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COMMENTS

THE CONFIDENTIAL RELATIONSHIP THEORY OF CONSTRUCTIVE TRUSTS—AN EXCEPTION TO THE STATUTE OF FRAUDS

The constructive trust, often referred to as a trust "implied in law,"¹ has been generally recognized as an exception to the Statute of Frauds.² Fraud, duress, mistake, undue influence, or the breach of a fiduciary relationship may all be the basis for a constructive trust. Promises to convey or to hold property in trust, which would ordinarily be unenforceable under the statute, have often resulted in the imposition of a constructive trust when the abuse of a confidential relationship has been found.³ The "abuse of confidence" exception to the statute, which defies accurate definition, has provided courts of equity with an elastic means for intervention whenever such is considered just and proper.

THE CONFIDENTIAL RELATIONSHIP AND FIDUCIARY RELATIONSHIP DISTINGUISHED

The confidential relationship has at times been identified with that of a true fiduciary.⁴ The two are not synonymous.⁵ It is true that a high degree of trust

1. Also referred to as a trust "ex maleficio," trust "ex delicto," trust "in invitum," or "involuntary" trust. Bogert, *Trusts and Trustees* § 471 (2d ed. 1960) [hereinafter cited as Bogert].

2. "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 trust, or by his last will in writing, or else they shall be utterly void and of none effect. . . .

Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law; then, and in every such case, such trust or confidence shall be of like force and effect as the same would have been if the statute had not been made. . . ." Statute of Frauds, 1677, 29 Car. 2, c.3, § 7.

3. Ames, *Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land*, 20 Harv. L. Rev. 549 (1907); Costigan, *Constructive Trusts Based on Promises Made To Secure Bequests, Devises, or Intestate Succession*, 28 Harv. L. Rev. 237, 366 (1915). For a thorough analysis of the bases for the imposition of a constructive trust, see Bogert §§ 471-501. See generally McWilliams, *The Doctrine of Constructive Trusts as Laid Down in Curdy v. Berton*, 16 Calif. L. Rev. 19 (1927); Scott, *Conveyances Upon Trusts Not Properly Prepared*, 37 Harv. L. Rev. 653 (1924); Stone, *Resulting Trusts and the Statute of Frauds*, 6 Colum. L. Rev. 326 (1906).

4. *In re Cover's Estate*, 188 Cal. 133, 204 Pac. 583 (1922); *In re Llewellyn's Estate*, 83 Cal. App. 2d 534, 189 P.2d 822 (Dist. Ct. App. 1948); *Peyton v. William C. Peyton Corp.*, 23 Del. Ch. 321, 7 A.2d 737 (Sup. Ct. 1939); *Gerson v. Gerson*, 179 Md. 171, 20 A.2d 567 (1941); *Sachs v. Cluett, Peabody & Co.*, 265 App. Div. 497, 39 N.Y.S.2d 853 (1st Dep't 1943); *Klein v. Ekco Prod. Co.*, 135 N.Y.S.2d 391 (Sup. Ct. 1954); *Renegar v. Bruning*, 190 Okla. 340, 123 P.2d 686 (1942); *Fipps v. Stidham*, 174 Okla. 473, 50 P.2d 680 (1935).

5. *Floyd v. Green*, 238 Ala. 42, 188 So. 867 (1939); *Wilson v. Cooper*, 126 Cal. App.

and confidence can be found in every transaction involving a fiduciary. To this extent, the fiduciary relationship is undoubtedly "confidential." The true fiduciary relationship and the duties and obligations which adhere thereto, however, can generally be placed into distinct categories wherein an underlying legal relationship also exists. Such would be true, for example, of the relationships of attorney and client, guardian and ward, executor and distributee, trustee and beneficiary, or principal and agent.⁶ The confidential relationship arises not out of the legal association between the parties but out of a long-standing personal or social relationship which has resulted in one party placing a high degree of trust, faith, and confidence in the other. Examples of the latter would be the relationships between brother and sister,⁷ an aged person and a nurse-companion,⁸ friends of long standing,⁹ or close business associates.¹⁰ Although the role of the confidant in the confidential relationship is not that of a fiduciary in the strict meaning of the word, his position of confidence is such that he is able to obtain a degree of trust, disclosure, intimacy, and superiority of position equivalent to that of a true fiduciary.¹¹

