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THE NECESSITY FOR UNJUST ENRICHMENT IN A CONSTRUCTIVE TRUST IN CALIFORNIA: ELLIOTT v. ELLIOTT

The constructive trust¹ has been called "the most important contribution of equity to the remedies for the prevention of unjust enrichment."² California courts and the *Restatement of Restitution*³ have referred to the constructive trust as a proprietary remedial device⁴ to be imposed to prevent unjust enrichment,⁵ capable of use in almost any case where there is a wrongful acquisition or retention of property.⁶ Dean Pound speaks of the use of the constructive trust as affording "specific restitution of a received benefit in order to prevent unjust enrichment."⁷

The constructive trust has been used to "frustrate human skulduggery,"⁸ yet it has remained an elusive remedy.⁹ One commenta-

¹ See generally 3 G. BOGART, TRUSTS AND TRUSTEES § 471 (2d ed. 1960); R. NEWMAN, TRUSTS 200 (2d ed. 1955); 1 J. POMEROY, EQUITY JURISPRUDENCE § 156 (5th ed. 1941); 4A. SCOTT, TRUSTS § 462 (2d ed. 1956); Cobb, *Resulting and Constructive Trusts in Realty*, 1 BAYLOR L. REV. 296 (1949); Costigan, *The Classification of Trusts as Express, Resulting and Constructive*, 27 HARV. L. REV. 437 (1914); Gilmer, *Current Developments in Resulting Trusts and Constructive Trusts in Kentucky*, 42 KY. L.J. 455 (1954); Jennings & Shapiro, *The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies*, 25 MINN. L. REV. 667 (1941); Scott, *The Expectant Legatee*, 63 HARV. L. REV. 108 (1949); Scott, *Constructive Trusts*, 71 L.Q. REV. 39 (1955); Waters, *The English Constructive Trust*, 19 VAND. L. REV. 1019 (1967); Note, *Imposition of a Constructive Trust in New England*, 41 B.U.L. REV. 78 (1961).

² J. DAWSON, UNJUST ENRICHMENT 26 (1951). "A constructive trust is the formula through which the conscience of equity finds expression." Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919).

³ RESTATEMENT OF RESTITUTION § 160 (1937).

⁴ *Bainbridge v. Stoner*, 16 Cal. 2d 423, 106 P.2d 423 (1940); *Schaefer v. Bernstein*, 180 Cal. App. 2d 107, 4 Cal. Rptr. 236 (1960); *Reay v. Reay*, 97 Cal. App. 264, 275 P. 533 (1929).

⁵ *Day v. Greene*, 59 Cal. 2d 404, 380 P.2d 385, 29 Cal. Rptr. 785 (1963); *Orella v. Johnson*, 38 Cal. 2d 693, 242 P.2d 5 (1952); *Beck v. West Coast Life Ins. Co.*, 38 Cal. 2d 643, 241 P.2d 544 (1952); *Sears v. Rule*, 27 Cal. 2d 131, 163 P.2d 443 (1945), cert. denied, 328 U.S. 843 (1946); *Efron v. Kalmanovitz*, 249 Cal. App. 2d 187, 57 Cal. Rptr. 248 (1967); *McCauley v. Dennis*, 220 Cal. App. 2d 627, 34 Cal. Rptr. 90 (1963); *Nevarez v. Nevarez*, 202 Cal. App. 2d 596, 21 Cal. Rptr. 70 (1962); *Ornbaun v. Main*, 198 Cal. App. 2d 92, 17 Cal. Rptr. 631 (1961); *Fleischman v. Blechman*, 148 Cal. App. 2d 88, 306 P.2d 548 (1957); *Atwood v. Elwood*, 132 Cal. App. 2d 761, 283 P.2d 43 (1955); *Monica v. Pelicas*, 131 Cal. App. 2d 700, 281 P.2d 269 (1955); *Weightmon v. Hadley*, 113 Cal. App. 2d 598, 248 P.2d 801 (1952); *Adams v. Talbott*, 61 Cal. App. 2d 315, 142 P.2d 775 (1943); *Steinberger v. Steinberger*, 60 Cal. App. 2d 116, 140 P.2d 31 (1943); *Sampson v. Bruder*, 47 Cal. App. 2d 431, 118 P.2d 28 (1941).

⁶ *Rankin v. Satir*, 75 Cal. App. 2d 691, 171 P.2d 78 (1946); *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 P. 560 (1906).

⁷ Pound, *The Progress of Law*, 33 HARV. L. REV. 420, 421 (1920).

⁸ 4 R. POWELL, REAL PROPERTY ¶ 593 (1949).

⁹ "Without much conscious purpose or plan we have created this shambling creature. It is time to fence it in." J. DAWSON, *supra* note 2, at 33. "It

tor has observed that the vagueness surrounding this subject is deliberately intended, "so the powers of the equity courts will not be unduly restricted."¹⁰

It has been suggested that the requirement of unjust enrichment has engendered "a fight between those who want to expand the common law by reference to its ultimate ethico-juridical principles and those content to stay in clearly defined paths . . ." ¹¹ A victory for those favoring expansion has seemingly occurred in the recent California case of *Elliott v. Elliott*,¹² where the district court of appeal stated that a benefit to the wrongdoer is not required for the imposition of a constructive trust.¹³ After examining the California law relating to constructive trusts, this note will discuss the propriety of that conclusion.

