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PROFITS AND THEIR RECOVERY

GRAHAM DOUTHWAITE

I. Introduction

A. Establishing Equitable Jurisdiction

1. Definition: Profits as Inclusive of Non-Monetary Benefits, but Not of Plaintiff’s Lost Profits

The word "profits" can mean any kind of advantage. In its narrowest sense it means excess of returns over expenditure in a given transaction or series of transactions. For purposes of this discussion it is defined as the value of any advantage, including savings to the defendant, recoverable by a plaintiff without any necessary relation to his proven damage.⁴ Gains which an injured person might have made but for the defendant's conduct are considered as damages, not as profits.⁵ Though plaintiff's lost profits do not thus fall within the scope of this work, it is worth noting that when these are sought, defendant's profits are relevant as probative of plaintiff's damage.⁶ Moreover, when plaintiff's lost profits are sought as damages, there is precedent for the use of an arbitrary ten percent of defendant's gross gains as the presumed profit plaintiff would have made.⁷ It is, of course, where a defendant has reaped gains far in excess of the plaintiff's lost profits or other proven damage that the doctrines here explored assume their fullest importance.⁸

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1. For examples of recoveries which would be profits rather than mere compensatory damages, see Spirit v. Bechtel, 232 F.2d 241 (2d Cir. 1956) (special transportation privileges accorded to corporate officers without proper authority); Mataraese v. Moore-McCormack Lines, 158 F.2d 631 (2d Cir. 1946) (reasonable value of idea and services whereby defendant saved expenses); Liggett v. Lester, 237 Ore. 52, 390 P.2d 351 (1964) (savings to defendant); Pederson v. Johnson, 169 Wis. 320, 172 N.W. 723 (1919) (liquidated damages forfeited by a defaulting vendee of land in terms of a stipulation inserted by vendor's agent without authority and retained by agent).

2. See Georgia-Pacific Corp. v. United States Plywood Corp., 243 F. Supp. 500, 516 (S.D.N.Y. 1965), stating that in patent nomenclature what the defendant makes is "profits" while what the owner of the patent loses by the infringement is "damages."


5. In Carter Products, Inc. v. Colgate-Palmolive Co., 214 F. Supp. 383 (D. Md. 1963), on an award totaling $5,500,000, $2,750,000 was for profits on general sales made by the defendant. The dollar amount of the recovery in an accounting for profits...
2. Profit Recovery Outside the Common Law

In our common law jurisprudence, profits, as such, are recoverable on the basis of a constructive trust in a suit brought in equity. At times, as will be seen, the same result has been reached in a suit at law on the basis of a quasi contract. The former approach is alien to the civil law. The latter is not. Quasi contract has its roots in the Roman maxim announcing the golden doctrine of unjust enrichment and is very much a part of the civil law. In the field of quasi contract, however, the element of impoverishment of the plaintiff, though it often takes an attenuated form, is usually regarded as a pre-requisite to recovery. To the extent that the modern civil lawyers ignore or gloss over this requirement, and to this extent only, defendant's profits can be said to be recoverable.

In this area of quasi contract, though there are substantial differences in the way in which, and the situations to which, the doctrine of unjust enrichment is applied, one can discern a general parallel approach in the common law and in the civil law systems. In the later Roman law there does not appear to have been any broad sweeping recognition of the doctrine of unjust enrichment as founding a cause of action. Much like quasi contract in the common law, the situation had to be fitted into an accepted pigeon-hole of liability, for example, the *condictio ob turpem vel iniustam causam* (to recover money paid in pursuance of an illegal or immoral agreement), the *condictio causa data causa non secuta* (for recovery when there has been a failure of consideration), the *condictio indebiti* (for recovery of money paid under mistake), and the like. The framers of the Code Napoleon seem to have had the same approach, and it was more due to the work of legal writers (particularly Pothier) that the notion evolved that there was a more sweeping basic underlying principle. A significant parallel can be seen in the growing recognition in the civil law countries of this

under the unjust enrichment rationale has no relation to the damages, if any, sustained by plaintiff. Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117 (9th Cir. 1968).

6. The Roman Law of Justinian, in addition to recognizing obligations *quasi ex contractu*, recognized those *quasi ex delicto*. This latter class, however, did not as the rubric might suggest, bear any relation to unjust enrichment. It was introduced to cover certain new delicts introduced by praetorian laws for which the accepted pattern had no category, embracing, incidentally, actions for negligence.

7. See p. 350 infra.

8. Observations as to the impact of the doctrine in relation to remedial gaps in the civil codes of France, Germany, and Italy, are to be found in O'Connel, Unjust Enrichment, 5 Am. J. Comp. L. 2 (1956). The author discerns a parallel between the nineteenth century tendency of English lawyers to confine unjust enrichment within the strait-jacket of quasi contract, and the inclination of their colleagues in France to confine it to those situations for which the Code made specific provision. The codes of Germany and Switzerland, on the other hand, do contain recognition of the doctrine in terms of general applicability.
doctrine of unjust enrichment as an all-pervasive flexible weapon of justice and the evolution in the common law of a general recognition of the potential of quasi contract as a means of securing restitution of unjustified benefits conferred. But, at any rate, on this side of the Atlantic, the real growing point of the restitutioary principle has not been in the doctrine of quasi contract. For the most part American lawyers seem content, in regard to that oft despised spurious appendage to the law of contract, to take the view of an English law lord that the growth has stopped. Equity thus has taken to pre-empting the field.

But let it not be imagined that even the civil lawyers have let the doctrine of unjust enrichment run to seed. This, as an English legal historian observes, would be to substitute chaos for law. Professor Nicholas, a student of the Roman law, has recognized that an unregulated discretion in the judiciary is ultimately the negation of law. He emphasizes that no civil law system remedies every unjust displacement of wealth from one to another but considers that the civil law pattern is unitary by contrast with the "complex and fragmentary character" of the common law of quasi contract. He summarises the requisites of the enrichment action at civil law under five heads: (i) enrichment, (ii) impoverishment of plaintiff, (iii) a connection between the enrichment and the impoverishment, (iv) absence of justification or cause and (v) "subsidiary" character of the remedy. If the second element, impoverishment of plaintiff, were rigidly required, defendant's profits as such would never be recoverable. Some courts, notably the French, do not take this requirement literally. Failure to acquire an asset or the loss of a chance of remunerative activity is regarded as sufficient impoverishment to support the action of unjust enrichment.

9. For a discussion of quasi contractual liability, see p. 350 infra.
10. "Our law did advance in certain respects some ways towards recognizing a doctrine of unjust enrichment, but the process was stopped short, leaving certain anomalies based on ancient authority embedded in the law." In re Cleadon, Ltd. [1939] Ch. 297, 307.
11. See Holdsworth, Unjustifiable Enrichment, 55 L.Q. Rev. 37 (1939), who is eloquent and persuasive as to the undesirability of adopting any broad theory of unjust enrichment as a single basis of relief, since this would leave everything to the judge's own personal concept of justice. Roman and English law became great, he says, because they resisted the temptation to "escape from the straight-jacket of a legal formula" and to "relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts."
12. Nickolas, Unjustified Enrichment in the Civil Law and Louisiana Law (pts. 1-2), 36 Tul. L. Rev. 605 (1962); 37 Tul. L. Rev. 49 (1963). The liability, to the extent of his unjustified enrichment, of one who has benefited by unsolicited intermeddling in the affairs of another (a doctrine deriving from the Roman negotiorum gestio, but ordinarily alien to our law) in civil law countries is discussed in Lorenzen, The Negotiorum Gestio in Roman and Modern Civil Law, 13 Cornell L.Q. 190 (1928). Such an intermeddler might well be made to account in our law as a guardian, trustee, or executor de son tort; if he is not such, whether his profits can be reached depends on whether there is an unperfect dominant contract, for tortious misappropriation of another's values.
In short, then, the civil law systems permit recovery of profit insofar, and only insofar as, they have been able to fit the fact situation into one in which established doctrines permit the application of the action for unjust enrichment. Loss to the plaintiff, or diminution of his estate — a factor which can be ignored in our equitable suit for profits — is a proof requirement that trammels the application of the remedy just as it has trammelled, and perhaps still trammels the application of the quasi contractual remedy in our courts.