The distinction between a confidential and a fiduciary relationship, while subtle, is worthy of note. This distinction has attained added importance in view of the tendency in some jurisdictions to apply the confidential relationship theory quite liberally. These jurisdictions have found the requisite confidential relationship in situations where there was, in fact, no legal relationship and circumstances indicated no more than a weak personal relationship between the parties.

The conduct of a true fiduciary when dealing with, or on behalf of, the one he represents must be without a suspicion of unfair dealing.¹² The same high degree of good faith is demanded of those standing in a confidential relationship and the courts will carefully scrutinize all transactions between the parties where such a confidence exists.¹³ The presumption of undue influence, which

607, 15 P.2d 174 (Dist. Ct. App. 1932); *Wagner v. Wagner*, 242 Iowa 480, 45 N.W.2d 508 (1951); *Roberts v. Parsons*, 195 Ky. 274, 242 S.W. 594 (1922); *Wood v. Rabe*, 96 N.Y. 414 (1884); 1 *Scott, Trusts* § 44.2 (2d ed. 1956).

6. *Bogert* § 482.

7. *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255 (1923).

8. *Ramstead v. Bridges*, 175 Ore. 182, 152 P.2d 306 (1944).

9. *Cullen v. Spremo*, 142 Cal. App. 2d 225, 298 P.2d 579 (Dist. Ct. App. 1956).

10. *Taylor v. Shields*, 111 N.E.2d 595 (Ohio Ct. App. 1951).

11. "[T]here is just as great intimacy, disclosure of secrets, intrusting of power, and superiority of position in the case of the representative, but . . . the law has no special designation for the position of the parties. It cannot be called trust or executorship, and yet it is so similar in its creation . . . that it should have like results." *Bogert* § 482.

12. *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928). "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.* at 464, 164 N.E. at 546.

13. *Mathy v. Mathy*, 88 Ark. 56, 113 S.W. 1012 (1908); *Spalding v. Spalding*, 361 Ill. 387, 198 N.E. 136 (1935); *Redwine Ex'r v. Redwine*, 160 Ky. 282, 169 S.W. 864 (1914); *Fowler v. Butterly*, 78 N.Y. 68 (1879).

is raised by any conveyance from a beneficiary to his fiduciary,¹⁴ similarly attaches to conveyances between those standing in a confidential relationship.¹⁵

The jurisdictions in the United States which have accorded recognition to the "abuse of confidence" theory of constructive trusts have granted or denied equitable relief in a wide range and variety of circumstances. It is therefore difficult to state with any great certainty when a particular case will, or will not, fall within the doctrine. Certain elements, however, are common to almost all decisions which have resulted in equitable intervention. It would appear then that the absence of any single element will result in a denial of equitable relief in the form of a trust implied in law. These basic prerequisites are: (1) the confidential relationship; (2) a conveyance to the grantee based upon, and arising out of the confidential relationship; (3) a promise to reconvey to the grantor or to a specified third person; and (4) a subsequent refusal to reconvey resulting in the grantee's unjust enrichment.¹⁶

WHO MAY BRING THE ACTION

Once an abuse of confidence has been established equitable intervention is governed by the demands of justice, and is not directed to compliance with the intent of the parties.¹⁷ To permit the grantee to use the Statute of Frauds as a

14. *Lezinsky v. Mason Malt Whisky Distilling Co.*, 185 Cal. 240, 196 Pac. 834 (1921); *Hill v. Hall*, 191 Mass. 253, 77 N.E. 831 (1906); *Pritchard v. Hutton*, 187 Mich. 346, 153 N.W. 705 (1915); *Butler v. Prentiss*, 158 N.Y. 49, 52 N.E. 652 (1899); 3 *Pomeroy, Equity Jurisprudence* § 956 (5th ed. 1941).

