

# Michigan Law Review

---

Volume 47 | Issue 4

---

1949

## WILLS-CONSTRUCTIVE TRUST IMPOSED ON ALL HEIRS WHERE SOME INTERFERED WITH EXECUTION OF WILL

Herbert E. Phillipson, Jr.  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Law Commons](#), and the [Estates and Trusts Commons](#)

---

### Recommended Citation

Herbert E. Phillipson, Jr., *WILLS-CONSTRUCTIVE TRUST IMPOSED ON ALL HEIRS WHERE SOME INTERFERED WITH EXECUTION OF WILL*, 47 MICH. L. REV. 598 ().

Available at: <https://repository.law.umich.edu/mlr/vol47/iss4/23>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

WILLS—CONSTRUCTIVE TRUST IMPOSED ON ALL HEIRS WHERE SOME INTERFERED WITH EXECUTION OF WILL—Two heirs at law, by physical force or by creating a disturbance, prevented decedent from executing a will devising her property to plaintiff. Shortly thereafter, decedent lapsed into a semi-comatose condition from which she never recovered. Plaintiff asked the court to impose a constructive trust on the distributive shares of all heirs, six of whom were not parties to the fraud. The district court gave judgment for the plaintiff; the Court of Civil Appeals partially reversed, allowing the innocent heirs to take free of any trust.<sup>1</sup> On appeal, *held*, judgment of district court affirmed. Since all heirs at law were unjustly enriched, their distributive shares were properly impressed with a constructive trust for plaintiff's benefit. *Pope v. Garrett*, (Tex. 1948) 211 S.W. (2d) 559.

Where a person by force or fraud prevents another from making a will, devise or legacy and the act inures to his benefit, equity will require the wrongdoer to hold for the benefit of the intended devisees or legatees on a theory of constructive trust.<sup>2</sup> Where the wrongful act benefits innocent third persons, some courts have said no recovery can be had from those persons.<sup>3</sup> Thus, where property descended to the heir at law because the draftsman, in collusion with the husband of the heir at law, omitted a devise and then read the will to the decedent as if drawn in the manner requested, it was held that no constructive trust could be imposed for the benefit of the intended devisee without violating the policy of the applicable statute of wills.<sup>4</sup> There was dictum, however, to the effect that relief would have been granted if the draftsman or his collaborator had benefited. It is a dubious distinction that conditions the remedy of a constructive trust upon the circumstance that the wrongdoer saw fit to benefit himself and not some third person. Certainly, a third person is as unjustly enriched as the wrongdoer; the injury to the intended devisee is equal; and the

<sup>1</sup> *Pope v. Garrett*, (Tex. Civ. App. 1947) 204 S.W. (2d) 867. The court indicated that plaintiff had an action against those participating in the fraud for (1) damages or (2) imposition of a constructive trust on their shares and damages for the value of the intended devise which descended to others. Not all courts are in accord. See 98 A.L.R. 474 (1935).

<sup>2</sup> *Dixon v. Olmius*, 1 Cox 414, 29 Eng. Rep. 1227 (1787); 8 L.R.A. (n.s) 698 (1907); 31 L.R.A. (n.s.) 176 (1911); 33 L.R.A. (n.s.) 996 (1911); 98 A.L.R. 474 (1935). Where probate provides no adequate remedy, equity usually asserts jurisdiction. *Allen v. M'Pherson*, 1 H.L.C. 191, 9 Eng. Rep. 727 (1847). *Case of Broderick's Will*, 21 Wall. (88 U.S.) 503 (1874).

<sup>3</sup> *Powell v. Yearance*, 73 N.J. Eq. 117, 67 A. 892 (1907); *Dye v. Parker*, 108 Kan. 304, 194 P. 640 (1921).

<sup>4</sup> *Dye v. Parker*, *supra*, note 3.

statute of wills is no more seriously violated by following the decedent's intent.<sup>5</sup> The better view, consequently, seems to be that taken by the court in the principal case.<sup>6</sup> The technical argument that plaintiff had no property right in the intended devise is properly rejected by the court; but for the fraud the will would have been executed and the plaintiff would have received the devise.<sup>7</sup>

*Herbert E. Phillipson, Jr.*

<sup>5</sup> Where a devisee or legatee under a will has promised the testator to give the devise or legacy to some third person and fails to do so, equity will recognize a constructive trust for the benefit of the third person. See annotations cited *supra*, note 2. In such a case, the court enforces the testator's intention although he could have complied with the statute of wills and the statute of frauds. The principal case presents a stronger argument for relief, because: (1) the decedent was powerless to comply with the statute of wills, and (2) he desired a direct gift rather than a gift in trust.

<sup>6</sup> See also *Bohannon v. Trotman*, 214 N.C. 706, 200 S.E. 852 (1939).

<sup>7</sup> The court in the principal case notes that the verdict for the plaintiff was well supported by the evidence, thus mitigating the objection that granting relief would violate the policy of the statute of wills.