The Louisiana Code provides that he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he unduly received it. This article can not be invoked to recover profits of a fiduciary or profits derived from a tortious misappropriation of another's property. And indeed, were it not for the equitable remedies of the constructive trust and the equitable lien, alien to the civil law, and were it not for the doctrine of constructive fraud, Louisiana lawyers who would try to keep faith with the civil law would have a hard time finding a remedy against disloyal fiduciaries. Those who do not avail themselves of the above-mentioned doctrines have merely trespassed on the terminology of our trust jurisprudence. More generally however, the liability is predicated on a highly liberal construction of the Code definition of fraud, construing it to embrace non-disclosure when a duty to disclose can very readily be asserted. Though this approach seems to rule out recovery of profits as such, as distinguished from plaintiff's damages, it is hard to envisage the courts of that State, surrounded by neighboring precedent awarding profits as such, plowing a lone furrow with the blinkers firmly concealing the high-powered mechanized instruments of their sister states. Thus, another formula they use is to hold the defendant as owing fiduciary obligations as a usufructuary.

15. See Mansfield Hardwood Lumber Co. v. Johnson, 263 F.2d 748 (5th Cir. 1959) (Louisiana's limited equity jurisprudence will not prevent the imposition of a constructive trust or equitable lien on a disloyal corporate fiduciary); In re Pan American Life Ins. Co., 88 So. 2d 410 (La. 1956) (a trust relationship existed between pledgor and pledgee); Sentell v. Richardson, 211 La. 288, 305, 29 So. 2d 852, 857 (1947) (a disloyal agent holds "merely as trustee for the account of his principal"); Haynesville Oil Co. v. Beach, 159 La. 615, 105 So. 790 (1925) (a self-dealing agent was guilty of a breach of trust, and the title which he thereby acquired to a drilling rig inured to the benefit of his principal). For an example of the employment of a civil law doctrine which enables an owner to recover his goods in changed form from a thief, to achieve substantially the result attained by tracing in equity, see Succession of Onorato, 219 La. 1, 51 So. 2d 804 (1951).
3. Presenting Grounds for Equitable Relief

Although it may be possible to present a case for the recovery of a defendant’s profits on a theory of quasi contract, the decree that defendant account for his profits is essentially a form of equitable relief.18 Hence facts must be averred and established which will support the jurisdiction of equity in the cause. This remains the case even where law and equity have been merged for procedural purposes. The fact that the complaint need merely set forth the facts constituting the cause of action and a demand for the relief to which the plaintiff supposes himself to be entitled does not mean that plaintiff can get equitable relief where a separate court of chancery would not have accorded him such relief. The codes have not changed the substantive rules of equity.19

When a case is made for relief such as an injunction,20 specific performance, or reformation or cancelation of an instrument, no problem is presented. Equity has jurisdiction because of the inadequacy of the remedy at law and the court has supplementary jurisdiction to decree that the defendant account for his profits.21 When, on the other hand, the situation does not call for any such equitable relief, it must be shown that a bill for an accounting in equity will lie. The traditional grounds on which jurisdiction to decree an accounting in equity is based are the existence of a fiduciary relation between the parties, a

18. See Lapsley v. American Institute of Certified Public Accountants, 246 F. Supp. 389 (D.D.C. 1965) (where the action is for damages for common law copyright infringement, plaintiff cannot recover by merely showing defendant's profits); Lehman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 456 (1932) (when equity has acquired jurisdiction of a suit for infringement it will award, as an equivalent of or substitute for damages, compensation measured by the rule applied to trustees, thus allowing defendant’s profits as a measure of compensation. See also Fuller Products Co. v. Fuller Brush Co., 299 F.2d 772 (7th Cir. 1962).


20. Compare St. James Church v. Supreme Court, 135 Cal. App. 2d 352, 287 P.2d 387 (1955), which held that when the complaint is for an ascertainable sum, no case for an accounting in equity is stated, yet, if an injunction is also properly sought, equity has exclusive jurisdiction with Allen v. Illinois Mineral Co., 299 Ill. App. 537, 20 N.E.2d 898 (1939), where, notwithstanding that injunctive relief was sought, the court held it had no jurisdiction for an accounting of minerals taken from land. The mere fact that a number of items were involved did not of itself present a case of complexity of account. The latter case is clearly against history and the weight of authority.


22. See National Presto Industries, Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964) (reformation); Sebree v. Rosen, 374 S.W.2d 132 (Mo. 1964) (cancellation).

complexity of the accounting situation and a need for discovery to determine the amount due."

As to the first of these, it should be remembered that for this purpose the fiduciary concept today extends to all situations where a confidence has been reposed and abused, and is not restricted to true fiduciaries. As to the second, the very fact that the amount of defendant's profits is not known can be argued to present a complexity of the accounting situation. And, as to the third, modern discovery procedures have all but negated its practical significance today.

Where there is no equitable jurisdiction to which a decree to account can be appended as incidental relief; no statute, as in the trademark and copyright infringement situations, authorizing a recovery of defendant's profits; and no complexity of the accounting situation

24. Kalberloh v. Stewart, 378 S.W.2d 820 (Mo. 1964). As to the historical origins of the bill for accounting in equity, see Belshem, The Old Action of Account, 45 Harv. L. Rev. 466 (1932); Langdell, A Brief Survey of Equity Jurisdiction (pts. 1-2), 2 Harv. L. Rev. 241 (1889); 3 Harv. L. Rev. 237 (1890); Lile, Bills for Account, 8 Va. L. Rev. 181, 266 (1922).

25. See p. 403 infra. However, the mere existence of an agency, without more, is insufficient to warrant equity's taking jurisdiction of a suit for recovery of a sum certain. There must be a showing that the agent holds property belonging to his principal or that he has profited beyond his lawful compensation. See Arnold Productions, Inc. v. Favorite Films Corp., 298 F.2d 540 (2d Cir. 1962) (no equitable accounting to defendant's fiduciary for profits from non-equity's dealings in profit-sharing basis); Berry Seed Co. v. Hutchings, 247 Iowa 417, 74 N.W.2d 233 (1956); American Button Co. v. Weishaar, 170 S.W.2d 147 (Mo. 1943); Kaminsky v. Kahn, 23 App. Div. 2d 231, 259 N.Y.S.2d 716 (1965) (accounting where defendant held stocks transferred by plaintiff with agreement as to dividends which was not performed, there being a fiduciary element plus a holding of profits due to principal); Alkahn Sil Label Co. v. Felsenstein, 7 App. Div. 2d 904, 182 N.Y.S.2d 380 (1959); Williams v. New York Ins. Co., 174 N.Y.S.2d 392 (Sup. Ct. 1958) (commission agent not a fiduciary; pre-trial examination and discovery adequate remedy).

26. See Rosenak v. Poller, 290 F.2d 748 (D.C. Cir. 1961) (an accounting is predicated on the assumption that plaintiff does not have the means to determine how much, or in fact whether, any money properly his own is being held by another); Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801 (D. Kan. 1928) (an accounting should lie where it would be impossible for a jury to do more than guess, or blindly follow the calculations of one witness); Remme v. Herzog, 222 Cal. App. 2d 863, 35 Cal. Rptr. 586 (1963) (accounting where accountants differ as to what profit book indicates); Second Michigan Co-op. Housing Ass'n v. First Mich. Co-op. Housing Ass'n, 358 Mich. 252, 99 N.W.2d 665 (1959) (accounting where, by reason of intricacy of fact situation, jury would not be appropriate tribunal). But see Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (in view of the powers given to district courts by Fed. R. Civ. P. 53 (b) to appoint masters to assist jury where issues are complicated, the burden of showing complexity of accounts as a basis for equitable accounting is difficult to discharge); Payrolls & Tabulating, Inc. v. Sperry-Rand Corp., 22 App. Div. 2d 595, 257 N.Y.S.2d 884 (1965) (mere allegations of the difficulty of assessing damages are insufficient for equitable jurisdiction and a conventional business relation does not become fiduciary by mere allegations to that effect); Jernberg v. Virtus Co., 32 Misc. 2d 820 225 N.Y.S.2d 180 (Sup. Ct. 1961) (the mere fact that money due under an agreement is determined by volume sales does not justify equitable accounting).

that a discovery order will not remedy; the state of modern authority compels the conclusion that whether equity will assume jurisdiction to decree an accounting is very much in the court's discretion. If it so chooses, it will lend a ready ear to such arguments as these: Equity, by tradition, has always had concurrent jurisdiction in cases of fraud; equitable, or constructive fraud, can be found in any unconscientious conduct whereby defendant has acquired a benefit; justifying the imposition of a constructive trust on his gains; fraud invariably involves an abuse of confidence reposed, thus warranting the court in treating defendant as a fiduciary; the very fact that defendant's profits may exceed plaintiff's proven damage goes to show that the remedy at law is inadequate; the illogic of letting the measure of a victim's recovery depend on the accident of whether or not he is able to state a cause of action for equitable relief such as an injunction is apparent. If, on the other hand, the court is not disposed to entertain a suit for an accounting it will say that, even where fraud is averred, the law affords an adequate remedy in damages. Here a lot will depend on a good presentation of the complaint, and the only categorical statement that can be made about these borderline situations is a negative one.


