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Confidential Relations and Unenforcible Express Trusts

George Gleason Bogert

CONFIDENTIAL RELATIONS AND UNENFORCIBLE EXPRESS TRUSTS

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It is a commonplace that courts of equity frequently base relief solely on the violation of a confidential relation. One of numerous examples of this action is to be found in the constructive trusts which are often created where a grantee has broken an oral, unenforcible promise to hold in trust for the grantor, and the grantee stood in a confidential relation to the grantor at the time of the making of the promise. The following is a typical case: A has conveyed land to B on B's oral agreement to hold it in trust for A and reconvey at A's command. A and B were in confidential relations before the deed was made. The Statute of Frauds prevents the enforcement of B's express promises. The retention of the land after setting up the Statute is not generally regarded as such inequitable conduct as to justify a decree that the holder is a constructive trustee. But the breach of the "confidential relation" existing between A and B is made the sole basis of a constructive trust in favor of A.

The scope and rationale of this doctrine seem unsatisfactorily explained. Doubtless there is some truth in the remark of Professor Pomeroy[1] that chancery declines to define the term "confidential relation" in order to preserve for itself complete liberty of action. It would seem, however, that sufficient freedom could be retained without shrouding the subject in the vague, conflicting generalities which now obtain.

An effort will here be made to examine some of the judicial and editorial expressions on the subject and to offer a scheme of analysis which may clarify thought.

Discussion is confined to the typical case outlined above. Similar will cases are excluded. Numerous other non-trust cases where confidential relationship is an important factor are not considered. To avoid the use of the cumbersome phrases, "the one trusting," "the one expressing confidence," "the confider," and the like, the word "grantor" will be used to refer to the person who has occupied the trusting or confiding end of the confidential relationship. And with like purpose the awkward phrases, "the one trusted," "the party relied upon," "the confidante," and similar words, will be

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[1] 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 956.

replaced by the word "grantee" when it is desired to indicate the individual who has been the recipient of trust and confidence.

In the law of trusts no extensive effort seems to have been made to keep the terms "confidential relation" and "fiduciary relation" distinct. They are generally used interchangeably.[2] The quotations hereinafter given sometimes use "confidential," sometimes "fiduciary." They are in fact referring to the same type of relation.

Reference to a few of many judicial and editorial discussions of the meaning and theory of operation of the confidential relation doctrine will, it is believed, illustrate the prevalent confusion.

Many definitions of "confidential relation" seem question-begging or so vague as to be valueless. In this class might be placed the following:

> "Stripped of all embellishing verbiage, it may be confidently asserted that every instance in which a confidential or fiduciary relation in fact is shown to exist will be interpreted as such... If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief."[3]
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> "A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person."[4]
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> A confidential relationship is one "in which, if a wrong arise, the same remedy exists on behalf of the injured party as would exist against a trustee on behalf of a cestui que trust."[5]

An important question upon which one might well expect to find light in the decisions, is whether "confidential relation" means a *pre-existing* state of trust and confidence or whether it may be a status arising at the time of the conveyance in question and the expression of which is consummated in the conveyance.

Some judicial definitions seem broad enough to cover cases where the sole proof of the confidential relationship is the deed given on the faith of the oral promise. Thus the Supreme Court of Illinois has used these words:[6]

> "A fiduciary relation exists in all cases in which influence has been acquired and abused. The origin of the confidence

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[2]Kochorimbus v. Maggos, 323 Ill. 510, 154 N. E.235(1926); Newell v. Halloran, 250 Pac. 986 (Utah, 1926); 20 R. C. L. §§ 93, 96; 39 CYC. 182; 2 POMEROY, *op. cit. supra* note 1, § 955.

[3]Quinn v. Phipps, 113 So. 419, 421 (Fla. 1927).

[4]26 R. C. L. 93.

[5]Dick v. Albers, 243 Ill. 231, 90 N. E. 683 (1909).

