source: "Did you understand that that was to be conveyed to you for your own property or for you to hold as you have stated for the benefit of her relatives?" "That was her idea." * * * "In other words, she would not have made the deed in the way that she did if she had supposed that you would have devoted it to other purposes than those she wished and although she conferred upon you an absolute discretion, it was in the confidence that you would use that discretion in favor of her relatives?" A. "Of course, if she had not complete confidence in me she could not have given me complete discretion." Q. "And you encouraged her in thinking that you would so use your discretion for the benefit of her relatives?" A. "Well, I would not so encourage her when I had very little to say about the matter, it was done in a very short time." Q. "You allowed her to think that; you did nothing to dissuade her from that idea, *not for your own benefit, for the benefit of those whom she said?*" A. "*Well, I think that was the idea.*" Q. "So that at the time of making this deed to you, she did not believe and you did not give her to believe that you were seeking your own profit or that you would take advantage of the absolute character of the deed, in order to use the property for your own use?" A. "*I don't think that she thought or dreamt it.*"

The clause quoted above as being tacked on to the habendum, whether or not it is sufficient in itself to constitute a precatory trust, is certainly strong corroborative evidence that it was the desire and intention of Martha that the grantee should hold the property subject to a trust of some sort.

Upon this and all the other evidence in the case, then, we believe and find that it was the desire and intention of Martha at the time she asked Smith's assistance in the drawing up of the necessary instrument, that the whole beneficial ownership in the property should pass to her five nephews and nieces and that the instrument to be drawn up should be but the means of accomplishing that object. Smith's statement that Martha wished to make the two nephews and Hattie Brown the sole beneficiaries to the exclusion of the two other nieces, we think was correctly accounted for by Circuit Judge Carter on the theory that it was inspired by hostility towards the two nieces because of the active part taken by them in bringing these proceedings.

The fact that Martha on one or more occasions said that she would leave the property to the children "as a homestead," does not necessarily show that she intended for them a life estate only. If that had been her intention she would have made some provision as to how the remainder was to be disposed of. No mention of any such remainder, or provision concerning the same was ever made by her. Moreover, where she did contemplate provision for life only, she said so distinctly, as in the case of Capt. J. H. Brown. We believe on all the evidence that she did not intend to limit the estate of the five for life.

Returning now to the subject of the drawing of the deed, we find that Smith delayed about a week after his conversation with Martha above referred to and finally on the 28th of July, 1891, produced the instrument. Martha, after reading it over, said: "What made you do it that way?" to which Smith replied, "That's the best way to do it, so that there shall be no quarreling," or words to that effect. Martha then signed the deed, and about ten or fifteen minutes later acknowledged it before a notary. We believe from the evidence that the deed was executed in the belief, on Martha's part, that in that way would her will concerning the property as above stated be accomplished and in the full confidence that Smith would faithfully carry out her wishes; further, that Smith led her to believe that if she signed the deed as drawn he would see to it that the property did go in accordance with her wishes, to her five nephews and nieces, that but for his interference and advice she would have disposed of her property either by will or by deed unmistakably defining the trust desired, and that Smith, in advising her as he did and in obtaining the deed as it now stands, acted mala fide and with the fraudulent intention to secure to himself the absolute title to the land.

It would be against conscience to permit Smith or his heirs to retain the advantage thus gained. Under circumstances such as these, equity regards the grantee as a trustee *ex maleficio*. The constructive trust so declared is not based upon the promise itself, but arises out of the intentional fraud committed. The bill sufficiently alleges facts upon which this relief can be granted in this case.

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."—2 Pom. Eq. Juris., Sec. 1053.

"A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose—as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like—and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained, is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement."—Sec. 1055, Ib.

See also Browne on the Stat. of Frauds, Sec. 94 et seq.; 1 Story Eq. Juris. Sec. 256; Hill on Trustees, top page 234.

"It will be observed that in all these cases there is something more than the mere receipt of the title to real estate, with a parol promise to hold it, subject to a trust. There is an interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs for the benefit of a third person, and to leave the execution to the party deluding him by a false promise, and through such false promise obtaining title to the property. * * * The distinction is this: If A voluntarily conveys land to B, the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C, the case falls within the statute, and chancery will not enforce the parol promise. But if A was intending to convey the land directly to C, and B interposed and advised A not to convey directly to C, but to convey to him, promising, if A would do so, he, B, would hold the land in trust for C, chancery will lend its aid to enforce the trust, upon the ground that B obtained the title by fraud and imposition upon A. The distinction may seem nice, but it is well established. In the one case B has had no agency in procuring the conveyance to himself. In the other he has had an active and fraudulent agency. In the one case he has done nothing to prevent a conveyance to the intended beneficiary. In the other he has, by false promises, diverted to himself a conveyance about to be made to another."—*Lantry v. Lantry*, 51 Ill. 464-466.