15. *Floyd v. Green*, 238 Ala. 42, 183 So. 867 (1939); *In re Brown's Estate*, 39 Cal. App. 2d 496, 200 P.2d 888 (Dist. Ct. App. 1948); *Roberts v. Parsons*, 195 Ky. 274, 242 S.W. 594 (1922). In *Bohn v. Gruver*, 111 Cal. App. 386, 394, 295 Pac. 891, 895 (Dist. Ct. App. 1931), the court, in referring to the presumption of undue influence, said: "[T]his rule applies not only to those who bear a formal relation of trust to those with whom they deal, but in every case where there has been confidence reposed which invests the person trusted with an advantage in treating with the person so confiding." *Contra*, *Towner v. Berg*, 5 App. Div. 2d 481, 484-85, 172 N.Y.S.2d 258, 262 (3d Dep't 1958). "Assuming a relation of confidence, emphasized originally, perhaps, by the presence of the wife and mother, that alone was not enough to condemn the retention. This was not the kind of a fiduciary relationship which has been held to render inherently fraudulent the retention of secret profits and acts of self-dealing generally . . . so that restitution will be decreed as a matter of course upon proof of the relationship, of enrichment and of nothing more. In such cases the acquisition itself is in violation of a fiduciary duty." See also *Cert v. Benson*, 159 Iowa 218, 140 N.W. 419 (1913); *Harper v. Robinson*, 275 Mich. 623, 267 N.W. 575 (1936); *Foster v. Foster*, 199 Okla. 466, 187 P.2d 222 (1947). There is some authority that, to raise the presumption of undue influence, the party against whom it is sought must have been in a position of "dominating influence." *Blake v. Brennan*, 1 N.J. Super. 446, 61 A.2d 916 (Ch. Div. 1948); *Union Trust Co. v. Cwynar*, 388 Pa. 644, 131 A.2d 133 (1957); *Newell v. Halloran*, 68 Utah 407, 250 Pac. 936 (1926).

16. The elements of good faith and "clean hands" required of a plaintiff in any equitable action are, of course, a prerequisite in the field of constructive trusts. *Frank v. Blumberg*, 78 F. Supp. 671 (E.D. Pa. 1948); *Klein v. Chicago Title & Trust Co.*, 295 Ill. App. 208, 14 N.E.2d 852 (1938).

17. *Ames, Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land*, 20 Harv. L. Rev. 549 (1907); *Comment*, 31 N.C.L. Rev. 242 (1953).

defense to his own breach of confidence would result in a retention of property to which he is not equitably entitled. It is argued by some that a constructive trust should be imposed solely for the benefit of the grantor whose confidence has been breached.¹⁸ The two most common cases arising under the "abuse of confidence" exception to the Statute of Frauds are: (a) where A and B are in a relationship of confidence and A conveys to B without consideration, and B in turn promises to reconvey to A upon demand; and (b) where A and B are in a similar relationship and A conveys to B without consideration in reliance upon B's promise to reconvey to C. Professor Scott urges that in both cases, upon B's refusal to reconvey, a constructive trust should be invoked in favor of A. To go further and permit an action by C to enforce the agreement in the second case would be to exceed the demands of justice.¹⁹ Many courts, however, have disagreed with this construction and have held that an action by C can be maintained.²⁰ It is therefore generally recognized that both the original grantor and the ultimate beneficiary of the promise to reconvey may invoke the doctrine of constructive trusts.

THE CONFIDENTIAL RELATIONSHIP

In a majority of cases wherein a confidential relationship has been found, a family relationship also existed between the grantor and the grantee.²¹ Kinship, however, is not a necessary element of the confidential relationship and those jurisdictions which construe the doctrine liberally have frequently found a confidential relationship in the absence of a simultaneous blood or family relationship between the parties.²² Even those jurisdictions which have been reluctant to grant relief in derogation of the Statute of Frauds insist that a family bond need not be the basis of the confidential relationship. New York has imposed constructive trusts in a number of cases where the parties were related,²³ and very infrequently when they were not related.²⁴ Yet, in one

18. 1 Scott, *Trusts* § 45.2 (2d ed. 1956).