[6]Seeberger v. Seeberger, 325 Ill. 47, 51, 155 N. E. 763 (1927).

is immaterial. It may be moral, social, domestic, or purely personal. If the confidence is in fact reposed by the one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation."

Some Illinois decisions appear to support the conclusion that the apparent breadth of the Illinois definition is actual. Thus, in *Kochorimbus v. Maggos*,[7] the only evidence of the confidential relation between grantor and grantee was that (1) the parties had known each other for twenty years, (2) their wives were cousins, and (3) the grantor had trusted the grantee in connection with the conveyance of the particular property in litigation. There was no proof of other business dealings between them in which the grantor had trusted the grantee. Obviously items (1) and (2) do not show a confidential relationship. But the court held that there was such relationship, apparently basing its decision on the single act of trusting out of which the litigation arose. This tendency to define the confidential relation which causes equity to act in these cases as one which existed before the conveyance *or* arose out of and at the time of the conveyance, is also manifested in numerous other cases.[8]

There are, however, many other cases in which the grantor had, by various acts, for a longer or shorter period before the conveyance, placed reliance on the good faith and skill of the grantee, so that it could be said that there was a *pre-existing* status of trust and confidence.[9] Whether or not the existence of this relationship before the grant on an oral promise was necessary to enable equity to create a constructive trust out of the transaction, at least there was such prior intimacy in business affairs.

In other decisions dominance or superiority seems to be treated as a *sine qua non* to the origin of a confidential relationship. It is said that the grantee must be one who overshadows the grantor, by reason of superior physical condition, maturity, experience,

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[7]323 Ill. 510, 154 N. E. 235 (1926).

[8]Smith v. Sharp, 70 Calif. App. 336, 233 Pac. 374 (1925); Cameron v. Ward, 8 Ga. 245 (1850); Meheula v. Hausten, 29 Haw. 304 (1926); Lewis v. Ziegler, 105 Mo. 604, 16 S. W. 862 (1891); Wells v. Cline, 19 Ohio App. 165 (1924); Hatcher v. Hatcher, 264 Pa. 105, 107 Atl. 660 (1919).

[9]See, for example, Dahlgren v. Dahlgren, 1 Fed. (2d) 755 (C. A. Dist. Col. 1924); Cole v. Manning, 248 Pac. 1065 (Calif. 1926); Wood v. White, 123 Me. 139, 122 Atl. 177 (1923); Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1057 (1895); Sinclair v. Purdy, 235 N. Y. 245, 139 N. E. 255 (1923); Broadway Bldg. Co. v. Salafia, 47 R. I. 263, 132 Atl. 527 (1926).

education or some other qualification. Thus, an Indiana Court has said:[10]

> "There is no invariable rule for determining the existence of a fiduciary relationship, but it would appear from the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one advantage over the other."

And a Utah court has recently made the following statement:[11]

> "The doctrine rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute a fiduciary relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other."[12]

In numerous cases courts have laid emphasis on lack of equality between the parties as proving a confidential relationship,[13] and sometimes lack of dominance or overweening influence has been treated as a reason for refusing to find a confidential relation.[14] But in other decisions the fact of great superiority of position seems to have been ignored as a basis for finding a confidential relation. Thus, in *Davis v. Stambaugh*,[15] an aged father on his death bed granted land to his daughter under an oral trust. The court refused to enforce an express or constructive trust and did not discuss the confidential relation doctrine.

Do certain relationships by blood or marriage *per se* show "confidential relations" of the kind in question? Or is kinship merely

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[10]Yuster v. Keefe, 46 Ind. App. 460, 90 N. E. 920 (1910).

[11]Newell v. Halloran, *supra* note 2, at 988. The grantee in this case had been the agent of the grantor previously, but this relationship had terminated. Since there was no superiority or dominance in favor of the grantee, the only possible basis for finding a confidential relation was the single act of trusting on which the case was founded. This was held insufficient to show a confidential relationship.