29. See Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962) (a suit for misappropriation of trade secrets disclosed in confidence to be regarded by federal courts as suit in equity whether or not injunctive relief is sought); Boyett's, Inc. v. Gross, 276 Ala. 432, 163 So. 2d 610 (1964) (a bill for accounting is good if it shows such wrong dealing as would authorize equity to take cognizance of the cause); Sojourner v. Sojourner, 247 Miss. 342, 153 So. 2d 803 (1963) (breach of a promise made without intent of performing it can support a constructive trust). But see Root v. Lake Shore & M.S. R.R., 105 U.S. 189, 214 (1882), where the court rejected the contention that patent owner could base right to an accounting in equity on a fiduciary relation, saying that this, if accepted, "would extend the jurisdiction of equity to every case of tort where the wrongdoer had realized a pecuniary benefit."


32. See Ingram v. People's Finance & Thrift Co., 226 Ala. 317, 146 So. 822 (1933) (accounting in equity should lie if the facts create a doubt as to whether adequate relief might be obtained at law); Concrete Coring Contractors, Inc. v. Mechanical Contractors & Engineers, Inc., 220 Ga. 714, 141 S.E.2d 439 (1965) (to exclude equitable relief, remedy at law must be complete and substantial equivalent of equitable relief); Majestic Loose Leaf, Inc. v. Cannizzaro, 10 Misc. 1040, 169 N.Y.S.2d 566 (Sup. Ct. 1957) (fact that suit lies in conversion does not preclude accounting in equity).

33. See Berry Seed Co. v. Hutchings, 247 Iowa 417, 74 N.W.2d 233 (1956) (accounting denied where defendant, managing plaintiff's business on a commission basis, obtained a large sum by misrepresenting profits); National Comm. on Mother's Day v. Kirby, Block & Co., 17 App. Div. 2d 390, 234 N.Y.S.2d 432 (1962) (even where the facts may support an action for fraud, accounting will not lie unless a fiduciary relation is established); Kocon v. Cordeiro, 98 R.I. 222, 200 A.2d 708 (1964) (a suit for damages for deceit against a corporate fiduciary is an adequate remedy at law).
4. Decree as Incidental to Statutory Injunctive Relief

The award of defendant's profits, when a statutory violation is enjoined, is not without precedent. Unless a contrary legislative intent is manifested, such a decree seems clearly proper. Restitution of amounts overcharged in violation of rent-control statutes and of backpay to employees due under Fair Labor Standards legislation prior to the amendment of the controlling statute to prohibit such restitution, has been granted. Defendants enjoined from violating the Fair Trade laws by underselling goods manufactured by plaintiff have, on occasion, been made to account to plaintiff for their profits through the medium of a

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37. See McComb v. Frank Scerbo & Sons, 177 F.2d 137 (2d Cir. 1949); Walling v. O'Grady, 146 F.2d 422 (2d Cir. 1944); Walling v. Miller, 138 F.2d 629 (8th Cir. 1943) (stating that any error herein, if error there be, would go to the merits and not to the jurisdiction).
fine for contempt. A more logical approach might well be that if any-
body is to have such profits it should be those who can show they could
have sold to the same customers at the regular price in competition
with the defendant. Yet one might argue against this that the manu-
ufacturer is injured by the cheapening of his product in the public eye.

Profits, as such, are not awarded for violations of the Clayton Act
since the statute spells out the damages. Nevertheless, plaintiff's dam-
ages can be measured by reference to defendant's profits. Similarly,
profits, as such, are not awarded for violations of the Sherman Act,
though they are not irrelevant to the measure of plaintiff's recovery. But one who suffers at the hands of a person who bribes the plaintiff's
employee to misrepresent the state of the market and thereby to extract
exhorbitant prices from plaintiff under the guise of arm's-length bar-
gaining, thus violating the Robinson-Patman Act, can recover profits
of the briber as a participant in the employee's breach of duty. The
liability of the briber and of the employee is joint and several.

Similarly, courts have declined to order restitution to defrauded
purchasers, of profits made in violation of the Federal Food Drug &
Cosmetic Act when injunctive relief is granted. In United States v.
Parkinson, the court held it had no statutory power to decree restitu-
tion as ancillary to its injunctive power. In dismissing an appeal, the
court said it was not the fashion of the English Crown to use Chancery
as a method of enforcement of regulations and that the use of the ex-
traordinary remedies of equity in governmental litigation should never
be permitted unless clearly and expressly authorized by statute.

38. See Gillette Co. v. Two Guys From Harrison, Inc., 36 N.J. 342, 177 A.2d 555
(1961), rejecting a contention that, without proof of damage, such award is punitive,

since it does not take from the defendant assets unrelated to his wrongful conduct.
In Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467 (2d Cir. 1958), a
decree awarding defendant's profits was held erroneous for want of proof of such
profits; but this seems to ignore the rule that the consequences of an inability to
demonstrate the loss resulting from a proven invasion of another's rights should rest
on the defendant.

39. See Sunbeam Corp. v. Civil Service Employee's Co-op. Ass'n, 187 F.2d 768
(3d Cir. 1951), rev'd, 192 F.2d 572 (1951).


42. See Rubenstein v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn.
1959) (pooling of net profits of monopolistic and victimized enterprises and equal
division thereof adopted as formula for assessment of damages).

(accounting proper).


45. United States v. Parkinson, 240 F.2d 918 (9th Cir. 1956).
fact that profit-recovery decrees are considered proper in analogous statutory injunction situations does, however, point in a contrary direction.\textsuperscript{46}

II. Profits Derived From Abuse of the Fiduciary Relation

A. Disloyalty

Aside from statute\textsuperscript{47} equity has from centuries back compelled a disloyal fiduciary to disgorge his profits.\textsuperscript{48} If he has such profit in his hands,\textsuperscript{49} he is generally held chargeable as a constructive trustee thereof.\textsuperscript{50} This applies even to a gratuitous agent\textsuperscript{51} and in general extends to situations where it is the fiduciary's spouse who benefits.\textsuperscript{52} The doctrine has not been confined to situations where the remedy in damages is inadequate. The choice, profits or damages, rests with the injured party.\textsuperscript{53} And where an award of profits would not make the plaintiff whole the court can, after the accounting has been taken, base its award on profits lost to plaintiff.\textsuperscript{54} The purpose of profit recovery being to discourage potential conflicts of interest and duty,\textsuperscript{55} it need not be shown that complainant suffered any loss from the misconduct.\textsuperscript{56}

1. Secret Commissions

The most obvious example of the situation where a fiduciary is accountable for his profit arises where he has acquired a secret com-


\textsuperscript{47} See, e.g., Cal. Civ. Code § 2237 (West 1954), which gives a trust beneficiary an option to require the trustee to account for profits, to pay value of use of property used, to dispose of it, to replace it, or to account for its proceeds.


\textsuperscript{49} See also pp. 370–71 infra.

\textsuperscript{50} Kirschner v. West Co., 300 F.2d 133 (3d Cir. 1962); Bandringa v. Bandringa, 20 Ill. 2d 167, 170 N.E.2d 116 (1961).

\textsuperscript{51} Spector v. Miller, 199 Cal. App. 2d 87, 18 Cal. Rptr. 426 (1962). See Wightman v. Wightman, 223 Mass. 398, 111 N.E. 881 (1916), which held that a brother, employed as assistant in brother's grocery, who continued to act and take salary after employment terminated by brother's insanity, sending out bills in brother's name, was accountable for profits as long as he did this, but ceased to be so accountable when he thereafter continued business in his own name, there being nothing to show him responsible for goodwill of business.

