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This practice of deciding cases on the basis of the opening statement is subject to criticism, in that it seems to place greater emphasis upon an informal, and often perfunctory, speech of counsel than upon the carefully-drawn answer or complaint. It is submitted, however, that the benefits to be derived from a careful use of this power greatly outweigh the possible evils which may result from its abuse. It is to be employed only in extreme cases, and then only after the party has been given the benefit of every doubt. Moreover, there is a further safeguard, which, psychologically at any rate, will prove a deterrent to any rash action on the part of the trial judge. If the action is dismissed, it is more than likely to meet with reversal at the hands of the appellate tribunal; whereas, if the motion is denied, and the party is able to go forward and prove his case, the defect, if any, is cured;¹³ if he is unable to accomplish this, his opponent is already victorious without an appeal.

JOEL B. ADAMS.

Trusts—Constructive Trust to Protect Victims of Theft.

B, an officer of a building and loan association, embezzled some \$8,000,000 from the association over a period of nine years. The embezzled funds were invested in, and deposited to the account of, a dummy oil corporation organized and controlled by *B*. In an action by the receiver of the building and loan association to declare a constructive trust upon all the assets of the oil corporation, *held*, a trust would be impressed upon the embezzled funds traced to a bank account of the oil company, and as far as they could be traced into other assets of the oil company.¹ Other parties, who were creditors of the oil company by reason of money advanced, and credit extended in sales transactions, were protected *pro tanto*.

There has been much reluctance in the application of the constructive trust device for the protection of victims of theft. It has been variously objected that there are adequate remedies at law,² that assumption of equity jurisdiction deprives the defendant of right (1909) (claim shown to be barred by the statute of limitations); *Abraham v. Gelwick*, 123 Okla. 248, 253 Pac. 84 (1926); *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642, 79 Pac. 308 (1905).

¹³ *Glass v. American Stores Co.*, 110 N. J. L. 152, 164 Atl. 305 (1933); *cf. Meaney v. Doyle*, 176 Mass. 218, 177 N. E. 6 (1931) ("Although a trial judge has power to direct a verdict at the close of the opening, he is not, as a matter of law, obliged to do so . . . whether so to rule rests in his discretion.").

¹ *Elmer Co. L't'd. v. Kemp*, 67 F. (2d) 948 (C. C. A. 9th, 1933).

² *Robinson v. Mutual Life Insurance Co.*, 193 Fed. 399 (C. C. A. 2d, 1912) (Insurance company director embezzled funds and turned them over to culpable president. Accounting denied.).

to trial of certain issues by jury,³ and that a thief has no title to stolen goods⁴ and hence that neither a thief nor holders under him could be regarded as constructive trustees.⁵ The objectors seem to have lost sight of the fact that a constructive trust is merely a remedial device for preventing unjust enrichment in a given case, and not a technical concept.⁶ Thus it has been pointed out that it would be ridiculous "if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it has been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided."⁷

Accordingly, it has been held that if a thief sells stolen goods, he may be regarded as holding the proceeds in the capacity of a constructive trustee for the benefit of the owner.⁸ And where a bank officer, to secure his personal notes, pledged stock—purchased in his own name with funds embezzled from the bank—it was held that the pledgee got only the embezzler's title, subject to a constructive trust in favor of the bank.⁹

Are there adequate remedies at law? Those so glibly suggested

³ *United States v. Bitter Root Development Co.*, 200 U. S. 451, 475, 26 Sup. Ct. 318, 50 L. ed. 550 (1905) (Plaintiff sought relief in equity for the cutting, carrying away, and conversion of timber. Due to the fact that the defendants had organized themselves into a number of corporations, actions at law in trespass or trover would have been most ineffectual. Nevertheless, equity jurisdiction was denied.).

⁴ Even a bona fide purchaser for value acquires no better title than that of the thief-vendor. *Saltus & Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541 (N. Y. 1838); *Phelps v. McQuade*, 158 App. Div. 528, 143 N. Y. Supp. 822 (1913).