[12]For similar pronouncements, see Duncan v. Dazey, 318 Ill. 500, 149 N. E. 495, 505 (1925); Rubin v. Midlinsky, 321 Ill. 436, 152 N. E. 217 (1926).

[13]Odell v. Moss, 137 Calif. 542, 70 Pac. 547 (1902); Hall v. Livingston, 3 Del. Ch. 348 (1869); Reigel v. Wood, 110 Okla. 279, 229 Pac. 556 (1924).

[14]Winkler v. Korzuskiewicz, 118 Kan. 470, 211 Pac. 124 (1923).

[15]163 Ill. 557, 45 N. E. 170 (1896).

evidence which may, alone or coupled with other facts, show a technical "confidential relation?" In numerous cases absence of a confidential relationship has been found, notwithstanding close kinship between grantor and grantee,[16] while in other instances kinship has been a factor of more or less influence in inducing the court to decree a confidential relationship.[17]

When one turns from the definition of the term "confidential relation" to the theory on which the rule operates in saving oral promises from the nullifying effect of the Statute of Frauds, one is met with similarly conflicting views. In some cases the courts have said that the transfer was "presumed fraudulent," but that this presumption might be overcome by evidence showing fairness and good faith on the part of the grantee, and full information in the grantor.

One able judge has described the reason of the rule as "constructive fraud, arising from the abuse of the confidential relation existing between grantor and grantee."[18] The word "constructive" in this connection may be subjected to criticism as leaving room for argument whether fraud implied in fact or fraud in law is meant, whether the fraud in question may be disproved or is irrefutably proved by the breach of the oral promise by the grantee who stood in a confidential relation.

It has been suggested that an implied agreement by the fiduciary not to acquire a personal advantage may explain some of the confidential relation cases.[19]

In a recent opinion entitled to great weight there seems to be a suggestion that there is an implied exception to be read into the Statute of Frauds, or that the grantor is justified in believing that he may create his trust without a writing beeause no fiduciary will set up the statute against his principal.[20]

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[16]Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900 (1903); Burch v. Nicholson, 157 Iowa, 502, 137 N. W. 1062 (1912); Von Buchwaldt v. Schlens, 123 Md. 405, 91 Atl. 466 (1914); Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51 (1911); Curtis v. Crossley, 59 N. J. Eq. 358, 45 Atl. 905 (1900); Rabassa v. Raab, 95 N. J. Eq. 255, 122 Atl. 309 (1923); Hamilton v. Buchanan, 112 N. C. 463, 17 S. E. 159 (1893); Parkes v. Burkhardt, 101 Wash. 659, 172 Pac. 908 (1918).

[17]Butler v. Hyland, 89 Calif. 575, 26 Pac. 1108 (1891); Rodriguez v. Rodriguez, 69 Calif. App. 399, 231 Pac. 375 (1924); Vosburgh v. Knight, 71 Colo. 473, 207 Pac. 1112 (1922).

[18]Burch, J., in Silvers v. Howard, 106 Kan. 762, 190 Pac. 1, 4 (1920).

[19]Nat. Wire Bound Box Co. v. Healy, 189 Fed. 49 (C. C. A. 7th, 1911).

[20]Cardozo, J., in Sinclair v. Purdy, *supra* note 9, at 253.

In a recent minor court decision in New York the court said:[21]

"In short, it is impossible to define the ground of the intervention of the court more closely perhaps than to say that it is called for whenever the transaction is condemned by the wholesome moral sense, the *mores*, of the community."

Two authorities[22] in the trust field have said that "undue influence" is the explanation of the rule. Apparently they believe that the relationship and the grant on an oral trust are some evidence of the existence of actual undue influence exercised upon the grantor by the grantee. And Dean Wigmore has referred the rule to "a presumption of undue influence or of fraud."[23]

Many courts employ the well worn phrase that "equity will not allow the Statute of Frauds to become an instrument of fraud,"[24] as an explanation of the confidential relationship cases of this type. Probably the majority of American courts merely give the result without reasoning. Perhaps the explanation is deemed so obvious as to require no elaboration, or it may be that the courts feel no doubt at all of the result they desire to reach but do not have clear notions of any logical steps by which such result could be justified.