Constructive Trusts Prior to 1872

Prior to 1872, cases involving constructive trusts required: (1) either a fiduciary relationship or wrongful or mistaken conduct; (2) a proprietary interest gained; and (3) an inequitable retention and enjoyment of the proprietary interest.

During this period constructive trusts were imposed where there was a breach of a fiduciary duty by an attorney,¹⁴ guardian,¹⁵ cotenant,¹⁶ administrator,¹⁷ agent,¹⁸ and a bank officer.¹⁹ Where an agent acquired an interest in property adverse to his principal it was held that the agent took as a constructive trustee;²⁰ his partner, who was outside the agency, took free of the constructive trust.²¹ Similarly, constructive trusts were imposed where there was wrongful conduct: for example, where the defendant misrepresented ownership of a mortgage in order to obtain title to real property,²² and where a party seeking to acquire a patent to realty misrepresented certain material facts.²³ Constructive trusts, likewise, were used to afford relief where an interest in property was gained by mistake, as illustrated by one case where a widow mistakenly kept land from her husband's heirs.²⁴

It was never enough merely to show that there was fraud, mistake, or a breach of a fiduciary relationship: there must have also

thus constitutes a fenceless field with hazy boundaries." 4 R. POWELL, *supra* note 8, at 565.

¹⁰ J. DAWSON, *supra* note 2, at 148.

¹¹ O'Connell, *Unjust Enrichment*, 5 AM. J. COMP. L. 2 (1956).

¹² 231 Cal. App. 2d 205, 41 Cal. Rptr. 686 (1964).

¹³ *Id.* at 210, 41 Cal. Rptr. at 688.

¹⁴ *Webster v. King*, 33 Cal. 348 (1867).

¹⁵ *Lathrop v. Bampton*, 31 Cal. 17 (1866).

¹⁶ *Mandeville v. Solomon*, 33 Cal. 38 (1867).

¹⁷ *Scott v. Umbarger*, 41 Cal. 410 (1871).

¹⁸ *Hardenbergh v. Bacon*, 33 Cal. 356 (1867).

¹⁹ *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133 (1859).

²⁰ *Hardenbergh v. Bacon*, 33 Cal. 356 (1867).

²¹ *Id.* at 379.

²² *De Leon v. Higuera*, 15 Cal. 483 (1860).

²³ *Salmon v. Symonds*, 30 Cal. 301 (1866).

²⁴ *Wilson v. Castro*, 31 Cal. 420 (1866).

been some interest acquired thereby. California courts refused to impose a constructive trust where either void²⁵ or defective²⁶ title to land was obtained by fraud. Where the interest obtained was uncertain²⁷ or there had been a change in form,²⁸ a constructive trust would be imposed only if the identity of the interest could be traced. Where it could not be shown that the property was the original trust property or the fruit or product thereof, a constructive trust would be denied.²⁹

There are several reasons for requiring the acquisition of a proprietary interest. First, although a constructive trust is an equitable remedy, it is dealt with in express trust terms and there must therefore be a res.³⁰ Second, since a constructive trust is a specific remedy, there must be some interest that can be returned to the owner.³¹ Third, a constructive trust is a remedy for the prevention of unjust enrichment³² and the requirement of a proprietary interest seems inextricably interwoven with that concept. So, where the decisions require the defendant to have gained a proprietary interest, it is difficult to determine if the court was simply requiring that there be a res before there could be a trust, or whether the court was requiring that there be some tangible unjust enrichment gained or held by the defendant.

In discussing constructive trusts prior to 1872 the courts made no specific references to the principle of unjust enrichment. Instead, the courts required the retention and enjoyment of the interest to be inequitable:³³

Where the circumstances of a transaction are such that a person who takes title to property cannot be permitted to hold and enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the benefit of the party entitled in equity to its beneficial enjoyment. It is because he holds the property, or some interest therein, which is inequitable for him to enjoy, that the court declares the trust and fastens it upon his conscience, and wrests the property or interest from him and causes it to be transferred to the person equitably entitled to it.³⁴

The prevention of inequitable retention of property was seen as the basis of the constructive trust and in this regard may be equated with the principle of unjust enrichment.

²⁵ *Mandeville v. Solomon*, 33 Cal. 38 (1867).

²⁶ *Scott v. Umbarger*, 41 Cal. 410 (1871).

²⁷ *Webster v. King*, 33 Cal. 348 (1867).

²⁸ *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133 (1859).

²⁹ *Lathrop v. Bampton*, 31 Cal. 17 (1866).

³⁰ "It is necessary in establishing and enforcing such a trust that there must be trust property as there should be trustee and *cestui que trust* . . ." *Mandeville v. Salmon*, 33 Cal. 38, 44 (1867).

³¹ "The plaintiff must allege that the defendant holds the title or some interest in certain property which is inequitable for him to enjoy as against the plaintiff for this is the subject matter of the action, and in its absence there is nothing the court can order transferred to him." *Id.*

³² See cases cited note 5 *supra*.

³³ *Meader v. Norton*, 78 U.S. (11 Wall.) 443 (1870); *Hardy v. Harkin*, 11 F. Cas. 510 (No. 6060) (C.C.N.D. Cal. 1865); *Wilson v. Castro*, 31 Cal. 420 (1866); *Kruetz v. Livingston*, 15 Cal. 344 (1860).

³⁴ *Mandeville v. Solomon*, 33 Cal. 38, 44 (1867).

