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Torts--Constructive Trusts

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TORTS — CONSTRUCTIVE TRUSTS. — Defendant threatened to kill anyone who interfered with his right to inherit from his wife, which prevented her from executing a will which she had made in favor of her sister. The prospective legatee now sues in tort to recover the amount of the proposed bequest. *Held,* that defendant is not liable, since plaintiff had no legal right in the prospective legacy which the court could protect, although the result is that defendant's moral wrong caused intentional harm to plaintiff. *Cunningham v. Edward.*[1]

This case is in strict accord with the authority on the question, there being no direct holding allowing recovery on such facts.[2] In the cases allowing recovery there is usually a will which is destroyed or altered by defendant, providing a legal right which may be enforced by the court. There is doubt even in these cases whether any right arises until after death, although a will has been executed in favor of plaintiff.[3] However that may be, authorities are substantially unanimous that on the facts of the principal case neither the moral iniquity of defendant's act, nor his malice, in intentionally causing this injury to plaintiff, constitutes a cause of action.[4]

It may be suggested that the property which defendant gained in this case should have been impressed with a constructive trust in favor of plaintiff, on the theory that defendant should not be allowed to profit by his own wrong. This result has been reached in similar cases where property was gained by the exercise of undue influence, the courts drawing an analogy to the cases of fraud and

Ry. Co. v. Conley, 113 Tex. 472, 260 S. W. 561 (1924). *Cf.* Thomas v. Monongahela Valley Traction Co., 90 W. Va. 681, 112 S. E. 228 (1922). But see also Searles v. Ry. Co., 32 W. Va. 370-374, 9 S. E. 248 (1889); Webb v. Big Kanawha, *etc.* Packet Co., 43 W. Va. 800, 806, 29 S. E. 519 (1897).

[1] 52 Ohio App. 61, 3 N. E. (2d) 58 (1936). See Note (1936) 35 MICH. L. REV. 348, to the effect that recovery should be allowed. This contention is probably unsound.

[2] See dictum in Lewis v. Corbin, 195 Mass. 520, 81 N. E. 248, 122 Am. St. Rep. 261 (1907) to the effect that recovery would have been allowed on these facts.

[3] Creek v. Laski, 248 Mich. 425, 227 N. W. 817 (1929); Pettit v. Morton, 38 Ohio App. 348, 176 N. E. 494 (1930), *aff'd* Morton v. Pettit, 124 Ohio St. 241, 177 N. E. 591 (1931).

[4] Lancaster v. Hamburger, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856 (1904); Hall v. Hall, 91 Conn. 514, 100 Atl. 441 (1917). But see Dade Enterprises v. Wometco Theatres, 119 Fla. 70, 160 So. 209 (1935), for the minority view allowing recovery for any malicious injury.

duress.[5] Since in some of those cases defendant's only wrong was in failing to carry out a promise as to his disposition of the property gained under the will, it would seem that a similar result might be reached here.[6] However, in those cases defendant gained property which he did not previously own, while here no vested property right was altered by his act. On these facts there seems to be no authority for the result contended for.

About the closest approach to this case is where defendant murdered his ancestor to prevent the execution of a will. At common law there was a split of authority as to whether he could nevertheless inherit, and if he did, whether he took subject to a constructive trust.[7] Today by statute the murderer is usually prevented from inheriting from his victim.[8]

In view of the fact that it is doubtful whether at common law defendant's crime would serve to disinherit him, and that here there was no crime or other directly illegal act, it is submitted that defendant's overreaching conduct was insufficient on the basis of past authority to raise a trust in favor of the prospective legatee in the principal case.

One factor of policy influencing these decisions is probably the reluctance of courts to give effect to a testamentary disposition of property without the requisite witnesses. However, it will, of course, be universally agreed that the result reached here is socially undesirable. The court in the principal case, although it had virtually no choice in the matter, acted with extreme reluctance in refusing to impose legal liability on this defendant. Even in the case of the murderer it is less likely that the wrongdoer will actually benefit personally by his act than here, where he is free to enjoy the property, having done nothing for which the courts will punish

[5] Spiller v. St. Louis & San Francisco R. Co., 14 F. (2d) 284 (C. C. A. 8th, 1926); Seventh Elect Church in Israel v. First Seattle Dexter Horton Nat. Bk., 162 Wash. 437, 299 Pac. 359 (1931). See a comment on this problem in (1930) 65 A. L. R. 1119.

[6] Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 Atl. 612 (1907); Brazil v. Silva, 181 Cal. 490, 185 Pac. 174 (1919); Hollis v. Hollis, 254 Pa. 90, 98 Atl. 789 (1916).

[7] Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S. E. 865 (1919); Wickline v. Phoenix Mutual Life Ins. Co., 106 W. Va. 424, 145 S. E. 743 (1928); Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540 (1896); Sherman v. Weber, 113 N. J. Eq. 451, 167 Atl. 517 (1933) (refusing to allow the murderer to inherit). *Contra*: Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914); Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292 (1920). See also Note (1936) 42 W. VA. L. Q. 241, discussing the problem of the murderer.

[8] Note (1934) 44 YALE L. J. 164.

him. As a matter of policy courts are deterred from disinheriting the murderer by the fear of forfeiture and corruption of blood. But here the decision would affect the wrongdoer personally, and it is therefore submitted that since the common law on the subject is unsatisfactory, a statute regulating these cases would probably be beneficial. C. A. P., JR.

TRUSTS — NECESSITY OF A TRUST *Res.* — The *A* company organized the *B* insurance association for its employees. All employees contributed to the insurance fund, weekly deductions being made from their wages. The money deducted was turned over to *B* for investment. For some months prior to insolvency, *A* made the usual deductions from the payroll, paying *B* simply by crediting the aggregate amount deducted to *B*'s account on *A*'s books. Upon *A*'s bankruptcy, *B* claimed a preference to the extent of its credit on *A*'s books on the theory that *A* was a trustee. The district court's denial of the preference was reversed by the circuit court of appeals on the ground that *A* was a constructive trustee.[1] This in turn was reversed by the Supreme Court. *Held,* that the mere failure to pay a debt will not give rise to a constructive trust. *McKey v. Paradise.*[2]

On strict trust principles, no other result could have been reached. It is axiomatic that there can be no trust without a trust *res,*[3] that a debt is not a trust.[4] What makes the case of interest, therefore, is the fact that an appeal to the Supreme Court was necessary for the reiteration of these settled principles.

In 1894 this statement was made by a New York court: "In no case has it ever been held as yet that a party may by transferring his property from one pocket to another make himself a trustee."[5] Courts today do not admit that he can. If troubled by the rule

[1] *In re* Grigsby-Grunow, Paradise v. McKey, 80 F. (2d) 478 (C. C. A. 7th, 1935).

[2] 57 S. Ct. 124 (1936).

[3] "Trusts are not declared in vacuo because of a trust relationship. They must be predicated of particular property." Edisto Nat. Bank of Orangeburg, S. C. v. Bryant, 72 F. (2d) 917, 919 (C. C. A. 4th, 1934); Marble v. Marble Estate, 304 Ill. 229, 240, 136 N. E. 589, 594 (1922); Govin v. De Miranda, 27 N. Y. S. 1049, 1052 (1894); 1 BOGERT, TRUSTS (1935) 81; RESTATEMENT, TRUSTS (1935) § 74.

[4] RESTATEMENT, TRUSTS § 12.

[5] Govin v. DeMiranda, 27 N. Y. S. 1049, 1052 (1894).