⁵ *Contra*: *Anderson, Meyer & Co. v. Fur & Wool Trading Co.*, 14 F. (2d) 586 (C. C. A. 9th, 1926) (purchaser from a thief held a constructive trustee) adversely criticized (1927) 25 MICH. L. REV. 313.

⁶ 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §1045 ("The specific instances in which equity impresses a constructive trust are numberless,—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.").

⁷ *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152 (1877) quoted with approval in *Preston v. Moore*, 133 Tenn. 247, 180 S. W. 320 (1915).

⁸ *Pioneer Mining Company v. Tyberg*, 215 Fed. 501 (C. C. A. 9th, 1914); *Aetna Indemnity Co. v. Malone*, 88 Neb. 260, 131 N. W. 200 (1911) ("In contriving means to cheat an owner out of his property a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found."); 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §1051 ("Whenever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds."); see *Anderson, Meyer & Co. v. Fur and Wool Trading Co.*, *supra* note 5.

⁹ *Millard v. Green*, 94 Conn. 597, 110 Atl. 177 (1920).

by the courts denying equity jurisdiction on this ground generally boil down to an action for the value of the article stolen or its substitute. When the exact amounts stolen are unknown and when creditors of the defendant are seeking to enforce claims against property to which the defendant, himself, never in good conscience had any just claim, then this remedy at law collapses. In the principal case, for example, an accounting, which can only be had in equity,¹⁰ is necessary. Therefore the summary use of the trust device here is to be commended.

HARRY W. MCGALLIARD.

Wills—Inheritance by Child Adopted After Execution of Adopting Parent's Will.

The testator attached a codicil in order to make provision for an infant adopted subsequent to the execution of the will. A technicality voided the codicil, but the South Carolina Supreme Court construed the statute governing adoption in connection with the statute providing for after-born children to reopen the will and to allow the child to take an intestate share of the estate.¹

The right of an adopted child to inherit arises solely from statute,² as no such right existed at common law.³ Subject to certain qualifications⁴ the adoption statutes make the obligations of the parent to the adopted child the same as would be owed if the child had been born to the adopting parents in lawful wedlock.⁵ The adopted child may inherit as a natural child where the foster parent dies intestate.⁶ The North Carolina statute expressly prohibits the adopted child

¹⁰ *Fur & Wool Trading Co. v. Fox*, 245 N. Y. 215, 156 N. E. 670 (1927); note (1928) 37 *YALE L. J.* 654 (discussion of general problem of thieves as constructive trustees).

¹ *Fishburne v. Fishburne*, 172 S. E. 426 (S. C. 1934).

² *In re Riemann's Estate*, 123 Kan. 718, 256 Pac. 1004 (1927); *Elmer v. Wellbrook*, 110 N. J. Eq. 15, 158 Atl. 760 (1932).

³ *Villier v. Watson*, 168 Ky. 631, 182 S. W. 869 (1916); *In re Powell's Estate*, 112 Misc. Rep. 74, 183 N. Y. Supp. 939 (1920); *Smith v. Bradford*, 51 R. I. 289, 154 Atl. 272 (1931).

⁴ For example there is a provision in Ill. and Ohio that the adopted child cannot take property limited to the heirs of the parent's body or from the collateral heirs of the parent [ILL. REV. STAT. (Cahill, 1929) c. 4 §5; OHIO GEN. CODE (Page, 1931) §10512(19)] while there is a provision in Va. that the relatives of the adopted child cannot take his share of the estate if he predeceases the foster parent [VA. CODE ANN. (Michie, 1930) §5333].

⁵ *Flannigan v. Howard*, 200 Ill. 396, 65 N. E. 782 (1902); *Bilderbach v. Clark*, 106 Kan. 737, 189 Pac. 977 (1920); *Kales, Rights of Adopted Children* (1914) 9 ILL. L. REV. 149.

⁶ *Fosburg v. Rogers*, 114 Mo. 122, 21 S. W. 82 (1893); *In re Pepin's Estate*, 53 Mont. 240, 163 Pac. 104 (1917).