It will be shown that the three requirements for imposition of a constructive trust, discussed above, were codified in sections 2223 and 2224 of the California Civil Code in 1872.

Civil Code Sections 2223 and 2224

California Civil Code section 2223 provides:

One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

California Civil Code section 2224 provides:

One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

Section 2223 applies only in the case of wrongful conduct; section 2224 applies in the case of specific kinds of wrongful conduct, including fraud, undue influence and violation of a trust, and also mistaken or accidental conduct. It is readily apparent that on this point sections 2223 and 2224 are a codification of the first requirement found in the early cases.³⁵

Both sections require that there be a proprietary interest gained, thereby codifying the second requirement of the early cases.³⁶ This consequence results from the reference in both sections to "a thing." It is clear that the statutory reference is to a res. The statutes do differ in that section 2223 requires a detention, whereas section 2224 requires an acquisition. However, use of the word "detains" in section 2223 does not mean that no proprietary interest need be gained; it merely sets out the manner by which the wrongdoer might come into possession of the interest. This section applies where the possession of the interest was lawfully attained but relinquishment is wrongfully refused. Section 2224, referring to "gain," applies where possession was wrongful from the beginning.

The pre-statutory requirement of inequitable retention,³⁷ now unjust enrichment, has also been codified by sections 2223 and 2224. Section 2224 impliedly requires that there be unjust enrichment. The key phrase is "unless he has some other and better right thereto." This phrase requires the equities to be balanced and is essentially a definition of unjust enrichment.³⁸ Section 2223, requiring that there be wrongful detention of property, does not expressly include the concept of unjust enrichment. This statute, however, must be read together with California Civil Code section 3517, which states, that "[n]o one can take advantage of his own wrong." The latter section

³⁵ See text accompanying notes 14-23 *supra*. Although called "involuntary" trusts by the legislature, trusts arising within sections 2223 and 2224 are called "constructive" trusts by the courts. *Strausburg v. Conner*, 96 Cal. App. 2d 398, 215 P.2d 509 (1950). Both terms are acceptable because each imports that such a trust is created by operation of law, rather than through the intent of the parties as is the case in an express trust. CAL. CIV. CODE § 2217. *But see Touli v. Santa Cruz County Title Co.*, 20 Cal. App. 2d 495, 67 P.2d 404 (1937).

³⁶ See text accompanying notes 25-32 *supra*.

³⁷ See text accompanying notes 33-34 *supra*.

³⁸ R. NEWMAN, TRUSTS 205 (2d ed. 1955).

has been held to be a codification of the principle of unjust enrichment.³⁹ The California Supreme Court has stated that "[t]he general principle that precludes a wrongdoer from unjustly enriching himself has been codified in section 2224 and 3517 in the Civil Code."⁴⁰ If sections 2223 and 3517 are read together, it would appear that both sections 2223 and 2224 are codifications of the prior case law and that both sections may be reasonably construed to be directed at the prevention of unjust enrichment.

Cases Under Civil Code Sections 2223 and 2224

California courts have used unjust enrichment as the basis for imposing a constructive trust in three categories of cases: (1) where there has been fraud, undue influence, mistake, or crime; (2) where there has been a breach of a fiduciary duty; and (3) where there has been a violation of an unenforceable contract.

In cases involving fraud,⁴¹ courts seem to focus on this element to the exclusion of any discussion of the element of unjust enrichment. Looking no further than to the fraudulent misrepresentation or concealment, the courts imply that fraud is the basis of the con-

³⁹ Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 241 P.2d 544 (1952); Brazil v. Silva, 181 Cal. 490, 185 P. 174 (1919).

⁴⁰ Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 645, 241 P.2d 544, 545 (1952).

⁴¹ Flores v. Arroyo, 56 Cal. 2d 492, 364 P.2d 263, 15 Cal. Rptr. 87 (1961) (husband fraudulently used community property to purchase property in defendant's name and then divorced his wife); Simonton v. Trusts & Sav. Bank, 192 Cal. 651, 221 P. 368 (1923) (executrix fraudulently concealed part of estate); Burns v. Ross, 190 Cal. 269, 212 P. 17 (1923) (defendant forged assignment of a contract for purchase of land); Brazil v. Silva, 181 Cal. 490, 185 P. 174 (1919) (misrepresented to testator the destruction of will under which defendant would take); Crosby v. Clark, 132 Cal. 1, 63 P. 1022 (1901) (misrepresented that prior possessor had left the land in obtaining title to land from railroad); Greiner v. Greiner, 58 Cal. 115 (1881) (fraudulently concealed property from wife on filing of divorce action); Efron v. Kalmanovitz, 249 Cal. App. 2d 187, 57 Cal. Rptr. 248 (1967) (corporation fraudulently acquired property); Fowler v. Fowler, 227 Cal. App. 2d 741, 39 Cal. Rptr. 101 (1964) (defendant had his bride repair home on a promise that he would have ownership of the home changed to a joint tenancy); Estrada v. Garcia, 132 Cal. App. 2d 545, 282 P.2d 547 (1955) (fraudulently represented ownership of house); Walter H. Leimert Co. v. Woodson, 125 Cal. App. 2d 186, 270 P.2d 95 (1954) (real estate agent misrepresented that he would obtain land for principal and instead purchased land for himself); Cardozo v. Bank of Am., 116 Cal. App. 2d 833, 254 P.2d 949 (1953) (fraudulently kept formal notice of probate from remainderman); Sellman v. Sellman, 82 Cal. App. 2d 192, 185 P.2d 846 (1947) (defendant misrepresented that he would pay note and instead purchased property at execution sale); Kallmeyer v. Poore, 52 Cal. App. 2d 142, 125 P.2d 924 (1942) (fraudulent promise to buy plaintiff's land at foreclosure sale); Apablaza v. Sepulveda, 91 Cal. App. 232, 267 P. 105 (1928) (wife misrepresented she was only beneficiary under will); Cole v. Manning, 79 Cal. App. 55, 248 P. 1065 (1926) (married woman took property on representation that she was single and would marry the plaintiff); Carter v. Holt, 28 Cal. App. 796, 154 P. 37 (1915) (fraudulently obtained money); Heinrich v. Heinrich, 2 Cal. App. 479, 84 P. 326 (1905) (misrepresented value of land to be purchased when obtaining money for that purpose from his wife).

