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leading Texas case on this point.²⁹ It is submitted that if the acts result in separate and distinct injuries, then each wrongdoer should be liable only to the extent of the damage caused by his acts. But if the combined results, though absent concert of design, result in a single and indivisible injury, the liability should be entire. The true distinction should be made between injuries which are divisible and those which are indivisible.³⁰

R. DAPHENE LEDFORD

Trusts—Constructive Trust—Breach of Oral Agreement Between Persons in Confidential Relationship

In the majority of those American jurisdictions requiring trusts of land to be in writing to be enforceable,¹ mere refusal or failure of a grantee of land upon an oral trust to carry out the terms of the trust is not a sufficient basis for a constructive trust to prevent unjust enrichment.²

Where, however, it is found that such a refusal or failure constitutes the breach of a confidential relationship between the grantee and the grantor, these courts have not hesitated to declare the grantee a constructive trustee.³ In an *A-to-B-for-A* situation, *B* is said to hold on

²⁹ *Sun Oil Co. v. Robicheaux*, 23 S. W. 2d (Tex. 1930).

³⁰ Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 420 (1939).

¹ About two-thirds of the American states have statutes similar to the seventh section of the early English Statute of Frauds. In at least two others, the trust section is assumed to be a part of the common law. The parol evidence rule or the contracts section has prevented enforcement of oral trusts in some of the remaining jurisdictions.

² "However inequitable and morally apprehensible it may be that property conveyed upon an express oral trust should be retained in violation of the agreement, a trust may not, under those circumstances, be ingrafted upon a deed absolute in its terms, because if that were the rule deeds would no longer be valuable as muniments of title." *Silvers v. Howard*, 106 Kan. 762, 768, 190 Pac. 1, 4 (1920).

The leading case in the *A-to-B-for-A* situations is *Patton v. Beecher*, 62 Ala. 579, 593 (1878), in which the court said, "In any and every case, in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation." For similar view, see *Reynolds v. Reynolds*, 121 Conn. 153, 183 Atl. 394 (1936); *Goff v. Goff*, 98 Kan. 201, 158 Pac. 26 (1916); *Henderson v. Murray*, 108 Minn. 76, 121 N. W. 214 (1908); *Brown v. Murray*, 94 N. J. Eq. 125, 118 Atl. 534 (Ch. 1922); *Kane v. Kane*, 134 Ore. 79, 291 Pac. 785 (1930); *Broadway Building Co. v. Salafia*, 47 R. I. 263, 132 Atl. 527 (1926); *Pacheco v. Mello*, 139 Wash. 566, 247 Pac. 927 (1927).

The same, of course, is true in the *A-to-B-for-C* cases. *E.g.*, *Bartlett v. Bartlett*, 221 Ala. 578, 130 So. 194 (1930); *Ampeuro v. Luce*, 68 Cal. App. 811, 157 P. 2d 899 (1945); *Keller v. Joseph*, 329 Ill. 148, 160 N. E. 117 (1928); *Westphal v. Heckman*, 185 Ind. 88, 113 N. E. 299 (1916).

In some jurisdictions, the rule that equity will raise a constructive trust upon the mere refusal of a grantee to perform an oral trust for the benefit of the grantor or a third person has been adopted by statute. See Uniform Trusts Act, § 16; N. C. GEN. STAT. § 36-39 (1950).

³ "The reason for the rule is that, when a person assumes a confidential relation-

constructive trust for *A*, the grantor.⁴ And in the *A-to-B-for-C* cases, the courts have decreed a constructive trust in favor of *C*.⁵ In so decreeing, the courts are not seeking to carry out the original express intentions of the parties. Rather, they are attempting to prevent the grantee's enrichment through misconduct more sinister than mere breach of contract.

But the courts have, in general, refused to set down any specifications as to just what constitutes a "confidential relationship" for this purpose. This lack of definiteness may well be intentional since it permits a flexibility which equity needs to meet variant situations. As a result, the meaning of the term "confidential relationship" in these cases is very nebulous.