\textsuperscript{52} See also p. 369 infra.


\textsuperscript{55} United States v. Carter, 217 U.S. 286 (1910).

\textsuperscript{56} See Byer v. International Paper Co., 314 F.2d 831 (10th Cir. 1963) (servant); United States v. Bowen, 290 F.2d 10 (5th Cir. 1961) (servant); Brophy v. Cities Serv. Co., 31 Del. Ch. 241, 70 A.2d 5 (1949); Mangels v. Tippett, 167 Md. 290, 173 A. 191 (1939) (trustee); In re Rose's Estate, 237 N.Y.S.2d 367 (Surrogate's Ct.}
mission. It is immaterial that the person who reposed trust in no way suffered any prejudice from the transaction. And the fact that he has recovered the amount of the commission from the donor does not affect his right to recover it from the fiduciary. The amount can be recovered in quasi contract or through the imposition of a constructive trust. The doctrine has been applied to effect recovery by a business house, of frequency discounts granted by a television station to an advertising agent, by reason of the agent's frequent use of spot advertisements of the principal's products over its stations. It has, of course, no application where it is the clear custom of the community that the agent is entitled to retain gratuities given to him by the public whom he serves. In a very early case this qualification was extended to render an insurance agent not accountable for a sum given to him by another insurer in recognition of the benefit it had received from a satisfactory loss adjustment negotiated by the agent. It is believed, however, that today a different result would be reached.

The Federal "Anti-Kickback Act" provides for the recovery by the government from the giver or the recipient of kickbacks where government subcontracts were bought. The Act, which controls even where the government is not a direct party to the contract, merely supplements the existing doctrine by giving the government a clear and direct procedural right to sue as party plaintiff for such profits.

2. Interest Conflicting With Duty: Self-Dealing

The oft-quoted words of Justice Cardozo apply to all persons who hold fiduciary status. "Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilious of honor the most sensitive, is then the standard of behavior. As to

38. See p. 355 supra.
44. Aetna Ins. Co. v. Church, 21 Ohio St. 492 (1871).
this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court. 67

Similar thinking has often found expression thus: Whenever one person is placed in such relation to another by the act or consent of that other, or the act of a third person, or by the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with which whose interest he has become associated. 68 Rights so acquired are held in trust for those in whose interest he was so prohibited, and to the extent of the prohibition. 69 For the practitioner such vague broad language helps little. Truly, man is a social animal. But it is seldom that his actions are motivated by sheer altruism, undiluted by any measure of self-interest. But, for better or for worse, the courts take care not to limit the doctrine by narrow definition of fiduciary or confidential status. 70 The doctrine has been applied, for example, to enable the members of an "earnings pool," who floated a corporation for the more advantageous exploitation of their earnings, to recover from one of their number the profits on warrants of such corporation he had acquired at issue price and sold at a profit. 71 Further, the mere existence of a fiduciary relation does not, of course, necessarily mean that any transaction between

69. See Clements v. Cates, 49 Ark. 242, 4 S.W. 776 (1887).
71. Kreher v. Prescott, 153 So. 2d 316 (Fla. 1963); Prescott v. Kreher, 123 So. 2d 721 (Fla. 1960). In Brigham v. McCabe, 27 App. Div. 2d 100, 276 N.Y.S.2d 328 (1966), the allegations were that a bank, with whom funds of a retirement system had been deposited, had made a profit from the use of these funds and that, in violation of the Education Law, an officer of the bank was a member of the board of the retirement system. The court, while it conceded that the deposito-trustee was owed the duties of a fiduciary by the bank, held that these allegations stated a case for injunctive relief but not for an accounting of profits. The court took the view that the statutory violation was not wrongdoing in the sense that requires an accounting. Though the decision is not easy to reconcile with the strict doctrine that a trustee can never be permitted to profit from his trust, it may well be a commendable one. To apply the doctrine to a situation where an individual happens to be one of a large group of executives of the trustee side and also one of a large group on the beneficiary side, there being nothing underhanded or irregular about their dealings outside of this technical violation of law, would be to subordinate common sense to harsh doctrine.
the parties is tainted with self-dealing. Thus a partner who, on disagreement arising between the partners, agrees to buy the others out is not acting in a fiduciary capacity in so doing.\textsuperscript{72} And, as a general rule, a full disclosure, laying bare the facts to the beneficiary "without ambiguity or reservation, in all their stark significance" will protect the self-dealing fiduciary from accountability.\textsuperscript{73}

Local statutes should be consulted on this matter. The Uniform Trusts Act, for example, forbids a trustee directly or indirectly to buy or sell property for the trust, from or to, itself or an affiliate; or from or to a director, officer or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate.\textsuperscript{74}

3. \textit{Profits or Commissions Net Yet Received}

The traditional remedy for the recovery of a secret benefit acquired by a fiduciary is the imposition of a constructive trust on such benefit. When the benefit has merely been promised, and not paid over, there is no property in the hands of the fiduciary to which the trust can attach. For this reason, English courts restrict the beneficiary to an action for money had and received when the benefit actually reaches the fiduciary.\textsuperscript{75} Additionally, since a contractual right might be considered the subject matter of a trust,\textsuperscript{76} it ought to be possible to impress a constructive trust on the agent's claim against the bribe-giver. Although the agent himself would probably have no enforceable claim for the bribe owing to the illegality or immorality of the transaction, it can well be argued that where the bribe-giver has already received the fruits of the tainted transaction, the injured beneficiary is not a party to the immorality and is thus not precluded from asserting his rights as beneficiary of a constructive trust. In such a suit, the disloyal fiduciary would be joined as a co-defendant.\textsuperscript{77} Recovery

\textsuperscript{74} Uniform Trusts Act § 5.
\textsuperscript{75} See Powell & Thomas v. Evan Jones & Co., [1905] 1 K.B. 11. (The liability of the bribe-giver in tort is, of course, another matter).
\textsuperscript{76} A. Scott, \textit{The Law of Trusts} § 82 (1967).
\textsuperscript{77} In Rush v. Curtis-Wright Export Co., 175 Misc. 873, 25 N.Y.S.2d 597 (Sup. Ct. 1941), the assignee of a purchasing agent for the government of Columbia (injured principal) brought the suit to recover the amount of a bribe. While holding that this assignee could not recover because of the illegality of the contract, the court asserted that he held the bribe-contract as a constructive trustee for Columbia and directed payment of the bribe to plaintiff on plaintiff's giving a surety bond for that amount with interest to secure its payment to Columbia. This was reversed in Rush v. Curtis-Wright Export Corp., 263 App. Div. 69, 31 N.Y.S.2d 550 (1941), aff'd mem., 285 N.Y. 562, 43 N.E.2d 712 (1942), because the suit had been at law and the foreign principal was not before the court. However, the decision supports the proposition that the injured principal can assert a constructive trust over the contract and obligate third parties in making the bribe.
on a basis of constructive trust against the bribe-giver could also be predicated on the argument that he has, with knowledge, received the beneficiary's property and is thus a constructive trustee thereof.\(^78\)

If, for example, \(x + y\) was the amount the principal paid for the bribe-giver's performance, and \(y\) represents the amount of the bribe, the bribe-giver has shown that he would have performed for \(x\). To the extent of the \(y\), therefore, he has restitutional liability. Thus, where in the course of a dispute a seller paid the buyer's agent a bribe to effect a settlement which was effected to the buyer's complete satisfaction, the buyer could nonetheless recover the amount from the seller on the theory that the price was to that extent "loaded."\(^79\)

4. Profits Derived from Exploitation of Opportunities Arising from the Fiduciary Relation

A fiduciary who secretly secures an advantage from the exploitation of an opportunity which he ought to have exploited for, or offered to, the reposant of confidence, holds that advantage as a constructive trustee and is consequently accountable for profits derived therefrom.\(^80\) But, in determining the opportunities to which this well known doctrine extends, close questions are often presented.\(^81\) Clearly the rule is applied more strictly to the trustee of an express trust than it is to a joint adventurer\(^82\) or a mere agent.\(^83\) The application of the doctrine to corporate fiduciaries\(^84\) and to employees, whom for some purposes are regarded as occupying a fiduciary status\(^85\) will be considered later.

