CONSTRUCTIVE TRUSTS, STATUTE OF FRAUDS, AND JUDICIAL LETHARGY

I. INTRODUCTION

Suppose A conveys land to B upon a verbal promise to hold the land in trust for A. If B refuses to honor his obligation, the express trust cannot be enforced because the Statute of Frauds bars proof of the parol agreement. Nonetheless, a constructive trust can still arise.

According to the rule currently in force in a majority of jurisdictions in the United States, certain limited patterns of conduct will create a trust obligation implied by law. For example, if B has procured the conveyance through fraud, duress, undue influence or by means of a confidential relationship, he will become a constructive trustee for the benefit of A. But if B’s conduct does not fall within these patterns, he will then be able to retain the land. A small number of courts in the United States would, nonetheless, follow the English rule and require a reconveyance of the land whenever a transferee has been unjustly enriched. According to the courts of England, unjust enrichment has become the test to be employed in determining whether a trust should be implied by law. Thus, even if B has not procured a conveyance by means of any inequitable conduct, his unjust enrichment would be a sufficient basis for the imposition of a constructive trust obligation. The United States majority rule of strict classification and the minority rule of unjust enrichment are the polestars of American law. Their principles have been instrumental in developing a hybrid body of law which is followed by some courts. The two polar rules and the hybrid rules are discussed in Section II.

1. The Nebraska Supreme Court has defined a constructive trust as: "[A] relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Box v. Box, 146 Neb. 826, 835, 21 N.W.2d 868, 873 (1946).

2. Bogert, Trusts and Trustees §§ 495, 496 (2d ed. 1960); 1 Scott, Trusts § 44 (3d ed. 1967).


The purpose of this comment is to summarize and analyze the United States majority, minority and hybrid rules. However, emphasis has been placed on the majority and minority rules because they most clearly elucidate the policies which are relevant to this analysis. Six policies have been used as a key to analysis. They are discussed in Sections III - VIII and include:

1. Preventing perjury;
2. Preventing unjust enrichment;
3. Protecting the security of titles;
4. Viewing the substance of a transaction instead of its form;
5. Achieving certainty, predictability and uniformity of result; and
6. Protecting the justified expectation of the parties.

II. DEVELOPMENT OF THE ENGLISH RULE, THE UNITED STATES MAJORITY RULE, AND HYBRID RULES

The courts of England have enforced parol trusts in land for many years. When a transferee has sought to rely on the Statute of Frauds, a constructive trust obligation has been imposed. One of the first decisions reflecting this policy was *Hutchins v. Lee*, decided in 1737. In the *Hutchins* case, the Lord Chancellor stated, "[T]hough there can be no parol declaration of a trust, since the Statute of 29 Car. 2, yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff, for the defendant's design was absolutely to deprive plaintiff of all the benefits of his estate." Whereas the basis of the *Hutchins* case was fraud, other English cases have employed a more liberal test. In the famous case of *Davies v. Otty*, decided in 1865, Sir John Romilly prefaced his opinion with the assumption that there was nothing whatsoever illegal in the transaction which he was reviewing. He reasoned that the transferor should recover simply because "it is not honest to keep the land." Recovery was allowed in the *Davies* case because the transferee was unjustly enriched. Many leading authorities have supported the English rule. Among these is Professor Ames who said:

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5. 1 Atk. 447, 26 Eng. Rep. 284 (Ch. 1737).
7. 35 Beav. 208, 55 Eng. Rep. 875 (Ch. 1865).
9. *Bogert, Trusts and Trustees* §§ 495-97 (2d ed. 1960); *Scott, Trusts* §§ 482-87 (3d ed. 1967); *Corbin, Contracts* § 401 (1950); Ames, *Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land*, 20 Harv. L. Rev. 549 (1907); Costigan, *Trusts Based on Oral Promises*
If A conveys land to B upon an oral trust to hold for or reconvey to himself, the grantor, and B repudiates the trust which he has assumed in good faith... A cannot enforce performance of the express trust because of the statute of frauds. But B ought not to be allowed to retain A's land and thus by his breach of faith to enrich himself at the expense of A. If he will not perform the express trust, he should be made to reconvey the land to A.10