In the conventional confidential relationship where there exists a client-attorney, principal-agent, partner-partner or other fiduciary status between the grantor and the grantee, the grantee is usually more than morally bound to act in the best interest of the grantor and the grantor is justified in imposing special trust and confidence in the grantee's fidelity.⁶ Where only a family or other close personal rela-

ship to another, it would be a flagrant injustice to permit the confidence to be betrayed and equity will not allow the betrayer to invoke the Statute of Frauds to sustain a transaction tainted with such bad faith." *Grimes v. Grimes*, 184 Md. 59, 63, 40 Atl. 2d 58, 61 (1944). "The absence of a formal writing grew out of the very confidence and trust, and was occasioned by it." *Goldsmith v. Goldsmith*, 145 N. Y. 313, 318, 39 N. E. 1067, 1068 (1895).

The eighth section of the English Statute of Frauds expressly excludes from the application of the seventh section the cases of trusts of land which "arise or result by the implication or construction of law." 29 Chas. II, c. 3 § VIII (1677).

⁴*Bradley Company v. Bradley*, 37 Cal. App. 263, 173 Pac. 1011 (1918); *Silvers v. Howard*, 106 Kan. 762, 190 Pac. 1 (1920) (constructive trust for the heirs of *A*); *Hatcher v. Hatcher*, 264 Pa. 105, 107 Atl. 660 (1919) (for *A*'s residuary legatees).

⁵A decree in favor of the beneficiary would seem to be taking the constructive trust doctrines too far. The majority of the courts, however, "wink" at the Statute of Frauds even here and grant a judgment for the beneficiary on the ground that in breaching the confidential relationship with his grantor, the grantee has committed a tort on the beneficiary. *Newton v. Newton*, 214 Ky. 278, 283 S. W. 83 (1926) (father to son for his brothers and sisters, they were allowed to benefit from the constructive trust); *Wright v. Logan*, 179 Okla. 350, 65 P. 2d 1217 (1937) (father and mother to son for brothers and sisters); *Reigel v. Wood*, 110 Okla. 279, 229 Pac. 556 (1924) (father to son for son, sisters and brothers); *Boggs v. Yates*, 101 W. Va. 407, 132 S. E. 876 (1926) (father to daughter for mother, trust for mother). *But cf.* *Harney v. Harney*, 170 Minn. 479, 213 N. W. 38 (1927) (fiduciary relationship can be taken advantage of only by grantor). For the North Carolina situation, see note 12 *infra*.

⁶*Stromerson v. Averill*, —Cal.—, 133 P. 2d 617 (1943) (principal to agent); *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428 (1902) (considered partners); *Wood v. White*, 123 Me. 139, 122 Atl. 177 (1923) (partners); *O'Day v. Annex Realty Company*, 269 Mo. 248, 191 S. W. 41 (1916) (principal to agent); *Koeford v. Thompson*, 73 Neb. 128, 102 N. W. 208 (1905) (partner to partner); *Schwartzle v. Dale*, 54 N. W. 2d 361 (N. D. 1952) (principal to agent). In the client to attorney case, a trust has been decreed without an oral trust or promise to reconvey. *Davis v. Hendrix*, 192 Ala. 215, 68 So. 863 (1915); *Bartholomew v. Guthrie*, 71 Kan. 705, 81 Pac. 491 (1905). See *Noble v. Noble*,

tionship exists, no confidential relationship is necessarily involved. While some courts have taken this view and have refused to find that such a closeness alone warrants grantor confidence,⁷ most of the decisions have deemed the existence of such a family or close personal relationship to be a determinative factor.⁸

In many cases, a transferee's dominance or superiority of position whether the result of disparity of age, education, business acumen, or physical or mental condition, may be emphasized.⁹ In others, the fact