19. *Ibid.*

20. *Stahl v. Stahl*, 214 Ill. 131, 73 N.E. 319 (1905); *Stout v. Stout*, 165 Iowa 552, 146 N.W. 474 (1914); *Coleman v. Kierbow*, 212 Miss. 541, 54 So. 2d 915 (1951); *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255 (1923); *Goldsmith v. Goldsmith*, 145 N.Y. 313, 39 N.E. 1067 (1895); *Schaffer v. Schaffer*, 17 Misc. 2d 592, 183 N.Y.S.2d 882 (Sup. Ct. 1959); *Moffitt v. Moffitt*, 340 Pa. 107, 16 A.2d 418 (1940); *Masino v. Sechrest*, 268 Wis. 101, 66 N.W.2d 740 (1954). But see *Serota v. Serota*, 20 Misc. 2d 455, 189 N.Y.S.2d 260 (Sup. Ct. 1959), wherein the court held that a confidential relationship cannot be the basis of a constructive trust where the plaintiff has not parted with consideration and there is no proof of defendant's unjust enrichment.

21. *Bogert* § 482 n.23.

22. *Swain v. Moore*, 31 Del. Ch. 288, 71 A.2d 264 (1950) (aged man and young neighbors); *Taylor v. Shields*, 111 N.E.2d 595 (Ohio Ct. App. 1951) (personal and business acquaintances); *Ramstead v. Bridges*, 175 Ore. 182, 152 P.2d 306 (1944) (aged person and nurse); *In re Hollinger's Estate*, 351 Pa. 364, 41 A.2d 554 (1945) (married man and unmarried woman); *McCown v. Fraser*, 327 Pa. 561, 192 Atl. 674 (1937) (aged woman and youth in position of a son).

23. *Foreman v. Foreman*, 251 N.Y. 237, 167 N.E. 428 (1929) (husband and wife); *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255 (1923) (brother and sister); *Leary v.*

case the New York Court of Appeals stated, "We disclaim any purpose of holding that the requisite confidential relationship must be one found within the confines of a family."²⁵ One of the few instances in which New York has found a confidential relationship in the absence of a coexisting family relationship is *McClellan v. Grant*.²⁶ In that case, an elderly woman conveyed property to a parish priest, whom she had known and consulted with for many years. He, in turn, promised to reconvey the property to her missing son, when, and if, he returned. Years later, a New York court imposed a constructive trust on the heirs-at-law of the priest in favor of the son. It is to be noted that the court might have more properly found a true fiduciary relationship existing between the parties, a relationship frequently accorded to the personal and privileged transactions and communications between penitent and confessor,²⁷ or between a minister and a member of his congregation.²⁸

California has been considerably more liberal in recognizing the existence of a confidential relationship.²⁹ In *Bradley Co. v. Bradley*,³⁰ a transfer while the parties were engaged was made the subject of a constructive trust due to the abuse of a confidential relationship found to exist during the period of engagement. A similar result was reached in *Cole v. Manning*,³¹ a case in which the parties were living together meretriciously, and in *Adams v.*

Corvin, 181 N.Y. 222, 73 N.E. 984 (1905) (father and daughter); *Goldsmith v. Goldsmith*, 145 N.Y. 313, 39 N.E. 1067 (1895) (mother and son); *Wood v. Rabe*, 96 N.Y. 414 (1884) (mother and son).

24. But see *Muller v. Sobol*, 277 App. Div. 884, 97 N.Y.S.2d 905 (2d Dep't. 1950) (memorandum decision); *Hifer v. Calmac Oil & Gas Corp.*, 258 App. Div. 78, 16 N.Y.S.2d 104 (4th Dep't 1939) (memorandum decision); *McClellan v. Grant*, 83 App. Div. 599, 82 N.Y. Supp. 208 (4th Dep't 1903); *Lett v. White*, 6 Misc. 2d 363, 163 N.Y.S.2d 453 (Sup. Ct. 1957).