Today only a small number of courts in the United States follow the view sanctioned by the English courts and Professor Ames.11 A majority of jurisdictions in the United States have employed more stringent standards. Decisions of these courts are founded on the basic premise that a transferor should not recover his land from a transferee who refuses to fulfill his oral promise to reconvey.12 But courts following the United States majority rule do allow the transferor to recover his land if the transferee's conduct falls within certain classifications. These classifications have gained recognition through the years and are embodied in section 44 of the Restatement (Second) of Trusts and section 182 of the Restatement of Restitution. The two sections are in substance identical. Section 182 provides:

Where the owner of an interest in lands transfers it inter vivos to another upon an oral trust in favor of the transferor or upon an oral agreement to reconvey the land to the transferor, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he holds the interest upon a constructive trust for the transferor, if

(a) The transfer was procured by a fraud, misrepresentation, duress, undue influence or mistake of such a character that the transferor is entitled to restitution, or

(b) The transferee at the time of the transfer was in a confidential relation to the transferor, or

(c) The transfer was made as security for an indebtedness of the transferor.

The Nebraska Supreme Court has substantially adopted these classifications.13

Majority rule jurisdictions follow a common law definition of

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10. Ames, supra note 9, at 551.
11. See note 3 supra.
fraud and misrepresentation.\textsuperscript{14} Essentially a transferor must prove that his transferee did not intend to reconvey at the time when the parol promise was made.\textsuperscript{15} At times, the requirement of adhering to common law principles puts an impossible burden on the transferor. Hence, to overcome this evidentiary plight, a hybrid body of law has developed. In the United States there are two species of hybrid rules, which are the “inference of fraud” and “constructive fraud” theories. Although each of these rules bears the “fraud” classification, characteristic of the majority rule in the United States, they also produce the just result characteristic of the English unjust enrichment test.

Nebraska deviated from the harsh common law requirement of proving fraudulent intent in 1903 when the case of Pollard v. McKenney\textsuperscript{16} was decided. In Pollard, the Nebraska Supreme Court indicated that fraud could be either actual or constructive. The court went on to conclude that the subsequent failure of a transferee to reconvey would give rise to an inference or presumption of fraud. While the decision might seem to indicate that mere breach of promise by a transferee could be deemed to be constructively fraudulent, subsequent cases have reached contrary conclusions. In Leichner v. First Trust Company\textsuperscript{17} the court clarified its earlier position:

The law does not presume fraud . . . . While statements found in the opinion in Federal Finance Co. v. Cass, 120 Neb. 834, 235 N.W. 579, and other cases therein cited might seem to indicate that such an evil intent could be inferred from the mere fact of nonperformance, an examination of these opinions will disclose that circumstances existed other than that of nonperformance from which such intent could be inferred.\textsuperscript{18}

Thus, in Leichner the court stated that a transferor had to establish certain circumstances before he would become entitled to equitable relief. The nebulous term “constructive fraud” found in the Pollard decision was not given reference. Instead, the court seized upon the circumstances of the case and ruled that certain

\textsuperscript{15} BOGERT, TRUSTS AND TRUSTEES § 496 at 243 (2d ed. 1960).
\textsuperscript{16} “[T]he existence of the evil intent at the time the promise was made may be inferred from the failure to comply with the promise, and that the promisor may be presumed to have intended, when he made the promise, to do what he finally did do.” Pollard v. McKenney, 69 Neb. 742, 750, 96 N.W. 697, 682 (1903); Wiseman v. Guernsey, 107 Neb. 647, 107 N.W. 55 (1922).
\textsuperscript{17} 133 Neb. 170, 274 N.W. 475 (1937).
\textsuperscript{18} Id. at 176, 274 N.W. at 478. One of the “other cases therein cited” was Pollard.
basic facts had to exist before any evil intent would be inferred. It now seems clear that if the transferor establishes the existence of a confidential relationship, an inference of evil intent will arise. Because of this, it is more descriptive to refer to Nebraska as an "inference of fraud" jurisdiction rather than as a "constructive fraud" jurisdiction.

Vermont has enabled a transferor to recover by attaching the label "constructive fraud" to a transferee's subsequent failure to reconvey. The essential difference between the term "constructive fraud" as used by the courts of Nebraska and Vermont is that in the latter jurisdiction the term is defined more liberally. The Vermont Supreme Court has provided that:

[W]hen one conveys the title to his property to another in reliance upon the latter's promise, a conscientious obligation is imposed, a violation of which for the grantee's own advantage is such a fraud that equity will make him a constructive trustee for the benefit of the grantor or his beneficiary.