255 Ill. 629, 99 N. E. 631 (1912) where a sister conveyed to her brother who was a lawyer.

⁷ Jones v. Gachot, 217 Ark. 462, 230 S. W. 2d 937 (1950) (aunt to nephew); Smith v. Mason, 122 Cal. 426, 55 Pac. 143 (1898) (father to daughter); Winkelman v. Winkelman, 307 Ill. 249, 138 N. E. 637 (1923) (parent to child); Biggins v. Biggins, 133 Ill. 211, 24 N. E. 516 (1890) (brother to sister); Gregory v. Bowlsky, 115 Iowa 327, 88 N. W. 822 (1902) (parent to child); Bolin v. Krengel, 116 Kan. 459, 227 Pac. 266 (1924) (father to foster son); Silvers v. Howard, 106 Kan. 762, 190 Pac. 1 (1920) (son to mother); Goff v. Goff, 98 Kan. 201, 158 Pac. 26 (1916) (father to son); Sloan v. McCartney, 58 Misc. 75, 108 N. Y. Supp. 840 (Sup. Ct. 1908) (parent to child); Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51 (1911) (father to son); Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93 (1921) (daughter to father). For additional cases, see 1 SCOTT, TRUSTS §§ 44.2, 45.2 (1st ed. 1939).

⁸ Steinberger v. Steinberger, 60 Cal. App. 2d 116, 140 P. 2d 31 (1943) (nephew to uncle); Robertson v. Summeril, 39 Cal. App. 2d 62, 102 P. 2d 347 (1940) (son to mother); Cole v. Manning, 79 Cal. App. 55, 248 Pac. 1065 (1926) (confidential relationship arose out of exchange of promises to marry, meretricious relationship was ignored); Logan v. Logan, 68 Cal. App. 448, 229 Pac. 993 (1924) (brother to brother); Bradley Co. v. Bradley, 165 Cal. 237, 131 Pac. 750 (1913) (parties betrothed); Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430 (1911) (husband to wife); Jones v. Jones, 140 Cal. 587, 74 Pac. 143 (1903) (mother to daughter); Brison v. Brison, 75 Cal. 525, 17 Pac. 689 (1888) (husband to wife); Wilder v. Wilder, 138 Ga. 573, 75 S. E. 654 (1912) (mother to son); Hanger v. Hess, 49 Idaho 325, 288 Pac. 160 (1930) (grantor to housekeeper); Shortridge v. Shortridge, 207 Ky. 790, 270 S. W. 47 (1925) (husband to wife); Rice v. Rice, 184 Md. 403, 41 Atl. 2d 371 (1945) (father to son); Levine v. Schafer, 184 Md. 205, 40 A. 2d 324 (1944) (father to son); Lipp v. Lipp, 158 Md. 207, 148 Atl. 531 (1930) (mother to son); Diefelder v. Winterling, 150 Md. 626, 133 Atl. 825 (1926) (mother to daughter); Wilmer v. Dunn, 133 Md. 354, 105 Atl. 319 (1918) (wife to husband for children); O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540 (1943) (brother to sister); Nelson v. Seevers, 143 Neb. 522, 10 N. W. 2d 349 (1943) (father to son-in-law); Bowler v. Curler, 21 Nev. 158, 26 Pac. 226 (1891) (son to father-in-law); Frick v. Cone, 160 Misc. 450, 290 N. Y. Supp. 592 (Sup. Ct. 1936) (husband to wife); Foreman v. Foreman, 251 N. Y. 237, 167 N. E. 428 (1929) (husband to wife); Aherns v. Jones, 169 N. Y. 555, 62 N. E. 666 (1902) (husband to wife); Hauson v. Svarerud, 18 N. D. 556, 120 N. W. 550 (1909); Trimble v. Bales, 169 Okla. 228, 36 P. 2d 861 (1934) (sister-in-law to brother-in-law); Bryant v. Mahon, 130 Okla. 67, 264 Pac. 811 (1927) (friend to friend); Lalic v. Bankovsky, 350 Pa. 441, 39 A. 2d 514 (1944) (brother to sister); Landrum v. Landrum, 62 Tex. Civ. App. 43, 175 N. W. 366 (1919) (father to son). For additional cases, see 1 SCOTT, TRUSTS §§ 44.2, 45.2 (1st ed. 1939).