25. *Fraw Realty v. Natanson*, 261 N.Y. 396, 402, 185 N.E. 679, 680 (1933). The dissenting opinion further defines the relationship: "The parties may be united by blood, family affection, close friendship or business relations." *Id.* at 412, 185 N.E. at 684.

26. 83 App. Div. 599, 82 N.Y. Supp. 208 (4th Dep't 1903).

27. *Henderson v. Murray*, 103 Minn. 76, 121 N.W. 214 (1909).

28. *In re Miller's Estate*, 16 Cal. App. 2d 141, 60 P.2d 492 (Dist. Ct. App. 1936) (testatrix and pastor). But see *Else v. Fremont Methodist Church*, 247 Iowa 127, 73 N.W.2d 50 (1955); *In re Rowlands' Estate*, 70 S.D. 419, 18 N.W.2d 290 (1945).

29. California's liberal approach to the doctrine is in measure attributable to a statutory approach to the subject of trusts embodying precepts considerably less stringent than those of the common law. The California Civil Code defines a trustee as follows: "Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this Chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control." Cal. Civ. Code § 2219.

30. 37 Cal. App. 263, 173 Pac. 1011 (Dist. Ct. App. 1918).

31. 79 Cal. App. 55, 248 Pac. 1065 (Dist. Ct. App. 1926). A New York court reached a similar conclusion in *Muller v. Sobol*, 277 App. Div. 884, 97 N.Y.S.2d 905 (2d Dep't 1950). Also, in *Lett v. White*, 6 Misc. 2d 363, 163 N.Y.S.2d 453 (Sup. Ct. 1957), a case in which the parties were living in an illicit relationship, the court ordered the defendant

Bloom,³² wherein the grantee was a close friend and business advisor of the grantor. Similar attempts to establish a confidential relationship between business associates have met with limited success.³³

Other jurisdictions have recognized the existence of a confidential relationship in varied instances in which the parties were not related. A Texas court, in *Wilson v. Therrell*,³⁴ found a confidential relationship between coadventurers arising out of their oral agreement concerning an oil and gas lease. A Pennsylvania court, in *McCown v. Fraser*,³⁵ held that a confidential relationship existed between a woman and a youth whom she regarded as a son, although the parties were not legally related.³⁵ An Oregon court held that a relationship of confidence existed between an aged man and his nurse.³⁶ In *Hanger v. Hess*,³⁷ an Idaho court imposed a constructive trust on property which the grantor had conveyed to his housekeeper. Although the court spoke in terms of a confidential relationship, it did not make a definitive finding that such a relationship actually existed. A Mississippi court, in *Sunflower Farms, Inc. v. McLean*,³⁸ went so far as to invoke a constructive trust when a grantor conveyed his property to an unknown third party upon the advice of a close relative, even though no confidential relationship was found to exist between the grantor and the original grantee.

While it is true that a family relationship has been present in most cases in which the doctrine has been applied, the mere existence of such a relationship will not satisfy the requirement.³⁹ Relatives are often "hostile to each other or deal at arms length and act independently and so are held not to have been in a confidential relation."⁴⁰ The confidential relationship must be established independently of the pre-existing family relationship.

It can therefore be said that where a family bond exists between the grantor

to give the plaintiff a quitclaim deed to property which the plaintiff had paid for but which was deeded to the parties as tenants in common. The court neither spoke in terms of a constructive trust nor did it find a confidential relationship existed. However, it called the case a proper subject for equitable intervention based upon an "overmastering influence" exerted over the plaintiff by the defendant which influence arose out of a "Svengali" relationship between the parties.

32. 61 Cal. App. 2d 315, 142 P.2d 775 (Dist. Ct. App. 1943).