Technically the two hybrid rules can be distinguished, but as a practical matter the rules produce similar results. Under each rule, breach of promise is not a sufficient basis for the imposition of a constructive trust. In Nebraska a transferor should establish the existence of a confidential relationship if he cannot prove actual fraud. In Vermont a transferor will be entitled to equitable relief when his transferee has breached his conscientious obligation

19. "The violation by the grantee of a promise to reconvey is constructively fraudulent and gives rise to a constructive trust which may be established by parol if he obtains a deed without consideration by means of a parol agreement to reconvey to the grantor to whom he stands in a confidential relation, even where there be no intention at the time not to perform the promise." Musil v. Beranek, 160 Neb. 269, 273, 69 N.W.2d 885, 888 (1955). In a subsequent case the court further discussed this subject: "To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances . . . . In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with the fraud." Workman v. Workman, 174 Neb. 471, 497, 118 N.W.2d 764, 780 (1964).


21. Id., 126 A. at 592.

22. Id.: "[A] broken promise is no fraud." Leichner v. First Trust Co., 133 Neb. 170, 176, 274 N.W. 475, 478: "[C]ircumstances existed other than nonperformance from which such intent could be inferred."

Viewing the problem realistically rather than abstractly, it is difficult to envision a relationship which would give rise to a conscientious obligation in Vermont without also being characterized as confidential in Nebraska.

The Nebraska Supreme Court may not wish to limit the basic facts necessary to establish an inference of fraud to the existence of a confidential relationship. In the case of Fisher v. Keeler the court gave the following definition of fraud:

Fraud in its generic sense, especially as the word is used in courts of equity, comprise all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another.

Thus the term constructive fraud, as used in the Pollard case, could well be construed as encompassing any "legal or equitable duty." But the proper construction of the word "fraud" is purely academic, for it is difficult to perceive a situation in which the court would not be able to term the relationship of the parties "confidential."

The hybrid rules of Nebraska and Vermont are in substance identical. By relaxing the requirements which must be satisfied in order to impose a constructive trust, results reached in jurisdictions which apply hybrid rules closely parallel those results arrived at by courts employing the unjust enrichment theory.

III. THE POLICY OF PREVENTING PERJURY

A. PURPOSE OF STATUTE OF FRAUDS; WHY AND HOW CONSTRUCTIVE TRUSTS ARISE.

Why do most jurisdictions in this country limit proof of a parol trust in land to those circumstances enumerated in section 182 of the Restatement of Restitution? To answer this question, it is necessary to examine the provisions of the Statute of Frauds, which in the State of Nebraska, has been

24. See text accompanying note 21 supra.
25. 142 Neb. 728, 7 N.W.2d 659 (1943).
26. Id. at 733, 7 N.W.2d at 663.
27. NEB. REV. STAT. § 36-103 (Reissue 1960): "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."
28. "In the great majority of the American states there are statutes which require a writing where a trust of land is created. Many of these statutes use the language of the English Statute of Frauds. In some of them the language is different, but in general the effect is the same." 1 Scott, TRUSTS § 40.1 at 311 (3d ed. 1967).
patterned after the English Statute of Frauds. These statutes preclude a party from introducing evidence of a parol trust in land with one notable exception, viz., neither statute applies to trusts arising by operation of law. The exception in question can be explained in terms of what the statute has historically sought to accomplish. Its purpose has been to prevent the introduction of perjured testimony in land transactions and other transactions. When a party has sought to shield his inequitable conduct by using the Statute of Frauds as a barrier, equity has created a trust to hurdle this obstacle. The Statute of Frauds has barred enforcement of the express trust, but equity has raised a constructive trust to prevent unjust enrichment. Professor Ames exemplified this by saying:

[B] ought not to be allowed to retain A's land and thus by his breach of faith to enrich himself at the expense of A. If he will not perform the express trust, he should be made to reconvey the land to A, . . . A, it is true, may by means of this constructive trust get the same relief that he would secure by the enforcement of the express trust. But this is purely accidental coincidence. His bill is not for specific performance of the express trust, but the restitution of the status quo.

Therefore, although the express trust can not be enforced, the transferee is not allowed to retain the land. A constructive trust is used to return the parties to the positions that they held before reaching their parol agreement.

B. WHEN CONSTRUCTIVE TRUSTS ARISE; VARIABLE RESISTANCE OF STATUTE OF FRAUDS TO CONSTRUCTIVE TRUSTS.

While the manner in which a constructive trust operates seems clear, the reason for its imposition is not so apparent. A common thread weaves together several factors which determine when a constructive trust will arise. The Statute of Frauds, the English unjust enrichment test, and the circumstances enumerated in section 182 of the Restatement of Restitution are all interrelated. The

29. 29 Chas. 2, c. 3, § 7 (1676): "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing, or else they shall be utterly void and of none effect."