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[21]Stewart & Co. v. Marcus, 124 Misc. 86, 207 N. Y. Supp. 685 (Sup. Ct. 1924).

[22]Costigan, *Constructive Trusts* (1915) 28 HARV. L. REV. 366, 373—"The requirement of active solicitation before charging the legatee or devisee as trustee is apparently the adoption of the view that such solicitation constitutes undue influence which will not make the legacy or devise void, but will justify equity in enforcing a trust against the wielder of the undue influence. The same idea is back of the view that if the relation of special trust and confidence exists between the testator and legatee or devisee, a constructive trust should be enforced."

Scott, *Conveyances Upon Trusts Not Properly Declared* (1924) 37 HARV. L. REV. 653, 661—"Again it is settled that if the transferee procured the conveyance by undue influence, a constructive trust will be raised in favor of the transferor. Thus, if it is shown that there was a confidential relationship existing between the transferor and the transferee at the time of the transfer, and that as a result of an abuse of the confidence reposed in him by the transferor because of this relationship, the transferee was enabled to procure the transfer, a constructive trust will be raised even in the absence of actual fraud. . . There is no agreement in the cases as to just what constitutes a confidential relationship sufficient to serve as the basis for imposing a constructive trust."

[23]5 WIGMORE, EVIDENCE (2d ed. 1923) § 2503: "Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied. But it is not possible to say that any single circumstance or group of facts is the invariable mark of such a presumption, or that there is any uniform rule capable of application apart from the facts of each case."

[24]Catalini v. Catalini, 124 Ind. 54, 24 N. E. 375 (1890); Hatcher v. Hatcher, *supra* note 8.

Be that as it may, many decisions merely find the confidential relation and the breach of the grantee's promise as facts, and then jump to the constructive trust without more.

Since the fifteenth century courts of equity have held that if one vests the legal or equitable *title* to real or personal property in another under an agreement to hold for the benefit of the transferor, the court will (subject to the Statute of Frauds and Statute of Wills) enforce the claim of the transferor as a use or trust.

Chancery has also long boasted that it regards the substance and not the form. In many situations the property interests of one are by his conduct subjected to the practical control of another, altho the latter has no title, legal or equitable. In these situations the one vested with control through ability to act on the titleholder, is in as strong a position as a trustee. When he gets that control through the act of the other in extending confidence that the control will be used for unselfish purposes, the one vested with control is in substance a trustee and ought to be treated as such by equity. It is believed that in creating and applying the confidential relation doctrine equity has treated the holder of control as if he were a holder of title.

For example, if A and B are in intimate business relations, B advising A with regard to the management of A's property, and A implicitly following B's advice, B is in a position to buy and sell and lease and mortgage for A just as if B had the legal estate in all A's realty and personalty as trustee for A. B causes the purchases, sales, mortgages and leases for A, not by his (B's) action in making a deed or what not, but by working on A and securing action on the part of A. The whole of A's land and goods is just as much under the influence of B as if B were a trustee of them. B holds a practical power of control which makes him in the view of equity a quasi-trustee of all of the things over which his influence extends.

Thus, when B, the confidential adviser of the kind described, takes to himself a deed from A of a part of the property over which B's influence has previously extended, B is in substance taking a conveyance of property which is already trust property. No promise by B to hold it in trust made at the time of the conveyance, or breach of such promise, is necessary to make the property conveyed trust property. It was in substance trust property before the conveyance. B's position after the conveyance is substantially equivalent to that of a strict trustee who by some means gets the title to trust property in his own name with no mention of the trust on the record.