33. For successful attempts, see *Cullen v. Spremo*, 142 Cal. App. 2d 225, 298 P.2d 579 (Dist. Ct. App. 1956); *Carter v. Abramo*, 201 Md. 339, 93 A.2d 546 (1953). Contra, *In re Lender's Estate*, 247 Iowa 1205, 78 N.W.2d 536 (1956).

34. 304 S.W.2d 723 (Tex. Civ. App. 1957).

35. 327 Pa. 561, 192 Atl. 674 (1937).

36. *Ramstead v. Bridges*, 175 Ore. 182, 152 P.2d 306 (1944).

37. 49 Idaho 325, 288 Pac. 160 (1930).

38. 233 Miss. 72, 101 So. 2d 355 (1958).

39. *Shapiro v. Rubens*, 166 F.2d 659 (7th Cir. 1948); *McMurray v. Sivertsen*, 28 Cal. App. 2d 541, 83 P.2d 48 (Dist. Ct. App. 1938); *Scherman v. Scherman*, 395 Ill. 574, 71 N.E.2d 16 (1947); *Masius v. Wilson*, 213 Md. 259, 131 A.2d 484 (1957); *Snell v. Seek*, 363 Mo. 225, 250 S.W.2d 336 (1952); *Serota v. Serota*, 20 Misc. 2d 455, 189 N.Y.S.2d 260 (Sup. Ct. 1959); *Zarnowski v. Fidula*, 376 Pa. 602, 103 A.2d 905 (1954).

40. *Bogert* § 482.

and grantee, the probability that a court will impose a constructive trust is heightened considerably. In view of a trend in some jurisdictions to liberalize the doctrine, however, it may also be said that a confidential relationship may be found in almost any case where there are frequent dealings between the parties which enable the grantee to exercise a position of superiority and influence over the grantor.

THE CONVEYANCE

It has been suggested that a confidential relationship may be inferred from the very existence of a conveyance, conditioned upon the grantee's oral promise to reconvey or hold in trust.⁴¹ Most courts, however, have required that the relationship be established as having existed prior to, and independent of, the conveyance.⁴² The relationship must be a motivating factor behind the transfer. It must be "the case of a confidence induced, not by the bare promise of another, but by the promise and the confidential relation conjoined."⁴³ If the grantee can establish that the conveyance was neither induced by the confidential relationship, nor made in reliance upon a promise to reconvey, equity will not intervene.⁴⁴ A similar result will occur if the grantee can show that the transfer would have been completed irrespective of the grantee's promise to reconvey.⁴⁵

In most cases involving the Statute of Frauds and constructive trusts, the transferor had conveyed a pre-existing real property interest to the defendant-promisor. To qualify as a proper basis for equitable intervention this prior interest need not be an estate in fee. A tenancy in common, a tenancy by entirety, or a leasehold interest may be the proper subject of a constructive trust.⁴⁶

41. "[I]t is difficult to see why a constructive trust should not be imposed on the ground of the existence of a confidential relation in every case where land is transferred upon an oral trust for the transferor, since the transfer would never be made except for the confidence which the transferor places in the transferee." 1 Scott, Trusts § 44.2 (2d ed. 1956).

42. "The confidential relation . . . is not the relationship which is newly created by the transaction involving the conveyance and the promise, for so to hold would mean that in every case a trust may be created by an oral declaration." *Fraw Realty v. Natanson*, 261 N.Y. 396, 401-02, 185 N.E. 679, 680 (1933). See *Farano v. Stephanelli*, 7 App. Div. 2d 420, 183 N.Y.S.2d 707 (1st Dep't 1949); *Halper v. Homestead Bldg. & Loan Ass'n*, 59 N.Y.S.2d 689 (Sup. Ct. 1944).

43. *Wood v. Rabe*, 96 N.Y. 414, 426 (1884). Accord, *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255 (1923); *Goldsmith v. Goldsmith*, 145 N.Y. 313, 39 N.E. 1057 (1895); *Frick v. Cone*, 160 Misc. 450, 290 N.Y. Supp. 592 (Sup. Ct. 1936).

44. *Serota v. Serota*, 20 Misc. 2d 455, 189 N.Y.S.2d 260 (Sup. Ct. 1959).