Perhaps the most frequent application of the doctrine arises where the defendant has acquired the renewal of a lease which he holds in a fiduciary capacity. Here the courts have often talked of the "chance of renewal," the probability of continuing in the established lessor/lessee

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\(^78\) Restatement (Second) of Agency § 314 (1957).

\(^79\) Donemar, Inc. v. Molloy, 252 N.Y. 360, 169 N.E. 610 (1930). See also Mayor of Salford v. Lever, [1891] 1 Q.B. 168, which, though holding only that the bribe-giver's tort liability is unaffected by the fact that the bribe has already passed hands, supports the reasoning in the text.


\(^81\) See Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928), where the decision to impress a constructive trust on a joint adventurer who acquired a lease renewal was by a majority of one judge in a court of seven.


\(^84\) See p. 398 infra.

\(^85\) See p. 384 infra.
relationship being itself regarded as a kind of product of the lease.\textsuperscript{86} Whatever the nature of the fiduciary relation, one who contemplates activity which might conceivably be regarded as competitive acts wisely in insuring himself against accountability for his profits by making a full disclosure to the persons for whom he is acting. This, if the latter have legal capacity and have not been imposed upon, will protect him.\textsuperscript{87}

5. \textit{Acquisition for Self of Asset Due to Another}

A fiduciary who acquires property for himself in breach of his duty to acquire it for his beneficiary holds the property as a constructive trustee. Since he cannot retain any gain derived from such a transaction, the enforcement of his duty to make restitution of the property and its fruits is on a plane with accountability for profits. If the defendant is shown to be a true fiduciary, and it is established that the property was so suited to the beneficiary’s needs that the acquisition deprived him of an opportunity that should have been exercised on his behalf, a cause of action for a constructive trust is presented.\textsuperscript{88} It is immaterial that the fiduciary acquired it with intent to hold for himself or that this intent was formed later.

However, the fiduciary principle can extend much further. There are a multitude of situations where one who has promised to acquire an asset for another, and instead has acquired it for himself, can be held as a constructive trustee. While no exhaustive discussion of the ramifications of this area can be attempted here, answers to the following questions will prove helpful in pinpointing the possible areas wherein a fact situation involving profit recovery can be presented:

- Was there a contract between the parties, or was it a mere gratuitous promise?\textsuperscript{89}
- Was it intended that both parties should have some interest in the acquisition, so that the transaction qualifies as a joint adventure?

\textsuperscript{86} See Warner Bros. Theatre, Inc. v. Cooper Foundation, 189 F.2d 825 (10th Cir. 1951); Mitchell v. Reed, 61 N.Y. 123 (1874); 13 Minn. L. Rev. 711 (1929).

\textsuperscript{87} See McLeod v. Lampkin Hotel Co., 257 Ky. 269, 77 S.W.2d 937 (1935) (agent); Ebberts v. McLean, 128 Tex. 573, 98 S.W.2d 352 (1937).


\textsuperscript{89} Sands v. Eagle Oil & Refining Co., 83 Cal. App. 2d 312, 188 P.2d 782 (1948). This is not conclusive, and a gratuitous promise can be made the basis of a constructive trust; Crowder v. Lyle, 225 Cal. App. 2d 439, 37 Cal. Rptr. 343 (1964); Harrop v. Cole, 85 N.J. Eq. 32, 95 A. 378 (1915), aff’d, 86 N.J. Eq. 250, 98 A. 1085 (1916). The fact that no consideration passed for the promise cannot be relevant to show no binding commitment was intended. See, e.g., McIlwain v. Doby, 238 Miss. 839, 120 So. 2d 553 (1960).
Whose money was to be used for the acquisition? If plaintiff’s money, whose money was actually used? Was defendant to be plaintiff’s agent in making the purchase? In whose name was the purchase intended to be made? Was the agreement in writing? Did it relate to land? If the price was not paid, did plaintiff or defendant assume liability for it? Was plaintiff induced in any way to act to his detriment? For example, did plaintiff not act to protect his rights to redeem the property about to be sold at a forced sale by reason of defendant’s promise to acquire it and to hold it for him? At the time of the agreement did either plaintiff or defendant have any equitable interest in the subject matter thereof? If there never was any agreement as to the subject matter, what, if any, are the circumstances in the relationship between plaintiff and defendant which would make it defendant’s duty to acquire this asset for plaintiff? For example, did he acquire knowledge of this opportunity in a confidential capacity? If the agreement was oral and there is a question as to whether the controlling statute of frauds would render it unenforceable, has there been any conduct on the part of plaintiff which could amount to part performance?

These suggested lines of inquiry are presented as nothing more than guideposts, and the practitioner acts wisely in thoroughly familiarizing himself with the state of authority in the jurisdiction involved before hastily concluding that the answers have provided a cause of action for the imposition of a constructive trust.

90. See Gates Hotel Co. v. C.R.H. Davis Real Estate Co., 331 Mo. 94, 52 S.W.2d 1011 (1932); Kinert v. Wright, 81 Cal. App. 2d 919, 185 P.2d 364 (1947).
91. Where the plaintiff’s money is used, there is a clear case for the imposition of a constructive trust. See Brunson v. Sports, 239 S.C. 58, 121 S.E.2d 294 (1961).
94. This is obviously true, but oral agreements can equally furnish the basis of a constructive trust. See Brown v. Zimmerman, 18 Ill. 2d 94, 163 N.E.2d 518 (1959); Gaines v. Hamman, 163 Tex. 358, 358 S.W.2d 557 (1962).
95. A good argument can be made that a contract to acquire land and convey it to another is not within the statute of frauds. See Harris v. Dunn, 55 N.M. 434, 234 P.2d 821 (1951). In any case, constructive trusts are a recognized exception to the rule that trusts in real estate cannot be enforced unless in writing.
96. If it was plaintiff who assumed liability, consider the possibility of accountability on the basis of a resulting trust (not restricted to land).
98. See Tanous v. White, 186 Miss. 556, 191 So. 278 (1939).
100. See Irwin v. Bird, 107 Misc. 710, 244 N.Y.S. 293 (Sup. Ct. 1930).
6. Purchase for Self of Beneficiary’s Property

An obvious conflict of interest and duty is presented when a fiduciary purchases for himself, directly or indirectly, the property of his beneficiary. He owes it to the latter to get top dollar while his own interest is to generally get it as cheaply as he can. Ordinarily, the result of such a transaction is to give the beneficiary an election. He may disaffirm and recover the property; or, he may treat the transaction as a conversion, recovering the difference between the price paid and the value either at the time of the transaction or at the time of the discovery thereof; or, some say, at the time action is brought. If the fiduciary has resold, his profit can be recovered. The doctrine is not of course restricted to transactions involving land. Further, it is immaterial that the sale was intrinsically fair, that no undue advantage was obtained, or even that the price was the highest that could be obtained. The right to disaffirm still exists. The rule is also not restricted to private sales. It has been applied to render accountable a trustee of a court-approved trust for bondholders for profits realized on a sale of bonds purchased by the trust subsequent to the court approval, even without a showing of bad faith, inadequacy of consideration or concealment. The contention that defendant, as underwriter of the bond issue, had acted in good faith pursuant to his duty to maintain the market failed, with the decree of foreclosure being viewed as extinguishing any duty he might, as underwriter, have owed to the mortgagor.

The rule, however, is not without its qualifications. It does not apply where the defendant can meet the burden of proving that he acted in the utmost good faith and made a full disclosure to all the beneficiaries who, being of full capacity, consented to the transaction or ratified it with full knowledge. Nor, in the case of an express trust, does it control where the settlor authorized such dealings or

102. See Wofford v. Wofford, 244 Miss. 442, 142 So. 2d 188 (1962); Moorehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964) (administrator).
111. See Appeal of Burke, 378 Pa. 616, 108 A.2d 58 (1954), wherein trustees, under authority of the trust instrument, took over portions of the trust property at a fair valuation in settlement of individual claims against settlor.
where leave of the court has been obtained. A further qualification is presented where the defendant was acting to protect an interest he had in the property in a capacity such as mortgagee or spouse with rights of dower or curtesy. But as against the beneficiary, such rights extend only to the protection of the interest for which the purchase was made. Where the purchase is made to prevent loss to the beneficiary’s estate, any title acquired is held in equity for the beneficiary’s benefit.

