 *id.* § 980; WALSH, HISTORY OF ENGLISH AND AMERICAN LAW §§ 50-54 (1926).

⁹ See note 7 *supra*.

¹⁰ 1 POMEROY § 277. See the dictum of Lord Eldon in *Eyre v. Everett*, 2 Russ. 381, 382, 38 Eng. Rep. 379 (1826): "There are some cases in which the Court entertains jurisdiction, though there would be a good defence at law; but that is, because in those cases the matter was of such a kind that there was an original jurisdiction belonging to this Court; and this Court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to have fallen in love with the same or a similar jurisdiction, and has attempted (the attempt for the most part is not very successful) to administer such relief as originally was to be had here and here only."

In the case of these express trusts, both Bogert¹¹ and Scott¹² agree that equity will act although adequate relief may also be had at law. Hence, it has been ruled, for example, that the fact that an action at law, sounding in damages, may be maintained for breach of a contract establishing a trust does not result in equity refusing jurisdiction of a suit to enforce the trust created by the contract,¹³ and that equitable relief will be granted against a trustee who has violated his trust, although the complainant had a perfect remedy at law on the bond.¹⁴

Constructive Trusts—The Substituted Res

Notwithstanding the fact that one seeking the constructive trust remedy, may under certain circumstances, be confronted with the requirement of establishing that the damages at law are inadequate, it would seem that such a condition to equitable relief must be limited to the instances where the acquirer still retains in specie the fruits of his wrong. For it is completely clear that once the res has been parted with by the wrongdoer, the true owner may follow it until it reaches a bona fide purchaser.

Certainly, where no title has ever passed, as in the case of a thief or a converter, there can be no bona fide purchaser and the true owner can reach the chattels in the hands of a third person even though such person has paid value for them without notice of the theft or conversion. In such a case the claimant would be forced to sue at law¹⁵ unless of course, the property was subject to a trust relationship before the wrong.¹⁶ A constructive trust is inappropriate since legal title has never left the true owner.

On the other hand, if the wrongdoer (or any other party who follows him in possession) wrongfully conveys the chattel to another, and receives legal title to other property in exchange therefor, the true owner is entitled to have a constructive trust impressed on the

¹¹ 4 BOGERT § 871: "The court of equity first recognized the trust as a legal institution and has fostered and developed it. The cestui naturally goes to this court for protection of his rights under the trust."

¹² 2 SCOTT § 198.3. There is a "difference of opinion" but Scott says that the better rule is that an action at equity will also lie where the trustee must immediately pay money or return a specific chattel and where therefore an action at law will also lie. "Certainly the mere fact that the trustee is liable in an action at law does not mean that he has ceased to be a trustee and has become a debtor. . . ." This, too, is the view taken in the RESTATEMENT, TRUSTS § 199, comment a (1935).

¹³ Seymour v. Freer, 8 Wall. 202, 215 (U. S. 1868).

¹⁴ Norton v. Hixon, 25 Ill. 371 (1861).

¹⁵ 3 BOGERT § 476.

¹⁶ Cf. Tucker v. Weeks, 177 App. Div. 158, 163 N. Y. Supp. 595 (1st Dep't 1917). In this type of case, the res is originally the subject matter of equitable relations and the adequacy of the legal remedy is immaterial against one who takes part in a breach of trust with the trustee. See also 1 PERRY § 217.

the substituted product of his property.¹⁷ Dean Ames tells us that "Although in a few early American cases the courts declined to permit the owner of property to recover its product, as a constructive trust if the misappropriation was by a person other than a fiduciary, it is now well settled that one who has been deprived of his property by fraud, by theft, or by any wrongful conversion, may charge the fraudulent vendee, the thief, or other wrongful converter as a constructive trustee of any property received in exchange for the misappropriated property."¹⁸

Thus in *Newton v. Porter*¹⁹ the owner of negotiable securities could claim their product in the hands of attorneys who were retained by the thieves with funds which were proceeds of the theft, and in *Edwards v. Culbertson*²⁰ a trust was established on land purchased by defendant with funds she had obtained from plaintiff by virtue of a fraudulent promise of marriage.²¹ The oft-cited case of *American Sugar Refining Co. v. Fancher*²² offers another apt illustration. There a trust was impressed on notes held by the assignee for the benefit of creditors of the plaintiff's vendee who had fraudulently procured the sale. The notes, of course, represented the proceeds of the goods. Such cases subjecting the substituted res to a trust in favor of the true owner are decisive.²³

