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DePaul College of Law

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### Recommended Citation

DePaul College of Law, *Remedy in Tort for Wrongful Interference with Testamentary Intent*, 1 DePaul L. Rev. 253 (1952)

Available at: <https://via.library.depaul.edu/law-review/vol1/iss2/6>

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## REMEDY IN TORT FOR WRONGFUL INTERFERENCE WITH TESTAMENTARY INTENT

The remedies available to one when his expectations of taking as legatee under another's will are not realized due to the fraudulent intervention or duress of a third party, resulting in no will being executed or an existing one revoked, present a problem with which the courts have increasingly had to contend. Although the legal remedy is the relief discussed here, both the legal and the equitable branches of the law must be considered in seeking a remedy.<sup>1</sup>

Although not within the scope of this comment, it would be well to mention that the remedy in equity has developed to such a point that it is generally conceded that the fraudulent wrongdoer will be declared a constructive trustee for the benefit of the defrauded party,<sup>2</sup> particularly if the wrongdoer has used false promises to sway the testator.<sup>3</sup>

The general assumption, often unspoken, is that the various statutes of wills, in prescribing mandatory forms for revocation or establishment of a will, are no bar to the granting of relief, either in law or in equity. It is reasoned that the plaintiff is not attacking the probate decree, as the relief granted operates on the legatee personally, the decree itself not being affected.<sup>4</sup>

In both law and equity it has been almost universally held that there must be a clear showing that the effect of the fraud continued up to the death of the testator; that but for the fraud of the defendant, plaintiff would have been the object of the testator's bounty.<sup>5</sup> The possibility of the testator making devises or bequests independently of the fraud must be considered.

The remedy at law, in an action in tort for damages, has been shrouded

<sup>1</sup> *Lowe Foundation v. Northern Trust Co.*, 342 Ill. App. 379, 96 N.E. 2d 831 (1951), a case of first impression in Illinois, provides an interesting discussion of the various remedies. As no fraud was found to exist, the court found it unnecessary to decide whether it would allow any relief.

<sup>2</sup> *Prosser*, Torts 1014-16 (1941); 11 A.L.R. 2d 808 (1950); *Ransdel v. Moore*, 153 Ind. 393, 53 N.E. 767 (1899). See 1 *Pomeroy*, Equity Jurisprudence § 155 (5th ed., 1941); *Rest.*, Restitution § 184, Comment i (1937).

<sup>3</sup> *Ransdel v. Moore*, 153 Ind. 393, 53 N.E. 767 (1899); *Drakeford v. Wilks*, 3 Atk. 539 (1747); *Thynn v. Thynn*, 1 Vern. 296 (1684). Cases are collected in 66 A.L.R. 156 (1930); 155 A.L.R. 106 (1945); 26 R.C.L. 1241, n. 10 (1929).

<sup>4</sup> *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E. 2d 168 (1949); *Brazil v. Silva*, 181 Cal. 490, 185 Pac. 174 (1919). *Contra*: *Hall v. Hall*, 91 Conn. 514, 100 Atl. 441 (1917); *Axe v. Wilson*, 150 Kan. 794, 96 P. 2d 880 (1939).

<sup>5</sup> *Hegarty v. Hegarty*, 46 F. Supp. 319 (D.C. Mass., 1942); *Lewis v. Corbin*, 195 Mass. 520, 81 N.E. 248 (1907). *Cf.* *Mitchell v. Langley*, 85 S.E. 1050, 143 Ga. 827 (1915).

in uncertainty, with few serious attempts by the courts to analyze the problem. Perhaps because of this lack of understanding, the remedy has been seldom attempted, and with the courts sharing this uncertainty, there have been very few direct holdings on the question.<sup>6</sup>

There can readily be visualized a situation where the defrauder has disposed of or damaged the fraudulently obtained property, or where his fraud has caused the property to be left, not to him, but to a third, and innocent party. In the latter instance, equity would be of little avail to the injured party in those jurisdictions holding that a constructive trust will not be declared where the defendant has in no way been instrumental in fraudulently obtaining the bequest.<sup>7</sup>

In the jurisdictions which have touched upon the problem, two main views seem to have emerged: some denying the relief, and others by dicta indicating that they would allow it were the proper set of facts squarely presented.