30. Neb. Rev. Stat. § 36-103 (Reissue 1960) provides: "Unless by operation of law"; 29 Chas. 20, c. 3, § 8 (1676), provides, "A trust or confidence shall or may arise or result by implication or construction of law."


32. Ames, supra note 9, at 551.
thread which connects them is the exemplary or deterrent function of the Statute of Frauds. The Statute of Frauds can be analogized to a barrier which resists proof of parol agreements. In jurisdictions which follow the English unjust enrichment test, the barrier is relatively low because constructive trusts arise with facility. Constructive trusts are more readily imposed in minority rule (English unjust enrichment test) jurisdictions than in those which follow the majority rule because the conduct proscribed by each rule is established through evidence of a different nature. While unjust enrichment is established by means of objective evidence, some of the circumstances enumerated in section 182 of the Restatement of Restitution are established through subjective evidence. For example, in the case of Davies v. Otty, the English court focused its attention on the transferee's breach of promise. The unjust enrichment which would have resulted from allowing the transferee to retain the land was a sufficient basis for the imposition of a constructive trust. The court was not directly concerned with subjective factors such as the transferee's motive or intent. On the other hand, in majority rule jurisdictions, evidence of an essentially subjective nature is required to establish many of the circumstances enumerated in section 182 of the Restatement of Restitution. If a transferor wishes to establish fraud in a majority rule jurisdiction he must prove the state of his transferee's mind at the time at which their parol agreement was entered into, a task not easily accomplished. Similarly, duress and undue influence are highly subjective factors which are difficult of proof. Furthermore, fraud is not to be lightly inferred because of the antisocial stigma attached to it.

In the majority of jurisdictions which adhere to the test enumerated in section 182 of the Restatement of Restitution, courts are more reluctant to impose a constructive trust than in those jurisdictions following the English rule (unjust enrichment). In effect the Statute of Frauds erects a relatively high barrier for a constructive trust to hurdle.

Why is there such a variance in the degrees of resistance posed by the Statute of Frauds in majority rule and minority rule (unjust enrichment) jurisdictions? This disparity can be explained by examining the functions of the Statute of Frauds. The purpose of the Statute is two-fold:

(1) to prevent perjured testimony from being introduced in each case which is litigated. (the litigation function)

(2) to operate in an exemplary manner. The stringent provisions of the Statute of Frauds encourage society to reduce future agreements to written terms. (the exemplary function)

The litigation function is concerned with the present while the exemplary function looks to the future. The question relevant to the litigation function is whether or not the plaintiff has sustained his burden of proof. If a party can satisfactorily prove that his testimony is not perjured then the litigation function of the statute is satisfied. Jurisdictions which follow the majority rule of the Restatement and those courts which follow the minority unjust enrichment test both share a common view of the litigation function. Courts following both rules impose upon the transferor the same burden of proof, which is more than a preponderance; clear and convincing evidence is usually required.34

While the minority and majority rule jurisdictions share identical views as to the resistance which the Statute of Frauds should pose in each case which is litigated (litigation function), they disagree on the role which the exemplary function should play. The exemplary function is a key which unlocks one answer to the question of why the Statute of Frauds poses more resistance to the imposition of constructive trusts in majority rule jurisdictions. It would seem that by vigorously enforcing the Statute of Frauds, majority rule jurisdictions employing the Restatement test are relatively more concerned with encouraging members of society to reduce their agreements to writing than are the unjust enrichment courts. In the decisions of jurisdictions adhering to the Restatement rule, an attitude of attempting to deter others from entering into similar parol agreements in the future is clearly reflected.

Since constructive trusts arise with equal facility in jurisdictions which follow the unjust enrichment test and those which have created hybrid rules (constructive fraud and inference of fraud), courts of both persuasions share identical views of the exemplary and litigation functions of the Statute of Frauds.

It is questionable whether the exemplary (deterrent) function of the Statute of Frauds is measurably strengthened by limiting the circumstances necessary for the imposition of constructive trust relief to those found in section 182 of the Restatement of Restitution.
IV. PREVENTING UNJUST ENRICHMENT

The policy of preventing unjust enrichment has been mentioned in each of the previous three sections. According to Scott, "If the transferee were allowed to retain the land he would be unjustly enriched; a constructive trust is imposed in order to prevent unjust enrichment." Not only must there be enrichment, but the enrichment must be unjust. The facts and circumstances of each case determine whether the enrichment has been unjust.