structive trust.⁴² But to limit the explanation of constructive trusts to mere "fraud rectifying trusts"⁴³ is inadequate for several reasons. In the first place that rationale has forced the courts to establish a doctrine of constructive fraud, which is differentiated from actual fraud by the courts, but is left undefined and limitless to serve as a catch-all for what seems to be improper conduct.⁴⁴ Second, in cases where fraud is found, the courts nevertheless deny the imposition of a constructive trust unless it is shown that there has been a benefit to the wrongdoer.⁴⁵ For example, in a case involving misrepresentation of the cost of home repair by a building contractor, the court denied a constructive trust, there having been no unjust enrichment as a result of the misrepresentation.⁴⁶ Third, any purported limitation of constructive trusts to fraud cases is rebutted by the large number of cases allowing a constructive trust where there has been only a mistake⁴⁷ or a breach of a fiduciary duty.⁴⁸ Nor is the imposition of a constructive trust based on fraud in cases where property has been acquired through undue influence⁴⁹ or a criminal act.⁵⁰

⁴² Johnson v. Clark, 7 Cal. 2d 529, 61 P.2d 767 (1936); Hayne v. Herman, 97 Cal. 259, 32 P. 171 (1893); Pacific Nat'l Bank v. Corona Nat'l Bank, 113 Cal. App. 366, 298 P. 144 (1931); Reay v. Reay, 97 Cal. App. 264, 275 P. 533 (1929); Holstrom v. Mullen, 84 Cal. App. 1, 257 P. 545 (1927); Sanguinetti v. Rossen, 12 Cal. App. 623, 107 P. 560 (1906).

⁴³ Johnson v. Clark, 7 Cal. 2d 529, 533, 61 P.2d 767, 769 (1936).

⁴⁴ Johnson v. Clark, 7 Cal. 2d 529, 61 P.2d 767 (1936); Jones v. Jones, 140 Cal. 587, 74 P. 143 (1903); Hayne v. Herman, 97 Cal. 259, 32 P. 171 (1893); Efron v. Kalmanovitz, 249 Cal. App. 2d 185, 57 Cal. Rptr. 243 (1967).

⁴⁵ Ward v. Taggart, 51 Cal. 2d 736, 742, 336 P.2d 534, 538 (1959) (so held as to the escrow agent); Loomis v. Loomis, 148 Cal. 149, 82 P. 679 (1905).

⁴⁶ McCauley v. Dennis, 220 Cal. App. 2d 627, 34 Cal. Rptr. 90 (1963).

⁴⁷ Decorative Carpets, Inc. v. State Bd. of Equalization, 58 Cal. 2d 252, 373 P.2d 637, 23 Cal. Rptr. 589 (1962) (retailer mistakenly charged customers too much state sales tax); Donovan v. Stevens, 179 Cal. 32, 175 P. 400 (1918) (attorney mistakenly collected too much for his fee); Estate of Walker, 160 Cal. 547, 117 P. 510 (1911) (later discovered will); First Nat'l Bank v. Wakefield, 148 Cal. 558, 83 P. 1076 (1906) (mistakenly deposited money in bank); Heydenfeldt v. Jacobs, 107 Cal. 373, 40 P. 492 (1895) (mistake in distribution of estate); Brown v. Volz, 90 Cal. App. 2d 793, 204 P.2d 110 (1949) (mistakenly designated accommodation maker on note as joint owner of the property).

⁴⁸ Cases cited note 51 *infra*.

⁴⁹ Allen v. Meyers, 5 Cal. 2d 311, 54 P.2d 450 (1936) (semiconscious mother deeded property to defendant); Donnelly v. Rees, 141 Cal. 56, 74 P. 433 (1903) (secured conveyance from alcoholic); More v. More, 133 Cal. 489, 65 P. 1044 (1901) (secured conveyance from alcoholic); Clark v. Pullins, 171 Cal. App. 2d 703, 341 P.2d 73 (1959) (decendent unduly influenced to devise property to defendant); West v. Stainback, 108 Cal. App. 2d 806, 240 P.2d 366 (1952) (niece improperly had all property of aunt willed to herself); Sampson v. Bruder, 47 Cal. App. 2d 431, 118 P.2d 28 (1941) (defendant practiced duress on elderly crippled woman to obtain property); Reay v. Reay, 97 Cal. App. 264, 275 P. 533 (1929) (son unduly influenced elderly mother to transfer property to him).