This problem of tort remedy was first touched upon in the United States in the oft-cited case of *Hutchins v. Hutchins*,<sup>8</sup> in 1845. In that case the plaintiff alleged that his father had devised certain lands to him, and that defendant, by fraudulent means and defamation of plaintiff, induced the father to revoke the will and execute a new one under which plaintiff received nothing. The court, in holding that such a statement of facts did not state a cause of action, said:

At best, the contemplated gift was not to be realized till after the death of the testator . . . or the testator might change his mind, or lose his property. In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility . . . which is altogether too shadowy and evanescent to be dealt with by courts of law.<sup>9</sup>

It is to be noted that the court placed much emphasis on the possibility that the expectancy of the plaintiff might not materialize, regardless of the fraud. The obvious query is what the decision would have been had there

<sup>6</sup> There have been only two unequivocal holdings that the action will not lie, and not one holding that there is such a cause of action co-extensive with a finding of fraud. The cases are all treated herein.

<sup>7</sup> No trust was allowed in the following cases against the innocent legatee: *Dye v. Parker*, 108 Kan. 304, 194 Pac. 640 (1921), noted in 5 Minn. L. Rev. 488 (1921); *Heinisch v. Pennington*, 73 N.J. Eq. 456, 68 Atl. 233 (Ch., 1907), aff'd 75 N.J. Eq. 606, 73 Atl. 1118 (1909). It was allowed in: *Pope v. Garrett*, 147 Tex. 18, 211 S.W. 2d 559 (1948), noted in 37 Ky. L. Rev. 113 (1948), 47 Mich. L. Rev. 598 (1949); *Bohannon v. Trotman*, 214 N.C. 706, 200 S.E. 852 (1939).

<sup>8</sup> 7 Hill (N.Y.) 104 (1845).

<sup>9</sup> *Ibid.*, at 110. For the present judicial outlook on this case in New York, see *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E. 2d 168 (1949) in which the case was offered by counsel to support their contention that equity would not fasten a constructive trust on a fraudulent legatee. The *Hutchins* case, said the court, was to be limited strictly to its holding, i.e., no cause of action in tort was present.

been a showing that the fraud remained operative until the testator's death.

The court, in passing, noted that it had not lost sight of the fact that in certain actions, such as slander, damages were recoverable for interference with mere expectancies, but stated that that principle should be regarded as peculiar to that species of injury.<sup>10</sup>

Shortly thereafter, in 1855, a Louisiana court<sup>11</sup> held, regrettably with but little discussion of the problem, that an action in tort will lie against one who by force and violence has prevented a person from making a will in favor of the plaintiff.<sup>12</sup> Thus was posed a fundamental difference of opinion, both cases gaining adherents in subsequent decisions.

The reasoning of the *Hutchins* case was followed in a comparatively recent Ohio decision,<sup>13</sup> in which a husband who would inherit his wife's estate if she died intestate, forcibly prevented her from executing a will leaving her property to plaintiff. The court emphatically stated that, as plaintiff had a mere expectancy, he could base no cause of action upon it.

In the case of *Hall v. Hall*,<sup>14</sup> relief was refused, but on different reasoning. Plaintiff alleged fraud of the defendants in making false representations to the testator, by reason of which defendants were made sole beneficiaries in his will; defendants were also charged with preventing plaintiff from opposing probate of the will, whereby plaintiff was deprived of his inheritance. In a somewhat confusing decision, the court first said that the fraud was practiced on the testator, and not on plaintiff, but then went on to hold that "the decree of the Court of Probate stands in the plaintiff's way, unless and until he obtains an adjudication removing it from his path."<sup>15</sup>

The reasoning in the case would seem to be unsound. In an action for damages such as this, the plaintiff is not collaterally attacking the decree, but is admitting its validity, and is suing the defendant personally for his fraud. The sole result of the probate decree is to put the defendant in the position where, if the plaintiff has no remedy, the defendant will benefit by his fraud. Possibly with this in mind, the court intimated that plaintiff would have had a cause of action had he sought equitable relief.<sup>16</sup>

<sup>10</sup> *Hutchins v. Hutchins*, 7 Hill (N.Y.) 104, 109 (1845).

<sup>11</sup> *Kelly v. Kelly*, 10 La. Ann. 622 (1855).

<sup>12</sup> The courts have apparently made no distinction between those cases in which fraud has been the wrong complained of, and those in which force was used. They have cited the cases indiscriminately, and have used the same reasoning in both types of cases.