⁹ Mead v. Mead, 41 Cal. App. 280, 182 Pac. 761 (1919) (grantee was skilled in business transactions); Willats v. Bosworth, 33 Cal. App. 710, 166 Pac. 357 (1917) (mother to son who was skilled in business affairs); Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506 (1910) (mother to son, mother on deathbed); Nervis v. Topker, 121 Iowa 433, 96 N. W. 905 (1903); Staab v. Staab, 158 Kan. 69, 145 P. 2d 447 (1944) (aged and uneducated father to his son); Henderson v. Murray, 108 Minn. 76, 121 N. W. 214 (1909) (grantor was 70 years old, grantee was priest of grantor's church); Harrington v. Schiller, 231 N. Y. 278, 132 N. E. 89 (1921) (mother to daughter, who was skilled in business affairs); Reigel v. Wood, 110

that the grantee even in good faith at the time of the conveyance had actually induced it has been a contributory circumstance.¹⁰

On the other hand, an improper motive on the part of the grantor in making the transfer has prevented the intervention of equity.¹¹

North Carolina has no trust section of the Statute of Frauds. While an oral trust for a third party is therefore enforceable,¹² our court has refused to engraft an oral trust for the grantor upon an absolute deed because of the parol evidence rule.¹³ However, in *Sorrell v. Sorrell*,¹⁴ the constructive trust device was employed in this *A-to-B-for-A* situation when the court found that a fiduciary relationship had been abused.¹⁵ In that leading case, the grantee was both nephew and busi-

Okla. 279, 229 Pac. 556 (1924) (grantor was mentally sick); *Parrish v. Parrish*, 33 Ore. 486, 54 Pac. 352 (1898) (grantor was feeble and old); *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270 (1895) (grantor was old, ignorant, illiterate, mentally weak, easily alarmed, easily imposed upon).

¹⁰ *Linahan v. Linahan*, 131 Conn. 307, 39 A. 2d 895 (1944); *In re Fisk* 81 Conn. 433, 71 Atl. 559 (1908); *Miller v. Miller*, 266 Ill. 522, 107 N. E. 821 (1915); *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116 (1892); *Fischbeck v. Gross*, 112 Ill. 208 (1884); *Jasinski v. Stanhowski*, 145 Md. 58, 125 Atl. 684 (1924); *Huffine v. Lincoln*, 52 Mont. 585, 160 Pac. 820 (1916); *Hartman v. Loverick*, 227 Wisc. 6, 277 N. W. 641 (1938).

¹¹ *Drake v. Thompson*, 14 F. 2d 933 (8th Cir. 1926), cert. denied 273 U. S. 744 (1927) (transfer to defraud creditors); *MacRae v. MacRae*, 37 Ariz. 307, 294 Pac. 280 (1930) (parties in pari delicto, no constructive trust when transfer admittedly made to defraud creditors); *Blaine v. Krysovaty*, 135 N. J. Eq. 355, 38 A. 2d 859 (Ch. 1944) (grantor seeking to avoid debt); *Robertson v. Sayre*, 134 N. Y. 97, 31 N. E. 250 (1892) (title in name of grantee in order to defraud creditors); *Kalinowski v. McLeny*, 68 Wash. 681, 123 Pac. 1074 (1902) (allowed recovery to creditors of grantee of admittedly fraudulent conveyance). See *Bartos v. Bartos*, 138 Misc. 117, 244 N. Y. Supp. 713 (Sup. Ct. 1930) (evidence insufficient to prove that conveyance in defraud of creditors); *Tiedemann v. Tiedemann*, 115 Misc. 462, 189 N. Y. Supp. 931 (Sup. Ct. 1921) (where conveyance to wife upon threat of suit, motive not considered important).