45. *Vance v. Grow*, 206 Ind. 614, 190 N.E. 747 (1934); *Ives v. Pillsbury*, 204 Minn. 142, 283 N.W. 140 (1938); *Bogert* § 499: "[I]t must appear certain that A gave the property to B in reliance on B's promise to hold it under a legally enforceable obligation for C. If A would have given the property to B whether B made the promise for C's benefit or made no promise at all, the case for C is defective."

46. *Huber v. Huber*, 27 Cal. 2d 784, 167 P.2d 708 (1946) (joint tenancy); *Sacre v. Sacre*, 143 Me. 80, 55 A.2d 592 (1947) (bond for a deed); *Sinclair v. Purdy*, 235 N.Y. 245, 139 N.E. 255 (1923) (tenancy in common); *Wood v. Rabe*, 96 N.Y. 414 (1884)

*Foreman v. Foreman*⁴⁷ typifies another line of cases in which the transferor did not have a prior interest in the property, but purchased the interest in the name of the grantee in reliance upon the latter's promise to reconvey. In *Foreman*, a husband, endeavoring to keep his real estate separated from his business assets, purchased certain property in the name of his wife. She, in turn, promised to reconvey to him upon demand, and to dispose of the profits from the land in accordance with his wishes. A year after the purchase, the wife died intestate and the property passed to her son, subject to the husband's life estate as tenant by curtesy. The husband thereafter brought an action to compel a conveyance in fulfillment of his wife's oral trust. The New York Court of Appeals held that the case properly fell within the abuse of confidence theory of constructive trusts, stating "where . . . the full price has been paid by the victim of the wrong, unjust enrichment will ensue if the holder of the legal title retains for his own use any portion of the purchase, and the trust will reach the whole. . . ."⁴⁸ A similar line of cases has developed in New York where the transferor merely supplied the transferee with the consideration with which to purchase a property interest and the transferee made an oral pledge to hold in trust. In these situations, if the transferor furnishes the entire consideration with which the transferee purchases the interest, the New York courts will generally impose a trust upon the total interest so acquired.⁴⁹ Where the promisee furnishes less than the total amount required to make the purchase, however, the courts will not impose a constructive trust, but rather an equitable lien on the acquired interest to the extent of the consideration advanced.⁵⁰

THE PROMISE

An express promise to hold in trust or to reconvey, or facts from which such a promise can be inferred must be established.⁵¹ In the absence of such a promise there can be no duty upon the grantee to reconvey and his retention will not be wrongful. Not only must this pledge be proven, but it must also be shown that the conveyance was made in reliance thereon.⁵² If the grantee can establish that the grantor would have completed the transfer even though the grantee refused to make the promise requested, then the grantee's enrichment is not unjust and a trust will not be imposed.⁵³

(remainder interest); *Hifler v. Calmac Oil & Gas Corp.*, 258 App. Div. 78, 16 N.Y.S.2d 104 (4th Dep't 1939) (oil and gas leases); *Wilson v. Therrell*, 304 S.W.2d 723 (Tex. Civ. App. 1957) (oil and gas leases).

47. 251 N.Y. 237, 167 N.E. 428 (1929).

48. *Id.* at 242, 167 N.E. at 429.

49. *Frick v. Cone*, 160 Misc. 450, 290 N.Y. Supp. 592 (Sup. Ct. 1936).

50. *Leary v. Corvin*, 181 N.Y. 222, 73 N.E. 984 (1905); *Petrukevich v. Maksimovich*, 1 App. Div. 2d 786, 147 N.Y.S.2d 869 (1956), (memorandum decision); *Marum v. Marum*, 21 Misc. 2d 474, 194 N.Y.S.2d 327 (Sup. Ct. 1959).

51. *Towner v. Berg*, 5 App. Div. 2d 481, 172 N.Y.S.2d 258 (3d Dep't 1958).