⁵⁰ Beck v. West Coast Life Ins. Co., 38 Cal. 2d 643, 241 P.2d 544 (1952) (beneficiary of insurance policy murdered insured); Whitfield v. Flaherty, 228 Cal. App. 2d 753, 39 Cal. Rptr. 857 (1964) (husband murdered wife); Jud Whitehead Heater Co. v. Obler, 111 Cal. App. 2d 861, 245 P.2d 608 (1952) (embezzled company funds); Church v. Bailey, 90 Cal. App. 2d 501, 203 P.2d 547 (1949) (misappropriated employer's funds); Brodie v. Barnes, 56 Cal. App. 2d 315, 132 P.2d 595 (1942) (embezzled funds).

Clearly, the prevention of fraud does not explain the results in these various cases, but the thread running through each is the court's determination to prevent the defendant's unjust enrichment by his acquisition or retention of a res.

Constructive trusts have been imposed where property is obtained through the violation of some fiduciary or confidential relationship.⁵¹ Illustrative of the principle of unjust enrichment is a case where a vice president of a bank fraudulently obtained money for the benefit of the bank without its knowledge, and the bank was held as a constructive trustee because it would not be allowed to benefit from the fraud.⁵² One situation especially points up the necessity for unjust enrichment: that is where a fiduciary acquires property for himself, when this should have been done for the benefit of his principal.⁵³ And a party who receives trust property with notice of the trust will take subject to a constructive trust.⁵⁴ In all of these situations the primary concern of the court is that the fiduciary should not be allowed to benefit by his wrong. Such a concern is simply a restatement of the principle of unjust enrichment.

Constructive trusts have also been used in certain unenforceable contract cases. A constructive trust will not be imposed because of a

⁵¹ *Bainbridge v. Stoner*, 16 Cal. 2d 423, 106 P.2d 423 (1940) (director of corporation acquired corporation property); *Boldemann Chocolate Co. v. Price*, 5 Cal. 2d 200, 53 P.2d 946 (1936) (president of corporation assigned away insurance policy taken out on him by corporation); *Leala v. Carrall*, 207 Cal. 542, 279 P. 443 (1929) (breach of agreement not to take as heir); *Clark v. Millsap*, 197 Cal. 765, 242 P. 918 (1926) (attorney refused to account for property turned over to him by client); *MacDermott v. Hayes*, 175 Cal. 95, 170 P. 616 (1917) (stockbroker used principal's money to buy stock for himself); *Smith v. H.J. Goethe Co.*, 147 Cal. 725, 82 P. 384 (1905) (administrator had mortgage foreclosed on estate); *Becker v. Schwerdtle*, 141 Cal. 386, 74 P. 1029 (1903) (son refused to keep bargain by which he was to support his mother in exchange for property); *Alaniz v. Casenave*, 91 Cal. 41, 27 P. 521 (1891) (daughter transferred property to father to manage); *Brison v. Brison*, 75 Cal. 525, 17 P. 689 (1888) (husband transferred property to wife before going on trip); *Briggs v. Nilson*, 226 Cal. App. 2d 342, 38 Cal. Rptr. 68 (1964) (mother repudiated promise to reconvey to daughter); *South v. Wishard*, 146 Cal. App. 2d 276, 303 P.2d 805 (1956) (attorney agreed to help with partner's client and kept oil royalties from client); *Carberry v. Trentham*, 143 Cal. App. 83, 299 P.2d 966 (1956) (defendant neglected his duty to pay taxes on another's property and bought property at tax sale); *Air Purification, Inc. v. Carle*, 99 Cal. App. 2d 253, 221 P.2d 700 (1950) (party to joint venture gets patent on modification of company's model); *Edwards v. Edwards*, 90 Cal. App. 2d 33, 202 P.2d 589 (1949) (son promised to provide house for parents if they would board him); *Dalakis v. Paras*, 86 Cal. App. 2d 243, 194 P.2d 736 (1948) (property transferred to defendant's husband to hold); *Rivero v. Thomas*, 86 Cal. App. 2d 225, 194 P.2d 533 (1948) (defendant used power of attorney for his own benefit); *Adams v. Talbott*, 61 Cal. App. 2d 315, 142 P.2d 775 (1943) (property conveyed to the defendant to manage); *Truesdail v. Lewis*, 45 Cal. App. 2d 718, 115 P.2d 218 (1941) (in return for his services, plaintiff was promised part of the stock in newly formed corporation).

⁵² *Pacific Nat'l Bank v. Corona Nat'l Bank*, 113 Cal. App. 366, 293 P. 144 (1938).

⁵³ Cases cited note 56 *infra*.

⁵⁴ *Scott v. Symonds*, 191 Cal. 441, 216 P. 604 (1923); *Lucas v. Associacao Protectora Uniao Madeirense do Estado da Cal.*, 61 Cal. App. 2d 344, 143 P.2d 53 (1943).

bare promise to buy property for another,⁵⁵ but will be imposed if an agent or other fiduciary agrees to buy property for his principal,⁵⁶ seemingly because only in the latter case will any retained benefit be deemed unjustly retained. A constructive trust will be imposed where there is an unenforceable promise to reconvey to the transferor,⁵⁷ or where there is a gift by will⁵⁸ or inter vivos conveyance⁵⁹ on an oral promise to hold in trust for some third party. In these cases, although there is usually a corresponding loss to the plaintiff, there is always an unjustly retained benefit.