¹² *Taylor v. Addington*, 222 N. C. 393, 23 S. E. 2d 318 (1942); *Reynolds v. Morton*, 205 N. C. 491, 171 S. E. 781 (1933); *Rush v. McPherson*, 176 N. C. 562, 97 S. E. 613 (1918); *Boone v. Lee*, 175 N. C. 383, 95 S. E. 659 (1918); *Lutz v. Hoyle*, 167 N. C. 632, 83 S. E. 749 (1914); *Ricks v. Wilson*, 154 N. C. 282, 70 S. E. 476 (1911); *Taylor v. Wahab*, 154 N. C. 219, 70 S. E. 173 (1911); *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775 (1904); *Sykes v. Boone*, 132 N. C. 199, 43 S. E. 645 (1903); *Owens v. Williams*, 130 N. C. 165, 41 S. E. 93 (1902).

¹³ While in the leading case of *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028 (1909) the grantor was seeking to defraud his wife, the question of motive apparently does not enter into the court's decisions in this situation. See, e. g., *Bass v. Bass*, 229 N. C. 171, 48 S. E. 2d 48 (1948); *Poston v. Poston*, 228 N. C. 202, 44 S. E. 2d 881 (1947); *Carlisle v. Carlisle*, 225 N. C. 462, 35 S. E. 2d 418 (1945); *Loflin v. Kornegay*, 225 N. C. 490, 35 S. E. 2d 607 (1945); *Atkinson v. Atkinson*, 225 N. C. 120, 33 S. E. 2d 666 (1945); *Winner v. Winner*, 222 N. C. 414, 23 S. E. 2d 251 (1942); *Penland v. Wells*, 201 N. C. 173, 159 S. E. 423 (1931).
¹⁴ 198 N. C. 460, 152 S. E. 157 (1930).

¹⁵ *Id.* at 464, 152 S. E. 157, 160, the court said, "The evidence tended to show an active trust relationship existing between the parties, and that the conveyance of the land on 24 December, 1915, by the plaintiff to the defendant was in pursuance of a general scheme or agreement between the parties for working out and liquidating the indebtedness owed by the plaintiff. Hence, a fiduciary relationship existed between the parties, and while there was neither allegation nor evidence of actual fraud, the law presumes fraud in transactions where confidential relationships existed between the parties."

ness manager of the plaintiff grantor. The North Carolina court has recently held that the question of whether a confidential relationship existed is one for the jury.¹⁶ No criteria for a finding of such a relationship was laid down. Whether or not our court will now require the conventional fiduciary basis for a confidential relationship which was present in the *Sorrell* case is an open question.¹⁷

There might be two solutions to the uncertainties arising in confidential relationship cases. In the first place, the courts could be more specific in their concept of what is considered such a relationship. A technical fiduciary relationship might be insisted upon.¹⁸ One authority would have the courts require a clear showing of a pre-existing relation of trust and confidence.¹⁹ Any such requirements would undoubtedly clarify the present situation and in addition bolster the significance of the Statute of Frauds provisions. On the other hand, the "confidential relationship" exception was developed by the courts to relieve a trusting grantor or beneficiary from the harsh consequences of the majority rule. It would seem that, if the criteria for such a relationship were predetermined and fixed, the effectiveness of the exception in accomplishing the result sought by the courts would be greatly limited.

The second answer has been recommended by authorities for many years.²⁰ They argue that the fundamental question involved is one of balancing the policy of the Statute of Frauds against the prevention of unjust enrichment, and that, if the court is adequately convinced of the existence of an agreement between the parties as the substantial price for the land, the prevention of unjust enrichment should prevail. The English courts and a minority of the American jurisdictions have permitted

¹⁶ *Crews v. Crews*, 236 N. C. 528, —S. E. 2d— (1952).