<sup>13</sup> *Cunningham v. Edwards*, 52 Ohio App. 61, 3 N.E. 2d 58 (1936), noted in 23 Va. L. Rev. 220 (1936), and 5 Fordham L. Rev. 514 (1936).

<sup>14</sup> 91 Conn. 514, 100 Atl. 441 (1917), critically noted in 27 Yale L. J. 263 (1917).

<sup>15</sup> *Hall v. Hall*, 91 Conn. 514, 521, 100 Atl. 441, 443 (1917).

<sup>16</sup> *Ibid.*, at 523 and 444.

Dicta in *Lewis v. Corbin*,<sup>17</sup> the case most cited as approving such relief, seems to indicate that the remedy in tort would be allowed. Plaintiff alleged that defendant, residuary legatee, fraudulently induced testator to execute a codicil which was invalid because the statutory number of witnesses was not present. This invalidity was unknown to testator, who intended to leave a legacy to plaintiff's father. Defendant's demurrer was sustained, but the court said that if plaintiff's pleading had averred fraud *up until the testator's death*, a good cause of action would have been stated. The court inferred that the decision in the *Hutchins* case might have been different had the same thing been shown there.<sup>18</sup>

North Carolina has held that such a cause of action exists—although damages were not actually awarded.<sup>19</sup> Plaintiff alleged that defendant had fraudulently caused decedent to change a fixed plan of distribution, favorable to plaintiff, which he had intended to fulfill by will or trust. The court, in rendering its decision, said: "It is true that such a cause of action may be difficult to prove—but that does not touch the existence of the cause of action, but only its establishment."<sup>20</sup>

A federal district court, applying Massachusetts law, denied defendant's motion to dismiss, holding that plaintiff had stated a good cause of action in alleging that defendant fraudulently induced decedent to transfer all his property to defendants, with the intent of defeating plaintiff's right of inheritance.<sup>21</sup> The court made note of the fact that plaintiff had specifically alleged fraud up to the time of the testator's death. Upon the trial of the case, however, no fraud was found to exist.<sup>22</sup>

The trend of the cases would seem to be toward allowing the action. This is in accord with reason and the law in situations which present similar problems. It must be noted, however, that in no case have damages actually been awarded.

Although there are no decisions on the point, it would seem on general tort principles that if the legatee did not participate in the fraud, he is guilty of no wrong, and the defrauded party is remediless against him. This objection is often of little importance in equity.<sup>23</sup>

With the paucity of decided cases on the instant problem, it is helpful to consider the solutions found to problems in analogous fields. The position of a beneficiary in an insurance policy in which the right to change the beneficiary is reserved, would seem analogous to that of a legatee under

<sup>17</sup> 195 Mass. 520, 81 N.E. 248 (1907).

<sup>18</sup> *Ibid.*, at 526 and 250.

<sup>19</sup> *Bohanon v. Wachovia*, 210 N.C. 679, 188 S.E. 390 (1936). See critical note in 23 Va. L. Rev. 614 (1936).

<sup>20</sup> *Bohanon v. Wachovia*, 210 N.C. 679, 684, 188 S.E. 390, 394 (1936).

<sup>21</sup> *Hegarty v. Hegarty*, 46 F. Supp. 319 (D.C. Mass., 1942).

<sup>22</sup> *Hegarty v. Hegarty*, 52 F. Supp. 296 (D.C. Mass., 1943).

<sup>23</sup> Authorities cited note 7 *supra*.

a will: they are both possessed of no more than a mere expectancy.<sup>24</sup> If it be argued that the insurance policy is in the nature of a third party beneficiary contract, it only need be answered that, if so, it is a contract terminable at will, and no rights vest in the beneficiary until the death of the insured.

A foundation case in this field is *Mitchell v. Langley*.<sup>25</sup> Defendant had fraudulently induced the insured to change the beneficiary in a benefit policy from plaintiff to defendant. The court, by dicta, answered the instant problem when it said: "There is such a status that an action will lie."<sup>26</sup>

This case seems to be in accord with the better authority in its field, although there are contrary holdings, most of them leaning on the "no legal rights" doctrine.<sup>27</sup>

An even stronger analogy appears to lie in the field of interference with advantageous relations.<sup>28</sup> As far back as the Year Books,<sup>29</sup> such a wrong seems to have been recognized, and a remedy provided therefore, although the leading case of *Temperton v. Russell*<sup>30</sup> was not decided until 1893. That case extended the doctrine of earlier cases by expressly recognizing as actionable an interference with a purely prospective contractual relationship. Today the general rule in this country is that an interference with a prospective economic advantage is actionable,<sup>31</sup> though based on a pure expectancy.