Further qualifications extend to agents. The rule does not apply to a transaction not within the subject matter of the agency. And a realtor, authorized to sell at a stated net figure and to keep any excess as commission, can buy for himself without any disclosure. In such a case the principal has lost nothing beyond the net price fixed and it is immaterial to him who buys. Additionally, the law does not forbid an agent from buying for himself, provided such disclosure is made as will effect a termination of the fiduciary relation. However, the agent cannot wait until he receives an offer in excess of the agreed price and then purchase it for less without informing the principal of this offer. To allow the agent to do such would encourage him to buy it and re-sell at the higher price for his own gain. But mere notification to the principal that he is acting for himself does not necessarily terminate his fiduciary status, especially where he receives the agreed commission on the sale to himself without communicating other offers that have been received.

114. See Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278 (1928).
117. Compare Rattray v. Scudder, 28 Cal. App. 2d 214, 169 P.2d 371 (1946), with Buchanan v. Fritts, 240 S.W.2d 614 (Ky. 1951), holding not liable for profits a realtor who bought from his principal and resold at a profit at a public auction when there was no showing of knowledge that any others were planning to bid at the auction for a price higher than that which he had paid principal.
118. Zikratch v. Stillwell, 196 Cal. App. 2d 535, 16 Cal. Rptr. 660 (1961); In re Noonan’s Estate, 361 Pa. 26, 63 A.2d 80 (1941) (sale by fiduciary to his employee); but see Cooper-Portieth Co. v. Keller, 49 Ohio Abs. 296, 75 N.E.2d 809 (1947), where an agent, after having communicated an offer for the property he was employed to sell which was refused, openly made an offer in his own name. It was held that the resulting contract was enforceable even though the acceptance was without knowledge of interim offers which the agent had failed to communicate, since the submission of his own offer terminated the fiduciary relation. This decision seems out of line with reason and with authority. The principal has not consented to the agent’s purchase until the agent’s offer is accepted. Until then, the duty to communicate material facts (the interim offers) should be held to continue.
7. Sale of Own Property to Beneficiary

Where one under a fiduciary duty to acquire property for another without the consent of that other,119 purchases the property from himself in his individual capacity, the beneficiary can set aside the transaction and hold him as a constructive trustee of the purchase money.120 This can be done whenever the fiduciary's interest, though not absolute, is of a sufficiently substantial nature as to affect his judgment.121 The rule extends to the purchase by a corporate trustee, for the trust, of an asset owned by an affiliated or subsidiary corporation in which it has a substantial interest.122 The complaint should request restoration, insofar as restoration is possible, of the property so dealt with.123 Prejudice to the beneficiary need not be averred or proved.124 Alternatively, the profit made by the fiduciary on the transaction can be recovered.125 To recover the difference between the price paid by defendant and the price he received from the plaintiff or his estate, it must be shown that he originally acquired the asset for the purpose of reselling it to the plaintiff.126 If this cannot be shown, only the difference between its actual value at the time of the sale and the price paid by the plaintiff (or out of his funds) can be recovered.127

8. Profits Derived from Wrong to Third Person

There are very few situations where an employer can recover the profits of a servant derived not from an act of disloyalty of which he is the true victim, but from a wrong to a third person. Where it has been allowed, it seems to have been based on a theory of unjust enrichment. Thus in Reading v. Attorney General128 a sergeant in the British Army had received about $20,000 from Egyptian smugglers for riding in uniform on trucks they used for their illegal purposes, thereby

120. See In re Anneke's Trust, 229 Minn. 60, 38 N.W.2d 177 (1949), which held voidable a purchase by a trust company of securities for its trust accounts from its own securities or banking department, since the temptation to favor shareholders at the expense of trust beneficiaries may be as insidious as that of a private trustee to favor himself.
121. See Montgomery v. Hundleby, 205 Mo. 138, 103 S.W. 527 (1907) (option holder who sells stock as agent).
122. See Clayton v. James B. Clow & Sons, 327 F.2d 382 (7th Cir. 1964).
123. Sim v. Edenborn, 242 U.S. 131 (1916), holding that any loss due to inability to make full restoration of the status quo should fall on the unfaithful agent.
enabling the trucks to pass by the Egyptian police without being searched. The British government seized the money and, in a suit by the sergeant for its recovery, was held entitled to retain it on the ground that its servant had obtained it illegally as a result of the misuse of his position as a soldier. Any official position, said the House of Lords, which enables the holder to earn money by its use gives his master a right to receive such money even though earned by a criminal act. The fact that the master suffered no damages is immaterial.

Recovery in such situations, as for example where a city recovered illegal kickbacks extorted by its mayor from city employees, seems to be entirely motivated by the policy against permitting the faithless steward to retain his profits. Thus it must be shown why the true victim cannot, or is unlikely to, bring suit himself. The logical corollary of this doctrine, without the qualification, would be that a janitorial service, for example, whose servant abused his position to gain entry to premises for the purposes of larceny would be the proper party plaintiff to recover the property stolen. If the true victim is not available to sue, the complaint should pray for recovery in order that the wrong perpetrated on him may be righted.

9. Profits Made After Termination of Fiduciary Status

Even though a defendant no longer serves as a fiduciary, the use of confidential information acquired in that capacity to the prejudice of his former reposant of confidence may carry with it liability or accountability for profits. A trustee, for example, is not necessarily exonerated from the consequences of a self-dealing transaction merely because he has resigned from office before the transaction is completed. So, too, an attorney may violate his duty to a one-time client even after his retainer is ended. Accountability for profits can result from a purchase by him of his former client's property at a


131. In Jersey City v. Hague, 18 N.J. 584, 599, 115 A.2d 8, 17 (1955), the court said the city was the proper party to recover property which "as between the parties to the suit" belongs to it. It was the proper party to seek "to right a wrong perpetrated upon its servants and inhabitants."

132. See Omohundro v. Matthews, 317 S.W.2d 771 (1958), aff'd, 161 Tex. 367, 341 S.W.2d 461 (1960); M. Hosch's Executors, 181 Ky. 781, 205 S.W. 963 (1918).
forced sale if he acquired the information leading up to the purchase while occupying fiduciary status. Similarly, a partner who profits through using, in his participation in a new partnership, the knowledge acquired through membership of a former partnership can be accountable to his former partners.

The most frequent source of litigation in this area, however, is where an ex-employee is using information obtained in his previous employment to the detriment of his former employer. Here the courts are faced with a grave problem of balancing conflicting policies. On the one hand, it is socially desirable that those who have exercised initiative and spent money to improve and perfect their methods and ideas should be protected against exploitation; on the other, the courts are preoccupied with the right of an individual, even if he once occupied a fiduciary or quasi-fiduciary status, to better his condition if he can honestly do so. It would go contrary to the whole spirit of free enterprise to hamstring employees in their choice of work and freedom to exploit their skills by reason of the accident of their former employment.

To establish a case for the recovery of profits from such a defendant, therefore, much will depend on the nature of the information so acquired, the circumstances of its disclosure and on the way in which it is being used. The type of inquiry which should be made to determine whether accountability for his gains should be decreed in this field is reflected in the following questions:

What is the nature of the information defendant has used? If it qualifies as a trade secret, no problem on this aspect is presented.

133. See Annot., 20 A.L.R.2d 1280. But see Stein v. Morris, 120 Va. 390, 91 S.E. 177 (1917), holding that nonconfidential information given by a client can be used by an attorney for his own profit.


If it relates to knowledge of plaintiff's customers, to what extent was this knowledge confidential? 138

How readily could others have obtained the same knowledge? 139

What was the extent of defendant's contact with the customers, and in what way did he serve them? 140

Did he take with him a list? 141

Did he solicit customers for his post-employment activity while in plaintiff's employ? 142

If it does not relate to customer knowledge, is this knowledge really information at all, or merely skills or technical knowledge? 143

How many other employees shared this same knowledge?

Was it expressly communicated to defendant?

Was he sworn to secrecy? 144

Why was the knowledge imparted to him?

If it had not been, could he have acquired it independently? 145

What relation does it bear to his employment? 146

In what way is he profiting? Did he sell the information, or use it himself? 147


139. See Ferranti Elect., Inc. v. Harwood, 43 Misc. 2d 533, 251 N.Y.S.2d 612 (Sup. Ct. 1964) (list of all best known in field, not protectable). But see Suburban Gas of Grand Junction, Inc. v. Bockelman, 156 Colo. 391, 401 P.2d 268 (1965), requiring fraud or trade secrecy before customer list is protectable.