Nor does it appear that in seeking to charge the substituted res held by the wrongdoer, one need show that the remedy at law is inadequate. On this question the New York Court has spoken clearly. In *Fur & Wool Trading Co. v. George I. Fox, Inc.*,²⁴ furs stolen from the plaintiff were received by the defendant with knowledge of the theft, and by him sold at a large profit. Certainly, had the defendant retained the goods in specie, title never having passed, the plaintiff would have been constrained to proceed at law.²⁵ But once the goods had been sold, the court charged the proceeds with a constructive trust, and this, *regardless* of the adequacy of the remedy at law. In the words of the court:

¹⁷ RESTATEMENT § 202; 3 SCOTT § 507.

¹⁸ Ames, *Following Misappropriated Property into its Product*, 19 HARV. L. REV. 511, 513 (1906).

¹⁹ 69 N. Y. 133 (1877).

²⁰ 111 N. C. 342, 16 S. E. 233 (1892).

²¹ Cf. *Converse v. Sickles*, 146 N. Y. 200, 40 N. E. 777 (1895); *Hammond v. Pennock*, 61 N. Y. 145, 156 (1874): "Moreover, the wrong-doer having made sales, holds the proceeds as a trustee *ex maleficio*; and the court gives the defrauded party the title to the proceeds of sales. . . ."

²² 145 N. Y. 552, 40 N. E. 206 (1895).

²³ See also *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205 (1893) (trust impressed on proceeds of insurance policies, the premiums of which were paid with misappropriated funds); *Schafuss v. Betts*, 94 Misc. 463, 157 N. Y. Supp. 608 (Sup. Ct. 1916) (trust impressed on proceeds of fraudulently acquired stock).

²⁴ 245 N. Y. 215, 156 N. E. 670 (1927). See Note, *A Thief as a Constructive Trustee*, 37 YALE L. J. 654 (1928).

²⁵ See note 15 *supra*.

Some remedy at law there certainly is. The plaintiff might sue for conversion. . . . Or if the goods had remained in the hands of the wrongdoer, an action in replevin would have afforded a complete remedy for their recovery. Or again if they have been sold there is an action for money had and received resulting in a personal judgment for the proceeds. If the plaintiff has no information as to this sum it may acquire it . . . by an examination of the defendant. . . . Even though this be so is the plaintiff entitled to still other relief in excess of what a court of law is competent to give?²⁶

This latter question was answered in the affirmative and the complaint was held to state a good cause of action.²⁷

Constructive Trusts—Chattel Held by Wrongdoer

The hypothesis in the instant phase of the discussion is merely this: the defendant, by his wrongful act, has acquired the legal title to plaintiff's goods and the latter seeks their recovery. Again it should be noted that the legal title must be in the defendant or there can be no trust of any sort.²⁸

Ordinarily, the plaintiff will have one or more legal causes of action. May he nevertheless come into a court of chancery and obtain a constructive trust? The question is hardly academic. Equity surely offers a more flexible procedure and if the remedy of constructive trust is available, the trustee will sustain all the losses and account for all the profits resulting from dealing with the property,²⁹

²⁶ *Fur and Wool Trading Co. v. George I. Fox, Inc.*, 245 N. Y. 215, 217, 156 N. E. 670, 671 (1927).

²⁷ *Accord*, *Falk v. Hoffman*, 233 N. Y. 199, 201, 135 N. E. 243, 244 (1922), where a constructive trust was impressed on the proceeds of stock fraudulently acquired from the plaintiff. The lower court had held for the defendant on the ground that the plaintiff's remedy at law was adequate. The language of the Court of Appeals, per Cardozo, J., is worth noting: "We think that equity will intervene to declare the wrongdoers trustees Some remedy at law there is. It is not so complete or effective as the remedy in equity 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." *But see* *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552, 561, 40 N. E. 206, 209 (1895): "When . . . legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive."; *Newton v. Porter*, 69 N. Y. 133, 137 (1877). In both of these latter cases, insolvency being present, the remedy at law was in fact inadequate.