See also *Larmon v. Knight*, 140 Ill. 232; *Dowd v. Tucker*, 41 Conn. 197, 198, 205; *Fischbeck v. Gross*, 112 Ill. 208, 214; *Hooker v. Axford*, 33 Mich. 452, 456; *Barrow v. Greenough*, 3 Vesey Jr. 151, 154; and *Giffen v. Taylor*, 139 Ind. 373.

Some of the cases seem to go to the extent of holding that even where the promise to hold for the benefit of another, or to convey to another, is made in good faith, if the grantee thereafter declines to carry out his agreement, equity will grant relief by declaring the grantee a trustee; but we need not now pass upon that question.

Hattie Brown, one of the nieces, died after the trial and prior to the filing of the bill of revivor. The record fails to show who her heirs are.

In view of the conclusion we have reached on the subject of the constructive trust, it becomes unnecessary for us to consider the question of a precatory trust.

In our opinion, Priscilla E. Hassinger, Annie H. Turton and Henrietta E. Ross, the heirs of W. James Smith, deceased, should be declared trustees of the property described in the deed under consideration for the use of Mary C. Aldrich, Helen B. King, Norman Brown and Douglas K. Brown, and other, if any, the heirs of Harriet N. Brown, and should be ordered to convey the said property by a good and sufficient deed to said beneficiaries.

The case is remanded to the Circuit Judge of the First Circuit, with instructions to correct, in the particulars above specified, the decrees reviving the original cause, if it be found that such decrees were in fact erroneous in those respects, to ascertain who the heirs of Harriet N. Brown are, and to enter a decree in accordance with the foregoing views.

Kinney, Ballou & McClanahan and *H. A. Bigelow* for complainants.

Robertson & Wilder for Henrietta E. Ross.

W. O. Smith and *A. Lewis, Jr.*, for Priscilla E. Hassinger and Annie H. Turton.

No appearance of or for D. K. Brown.

DISSENTING OPINION OF J. ALFRED MAGOON, ESQ.

I am unable to concur in the opinion of the Court. Were I not satisfied that the defendants should prevail in this case a difficulty presents itself which cannot be overcome on this appeal as the case now stands.

The original plaintiffs were Mary C. Aldrich, Helen B. King, Harriet N. Brown, Henry S. Swinton, Charles E. S. Swinton, Helen M. Seal and Norman Brown, and Douglas K. Brown, by their next friend W. C. King.

Henry S. Swinton has practically disclaimed in his testimony, and it is perhaps immaterial as to him whether he is party plaintiff or defendant. Helen M. Seal, by stipulation, was made party defendant, but an order of the Court signed October 24th, 1899, contains the following,—"said suit shall hereafter be entitled Mary C. Aldrich, Helen B. King, Henry S. Swinton, Helen M. Seal and Norman Brown by W. C. King, his next friend, vs. Priscilla E. Hassinger, Annie M. Turton and Henrietta E. Ross and Douglas K. Brown." It will be observed that Mrs. Seal is still improperly joined as party plaintiff and that Charles E. S. Swinton and Hattie K. Brown by the same order are left out of the case entirely with nothing on the record to show the reason therefor. The interests of Charles E. S. Swinton are directly opposed to those of Mary C. Aldrich, Helen B. King, Norman Brown and Harriet N. Brown, and he should not be a party plaintiff in this action as he has not now and never has had independent counsel herein, and has not personally made any appearance in the case. While it is not necessary that a party plaintiff having interests adverse to the other plaintiffs should in equity be a defendant; (1 Pom. Eq. Jur. p. 98) it is essential that the record show that he is represented, if he be made a party plaintiff, but no attorney can represent conflicting interests in a case.

"An attorney cannot accept employment from adverse litigants at the same time and in the same controversy, though his intentions and motives are honest. The rule is a rigid one and designed, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well, to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests rather than to enforce to their full extent the rights and interests which he should alone represent."

Strong v. International Building Loan & Investment Union, 82 Ill. App. 426 and see Weeks on Attorneys p. 548, 15 Ency. Pld. & Pr. p. 584. It is a familiar rule of equity that all persons materially interested in the event of the suit, must be made parties. This confusion with reference to the parties and their appearance is, in all probability, due to the fact that this litigation has been before the Courts, in one way or another, since 1891, and many different counsel have appeared in the case. As I desire that no misunderstanding shall arise with reference to what I have above stated, I will say that no reflection of any kind is directed against counsel in the case, either for the real plaintiffs or the defendants, for nothing could be more honorable than their conduct in their most able presentation of this case.