The courts in their discussions spend a negligible amount of time in considering the loss to the plaintiff and instead appear to be concerned only with the proprietary interest retained by the defend-

⁵⁵ *Mazzera v. Wolf*, 30 Cal. 2d 531, 183 P.2d 649 (1947); *Taylor v. Kelly*, 103 Cal. 178, 37 P. 216 (1894); *Elliott v. Wood*, 95 Cal. App. 2d 314, 212 P.2d 906 (1949).

⁵⁶ *Stromerson v. Averill*, 22 Cal. 2d 808, 141 P.2d 732 (1943) (agent took contract in his name for principal and later repudiated his fiduciary duty); *Webb v. Vercoe*, 201 Cal. 754, 258 P. 1099 (1927) (agent who purchased property for principal at foreclosure sale refused to reconvey); *Koyer v. Willmon*, 150 Cal. 785, 90 P. 135 (1907) (partner took property intended for partnership in his own name); *Broder v. Conklin*, 77 Cal. 330, 19 P. 513 (1888) (attorney repudiated trust after receiving deed from sale); *Sadugor v. Holstein*, 199 Cal. App. 2d 477, 18 Cal. Rptr. 859 (1962) (partner purchased land intended for partnership for himself); *South v. Wishard*, 146 Cal. App. 2d 276, 303 P.2d 805 (1956) (attorney retained property intended for client); *Walter H. Leimert Co. v. Woodson*, 125 Cal. App. 2d 186, 270 P.2d 95 (1954) (real estate agent purchased land intended for principal).

⁵⁷ *Johnson v. Clark*, 7 Cal. 2d 529, 61 P.2d 767 (1936) (plaintiff transferred store to her sister); *Smith v. Lombard*, 201 Cal. 518, 258 P. 55 (1927) (transfer of property in joint tenancy on oral promise that plaintiffs to have possession for life); *Becker v. Schwerdtle*, 141 Cal. 386, 74 P. 1029 (1903) (property conveyed to son on his promise to support mother); *Jones v. Jones*, 140 Cal. 587, 74 P. 143 (1903) (property conveyed to husband to oust tenant); *Alaniz v. Casenave*, 91 Cal. 41, 27 P. 521 (1891) (property conveyed to father to manage); *Briggs v. Nilson*, 226 Cal. App. 2d 342, 38 Cal. Rptr. 68 (1964) (daughter executed joint tenancy to mother on promise to reconvey); *Nevarez v. Nevarez*, 202 Cal. App. 2d 596, 21 Cal. Rptr. 70 (1962) (property transferred to son before undergoing surgery); *Atwood v. Elwood*, 132 Cal. App. 2d 761, 283 P.2d 43 (1955) (property deeded to defendant to obtain patent to land); *McMillen v. McDonald*, 127 Cal. App. 2d 302, 273 P.2d 683 (1954) (property conveyed to defendants to obtain veterans tax benefit); *Dalakis v. Paras*, 86 Cal. App. 2d 243, 194 P.2d 736 (1948) (money given to defendant's husband to hold); *Steinberger v. Steinberger*, 60 Cal. App. 2d 116, 140 P.2d 31 (1943) (nephew deeded land to uncle who orally promised to reconvey).

⁵⁸ *Estate of Sargavak*, 41 Cal. 2d 314, 259 P.2d 897 (1953); *Leala v. Carroll*, 207 Cal. 542, 279 P. 443 (1929).

⁵⁹ *Day v. Greene*, 59 Cal. 2d 404, 380 P.2d 385, 29 Cal. Rptr. 785 (1963) (wife agreed to convey to children); *Aho v. Kusnert*, 12 Cal. 2d 687, 87 P.2d 358 (1939) (husband promised to convey to children); *Allen v. Meyers*, 5 Cal. 2d 311, 54 P.2d 450 (1936) (promised to reconvey to plaintiffs); *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430 (1911) (promised to devise to grantor's parents); *Kimball v. Tripp*, 136 Cal. 361, 69 P. 428 (1902) (promise to hold in trust for plaintiffs); *Hayne v. Hermann*, 97 Cal. 259, 32 P. 171 (1893) (promised to hold in trust for children); *Casey v. Casey*, 97 Cal. App. 2d 875, 218 P.2d 842 (1950) (promised to hold in trust for plaintiff).

ant.⁶⁰ Although the courts do not in every instance express the need for unjust enrichment as a condition precedent to the imposition of a constructive trust, the facts and results invariably justify such a conclusion,⁶¹ and certainly no case specifically rejects unjust enrichment as a standard. This fact explains why, in the cases involving fraud, a constructive trust is not imposed unless it is shown that some benefit has been gained by that fraud. In the cases where a fiduciary has breached his duty, he is forced to turn over to his principal his ill-gotten gains even though it is not shown that the principal is entitled to the profits or that the principal has suffered any loss.⁶² In the cases involving the violation of an unenforceable contract, property has been passed to the defendant to hold, and he refuses to relinquish the property.