A constructive trust is imposed in all jurisdictions in the United States on the broad foundation of preventing unjust enrichment. Courts following the English rule (unjust enrichment test) impose constructive trusts on the basis of any conduct which results in unjust enrichment. In majority rule jurisdictions a transferee is allowed to retain the land he has promised to hold in trust unless his unjust enrichment has resulted from the type of conduct described in section 182 of the Restatement of Restitution (fraud, duress, undue influence, etc.). As noted in Section III, one reason why courts following the majority rule do not allow recovery in all cases is that they are attempting to encourage others to reduce future land trust agreements to writing. It is only in the English and hybrid rule (constructive fraud and inference of fraud) jurisdictions that the policy of preventing unjust enrichment is believed to be of sufficient import to outweigh the exemplary (deterrent) function of the Statute of Frauds.

V. POLICY OF PROTECTING TITLE SECURITY

Some courts have mentioned a policy of protecting the security of titles. The Kansas Supreme Court has held that "In the opinion of the legislature, it is better for the social order and general welfare that a few persons, who might not observe the statutes, should suffer hardship than the security of all titles should be destroyed." Bogert criticizes this attitude for when constructive trusts are imposed, courts are preventing greater evils than those which result because title security is impaired.

35. 1 Scott, TRUSTS § 44 at 326 (3d ed. 1967).
36. "A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." 5 Scott, TRUSTS § 404.2 at 3215 (3d ed. 1967).
38. Silvers v. Howard, 190 P. 1, 4 (1920).
purchasers for value are the only class of buyers whose titles must be protected. When the rights of bona fide purchasers are affected, constructive trusts cannot be imposed because unjust enrichment is the basic foundation of constructive trusts. If a purchaser has acted in good faith and has given value, he has not been unjustly enriched. Without unjust enrichment a constructive trust can not arise. Although the policy of protecting title security has been mentioned by a few courts, it is not as controlling as the policies of preventing unjust enrichment and of preventing perjury.

VI. EQUITY LOOKS TO SUBSTANCE NOT FORM

By over-emphasizing the exemplary function of the Statute of Frauds, the courts following the majority rule have tended to overlook the familiar axiom that equity looks to substance, not to form. Illustrative of the over-emphasis are cases involving the Restatement of Restitution fraud exception found in subsection (a) of section 182. Most jurisdictions in the United States require proof of intent to defraud at the time a promise was made in order to entitle the transferor to equitable relief by means of a constructive trust. As noted in Section II, Nebraska, a hybrid class jurisdiction, deviates from this view by inferring that the transferor's intended conveyance was procured by fraud. This approach has been commended because it eliminates some difficulties of proving actual fraud. A somewhat different view was advanced by Costigan who reasoned that "Fraud in retention is just as much actual as fraud in acquisition . . ." The Costigan view seems to be more in line with traditional notions of equitable relief. Historically courts of equity have exercised discretion in deciding each case on an individual basis, and have not required adherence to form. For example, in the fifteenth century, equity courts enforced many contracts which were not actionable in the common law courts because of the common law courts' principal emphasis on form.

A caveat to the Restatement of Restitution indicates that section 182 was never intended to restrict specifically the imposition of constructive trusts to those exceptions enumerated there-

40. See note 14 supra.
41. See note 16 supra.
42. See note 13 supra.
43. Costigan, note 9 supra, at 438.
44. Bordwell, The Resurgence of Equity, 1 U. Chi. L. Rev. 741 (1934); Walsh, Is Equity Decadent?, 22 Minn. L. Rev. 479 (1938).
45. Walsh, note 44 supra, at 483.
Thus it would appear that section 182 was only intended to be a nonrestrictive guide. In the comment to the Restatement (Second) of Trusts, which was published by the American Law Institute after the Restatement of Restitution, the Commissioners took the position that a constructive trust should be imposed because this is the trend of case law.

