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WILLS-INTERFERENCE WITH REVOCATION-CONSTRUCTIVE TRUST

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WILLS—INTERFERENCE WITH REVOCATION—CONSTRUCTIVE TRUST—The complaint alleged that testatrix who had executed a will leaving her whole estate to defendants attempted to make a new will containing legacies to plaintiffs, but that by means of misrepresentations, undue influence, force, and murder, testatrix was prevented by defendants from signing the new will. On appeal from dismissal of the complaint for insufficiency, *held*, reversed. If the alleg-

tions of the complaint be taken as true, plaintiffs are entitled to a judicial declaration that defendants hold the property under a constructive trust for plaintiffs. *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E. (2d) 168 (1949).

Courts of equity have long thought it proper to impose a constructive trust on a distributee or legatee where the execution or revocation of the will has been induced or prevented by force, fraud, or undue influence.¹ The general rule with respect to revocations is that, despite the wrong, the testacy or intestacy of the decedent is nevertheless his legal wish subject to an equity.² Invariably, however, the courts have directed their attention exclusively to the unjust enrichment of the defendant and have neglected entirely the plaintiff's equities, resting their decisions on the maxim "that no one may profit from his own wrong." The courts' willingness to impose a constructive trust has been affected by such factors as: (1) whether the defendant or a third person was guilty of the fraud,³ (2) whether or not the defendant was an heir or distributee, and (3) the flagitiousness of the defendant's misconduct. The courts and the text writers have been concerned with a conflict of policies between complying with the Statute of Wills on the one hand and denying the defendant unjust enrichment on the other,⁴ yet there is the equally well-recognized principle that the plaintiff is not entitled to more relief than is necessary to make him whole. Both the defendant, as distributee or legatee, and the plaintiff, as disappointed distributee or intended legatee, had mere expectancies. To permit full recovery by means of a constructive trust where the interest invaded is only in expectancy seems as inaccurate as to deny recovery altogether. If the decedent was advanced in age, near death, and not in the habit of changing his will, the value of the expectancy would be much greater than if he were young and his will subject to frequent change during his lifetime. And if the defendant's misconduct was merely temporary, the decedent might have expressed his true intent after it ceased; therefore, it is much less the proximate cause of the loss of the plaintiff's expectancy than if it continued until the decedent's death. Where, as in the principal case, the defendant's misconduct causes or continues until the decedent's death, the damages equal the full value of the expectancy, but theoretically the expectancy never equals the full amount of the legacy until it has become a vested right by

¹ *Marriot v. Marriot*, 1 Strange 666, 93 Eng. Rep. 770 (1725); *Dixon v. Olmius*, 1 Cox Ch. Cas. 414, 29 Eng. Rep. 1227 (1787); *Luttrell v. Waltham*, cited with approval by Lord Eldon in *Mestaer v. Gillespie*, 11 Ves. Jr. 622 at 638, 32 Eng. Rep. 1230 at 1236 (1805); *Gains v. Gains*, 2 A. K. Marsh (Ky.) 190, 12 Am. Dec. 375 (1820) (dictum); *Bulkley v. Wilford*, 8 Bligh (N.S.) 111, 2 Cl. & Fin. 102, 6 Eng. Rep. 1094 (1834); *Blanchard v. Blanchard*, 32 Vt. 62 (1859) (dictum); *Brazil v. Silva*, 181 Cal. 490, 185 P. 174 (1919); *Seeds v. Seeds*, 116 Ohio St. 144, 156 N.E. 193 (1927); and see 98 A.L.R. 474 (1935); *RESTITUTION RESTATEMENT* §184 (1937) comment *i*, in particular, as applied to the facts of the principal case; 1 *PAGE, WILLS* §448 (1941); *Contra: Kent v. Mahaffey*, 10 Ohio St. 204 (1859); *Bohleber v. Rebstock*, 255 Ill. 53, 99 N.E. 75 (1912).