140. It seems unrealistic to generalize, as some writers have done, such as that remembered lists can be used, written lists cannot. See, e.g., Restatement (Second) of Agency § 396 (1957). The entire situation should be examined.


143. The fact that no contract of secrecy is required or mentioned is not, of course, conclusive as to the right to use information. See Junker v. Plummer, 320 Mass. 76, 67 N.E.2d 667 (1946); Schunenburg v. Signatrol, Inc., 50 Ill. App. 2d 402, 200 N.E.2d 615 (1964).


145. See Rimer v. Paskan, 213 Cal. App. 2d 499, 28 Cal. Rptr. 846 (1963), holding that corporate officers who, at their own expense, acquired mining claims about six months after termination of their relation with an ore-processing corporation, which was defunct and insolvent, were not accountable to stockholders of that corporation.

146. Clearly the receipt of consideration for the information as such presents a situation different from accountability to the insurer's use of it for competitive purposes.
Is his profit being made in competition with plaintiff?\textsuperscript{148}

Did he know, or have reason to know, he was not free to compete?

Was there any covenant not to compete? If so, was it reasonable as to duration, area and scope?\textsuperscript{149}

Why did defendant initially go to work for plaintiff?\textsuperscript{150}

Why did he leave?\textsuperscript{151}

Did he ever make any disclosure to plaintiff of his plans after leaving?\textsuperscript{152}

Has plaintiff in any way indicated acquiescence in the activities complained of?\textsuperscript{153}

In this technological era it is an everyday occurrence for trained personnel to compete with their former employers, either individually or as employees of a rival. To hold either them or their new employers accountable for gains so derived, in the absence of a showing of some element of chicanery in the situation, would be unjust and impolitic. The competition must be shown to be unfair. And it is for this reason that, though no single answer to any of the above suggested questions is conclusive, it is of vital importance that the entire picture should be placed before the court\textsuperscript{154} if a good case is to be presented.

\textsuperscript{148} A covenant not to compete will not be enforced where to enforce it would merely serve to oppress defendant whose conduct cannot result in injury to complainant. See Sternberg v. O'Brien, 48 N.J. Eq. 370, 22 A. 348 (1891).


\textsuperscript{150} A showing that he obtained employment with plaintiff for the express purpose of acquiring information he could later use in competition would be highly persuasive.

\textsuperscript{151} In Byrne v. Barrett, 268 N.Y. 199, 197 N.E. 217 (1935), an agent, employed by a broker to negotiate the sale of a lease, lined up a prospect. Due to a slight disagreement no contract resulted. The agent resigned from his employment, qualified as a broker and, within a month, concluded the negotiations, gaining his commission. His agreed compensation from the plaintiff ex-employer being one-half of commissions earned by the latter, he was held accountable for one-half of such commission earned from the deal. In view of his failure to tell the plaintiff that negotiations were practically concluded at the time of his resignation, the decision does not seem open to criticism. But see 48 Harv. L. Rev. 1014 (1935); 10 St. John’s L. Rev. 140 (1935); 9 U. Cinn. L. Rev. 518 (1935); 83 U. Pa. L. Rev. 691 (1935); 44 Yale L.J. 882 (1935).

\textsuperscript{152} See Standard Brands, Inc. v. U.S. Partition & Packaging Corp., 199 F. Supp. 161 (E.D. Wis. 1961), holding that an employee who plans to compete with his employer when he leaves should fully disclose his intentions. But see Chevron Oil Co. v. Tlapek, 265 F. Supp. 598 (W.D. Ark. 1967), modified, 407 F.2d 1129 (8th Cir. 1969), where disclosure of intention “to lease an area in respect of which he had acquired confidential information” after resigning, was held no excuse.

\textsuperscript{153} The fact that defendant was wrongfully discharged from employment may well operate to relieve him from accountability for profits. See General Bill-Posting Co. v. Atkinson, [1909] A.C. 118 (Eng.), 1 B.R.C. 497.

\textsuperscript{154} “Jury” determination of issues presented in this area is conclusive if supported by substantial evidence. See Hulsenbush v. Davidson Rubber Co., 344 F.2d 730 (8th Cir. 1965).
10. Effect of Settlor's or Beneficiary's Exoneration from Accountability

If it is provided by the terms of an express trust that the trustee shall be exempted from any duty to account for his administration and the clause cannot be construed as indicating that a gift absolute to the trustee was intended, such provision is not ordinarily considered to preclude injured beneficiaries from bringing suit to remedy a breach of trust. Similarly, a provision exculpating the trustee from liability for a breach of trust, or for certain breaches of trust, is accorded limited recognition but when recognized it is strictly construed. The overwhelming weight of authority is to the effect that it cannot relieve him from accountability for profits derived from self-dealing. And, if such a clause is to be relied on, it should be shown that it was not inserted as a result of undue influence. If the trustee himself drafted the instrument, it should be established that the settlor knew of its insertion.

It seems that the same principles would extend to any fiduciary. To permit him to contract out of accountability for profits resulting from disloyalty would go counter to clear notions of public policy. That is not to state, of course, that consent of the reposant of confidence is never a good defense nor imply that a confidential relation cannot be negated by contractual stipulation. But one cannot contract out of liability for fraud.

156. See Wood v. Honeyman, 178 Ore. 484, 169 P.2d 131 (1946), holding that a provision exempting trustee from the need to keep formal accounts did not preclude beneficiary from requiring that he show faithful performance of his duties. See Annot., 171 A.L.R. 631 (1947).
157. See Clark v. Judge, 84 N.J. Super. 35, 200 A.2d 801 (1964), from which it would appear that power to borrow could properly be given in or implied from a trust instrument; Telephones, Inc. v. LaPrade, 206 Va. 388, 143 S.E.2d 853 (1965) holding no breach of duty in the purchase for the trust of stock in which trustee held an interest where instrument expressly permitted such conduct.
161. See In re Putnam's Will, 257 N.Y. 140, 177 N.E. 399 (1931) (legacy to draftsman).
11. Accountability for Profits Made by Third Person

A fiduciary is not ordinarily accountable for the wrongdoing of another unless he himself is guilty of wrongdoing. Thus, if he properly delegates to another a duty which is properly delegable,\(^{164}\) he will not be accountable for the profits of the one to whom he has delegated the duty.\(^{165}\) So, too, he is not accountable for the profits of a predecessor in office, though failure to take timely steps to redress a breach of trust may involve him in liability for damages. The same rule applies to the profits of a co-fiduciary who is guilty of disloyalty.\(^{166}\)

To hold him for the latter's gains a showing must be made either of participation by defendant, an improper delegation, an approval or acquiescence in the misconduct, or, perhaps, a failure to exercise due care in the supervision of the co-fiduciary's conduct.\(^{167}\)

Where, however, it can be shown that it was the fiduciary who made it possible for another to profit, he can be made to account for that profit whether or not he himself has pocketed any benefit. Thus a trustee who, in the process of reorganizing a group of companies, allowed his employees to purchase interests in the latter and re-sell them to him as reorganization trustee at their true value was held surchargeable.\(^{168}\) An attorney who paid the realtor his client's purchase money with knowledge that the realtor was making a secret profit of $1,000 over and above his commissions, was made to account for that sum.\(^{169}\) And an executor who, after his attorney had settled a claim against the estate by making a lesser payment out of his individual funds, paid the judgment creditor the full amount, which payment was passed on to the attorney, was surcharged for the profit the attorney had made.\(^{170}\)

12. Liability of Participating Third Persons

Apart from the situation where a non-participating co-fiduciary is held liable for the amount of his co-fiduciary's profits for negligence or breach of trust,\(^{171}\) where a third party has acted in collusion with the fiduciary, liability for the recovery of his profit is generally founded

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164. See Restatement (Second) of Agency § 18 (1957); Restatement (Second) of Trusts § 171 (1957).
on the basis of a constructive trust. Where, on the other hand, the third party cannot be shown to have participated except to the extent that he took advantage of the situation with knowledge that disloyalty was involved, recovery is restricted to the gains he made after acquiring such knowledge.