52. *Duboff v. Duboff*, 18 Misc. 2d 1050, 186 N.Y.S.2d 760 (Sup. Ct. 1959); *Mayer v. Mayer*, 67 N.Y.S.2d 898 (Sup. Ct. 1946). See also *Mead v. Robertson*, 131 Mo. App. 185, 110 S.W. 1095 (1908).

53. *Bogert* § 482.

Although the promise must be shown, it need not be expressed orally.⁵⁴ It may be inferred from the grantee's silence when there was a duty to speak, or from acts of acquiescence at the time of the imposition of the condition and the conveyance.⁵⁵ Good faith upon the part of the grantee at the time of the transfer is of no consequence.⁵⁶ In a proper case involving a constructive trust arising out of an abuse of confidence, the good faith of the grantee will be established. The absence of such initial good faith would more properly be a basis for a trust "ex maleficio" based upon actual fraud.⁵⁷ It is the subsequent change of heart by the grantee that gives rise to the "constructive fraud"⁵⁸ which is the basis for the "abuse of confidence" theory of constructive trusts.

UNJUST ENRICHMENT

The underlying principle in any constructive trust is the realization that the party wronged cannot prevail in an action at law, and, in the absence of equitable intervention, the wrongdoing grantee will reap an unjust profit from the grantor's misguided agreement.⁵⁹ The trust is imposed therefore, not to fulfill the intention of the parties, but rather to deprive the grantee of the profits, uses, and benefits which he should not in justice be permitted to enjoy.⁶⁰ The burden is therefore upon the one seeking to impose the trust to establish the inequities which must result if the party is left to his action at law.⁶¹

STATUTE OF LIMITATIONS

The willingness of a court to hold the Statute of Frauds inapplicable when dealing with constructive trusts has not been extended to the statute of limitations.⁶² The statute of limitations applicable to an action in equity will limit the

54. *Janssen v. Christian*, 57 S.W.2d 692 (Mo. Ct. App. 1933); *Bogert* § 499.

55. *Farano v. Stephanelli*, 7 App. Div. 2d 420, 183 N.Y.S.2d 707 (1st Dep't 1959); In the Matter of *Frankenthaler*, 1 Misc. 2d 194, 146 N.Y.S.2d 222 (Surr. Ct. 1955).

56. 1 *Scott*, *Trusts* § 44.2 (2d ed. 1956).

57. *Bennett v. Bennett*, 83 F. Supp. 19 (D.D.C. 1949). See also *Deswell v. Hughen*, 266 Ala. 87, 94 So. 2d 377 (1957).

58. 3 *Pomeroy*, *Equity Jurisprudence* § 956 (5th ed. 1941).

59. "It is not the promise only, nor the breach only, but unjust enrichment under cover of the relation of confidence, which puts the court in motion." *Sinclair v. Purdy*, 235 N.Y. 245, 253, 139 N.E. 255, 258 (1923). "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, a constructive trust arises." *Restatement, Restitution* § 160 (1937).

60. It is often held that the plaintiff must establish a constructive trust by "clear and convincing" evidence. *Matt v. Matt*, 156 Iowa 503, 137 N.W. 489 (1912); *Clark v. Smith*, 252 Ky. 50, 66 S.W.2d 93 (1933); *Gordon v. Kaplan*, 99 N.J. Eq. 195, 138 Atl. 195 (1924).

61. The desire to prevent unjust enrichment has at times resulted in the imposition of a constructive trust notwithstanding an absence of undue influence, fraud, duress, confidential or fiduciary relationships, or one of the other normal bases for such a trust. *Grissom v. Bunch*, 227 Ark. 696, 301 S.W.2d 462 (1957); *Strausburg v. Conner*, 95 Cal. App. 2d 398, 215 P.2d 509 (Dist. Ct. App. 1950); *Kent v. Klein*, 352 Mich. 652, 91 N.W.2d 11 (1958); *Greenly v. Shelmidine*, 83 App. Div. 559, 82 N.Y. Supp. 176 (4th Dep't 1953).

62. "[T]he suggested extension of that doctrine to a case involving the statute of limita-