The subsequent conduct of B in seeking to set up the Statute of Frauds and apply the property to his own benefit, is thus strictly

analogous to a true trustee's misapplication of trust funds. It is in substance a breach of a trust in favor of A which had attached to the property before it was conveyed to B. When a strict trustee has title to property which is identified as trust property, whether the record discloses the trust or not, the trustee is forced by equity to carry out his trust. So B should be obliged to respect the equity which attached to the property in favor of A, before B got his deed. This quasi-trust, or control accepted for another's benefit, is enforced through a constructive trust, chancery's remedial weapon against all inequitable holding.

If this theory of "confidential relations" be accepted, it ought to be possible to make the definition of that term more certain than do the existing authorities, heretofore quoted. If a confidential relation is to be a quasi-trust, we ought to find in it the substantial equivalents of the elements of a true trust. The "grantor" and "grantee," of course, always afford possible *cestui* and trustee. But there should be a trust *res* in this quasi-trust, as there must be in a strict trust. Unless the confidence imposed by the grantor has resulted in giving to the grantee power over some of the property interests of the grantor, there is lacking an essential element. If the facts are merely, as alleged in an Arkansas case,[25] that the grantor and grantee had been "intimate friends of long standing," that the grantor had reposed "unbounded trust" in the grantee, and that there was "reciprocal trust and confidence," there is no *res* for the quasi-trust. The grantor may have owned no property during the period of reliance. His trust may have been merely a mental attitude. It may not have subjected any specific property interests to the power of the grantee in the manner in which the true trust subjects specific property interests to the control of the trustee.

Even though the trust and confidence exist in the mind of one and are expressed to the person in whom they rest, they should be of no significance as creating a technical confidential relation, unless the property rights of the trusting party are affected. A citizen may have observed a bank president for years, noted his honesty and prudence, and expressed often to the president admiration of his character and works, and yet he ought not to be regarded as in a confidential relation with the president until he has given the president some influence over his business affairs by taking advice about actual transactions, becoming a customer of the bank, or other similar conduct. If a confidential relation is to be a quasi-trust, it should result from confidence expressed in such a way as to affect property rights.

[25]O'Connor v. Patton, 171 Ark. 626, 286 S. W. 822 (1926).

Furthermore, not every kind of confidence expressed so as to affect property rights will do. A customer of a food dealer relies on his grocer to furnish wholesome food, and to give honest measure for fair prices. This is trust expressed in conduct which may affect the pocket book of the customer. But this is not the trust and confidence necessary to create a confidential relation of the kind we are considering. The trust and confidence imposed by a *quasi-cestui* in a true confidential relation must be an extraordinary reliance which causes the *quasi-cestui* to drop his guard, abandon formalities, and deal with another in intimacy. It must be the analogue of the reliance which the beneficiary of a technical trust is entitled to place in his trustee. It must, as in the true trust, spring from a requirement of the utmost good faith imposed on the opposite party. A grocer is required to use merely the ordinary care of a reasonably prudent man in dealing with his customer. He and the customer deal at arm's length. At least to some extent *caveat emptor* applies. Even though the customer relies and confides implicitly in the grocer, he is not in a confidential relation with him for the reason that the confidence expressed is of an inferior character.

If the quasi-trust theory is to be followed, it would seem necessary that the expression of confidence of the kind described should continue down to the time of the deed in question, in order that the confidential relation doctrine may be applied. It ought not to be sufficient that previously such confidence existed, if it was violated and thereafter the confidence was withdrawn and the control over the property ceased. The important fact should be the continuance of the requisite trust down to the time of the deed on the oral trust. If an express trust has ended, subsequent transactions between the former trustee and former *cestui* are not subjected to any scrutiny by equity.