²⁸ In this connection, it is interesting to parenthetically note that according to Professor Bogert if a thief acquires legal title by open adverse holding, he should be chargeable as a constructive trustee. 3 *BOGERT* § 476.

²⁹ See 3 *SCORR* § 508: "The rule that a wrongdoer is liable for any loss that he incurs and is accountable for any profit which he makes is based upon sound policy, which operates as a deterrent to wrongdoing." Also see Ames, *Following Misappropriated Property into its Product*, 19 *HARV. L. REV.* 511, 512 (1906): "Public policy demands that the faithless trustee should not retain any advantage derived from his breach of trust. Hence the wholesome rule that whatever a trustee loses in the misuse of the trust fund he loses for himself, and whatever he wins, he wins for the beneficiary."

the trust will be superior to the lien of attaching creditors,³⁰ and the plaintiff will have a preference as to the trust property in case of insolvency.³¹ In addition, the plaintiff may benefit by the more inclusive definition of fraud in equity,³² and may prevent the wrongdoer from demanding a jury trial.³³ Without doubt these are advantages to be reckoned with and the problem may not be summarily dismissed.

In most of the cases where equitable relief by way of constructive trust is granted, the reason assigned is that the legal remedies are inadequate. There would seem to be two situations in which the fact that the remedies at law are inadequate, admits of no dispute: where the chattel is unique³⁴ and where the defendant is insolvent.³⁵ In another class of cases—where the defendant-wrongdoer stands in a fiduciary or quasi-fiduciary relation to the plaintiff,—the question of inadequacy similarly constitutes no obstacle.³⁶ Starting with the last, it is well to briefly treat each of the three classes.

Whenever it is found that parties stand in a fiduciary or quasi-fiduciary relationship towards one another it inevitably follows that equity stands alert keeping a jealous vigil. Historically, chancery has undertaken to minutely scrutinize the actions of a party in whom another has reposed trust to prevent imposition and selfish behavior by the former. It is not surprising then, that the abuse of such a relationship is a basis for a suit in equity without regard to the adequacy of the remedy at law.³⁷ This attitude is well illustrated by the English Case of *Wood v. Rowcliffe*³⁸ where the plaintiff delivered some household furniture and effects to the defendant to be held by her as agent. Instead, the defendant breaching her duty to her prin-

³⁰ *McAllister v. Bailey*, 127 N. Y. 583, 28 N. E. 591 (1891).

³¹ *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552, 40 N. E. 206 (1895); *accord*, *Matter of Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504 (1887). *But cf.* *Matter of Hicks*, 170 N. Y. 195, 63 N. E. 276 (1902). However, the presence of insolvency makes the remedy at law inadequate in fact, and if it is present, the trust remedy will always be obtainable. See *infra* note 35.

³² See, e.g., 1 PERRY § 170; 3 POMEROY § 873; 1 STORY'S EQUITY JURISPRUDENCE § 262 (14th ed. 1918).

³³ There is no right to a jury trial in such an action, 4 CARMODY, NEW YORK PRACTICE § 1177 (2d ed. 1932). At a time when the statute of limitations for fraud was six years from the wrong, the plaintiff had further advantage in proceeding by way of constructive trust for equity unlike courts of law, computed the period beginning with the date of discovery of the wrong. See *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582 (1910). By Laws of N. Y. 1921, c. 199, the period of limitation became six years from the discovery in either law or equity. N. Y. CIV. PRAC. ACT § 48, subd. 5.

³⁴ RESTATEMENT § 160, comment e.

³⁵ *Id.* § 160, comment f.

³⁶ *Id.* § 166, comment d; 3 SCOTT § 468.

³⁷ *Wood v. Rowcliffe*, 3 Hare 304, 67 Eng. Rep. 397 (1844), *aff'd*, 2 Ph. 382, 41 Eng. Rep. 990 (1847); *Schrafft v. Wolters*, 61 N. J. Eq. 467, 48 Atl. 782 (1901); *Ramsey v. Ramsey*, 351 Pa. 413, 41 A. 2d 559 (1945); *Steinmeyer v. Siebert*, 190 Pa. 471, 42 Atl. 880 (1899).