It has been suggested that the degree of probability that plaintiff would take under testator's will be ascertained, and damages apportioned accordingly.<sup>32</sup> Although otherwise sound, the difficulty of ascertaining such nebulous matters as "probabilities" would seem to make it impractical. Although in the business field of prospective contracts, such practice has become accepted, it must be remembered that business, in many respects, has become almost a science, so that the determining of possible loss sustained is far from conjectural. In a situation such as we have here, the difficulties incident to ascertaining the precise degree of probability would

<sup>24</sup> 29 Am. Jur., Insurance § 1276 (1940); Vance, Insurance, 559-64 (2d ed., 1930).

<sup>25</sup> 143 Ga. 827, 85 S.E. 1050 (1915).

<sup>26</sup> *Ibid.*, at 831 and 1053.

<sup>27</sup> The action was allowed in *Daugherty v. Daugherty*, 152 Ky. 732, 154 S.W. 9 (1913). *Contra*: *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185 (1896). For a general discussion, see 105 A.L.R. 950, 957 (1936).

<sup>28</sup> See *Bohanon v. Wachovia*, 210 N.C. 679, 188 S.E. 390 (1936).

<sup>29</sup> Prosser, Torts 1014 n. 59 (1941).

<sup>30</sup> [1893] 1 Q.B. 715.

<sup>31</sup> A great many cases are listed and discussed in Prosser, Torts §§ 105, 106 (1941). See *Lewis v. Bloede*, 202 Fed. 7 (C.C.A., 1912); 84 A.L.R. 43, 60 (1933).

<sup>32</sup> 48 Harv. L. Rev. 984 (1935); Prosser, Torts 1017 n. 81 (1941).

seem to require that damages, if awarded, be either purely nominal, or the full amount of the legacy or devise. The possibility of awarding nominal damages would answer those who decry awarding any damages at all, the basis of their opinion being the impracticability of ascertaining what the testator would have done but for the fraud.

With the increasing realization that the true function of the law is to do justice, and the tendency to discard pat and arbitrary formulas, particularly in realizing that expectancies in many areas should be afforded the protection of the law, it is to be expected that the right to a remedy at law, in the problem herein discussed, will come to be firmly established. Its dangers must not be overlooked; the fraud must clearly be shown to be the ultimate cause of plaintiff's disappointment. To use the more familiar language of torts, the fraud must be shown to be the proximate cause of plaintiff's loss. But, when these conditions are met, the remedy in tort should be invaluable when equity affords no protection.

### COMPARATIVE INTELLIGENCE DOCTRINE IN EQUITY

Equity's extraordinary jurisdiction in granting relief is well-known and settled. However, within this vast, broad body of equitable principles there exists a rather obscure doctrine which may be termed "the doctrine of comparative intelligence." This doctrine stems from the fact that it is a principle of law and equity as well as of natural justice that a greater degree of consideration and care is due persons who are unable to care for themselves than to persons who are able. Interwoven with other discretionary defenses, the doctrine has been used primarily to defeat actions for the specific performance of contracts. Courts generally do not acknowledge the existence of the "doctrine of comparative intelligence" by name; nevertheless, from a study of cases, it is apparent that the principles underlying the doctrine are being and have been applied in certain instances. Before discussing "comparative intelligence," it is necessary to discuss briefly some of the discretionary defenses to affirmative equitable relief.

In general, a court of equity will not interfere to relieve either party to a contract, fairly entered into, from its binding effects because of the wisdom or folly of the contract or because of bad business judgment; a bargain is a bargain.<sup>1</sup>

But, specific performance is not a right;<sup>2</sup> it is granted in the discretion of the court according to general rules and principles.<sup>3</sup> For instance, the complainant must show the contract is not unjust or oppressive to the defendant.<sup>4</sup> Specific relief may be denied on the ground that the defendant

<sup>1</sup> Knott v. Cutler, 224 N.C. 427, 31 S.E. 2d 359 (1944).

<sup>2</sup> Beard v. Morgan, 143 Neb. 503, 10 N.W. 2d 253 (1943).

<sup>3</sup> London v. Doering, 325 Ill. 589, 156 N.E. 793 (1927).

<sup>4</sup> Stone v. Pratt, 25 Ill. 16 (1860).