Counsel for Mrs. Aldrich, Mrs. King, Harriet N. Brown and Norman Brown, who should be the real plaintiffs in this case as it now stands, rely for relief upon two grounds. They, in the first place, contend that a precatory trust was created. While the doctrine of precatory trust is firmly established it is certainly looked upon with great disfavor. 2 Pom. Eq. Jur. Sec. 1017. The doctrine depends upon a presumption of law that a person using words of belief, desire, will, request, wish, hope, etc., intended to give to those expressions the meaning of direction, command, etc. The doctrine is applicable to wills which are made in contemplation of death and not to deeds. In a will the testator must leave to others the execution of his wishes. He is obliged to substitute as it were the discretion of another for his own. If it is claimed that the deed in question was to serve the purpose of a will, the answer is that it was not a will, and I do not believe in extending the doctrine of precatory trust. Even though the deed created a precatory trust it would contravene the contention of the real plaintiffs. By the deed the relatives within the second degree of consanguinity would be the *cestuis que trustant*, but counsel for the real plaintiffs rely upon parol proof to establish the trust in their behalf in common with Douglas K. Brown. This is directly contrary to every principle of law and equity. It is an attempt to vary a written instrument by parol proof, which manifestly cannot be done. 1 Perry on Trusts, 3rd p. 113, in note and case there cited; *Irvine v. Sullivan*, Law Rep. 8 Eq. 673.

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagements, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing, and all oral testimony of a previous colloquim between the parties, or of conversation of declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract from the one which was really agreed upon, to the prejudice, possibly of one of the parties, is rejected." 1 Greenleaf Evi., 13th Ed., p. 321.

"The writing, it is true, may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties, but as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used." Id. 322.

* * * "The rule excludes only parol evidence of the language of the parties, contradicting, varying or adding to that which is contained in the written instrument, and this because they have themselves committed to writing all which they deemed necessary to give full expression to their meaning, and because of the mischiefs which would result if verbal testimony in such cases were received." Id. p. 328.

The degrees of consanguinity should be computed according to the common law; but if it was intended to create a trust and it is uncertain under which rule the degrees are to be computed, and for this reason the deed to Smith is inoperative, the land must go to all of the heirs of Martha Swinton and not to the real plaintiffs.

The real plaintiffs in the second place, contend that in case no precatory trust was created, the facts and circumstances show a constructive trust. A constructive trust must under the circumstances in this case be established by actual fraud; there is no element of constructive fraud involved. If such a trust exists, it rests entirely upon a deliberate intent to cheat and defraud Martha Swinton when the deed was signed. To sustain this contention the evidence should be clear and convincing. 15 Am. & Eng. Ency. of Law, 1195; *Lantry v. Lantry*, 51 Ill. 458.

Instead of being convinced that there is actual fraud, I am convinced to the contrary. Counsel for the real plaintiffs state the case as strongly in their favor as it can be put. This is what they say,—"Now those whom she preferred, it is perfectly clear from the evidence in the case, were the five children already mentioned, so that it seems pretty clear that at the time W. James Smith called with reference to the property Miss Swinton's idea was still as it had been for years past, that the property after her death should go to her five nephews and nieces." I cannot consent to brand a man as a scoundrel upon any such theory. That it is "*pretty clear*," according to the mind of counsel for the real plaintiffs, that Miss Swinton's idea was that the property after her death should go to her five nephews and nieces, is not sufficient. It must be *clear*. Many things might have happened between the time when she last spoke to any of her nieces and nephews in regard to the matter, and the execution of the deed, which was about one week, according to the view of the testimony most favorable to the real plaintiffs. Even if it were admitted that the testimony for the real plaintiffs in this regard be true, it would not necessarily follow that Miss Swinton had not changed her mind. She might have recognized her ingratitude towards Mr. Smith, as she saw her end approaching, and have been stricken with remorse at being the recipient of his bounty for all those twenty-three years, without recognizing him in any way at her death. She had no one who had any peculiar claims upon her but Mr. Smith. She was greatly indebted to him, and is it any wonder that she should want to return to him, when she thought she no longer had any use for it, the property which he had so generously given her. She could see that by giving it to her five nephews and nieces in all probability it would go from him forever, and why should they have it? What had they done for her to counterbalance the services and generosity of Mr. Smith, not only towards her but towards the members of her family. Under the circumstances was he not the natural object of her bounty? She had every reason to believe that, owing to the almost paternal love he had shown for her nephews and nieces, he would give the property to them or to such of them as he thought most deserving when he should no longer need it I cannot bring myself to believe that this man who had been so good to the members of this family, had any intention in his heart to commit the fraud now attempted to be fastened upon him. It was Miss Swinton who urged the making of the deed—who represented the necessity for haste. The deed was executed in the light of day, with the full knowledge of the family. There was no attempt at concealment. Miss Swinton was in full possession of her mental faculties. It must be assumed that she was a woman of intelligence. She spoke English better than her native tongue. She took the deed and read it carefully over in the presence of at least one witness, and then, according to the statement of that witness whose testimony is relied upon by the real plaintiffs, she asked Smith, "What made you do it in this way? A. That is the only way I can stop a row, from being a row. Q. She did not say anything? A. That is all I heard. * * * Q. Did not Miss Swinton say to Mr. Smith, I want this to go to the five