VII. CERTAINTY, PREDICTABILITY AND UNIFORMITY OF RESULT

Courts following the majority rule of refusing to deviate from the circumstances enumerated in section 182 of the Restatement of Restitution are currently adhering to a policy of achieving certainty, predictability and uniformity of result. Courts of equity have historically been befallen by this plight. However, the judiciary has traditionally formulated narrow rules of law as a consequence of utilizing a natural law standard. Morris R. Cohen observed that:

Legal history shows, if not altering periods of justice according to law and justice without law, at least periodic waves of reform during which the sense of justice, natural law or equity introduces life and flexibility into the law and makes it adjustable to its work. In the course of time, however, under the social demand for certainty, equity gets hardened and reduced to rigid rules, so that, after a while a new reform wave is necessary.

Parol trust relief has not followed the pattern of development which equity has traditionally followed. The majority rule jurisdictions have not shifted from a broad standard (the unjust enrichment test) to a more rigid one. They have always utilized the standards enumerated in the Restatement. Perhaps it is not too late for equity courts to exercise their broad powers for the first time.

Justice Powers of the Vermont Supreme Court has discussed constructive trusts in terms of a natural justice principle. In Miller v. Belville, he stated that “The forms and varieties of...

46. A caveat to § 182 provides: “The Institute takes no position in the question whether the transferee holds upon a constructive trust for the transferor an interest in land transferred to him inter vivos, where he orally agreed with the transferor to hold it in trust for the transferor or to reconvey it to the transferor, except under the circumstances stated in this section.”

47. Restatement (Second) of Trusts, Explanatory Notes, comment a at 114 (1959).


49. 98 Vt. 243, 126 A. 590 (1924).
constructive trusts are practically unlimited . . . . The broad principle of natural justice contained in this (the natural justice) doctrine is obvious to every honest mind. It should be the policy of the law to extend rather than to limit its application.\textsuperscript{50}

VIII. PROTECTING THE JUSTIFIED EXPECTATIONS OF THE PARTIES

Lastly, a policy which is very important to parol trust litigation is the policy of protecting the justified expectations of the parties. Though this policy needs little explanation, it cannot be overemphasized. In and of itself this policy is one of the most significant forces giving rise to constructive trusts. According to Scott, "There is a natural desire to give effect to the reasonable expectations of the parties if those expectations are proved, even though not proved by the methods which the legislature has provided for."\textsuperscript{51}

IX. CONCLUSION

It is submitted that the English unjust enrichment test is superior to the Restatement rule followed by a majority of jurisdictions in the United States. While the exceptions enumerated in section 182 of the Restatement of Restitution should be a guide to equity courts, they should not become a shackle. An unjust enrichment test would provide a high degree of justice in each individual case and still retain an acceptable degree of certainty. Moreover, this test would be sufficiently precise so that the Statute of Frauds would retain its exemplary (deterrent) function. Each policy discussed in this comment is relevant to the rule of law which a jurisdiction follows. Courts following the majority rule which limits the circumstances in which a transferor can recover his land, place great emphasis on the policies of preventing perjury and of achieving certainty, predictability and uniformity of result. Less emphasis is placed on the policies of preventing unjust enrichment, protecting the security of titles, viewing the substance of a transaction instead of its form, and protecting the justified expectations of the parties. On the other hand, courts which follow the unjust enrichment test emphasize the policies of preventing unjust enrichment, viewing the substance of a transaction instead of its form and protecting the justified expectations of the parties. Slightly less weight is given to the policy of preventing perjury. The policies of protecting the security of titles and of achieving

\textsuperscript{50} Id., 126 A. at 593.

\textsuperscript{51} 1 Scott, Trusts § 40 at 310 (3d ed. 1967).
certainty, predictability and uniformity of result are given little weight by unjust enrichment test courts. The same policies which precipitated the unjust enrichment test gave birth to the hybrid theories (constructive fraud and inference of fraud). Courts following the hybrid theories differ from those which have adopted the unjust enrichment test basically in the label which they place on the theory for relief. Law is a battleground of conflicting policies. Each policy must be weighed and evaluated in terms of modern social needs. The product of judicial balancing of policies is a rule of law.

The United States majority rule, which narrowly limits the imposition of constructive trusts to those circumstances enumerated in section 182 of the Restatement of Restitution, should be re-evaluated in terms of the policies enumerated in this comment. It would appear that society derives greater benefit from the unjust enrichment test than from the rule followed by the majority of jurisdictions in the United States.

The popularity of the majority rule may unfortunately be due to judicial lethargy. Perhaps dictum expressed thirty years ago by Justice Allen of the Kansas Supreme Court reflects a realistic appraisal of why courts follow the majority rule: "[I]t must be conceded that the rule followed in this case is too firmly established to be departed from at this late day."52

Duncan B. Cooper, III '68