² *RESTITUTION RESTATEMENT* §184 (1937); 1 *PERRY, TRUSTS AND TRUSTEES* §182 (1929); 68 C.J. 824, *WILLS* §529 (1934). The same rule should apply to original wills wrongfully induced but such has not always been the case. Warren, "Fraud, Undue Influence, and Mistake in Wills," 41 *HARV. L. REV.* 309 at 313 (1928).

³ *Kent v. Mahaffey*, *supra*, note 3; *Dye v. Parker*, 108 Kan. 304, 194 P. 640, 195 P. 599 (1921).

⁴ 3 *SCOTT, TRUSTS* §489.6 (1939).

the decedent's death. The damages, therefore, can never equal the legacy except where the misconduct has occurred after the decedent's death as in the suppression of a will. If the plaintiff is to be recompensed only to the amount his expectancy has been diminished,⁵ then it is necessary to scale the relief, a result which cannot be achieved in equity with a constructive trust but which can be accomplished easily at law in a tort action for damages. The obstacle encountered by such a procedure is that a reasonable expectancy of this kind has not always been regarded as a substantive right capable of being invaded.⁶ Nevertheless, the courts, with the approval of text writers,⁷ have permitted recovery in analogous situations⁸ under the doctrine of *Lumley v. Gye*⁹ even where the damages have been almost incapable of evaluation.¹⁰ Argument can be made that the doctrine should be extended to the field of testamentary transactions¹¹ and, indeed, there has been such a tendency in a few jurisdictions,¹² but the difficulty of evaluating the damages makes it doubtful whether a greater degree of accuracy is assured than by imposing a constructive trust for the entire legacy. There still remains the problem of the defendant's unjust enrichment but he, too, had an expectancy though admittedly not as valuable as the plaintiff's; therefore, if the residue is considered to be the value of this expectancy, then there is no unjust enrichment. No precedent for a damage action seems to have been established in New York,¹³ however, and the court in the principal case, which under the Code was at liberty to find sufficient facts stating a cause of action either at law or in equity, evidently preferred to impose a constructive trust rather than to deny relief altogether.¹⁴

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⁵ Note that if the misconduct is only temporary, it causes the expectancy to be diminished, whereas if it continues until the decedent's death, it causes the expectancy to be lost.

⁶ *Hutchins v. Hutchins*, 7 Hill 104 (N.Y. 1845); *Simar v. Canaday*, 53 N.Y. 298, 13 Am. Rep. 523 (1873); 2 BOHLEN, CASES ON TORTS 1186 (1915) (footnote). This was said to be *damnum absque injuria*.

⁷ Terry, "Malicious Torts," 20 L.Q. REV. 10 at 15 (1904); and see note, 48 HARV. L. REV. 984 (1935).

⁸ Wilful destruction of plaintiff's reasonable expectancy of earning a livelihood, e.g., preventing formation of contracts with third persons, injuring his business by conduct not involving defamatory statements, frightening away game he might have taken, making more onerous his performance of contracts with third persons, inducing breach of contract which was terminable at will or unenforceable because of infancy or Statute of Frauds; and also where "special damages" were sought in slander actions for defamatory words not actionable per se including injuries for loss of expected gratuity, prospective marriage, and future economic gain. For specific cases and citations, see note, 48 HARV. L. REV. 984 (1935).

⁹ 2 E. & B. 216 (Q.B.) 118 Eng. Rep. 749 (1853).

¹⁰ *Chaplin v. Hicks*, [1911] 2 K.B. 786.

¹¹ Evans, "Torts to Expectancies in Decedents' Estates," 93 UNIV. PA. L. REV. 187 at 193 and 196 (1944).

¹² *Kelly v. Kelly*, 10 La. Ann. 622 (1855); *Lewis v. Corbin*, 195 Mass. 520, 81 N.E. 248 (1907); *Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936); 3 SCOTT, TRUSTS §489.4 (1939). No support, however, is found for this view in the RESTITUTION RESTATEMENT.

¹³ In fact *Hutchins v. Hutchins*, supra, note 6, is good authority to the contrary, but it is interesting to note that this case was decided before *Lumley v. Gye*.

¹⁴ For an analysis of the constructive trust aspects of the principal case, see Professor Scott's note, 63 HARV. L. REV. 108 (1949).