³⁸ 3 Hare 304, 67 Eng. Rep. 397 (1844).

cial, contracted to sell the goods to a third party. Demurring to plaintiff's bill for an injunction, defendant's counsel claimed ". . . there is no allegation that any article . . . is of a nature which might not be immediately replaced by a common upholsterer."³⁹ In overruling the demurrer, the court made it clear that equity's intervention where wrongful acts of fiduciaries are concerned, is not limited to cases involving unique chattels.⁴⁰ Thus, it is apparent that a fiduciary relationship is of itself sufficient to invoke the remedies of chancery.

Similarly, the mere fact that a chattel is unique makes the right to resort to equity clear. Where the article has a special value so that it cannot be duplicated in the market, money damages at law will be inadequate exactly as in cases of land. Just as equity will give specific performance of a contract concerning such an article⁴¹ and will decree specific reparation for a tort affecting it,⁴² so too will it make the constructive trust remedy available to a plaintiff who seeks it.⁴³

With respect to uniqueness, legal damages are inadequate both in law and in fact. In the situation which follows, where the wrongdoer-defendant is insolvent, the remedy of damages at law is factually inadequate. For what does it serve a claimant to reduce his claim to a judgment if it is clear that there is a practical impossibility of having it satisfied?

Thus, where the wrongdoer holding the property is insolvent, the true owner is entitled to recover the property in specie.⁴⁴ Consequently, the equitable interest of the beneficiary in the property will be protected if the rights of bona fide purchasers do not intervene; and of course, the creditors of the wrongdoer are not bona fide purchasers. Nor does this proposition conflict with the spirit of the bankruptcy laws. True, by said laws the very happening of insolvency should create equality in creditors, rather than serve as a peg upon which to hang a constructive trust thereby removing the chattel from the insolvent's general estate. However, any seeming conflict is readily rationalized for according to both Professor Scott⁴⁵

³⁹ *Id.* at 308, 67 Eng. Rep. at 399.

⁴⁰ This conclusion was affirmed on appeal, *Wood v. Rowcliffe*, 2 Ph. 382, 383, 41 Eng. Rep. 990, 991 (1847). The court had this to say: "The cases which have been referred to [cases involving unique chattels] are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the Court will interfere. . . ."

⁴¹ *Fells v. Read*, 3 Ves. Jr. 70, 30 Eng. Rep. 899 (1796).

⁴² *Pusey v. Pusey*, 1 Vern. 273, 23 Eng. Rep. 465 (1684); *Duke of Somerset v. Cookson*, 3 P. Wms. 390, 24 Eng. Rep. 1114 (1735).

⁴³ *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830 (1900) (racing trophy). See also RESTATEMENT § 163, comment *d.*

⁴⁴ *Corn Exchange National Bank v. Solicitor's Loan and Trust Co.*, 188 Pa. 330, 41 Atl. 536 (1898); see note 35 *supra*.

⁴⁵ 3 SCOTT § 462.3.

and the Restatement,⁴⁶ the constructive trust arises at the time of the defendant's wrongful act and his insolvency merely motivates equity in enforcing the trust. Therefore, the fact that the trust antedates the insolvency, dispels any doubts about preferential treatment of creditors in insolvency.

Assuming now, that a non-unique article has been wrongfully acquired and is wrongfully held by a solvent, non-fiduciary defendant, may the rightful owner have a trust remedy? Professor Scott thinks not and feels that although a trust was created by the wrongful act of the defendant and surely exists, equity will not enforce it so long as there is an adequate remedy at law. He chooses to put it in the following words:

Ordinarily where property is held by one person upon a constructive trust for another, a court of equity will specifically enforce the duty of the constructive trustee to convey the property to the other. There are, however, situations in which it is held that because the remedy at law is adequate equity will not specifically enforce the duty of the constructive trustee. Thus where the title to a chattel which is not unique is obtained from the owner by fraud, it is held that the fraudulent person is liable in an action at law for conversion, and since the legal remedy is adequate, he will not be compelled in a proceeding in equity specifically to restore the chattel. It does not follow, however, that he does not hold the property upon a constructive trust.⁴⁷

On the other hand, Professor Bogert seems to be of the contrary opinion and flatly asserts:

In many cases where a constructive trust is decreed, the plaintiff has the choice between a remedy at law and the constructive trust or another remedy in equity. In a suit to obtain a constructive trust it is not necessary to prove the inadequacy of the remedy at law.⁴⁸

⁴⁶ RESTATEMENT § 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. Thus, if money is paid under such circumstances that a debt arises but not a constructive trust, the payor cannot maintain a bill in equity for the specific recovery of the money, even though it remains in specie in the hands of the payee and even though the payee is insolvent."

