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TRUSTS — CONSTRUCTIVE TRUST AS DEVICE TO PERMIT TRACING OF PLAINTIFF'S PROPERTY IN ACTION OF RESCISSION FOR BREACH OF WARRANTY — Defendant, in order to finance the purchase of a tract of land adjoining his farm, arranged to sell the oil and gas lease in the new tract to the plaintiff for \$750. He took a conveyance of the new tract, giving a check to the vendor for \$1,200, the entire purchase price. A few hours later he executed an oil and gas lease to the plaintiff who paid him \$750, which defendant then deposited in his bank account together with \$650 he had borrowed from the bank, thus covering the \$1,200 check. Both parties understood that the money paid by the plaintiff was to be used in the purchase of the land. It transpired that the land was already subject to an oil and gas lease which was registered in the Union Indian Office, but not in the county records. Defendant was innocent of deliberate misrepresentation, and there was no claim that he had been negligent. Defendant was insolvent at the time of this action for rescission and claimed a homestead exemption. *Held*, a constructive trust should be imposed upon the land upon grounds of constructive fraud. Plaintiff is given an equitable lien upon the land for \$550, taking junior to the bank's mortgage securing the \$650 loan. *Orr v. Rose*, (Okla. 1934) 37 Pac. (2d) 300.

Equity, through the constructive trust, has permitted one deprived of his property by theft or embezzlement to trace the proceeds of that property in the hands of the wrongdoer.¹ And the same is also true where one has parted with his property under a mistake of fact.² Since the case of *American Sugar Refining Co. v. Fancher*,³ it has been clearly established that one who has been induced by fraud to part with his property may rescind the transaction and trace the proceeds of the property to which he became entitled again by his rescission. The instant case shows a further extension of tracing principles, although it is difficult to tell just how great an extension. "Constructive fraud" covers such a heterogeneous list of situations⁴ that it is almost valueless in stating a rule of law. It is necessary to consider the case in the light of its facts. The money became the property of the plaintiff only through his rescission. There was no actual

¹ *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152 (1877); *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747 (1910); *Aetna Indemnity Co. v. Malone*, 89 Neb. 260, 131 N. W. 200 (1911); *Lamb v. Rooney*, 72 Neb. 322, 100 N. W. 410, 117 Am. St. Rep. 795 (1904); 1 PERRY, TRUSTS AND TRUSTEES, 7th ed., 309 (1929); L. R. A. 1915B 442, note.

² *In re Berry*, 147 Fed. 208, 77 C. C. A. 434 (1906); *Bank of Williston v. Alderman*, 106 S. C. 386, 91 S. E. 296 (1917); *First Nat. Bank of Modesto v. Wakefield*, 148 Cal. 558, 83 Pac. 1076 (1906); 2 FONBLANQUE, EQUITY, 3rd Am. ed., c. 1, sec. 1, n. b (1831); and see *Re Thellusson*, [1919] 2 K. B. 735.

³ 145 N. Y. 552, 40 N. E. 206 (1895). Also see *Success Realty Co. v. Trowbridge*, 50 Okla. 402, 150 Pac. 898 (1915); *Harrison v. Tierney*, 254 Ill. 271, 98 N. E. 523 (1912); *General Motors Acceptance Corp. v. Larson*, 110 N. J. Eq. 305, 159 Atl. 819 (1932). Cases involving bank deposits are collected in 20 A. L. R. 1206 (1922) and 25 A. L. R. 728 (1923).

⁴ "Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful. . . ." 2 POMEROY, EQUITY JURISPRUDENCE, 4th ed., 1933 (1918).

fraud, no fiduciary relation, no inequality of bargaining power—nothing, it would seem, as a basis for rescission except breach of warranty. It is true that there was an element of mutual mistake, but no more than in any breach of warranty case where there has not been a deliberate misrepresentation. There has been at least one other case⁵ which has permitted tracing after rescission for breach of warranty. This extension of a remedial device into new fields raises questions of policy which the courts have not yet thoroughly examined. There are a number of situations in which application of tracing fictions produces an artificial preference based more upon accident than equity.⁶ This result will be more obvious in the case of breach of warranty than with fraud, because a party's equitable position seems weaker (and thus any preference given him more artificial) as the degree of wrongfulness of which he is complaining decreases. In the instant case it is significant that the court emphasizes the intention of both parties that plaintiff's money be used in the purchase of the new tract. As intent is of no consequence so far as the mechanical aspects of tracing are concerned, it may well be that it is the intent feature of this case which makes the court feel that this plaintiff occupies an especially strong equitable position and should be permitted to trace. When both parties intended that plaintiff's money go into the land, it is less shocking to consider that he is entitled to this property through the constructive trust device. And certainly, under the circumstances, one can more readily say that there is no unfairness to other creditors, since the debtor would not have had this land if it had not been for his transaction with the plaintiff. It is too soon to say, however, how much further the achievement of equitable preferences against insolvent persons will be permitted on rescission for substantial breach of contract. It is to be expected that any further extensions of remedial devices in this field will be made with caution.

C. R. H.

⁵ *Matthews v. Crowder*, 111 Tenn. 737, 69 S. W. 779 (1902).

⁶ In one such instance the court in *St. Louis & San Francisco R. R. v. Spiller*, 274 U. S. 304, 47 Sup. Ct. 635 (1926), refused to apply tracing presumptions, although it was said that they would be used in the ordinary constructive trust case. And in a similar situation, the court in *People v. California Safe Deposit & Trust Co.*, 175 Cal. 756, 167 Pac. 388 (1917), was moved to say that tracing presumptions had no application except in cases of express trust. Also see *Cunningham v. Brown*, 265 U. S. 1, 44 Sup. Ct. 424 (1923), involving the Ponzi swindles.