Applicable California statutes and case law require unjust enrichment before a constructive trust will be imposed. This accumulation of authority has been challenged by the court in *Elliott v. Elliott*.⁶³

Elliott v. Elliott

In *Elliott v. Elliott*, the plaintiff brought an action against her former husband to have him declared a constructive trustee of one-half of the face value of a promissory note plus interest. This one-half interest had been awarded to the wife as community property in an interlocutory decree of divorce. The statute of limitations ran on the note while the divorce decree was on appeal and after the wife had demanded that the husband collect on the note. The defendant contended that a constructive trust could be imposed under California Civil Code sections 2223 and 2224 only if the plaintiff proved that the defendant had gained a benefit and that since the note was worthless there was no benefit. The court, relying on the *Restatement of Restitution* and three California cases, stated, "we do not deem a tangible benefit to the constructive trustee a *sine qua non* of a constructive trust."⁶⁴

The court in *Elliott* prefaced its argument on a sentence in the introduction to the *Restatement of Restitution*.⁶⁵ "The Restatement of this Subject deals with situations in which a person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss."⁶⁶ The court failed to cite any part of section 160 of the *Restatement*, the section dealing with constructive trusts. That section explicitly states that "a constructive

⁶⁰ *E.g.*, *Bainbridge v. Stoner*, 16 Cal. 2d 423, 106 P.2d 423 (1940); *Schaefer v. Bernstein*, 180 Cal. App. 2d 107, 4 Cal. Rptr. 236 (1960); *Sampson v. Bruder*, 47 Cal. App. 2d 431, 118 P.2d 28 (1941); *Reay v. Reay*, 97 Cal. App. 264, 275 P. 533 (1929).

⁶¹ *E.g.*, *MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616 (1917); *Donnelly v. Rees*, 141 Cal. 56, 74 P. 433 (1903); *Heyenfeldt v. Jacobs*, 107 Cal. 373, 40 P. 492 (1895); *Rankin v. Satir*, 75 Cal. App. 2d 681, 171 P.2d 78 (1946).

⁶² *Bank of Am. v. Ryan*, 207 Cal. App. 2d 698, 24 Cal. Rptr. 739 (1962).

⁶³ 231 Cal. App. 2d 205, 41 Cal. Rptr. 686 (1964).

⁶⁴ *Id.* at 210, 41 Cal. Rptr. at 688.

⁶⁵ *Id.* at 210, 41 Cal. Rptr. at 689.

⁶⁶ *RESTATEMENT OF RESTITUTION 1* (1937).

trust is imposed upon a person to prevent his unjust enrichment."⁶⁷ Professor Scott, the reporter for the topic on constructive trusts, has said:

The conception of the Restatement is that a constructive trust is a remedy created to enforce a right of restitution arising out of unjust enrichment, and that it arises in every case where a benefit consisting of property has been received as to which there is a duty to make restitution to another.⁶⁸

Furthermore, every illustration under section 160 clearly indicates that a constructive trust is to be used only in a situation where there is a gain by the defendant; no situation is referred to where there is merely a loss to the plaintiff. In the first topic which deals with quasi-contracts, however, there are examples and sections dealing with a few limited situations where there is a loss to the plaintiff with no corresponding gain by the defendant.⁶⁹ It would seem that the introductory statement of the *Restatement* relied upon by the court refers to these limited quasi-contractual situations.

The court was bothered by Civil Code sections 2223 and 2224. It assumed that those sections require that the wrongdoer gain a benefit, and hence it sought to avoid them. The court used an introductory note of the *Restatement* in an attempt to neutralize sections 2223 and 2224:

The rules stated in the Restatement of this Subject depend for their validity upon certain assumptions in regard to what is required by justice in the various situations. In this *Topic* these are stated in the form of principles. They cannot be stated as rules since they are too indefinite to be of value in a specific case or, for historical or other reasons, they are not universally applied. They are distinguished from rules in that they are intended only as general guides for the conduct of the courts.⁷⁰

This section was applied by the court in the construction, not of the *Restatement*, but of California Civil Code sections 2223 and 2224. Moreover, even if statutes could be so loosely interpreted,⁷¹ the *Restatement* section cited by the court was not even intended to apply to constructive trusts. That section, in its text, is specifically limited to "this *Topic*" and since it is found in the introduction to topic one which deals with quasi-contracts, it does not refer to topic two, which includes constructive trusts. This is further illustrated by the fact that in the introduction to topic two no such qualification is found. Therefore the court's avoidance of sections 2223 and 2224 of the Civil Code was entirely unjustifiable.

The court was unable to distinguish, from the situation before it, the cases of *Corey v. Struve*⁷² and *Noble v. Noble*.⁷³ In *Corey v. Struve* the tenant's lease required him to use beet tops that re-

⁶⁷ RESTATEMENT OF RESTITUTION § 160, comment c at 42 (1937).

⁶⁸ SEAVEY & SCOTT, *Restitution*, 54 L.Q. REV. 29, 41 (1938).

⁶⁹ RESTATEMENT OF RESTITUTION § 1, comment e, at 15 (1937).

⁷⁰ RESTATEMENT OF RESTITUTION 11 (1937) (emphasis added).

⁷¹ Cardozo, in recognizing "judge made law as one of the realities of life," admitted that a statute which is consistent with the constitution overrides the law of judges. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10, 14 (22d ed. 1964).

⁷² 170 Cal. 170, 149 P. 48 (1915).

⁷³ 198 Cal. 129, 243 P. 439 (1926).

mained after harvest as fertilizer for the land. Instead, he sold the beet tops as feed for cattle which were pastured on the land by a third party. The court held the tenant to be a constructive trustee for the benefit of the landlord of the money gained as a result of the sale, even though it was found that the natural fertilizer left by the cattle was more beneficial to the land than the beet tops would have been.⁷⁴ In other words, while it is true there was no loss to the plaintiff, there was clearly a benefit to the defendant—the money—which justified the imposition of a constructive trust. Therefore rather than supporting the argument of *Elliott, Corey v. Struve* lends support to the contrary position.