Attention has previously been directed to the failure of courts and writers to emphasize the requirement that the confidential relation must be *pre-existing*. If a contemporaneous confidential relation will do, too much is proved. Then the confidential relation doctrine completely negatives the Statute of Frauds. Every grantor on an oral trust has high faith in his grantee and gives the grantee power over the grantor's property. If he did not have such strong confidence, he surely would either refuse to make the deed or would demand that the express trust be stated in writing. The deed proves the existence at the time of the deed of a confidential relation. While logically it may be difficult to differentiate the new and the old confidential relations in the effect which they should produce in

equity, it would seem inevitable on grounds of expediency that the courts ought to insist on a preexisting confidential relation in order to save the Statute of Frauds from complete destruction.

A much better way out would be to decree a return of the property to the grantor in all cases of breach of the oral trust,—this on the basis of a constructive trust, and not an express trust. This would be on the theory that it would be inequitable not to restore the grantor to his former position, after the grantee has set up the Statute of Frauds. This is Dean Ames' *restitutio in integrum* doctrine[26] which unfortunately has not been received with favor by the courts. If such a line were followed, the confidential relation doctrine could be abandoned in this department of the law. But assuming that the great majority of the courts are to continue to refuse to see an inequitable holding in the retention of land after setting up the Statute of Frauds, then they surely desire to limit the confidential relation doctrine as above indicated. They must mean, if they are pressed to explain, a confidential relation existing prior to the grant on an oral trust and arising out of a transaction or transactions other than the grant and the negotiations leading up to it.

Dominance is not necessary to the origin of a trust and it should not be a prerequisite to the rise of the quasi-trust or confidential relation. It is not required in order to have an express trust that the trustee should tower over the *cestui* in physical, mental, or moral qualities. They may be on a parity. It is believed that the conception, previously referred to, that there can be no confidential relation without dominance or superiority of position, is due to confusion of thought. The mere fact that A is ignorant and inexperienced, and B educated and skilled in affairs, does not tend to prove that A and B are in a confidential relation. A may have trusted B and given B influence in A's affairs or he may not. If there has been such trust extended and influence acquired, it is immaterial whether the parties were equal or unequal as far as the existence of the confidential relation is concerned. But the disparity is important for another reason. It is evidence from which a finding of undue influence would be justified. If an aged, feeble, ignorant man conveys to an able-bodied, experienced business man, under an oral trust, a court may well treat the facts of disparity and the conveyance as some evidence of actual undue influence, or as raising a presumption of undue influence, or as creating a duty on the grantee to introduce evidence to show good faith, full disclosure and a fair

[26]Ames, *Constructive Trusts Based upon the Breach of an Express Oral Trust of Land* (1907) 20 HARV. L. REV. 549.

price. But it is a misnomer to use "confidential relation" to describe the dominant character of the stronger. The stronger may have been trusted so as to come into a confidential relation, but the mere dominance does not show the trusting. There seems to have been a confusion of the quasi-trust and undue influence concepts at this point.

In arguing that dominance is not a relevant factor in determining the *existence* of a confidential relation, the writer does not wish to be understood as stating that, after a confidential relation has been created, superiority of influence on the side of the confidante is not a necessary result. Such superiority is an effect or consequence of the confidential relation, and not a cause of the origin of the confidential relation.

Relationship by blood or marriage between grantor and grantee ought to be significant in proving a confidential relationship only in so far as it shows that the property of the grantor has actually, prior to the deed on oral trust, been under the control of the grantee. Mere kinship does not prove the existence of a spirit of reliance on the good faith and ability of another, nor does it necessarily prove control by one over the property of another. Near relatives frequently are on bad terms and place no trust the one in the other. Many near kinsmen have no business transactions with each other. If actual trust of a high character affecting the grantor's property interests has existed, the fact of close family relationship between grantor and grantee will explain and corroborate the other evidence regarding extension of confidence but the relationship alone will not tend to show the reliance.