¹⁷ In *Atkins v. Withers*, 94 N. C. 581, 590 (1885), the court stated, "The cases in which the law will presume fraud, arising from the confidential relations of the parties to a contract, are, executors and administrators, guardian and ward, trustees and *cestui que trust*, principal and agent, brokers, factors, etc., mortgagor and mortgagee, attorneys and clients, and to those have been added, we think very appropriately, husband and wife." This sentence was cited in the *Sorrell* case and is indicative of the instances where our court will find a confidential relationship. *But cf.* *Winner v. Winner*, 222 N. C. 414, 23 S. E. 2d 251 (1942), where a father-to-son transfer was held not sufficient to raise a constructive trust.

¹⁸ As will be seen upon an examination of the cases, the courts have used the words "fiduciary" and "confidential" interchangeably. However, that relationship wherein one party is the legal representative of the other whether by agreement between the parties or otherwise could be termed "fiduciary" in contrast to those circumstances where only a moral duty exists.

¹⁹ 3 BOGERT, TRUSTS AND TRUSTEES §§ 482, 496 (2nd ed. 1935); *Bogert, Confidential Relations and Unenforceable Express Trusts*, 13 CORNELL L. Q. 237 (1927).

²⁰ 3 BOGERT, TRUSTS AND TRUSTEES § 497 (2nd ed. 1935); 1 SCOTT, TRUSTS §§ 44.2, 45.2, 55.9 (1st ed. 1939); Ames, *Constructive Trusts Based Upon the Breach of an Express Oral Trust of Land*, 20 HARV. L. REV. 549 (1907); Costigan, *Trusts Based on Oral Promises*, 12 MICH. L. REV. 423, 515 (1914); Stone, *Resulting Trusts and the Statute of Frauds*, 6 COL. L. REV. 327 (1906).

the grantor a right to restitution on this basis alone.²¹ Such a view seems to get to the crux of the problem without resorting to the "confidential relationship" exception.

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²¹ But the English rule as pronounced in *Davies v. Otty*, 35 Beav. 208, 55 Eng. Rep. 875 (1865), and *Haigh v. Kaye*, L. R. 7 Ch. App. 409 (1872), has not been given its full sweep in America even in those jurisdictions which profess to stress the unjust enrichment through breach of agreement. Examination of those American decisions supporting the English view reveals, that there is usually present a confidential relationship which could itself have justified the constructive trust. In effect then, our "liberal" courts seem to be extending the "constructive fraud" doctrine to include mere breach of an oral agreement when they are partly motivated by the confidential relation factor. *E. g.*, *Mandley v. Bacher*, 73 App. D. C. 412, 121 F. 2d 875 (1941); *Steinberger v. Steinberger*, 60 Cal. App. 2d 116, 140 P. 2d 31 (1933); *Robertson v. Summeril*, 39 Cal. App. 2d 62, 102 P. 2d 347 (1940); *Gilbert v. Cohn*, 374 Ill. 452, 30 N. E. 2d 19 (1940); *Becker v. Neurath*, 149 Ky. 421, 149 S. W. 857 (1912); *Ruhe v. Ruhe*, 113 Md. 595, 77 Atl. 797 (1910); *Androscoggin Co. Savings Bank v. Tracy*, 115 Me. 433, 99 Atl. 257 (1916); *Eastmond v. Eastmond*, 2 N. J. Super. 529, 64 A. 2d 901 (1949); *Moses v. Moses*, 140 N. J. Eq. 575, 53 A. 2d 805 (Ct. Err. & App. 1947).

Cf. Justice Seawell's statements in *Atkinson v. Atkinson*, 225 N. C. 120, 126, 33 S. E. 2d 666, 671 (1945), where he makes it clear that any approach to the theory of constructive trust via unjust enrichment should be made with caution, and that such cannot be invoked "to broaden the basis of equity jurisdiction or to bring within its cognizance situations which have heretofore escaped the comprehension of its long recognized rules."