In *Noble v. Noble*⁷⁵ a sister had conveyed property to her brother without consideration, with the oral understanding that he would manage the property and reconvey at her will. Thereafter, with the sister's consent, the brother exchanged the property for a house and a lot. Having allowed the house and lot to deteriorate, the brother, without the knowledge or consent of his sister, sold the property for one-half of its original value and deposited the money received in his own account. The court held that the sister could recover by a constructive trust, but only that amount which could be traced to the brother's bank account, that is, the amount by which he benefited by the sale.⁷⁶ The court said that the difference between the sale price and the value of the original property was a matter of personal liability and that it could not be recovered in an action to impose a constructive trust.⁷⁷ Clearly, the sister was limited to the amount of the benefit unjustly conferred upon her brother.

In opposition to the court's statement, both *Corey v. Struve* and *Noble v. Noble* are distinguishable from, if not contrary to, *Elliott*. *Corey* and *Noble* each concerned a situation where the property had changed form; the problem was one of tracing. Both courts limited recovery to the benefit unjustly derived by the wrongdoer. While the court in *Elliott* was correct in finding that the promissory note would satisfy any technical requirements for a res, there was nothing to trace since the res was worthless. California courts have held that where an instrument is void no interest passes thereby and there can be no imposition of a constructive trust.⁷⁸

Finally, the court in *Elliott* suggested that the result in *Ward v. Taggart*⁷⁹ is comparable to the result it was trying to reach.⁸⁰ *Ward v. Taggart* is important, not for the reasons suggested by *Elliott*, but for the reasoning of the court in imposing punitive damages, because in so doing the court illuminated the true basis of the constructive trust. In *Ward*, the defendant real estate agent fraudulently misrepresented to a purchaser the price of a certain piece of real property as \$5,000 per acre, when he knew that the owner was asking \$4,000. The purchaser paid the defendant agent \$5,000 per acre, and the defendant then bought the land for \$4,000 per acre

⁷⁴ 170 Cal. at 171, 149 P. at 49.

⁷⁵ 198 Cal. 129, 243 P. 439 (1926).

⁷⁶ *Id.* at 136, 243 P. at 442.

⁷⁷ *Id.*

⁷⁸ *Loomis v. Loomis*, 148 Cal. 149, 82 P. 679 (1905); *Mandeville v. Salmon*, 33 Cal. 38 (1867).

⁷⁹ 51 Cal. 2d 736, 336 P.2d 534 (1959).

⁸⁰ 231 Cal. App. 2d at 211, 41 Cal. Rptr. at 689.

and conveyed it to the purchaser. The court held that even though the land was worth \$5,000 per acre, the defendant took the \$1,000 per acre differential as a constructive trustee for the purchaser. The court said that in such a situation the defendant should be punished, but that a constructive trust would not serve as a punitive measure. All that a constructive trust would accomplish would be the forced return by the defendant of what he had wrongfully obtained;⁸¹ hence a wrongdoer would have everything to gain and nothing to lose. For this reason, in addition to the constructive trust the court imposed punitive damages.⁸² Rather than being comparable with the reasoning in *Elliott, Ward v. Taggart*, in opposition to that reasoning, points out that the liability of the defendant as a constructive trustee is limited to the extent of the unjust enrichment—the proprietary interest—retained by him. By implication, the court in *Ward v. Taggart* must be taken to say that if there has been no unjust enrichment, there can be no constructive trust.⁸³

Summary

The writers, the *Restatement of Restitution*, and the California courts have consistently indicated that the basis of a constructive trust is the prevention of unjust enrichment. The court in *Elliott* said that a constructive trust may also be imposed where a person is wrongfully deprived of property regardless of any unjust enrichment.⁸⁴ While the result in *Elliott* was equitable, the court reached it through the wrong remedy.

A constructive trust is a proprietary remedy⁸⁵ which must have something upon which to act—a benefit unjustly retained by the wrongdoer. The constructive trust as envisaged by the court in *Elliott* is a “hybrid-remedy” which would be both a proprietary and a personal remedy. The application of such a remedy by the court in *Elliott* results in a “hybrid-constructive trust” which would apparently return the unjust enrichment; if none, then the defendant would be personally liable to the extent of the plaintiff's loss. Whether such a form of action is desirable is beyond the scope of this note, but such a remedy does not fall within the confines of a constructive trust as delineated by California statutory and case law.

Elliott v. Elliott was a situation in which a constructive trust was particularly inapplicable since the defendant had not been unjustly enriched. Rather than completely changing the character of the constructive trust to do justice in one case, the court should have recognized that the plaintiff's recovery should have been limited to any damages recoverable in an action at law.

Larry Hultquist*

⁸¹ 51 Cal. 2d at 743, 336 P.2d at 538.

⁸² *Id.* at 743, 336 P.2d at 539.

⁸³ The court also reversed the judgment against the escrow agent because she did not share in the illicit profit. “One cannot be held to be a constructive trustee of something he has not acquired.” *Id.* at 744, 336 P.2d at 538.

⁸⁴ 231 Cal. App. 2d at 210, 41 Cal. Rptr. at 688.

⁸⁵ Some courts have compared constructive trusts with specific performance. *Bennett v. Forrest*, 24 Cal. 2d 485, 496, 150 P.2d 416, 421 (1944) (concurring opinion); *Henderson v. Fisher*, 236 Cal. App. 2d 468, 472, 46 Cal. Rptr. 173, 177 (1965).

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