⁴⁷ 3 SCOTT § 462.3. *Also see* Strout v. Burgess, 68 A. 2d 241, 256 (Me. 1949), where although a trust existed in favor of the claimant, a transfer was not ordered as the remedy at law was adequate. The court stated: "The mere fact that personal property is held upon a constructive trust does not give equity jurisdiction to order its transfer in specie to the person in favor of whom such trust exists. The transfer in specie of personal property which is the subject matter of a constructive trust will only be ordered when in addition to the existence of the trust there are present additional facts which justify and require the exercise of the equitable powers of the Court in this respect, as inadequacy of legal remedy, insolvency of the constructive trustee, the unique character of the chattel, etc."

⁴⁸ 3 BOGERT § 472.

Scott cites no cases standing for his textual assertion, but before the conflict is discussed on principle the cases noted by Bogert will be examined. Upon doing so, it is at once apparent that they do not stand for a proposition as broad as his unqualified statement. Three of the cases referred to concern situations where the owner seeks to charge the substituted res.⁴⁹ In three others, the courts paid particular attention to the fiduciary nature of the relationship between the parties.⁵⁰ Moreover, in two of the six cases, it is interesting to note, and it was remarked upon by the respective courts that no objection to the jurisdiction of the equity court had been raised below and it had not been claimed that there existed an adequate remedy at law.⁵¹ Bogert then remarks that there are a number of cases which discuss an election by a wronged party between a remedy at law and a constructive trust, and thus show that the existence of the former is not exclusive of the latter. Of course, these cases carry no imperative weight and furthermore a perusal reveals that any elective trust remedy in them, may likewise be explained on the theory of following the res,⁵² reaching the product of the res⁵³ or on the fiduciary or quasi-fiduciary relationship between the parties.⁵⁴

Thus, it is plain that the breadth of Bogert's assertion is not justified even by his own authorities. He has indicated no case, nor has the writer of this note found any case, in which a constructive trust was impressed on non-unique personalty in its original form *in the hands* of a solvent, non-fiduciary wrongdoer. The dicta and decisions to the contrary are, on the other hand, quite abundant.⁵⁵

⁴⁹ Anderson, Meyer & Co. v. Fur & Wool Trading Co., 14 F. 2d 586 (9th Cir. 1926); Fur & Wool Trading Co. v. George I. Fox, Inc., 245 N. Y. 215, 156 N. E. 670 (1927); Falk v. Hoffman, 233 N. Y. 199, 135 N. E. 243 (1922). See discussion *supra* under subheading *Constructive Trusts—The Substituted Res.*

⁵⁰ Lupton v. American Wholesale Corp., 143 Md. 333, 122 Atl. 315 (1923) (employee holding funds rightfully owing to his employer); Boston v. Santosuosso, 298 Mass. 175, 10 N. E. 2d 271 (1937) (mayor received monies for having collusive judgment entered against city); Brown v. Father Divine, 173 Misc. 1029, 18 N. Y. S. 2d 544 (Sup. Ct.), *aff'd*, 260 App. Div. 443, 23 N. Y. S. 2d 116 (1st Dep't 1940) (religious leader holding belongings of follower). See notes 36 and 37 *supra* and text thereto.

⁵¹ Anderson, Meyer and Co. v. Fur and Wool Trading Co., 14 F. 2d 586, 589 (9th Cir. 1926); Brown v. Father Divine, 260 App. Div. 443, 23 N. Y. S. 2d 116, 117 (1st Dep't 1940).

⁵² Equitable Trust Co. of N. Y. v. Connecticut Brass and Mfg. Corp., 10 F. 2d 913 (2d Cir. 1926); Clay v. Walker, 6 S. W. 2d 961 (Mo. 1928); Tyler County State Bank v. Shivers, 6 S. W. 2d 108 (Tex. 1928).