It is true that many decisions state that the more intimate family relationships show *ipso facto* a confidential relation. For example, it is often stated that, as a matter of law, a husband stands in a confidential relation to his wife.[27] To the writer it would seem better to explain these cases as instances of unrebutted presumption of fact. Most wives place confidence of the highest type, and of a property-affecting nature, in their husbands. Most husbands have in fact the practical control over their wives' property interests which characterize the quasi-trustee. Consequently the mere existence of the relation of man and wife might well be held to be *prima facie* evidence of the existence of a confidential relation. But this presumption should be capable of rebuttal by the husband, if he shows that actually no confidence was extended and no control existed.

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[27]Huffine v. Lincoln, 52 Mont. 585, 160 Pac. 820 (1916).

To a limited extent parents and husbands have been given, by the common law or statute, property rights in the wages or services of their wives or minor children. And certain rights of guardianship or control over the property of the wives or infant children may likewise be conferred by common law or statute on the parents in the one case and husbands in the other. In so far as there is such property control by virtue of the relationship alone, then mere kinship does prove an intimate relationship of the technical character under discussion, created not by the act of the grantor but by operation of law. This relationship might well be called a "fiduciary relationship." It does not arise from actual confidence extended but from a duty created by law.

To the writer it has seemed desirable to use the terms "fiduciary" and "confidential" to distinguish two separate types of relationships. The former term might well be reserved for relations which have distinct names and compartments in the law, as, for example, the trust, agency, guardianship, etc. While the latter might be applied to that large miscellaneous list of cases where actual trust and confidence of a high type creates a corresponding duty, but where no tag or label can be given to the relationship except the broad term confidential relationship. Thus used, the term "fiduciary" would lay emphasis on intimacy arising from the innate character of certain fixed institutions, while "confidential" would stress intimacy having its origin in the attitude of a party himself.

Two other explanations of the theory of operation of the confidential relation rule may be urged with some force, although they do not seem as satisfactory as the reason offered above.

In strict trusts equity has two fundamental doctrines, namely, (1) the trustee must act solely in the interest of the *cestui que trust*, and never in the trust administration accept a personal benefit aside from his commissions; (2) when the trustee and *cestui que trust* contract or the *cestui* conveys property to the trustee, the burden is on the trustee to show the fairness of the contract or transfer.

The former rule arises from knowledge that if the interests competing for the trustee's attention are those of the *cestui* and of the trustee personally, the trustee will often out of the weakness of human nature, prefer his own advantage to that of the beneficiary. It is a rule of policy to force the trustee to single-minded loyalty to his trust. The penalty for its violation is that the *cestui que trust* may, at his option, treat the trustee as a constructive trustee of the private gain the trustee has made in administering the trust, irrespective of proof by the trustee of his good faith or the lack of injury to the *cestui*.

The second rule is designed to prevent imposition on the *cestui* by the trustee. The former is generally superior in knowledge as to the value of the *cestui que trust's* interest. The *cestui que trust* naturally expects that he may confide in the trustee and rely on his honesty. These advantages which the trustee has over the *cestui* make it easy for him to defraud the *cestui*. History shows many cases of actual imposition. To guard the *cestui que trust* against this danger, equity places a burden on the trustee to show the fairness of the transaction between himself and the beneficiary. Equity does not declare the transaction void, or voidable in all events by the *cestui*. It makes the trustee a constructive trustee of the property received from the *cestui que trust*, unless the trustee sustains the burden of proving the transfer fair.

It is common knowledge that equity has applied these two doctrines to situations outside the realm of strict trusts where analogous circumstances exist and the same results are to be accomplished.

The no-profit-in-trust-administration rule has been applied to agents, executors, administrators, attorneys, directors of corporations, guardians, and others who are not strict trustees but whose functions are like those of the trustee in that they act for others and are entrusted with power over, and title to or possession of, things to be used for the advantage of another. These quasi-trustees have well recognized distinct names and classifications in the law. There are also many transactions, situations and dealings which cannot be tagged or placed in a particular compartment of the law, but which nevertheless show a status of reliance on the integrity and skill of another. The one trusted has received communications and information, rendered services and given advice in a way analogous to the transactions which occur in trusts and agencies. The one trusted in a loose way acts for the other and has the power to affect the latter's financial interests. Equity applies this no-profit rule to all these fiduciaries from the strict trustee down to the most remote quasi-trustee in order to encourage fidelity and loyalty.