⁵³ Converse v. Sickles, 146 N. Y. 200, 40 N. E. 777 (1895).

⁵⁴ Ward v. Jossen, 218 Ala. 530, 119 So. 220 (1928) (guardian and ward); Hunter v. Hunter, 50 Mo. 445 (1872) (principal and agent); Eshelman v. Lewis, 49 Pa. 410 (1865) (same).

⁵⁵ See, e.g., Ponder v. Jefferson Standard Life Ins. Co., 194 Ark. 829, 109 S. W. 2d 946 (1937); Strout v. Burgess, 68 A. 2d 241 (Me. 1949); Provisional Government of French Republic v. Cabot, 53 N. Y. S. 2d 293 (Sup. Ct.), *aff'd*, 269 App. Div. 745, 55 N. Y. S. 2d 121 (1st Dep't 1945); Edelman v.

It remains, then, to see if perhaps his position is more tenable on principle, than that taken by Scott.

The fundamental reason, it is true, for impressing a constructive trust is to prevent unjust enrichment,⁵⁶ and a wrongdoing defendant may be unjustly enriched in numberless undefinable situations; among them, fraud,⁵⁷ mistake, duress and undue influence. Now, in choosing a constructive trust remedy, the plaintiff will be required to bring himself within some sphere of equity jurisdiction.⁵⁸ It must be borne in mind that equity, as such, is a system of remedies which, in effect, has evolved to redress the wrongs which were not cognizable by or adequately righted by the common law. Fraud, for instance, was one of those wrongs.⁵⁹ But, although the jurisdiction of chancery unquestionably exists in every case in which fraud is found, the courts will not ordinarily exercise this jurisdiction where there is a "plain, adequate, and complete" remedy at law;⁶⁰ that is to say, when there are no other motivating equities extant. Thus, since it is not according to the usual practice for equity to entertain a bill in such cases, whenever a complainant's primary right is legal, as a condition to the exercise of jurisdiction in his behalf, he must demonstrate the inadequacies of his remedies at law.⁶¹

The outstanding equities, which, in the normal case, make the legal remedy inadequate are uniqueness of the chattel, insolvency of the defendant, or a fiduciary relationship between the parties. However, earlier in this discussion, it was noted that there is yet another class of cases in which equity will establish a constructive trust—where the wrongdoer has parted with the property. This seems to be a time-honored and deeply rooted exception to the inadequacy requirement. For, it is difficult, if not impossible, to distinguish the cases in which the *res* is followed from those in which the wrongdoer retains the chattel in specie. Yet it is clear that on the authorities

Latshaw, 159 Pa. 644, 28 Atl. 475 (1894); Capuano v. Boghosian, 54 R. I. 489, 175 Atl. 830 (1934); *In re* National Ben. Ass'n, 72 S. D. 23, 29 N. W. 2d 81 (1947). *But cf.* Morris v. Vyse, 154 Mich. 253, 117 N. W. 639 (1908), where although the court expressly held insolvency to be unnecessary, the facts presented a problem of following the *res*.

⁵⁶ RESTATEMENT § 160, comment *c*; Note, 37 Ky. L. J. 113 (1948).

⁵⁷ See Note, 14 TEX. L. REV. 252 (1936), for a discussion of the constructive trust as a remedy for fraud.

⁵⁸ MATTLAND, EQUITY (1909), quoted in CHAFFEE & SIMPSON, CASES ON EQUITY 6 (2d ed. 1946), defines the early chancery jurisdiction by the following old rhyme:

"These three give place in court of conscience
Fraud, accident, and breach of confidence."

Modernly we would speak of the last as "trusts."

⁵⁹ 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 292 (2d ed. 1937).

⁶⁰ BISPHAM, PRINCIPLES OF EQUITY § 200 (10th ed. 1926); 3 POMEROY §§ 910-914. See Note, *Jurisdiction of Equity in Cases of Fraud Where Adequate Remedy at Law Exists*, 3 ANN. CAS. 611 (1906).

⁶¹ 1 POMEROY §§ 216-222. However, where his primary right is equitable, for example, the cestui que of an express trust, he is, as a matter of right entitled to relief in equity.

a trust will be impressed in the former case but not in the latter; and unfortunately, it is equally clear that the reasons for equitable intervention in the former case have been assumed rather than stated.

What greater equities exist in favor of a plaintiff-owner whose chattel has been transferred by a wrongdoer than in favor of an owner whose chattel is retained in specie? Certainly the wrongdoer has been unjustly enriched in both cases. Likewise, a legal remedy is available to both plaintiffs, and the damages, if adequate in one case are every bit as adequate in the other. If we are to adopt the view that the constructive trust is created by the defendant's wrongful act,⁶² a trust arose in each of the foregoing examples. To say that where the res has been parted with, the trust will be enforced to make the defendant accountable for any gains or losses he sustains is begging the question. The same objection may be raised to any greater analogy that is made between that case and express trusts. Nor can it be said that in that case a plaintiff would have greater difficulty from an evidentiary standpoint; for, supposing the wrong to be a fraudulent acquisition, the same elements make out the legal cause of action no matter what the form or location of the chattel at the time suit is brought. Thus, on principle, Bogert's position seems quite sound. His stand is further buttressed by the realization that by putting the more flexible and efficacious trust remedy beyond the reach of the normal plaintiff, equity tacitly acknowledges a right of private confiscation whereby one individual, merely by paying legal damages equal to the market value of the non-unique chattel may retain it as against the true owner, who, for reasons of his own, would not have voluntarily parted with it either at that time or at that price.

Any suggestion that to enforce the trust in every case would convert many actions for replevin, and fraud and deceit to suits in equity with a resultant overcrowding of the equity calendars does not go far in refuting the foregoing considerations. But, in view of the fact that the holdings are conclusively opposed to impressing a trust where the property remains in the wrongdoer's hands, it would seem that at present, all that may be anticipated is a modification of this attitude with respect to the degree of inadequacy that is to be required.⁶³

⁶² See notes 45 and 46 *supra*.

⁶³ See, e.g., *Falk v. Hoffman*, note 27 *supra*; *Fur and Wool Trading Co. v. George I. Fox, Inc.*, note 26 *supra*, and language of the court quoted in the text. These were both cases of reaching the substituted res and although they do evidence a judicial attitude, no case has been found in which such an attitude appears, which does not fit in one of the four classes (uniqueness, fiduciary relationship, insolvency, substituted res) discussed above. See also Note, 171 A. L. R. 429 (1947). It is interesting to note that in *WALSH ON EQUITY* 307, n. 26 (1930), the author intimates that the advantage of replevin over trover and conversion seems to have been defeated by the privilege of rebonding now given to defendants.

Conclusion

No more appropriate summary of the state of the authorities could be devised than the words of Dean Ames with which this discussion was opened.⁶⁴ Re-emphasizing then; express trusts are enforceable in equity at the suit of the cestui que without regard to the adequacy of the remedy at law. However, as to constructive trusts, while equity has the power to act, it will not; unless a fiduciary or quasi-fiduciary relation is involved, or unless relief at law would be inadequate because the chattel is unique or the defendant-wrongdoer is insolvent. So too, if the wrongdoer by parting with the plaintiff's goods has received title to other property in exchange, chancery will not stay its hand and 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."⁶⁵ In such a case whether there be an adequate remedy at law or not, the res will be followed, or the substituted chattel will be impressed with a trust. As a general proposition, however, it remains true that while a constructive trust may exist, having been brought into being by the defendant's conduct, it will not be enforced by equity unless the remedy at law is for some reason inadequate.



FREEDOM OF SPEECH V. BREACH OF THE PEACE

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."¹ Thus did Mr. Justice Roberts, speaking for a unanimous court, declare the scope of permissible speech afforded by the Federal Constitution.

The First Amendment has always guaranteed this right against curtailment by the federal government. In addition, the Supreme

⁶⁴ See note 7 *supra*.

⁶⁵ *Falk v. Hoffman*, 233 N. Y. 199, 202, 135 N. E. 243, 244 (1922). As has been indicated *supra*, no good reason appears why equity should be "overnice in balancing" the remedies when the wrongful acquirer retains the chattel. Nevertheless, the courts have done so.

¹ *Cantwell v. Connecticut*, 310 U. S. 296, 310 (1940).