The presumed-fraud-in-superior-to-inferior transaction rule is likewise administered where the relationship is a quasi-trust having a distinct name in the law, as for example, agency and guardianship; and in the looser, vaguer relationships without a separate tag or pigeon-hole in the analysis of legal relations. So long as there is trust reposed on the one side and superiority of influence on the other, there is need for scrutiny of transactions between the two parties, no matter what names the parties may bear in digest or dictionary.

If A, standing in a confidential relation with B, conveys land to B, under an oral promise by B to hold the land in trust for A, and later B repudiates his promise and sets up the Statute of Frauds, have we a case of (1) attempted misappropriation of trust property, or (2) attempted profit in trust administration, or (3) a conveyance from inferior to superior? If (1), the property in question is restored to the plaintiff because it was the subject matter of a quasi-trust which existed before the conveyance by A to B and which equity enforces as a constructive trust. If (2), if would seem that, to put it in the usual way, there would be a conclusive presumption of fraud, or, to put it in another manner, A could charge B as a constructive trustee of the land for A, regardless of the Statute of Frauds and regardless of any proof B might offer as to fairness. If (3), the usual phraseology applicable would seem to be that there was a rebuttable presumption of fraud and that the burden was on B to show the fairness of the transaction, or, in other words, that A could charge B as a constructive trustee only if B failed to show A had freely conveyed with full knowledge of all relevant facts and that the consideration, if any was intended to pass, was adequate.

For the reasons previously stated the writer believes theory (1) is the most natural and reasonable.

It may be argued that what B in the illustration is doing is attempting to get a profit for himself in setting up the Statute of Frauds.[28] Here the emphasis is placed on B's act of repudiation of his promise and pleading the Statute. No stress is laid on the transfer itself as *per se* having any effect. The argument is that one who was prior to the deed already a trustee or quasi-trustee is disabled from getting private advantage by raising rules of law or statutes which would be available to the non-fiduciary. This is perhaps the view expressed in the New York decision previously referred to.[29] To this argument an answer can be made, namely, that the no-profit-in-trust-administration rule is aimed against acquisition by the trustee of non-trust property through third persons in the course of the administration and not against a breach of trust in appropriating the trust property itself. And, of course, a reply to this answer may well be that the proponents of theory (2) do not accept the thesis that the property of the one extending confidence is quasi-trust property before the deed on oral trust. They may well allege that a confidential relation does not involve a *res* but rather only two

[28]Story seems to have accepted this theory: STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 446.

[29]Sinclair v. Purdy, *supra* note 9.

persons. If they are right, theory (1) must be abandoned and a choice made between theories (2) and (3).

It may also be urged with much force that the case is really one of transfer from inferior to superior. Here the fact which is stressed is not the repudiation of the promise by B, but rather the obtaining of title by B when in a position of influence over A. This transfer, without more, would, it may be urged, place the burden on B to prove that the transfer was equitable, that is, that it was a gift from an adult of sound mind, acting freely on full information and without undue influence by the transferee, or that it was a transfer for consideration made by a similar transferror who received a recompense of at least reasonable adequacy.

Other things being equal, probably that theory of the operation of the confidential relation doctrine should be preferred which makes it easiest for the grantor to prove his case and hardest for the grantee to defend. The probability of a grantor simulating a confidential relation and an oral trust in order to set aside a *bona fide* transfer is not great. If he succeeds in such wrongful use of the confidential relation rule, the utmost disadvantage to the grantee will be to deprive him of a gift, or an expected profit in the case of a sale. On the other hand, one knows that instances of the violation of confidence are numerous.