Similarly, a participating third party can be held for profits he has not received. The liability of such persons and that of the fiduciary is often said to be joint and several. Thus, he can be held for the entire profit even though he received nothing. In view of the difficulty of envisaging a constructive trust where there is no conceivable res to which it can attach, it is probably preferable to present the action as one in tort for conspiracy. However, if for some reason a suit in tort does not lie, as, for example, it is barred by the statute of limitations, it is possible to assert a cause of action in quasi contract even though recovery on this basis is traditionally restricted to benefits actually received. Thus, where defendant has bribed plaintiff's buying agent it can be argued that that part of the price paid by plaintiff which represents the bribe remains the money of plaintiff. When paid to the agent the defendant does not exonerate himself from the obligation to return it to plaintiff any more than if he had stolen a chattel and lost it. As an alternative, it can be argued that defendant is a co-constructor trustee and secondarily liable as a guarantor of the entire fund.

172. Lawrence Warehouse Co. v. Twohig, 224 F.2d 493 (8th Cir. 1955); Ohio Oil Co. v. Sharp, 135 F.2d 303 (10th Cir. 1943); Goggins v. Moss, 221 F. Supp. 905 (N.D. Tex. 1962); Gethsemane Lutheran Church v. Zacho, 253 Minn. 469, 92 N.W.2d 905 (1958); Corndale v. Stewart Stamping Corp., 129 N.Y.S.2d 808 (Sup. Ct. 1954).


174. Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829 (N.D. Ohio 1964); Commodity Credit Corp. v. Transit Grain Co., 157 F. Supp. 527 (S.D. Tex. 1957). In Lappas v. Barker, 375 S.W.2d 248 (Ky., 1964), the liability is said to be "joint." But since the main attribute of joint liability as distinguished from joint and several liability is the right of a co-obligor to insist that his co-obligor be joined in the suit, this is clearly unsound.

175. See Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1952), where a selling syndicate, held to stand in a fiduciary relation to a subdivision to whom it had sold a bridge, had both actively participating members and nonparticipating members, and the former were held jointly and severally liable for the entire profit made. The latter were held severally liable only to the extent of their respective profits. See also Knox Glass Bottle Co. v. Underwood, 228 Miss. 699, 89 So. 2d 799 (1956).


177. F. Woodward, QUASI CONTRACTS § 289 (1913).

Finally, counsel should be aware of the fact that some jurisdictions have enacted statutes which protect those who deal with fiduciaries.\(^{180}\)

13. **Double Recovery — Against Third Person as Well as Fiduciary**

When an agent — be he the agent of a seller of goods or of the buyer — is bribed, it is well settled that the amount of the bribe can be recovered against the bribe-giver.\(^{181}\) There is no need to show that the price would have been lower had it not been for the bribe if the victim is the buyer. The assumption is that the price was loaded by this amount.\(^{182}\) The victimized principal can, of course, recover the secret commission from his agent,\(^{183}\) but the question remains as to whether he can recover the amount of the bribe twice.

It seems clear enough that a recovery against the bribe-giver will not preclude him from recovery against the agent. The latter's accountability is imposed by law to discourage self-dealing, not to compensate the principal, and it would be strange to allow a disloyal fiduciary to retain the fruits because his victim no longer needs to be compensated.\(^{184}\) But if the bribe has passed hands and has been recovered from the agent, can the bribe-giver be made to doubly reimburse the principal? English courts have so held. He can recover from both, and it does not matter which he sues first. "The agent has been guilty of two distinct and independent frauds — the one in his character of agent, the other by reason of his conspiracy with the third person . . . [who] cannot absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he received. . . ."\(^{185}\)

\(^{180}\) Those knowingly dealing with fiduciaries are readily chargeable with constructive notice of any disloyalty of which the fiduciary may be guilty. With this in mind, and particularly to protect depositories of fiduciary funds against some of the harsh results of this, many jurisdictions have enacted the *Uniform Fiduciaries Act* (1922). This relieves such persons from the very high degree of vigilance in the detection of possible disloyalty which the common law requires of them. *See* Wysowatcky v. Denver-Willys, Inc., 131 Colo. 266, 281 P.2d 165 (1955).

\(^{181}\) *See* Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 344-45 (E.D. Wis. 1956), holding a vendor who paid secret commissions to purchaser's agent would be liable either on the basis of "constructive trust, joint tort, or for moneys had and received."


\(^{183}\) Donemar v. Molloy, 252 N.Y. 360, 169 N.E. 610 (1930).

\(^{184}\) *Id.* In Sears, Roebuck & Co. v. Metropolitan Engravers, 245 F.2d 67 (9th Cir. 1957), it was held that the fact that the victim had levied an attachment in a suit against the agent for his profits did not render the complaint against the principal bad for improper service.

\(^{185}\) Mayor of Salford v. Lever, [1891] 1 Q.B.D. 168, 176-77.
theory to actions presently used in American law a problem arises. Firstly, the reasoning would seem to run counter to the fact that the liability of a fiduciary and his participant is joint and several, with "several" generally used to mean that payment by one releases the other.

Secondly, if the liability of the bribe-giver is in tort for deceit, it would seem that double recovery is precluded by the fact that the victim has already been compensated for the wrong. If the suit is based on quasi contract, the fact that the defendant, having passed on to the agent the enhancement of the price, has not been enriched, might well present an objection. For these reasons, though authority supports the position that recovery can be had from the agent after relief has been had against the participating third person, a suit against the latter after recovery has been had from the agent would present much difficulty.

14. Effect of Disloyalty on the Right to Compensation

Whether or not a fiduciary called upon to account for his profits will be required to forgo his compensation is a question very much for the discretion of the court, with much depending on the gravity of his misconduct. If the court is to be persuaded to deny him his emoluments the proof should be directed into one or more of the following channels: his conduct as showing deliberate bad faith, or as unconscionable, or as evidencing a consistent pattern of dereliction of duty, his conduct as showing active and continued opposition to the complainant's interest, or that the remuneration is being

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186. See p. 372 supra.
188. In Tarnowski v. Resop, 236 Minn. 33, 51 N.W.2d 801 (1952), a principal induced to contract by fraud of his agent and of a third person, having recovered substantially the amount of his down payment from the latter, was held entitled to the agent's commissions. See also Restatement (Second) of Agency § 407 (1957).
190. Rushing v. Stephanus, 64 Wash. 2d 607, 393 P.2d 281 (1964). In Blackburn & Co. v. Park, 357 F.2d 523 (2d Cir. 1966), an agent, employed by a prospective buyer under the mistaken belief, cultivated by the plaintiff, that plaintiff agent was in an exclusive position to find a buyer, and that the seller could not be approached directly, was denied compensation for negotiating a purchase on a showing that, at the time of the rendition of these services, he was also preparing the way for a purchase of the property by other buyers. The court, however, hints that a quasi contractual claim might have been successful had it been properly pleaded.
sought for the very acts which have been denounced\footnote{See Shapiro v. Stahl, 195 F. Supp. 822 (M.D. Pa. 1961) (agent); Canon v. Chapman, 161 F. Supp. 104 (W.D. Okla. 1958) (broker); Evans v. United States Fidelity & Guaranty Co., 127 A.2d 842 (D.C. Mun. Ct. 1956) (broker); Sunset Acres Motel, Inc. v. Jacobs, 336 S.W.2d 473 (Mo. 1960) (broker).} so that an award of compensation would enable him to profit from his own wrong. Conversely, if the aim is to persuade the court that he ought not to forfeit his compensation, or at least not in toto,\footnote{See Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949); Steiner v. Hawaiian Trust Co., 47 Hawaii 548, 393 P.2d 96 (1964) (reduced compensation).} the proof could usefully be directed to bring out some of the following features: that the transaction complained of was one isolable from his conduct in general, a single episode marring a long term of useful service, or related only to a small part of his duties;\footnote{See Brooks v. Conston, 365 Pa. 256, 72 A.2d 75 (1950).} that the agreed compensation for services performed before the act of disloyalty was apportioned in the contract;\footnote{See Vest v. Bianson, 365 Mo. 1103, 293 S.W.2d 369 (1956).} or that his services considerably benefited the beneficiary.\footnote{See Welsh v. Atlantic Research Associates, Inc., 321 Mass. 57, 71 N.E.2d 580 (1947) (competing employee). See also Annot., 80 A.L.R. 1075 (1932); Annot., 102 A.L.R. 1115 (1936); Annot., 134 A.L.R. 134 (1941); 46 Mich. L. Rev. 112 (1947).} Good faith, though not of course conclusive as to his right to compensation,\footnote{See in re Weinstein’s Will, 43 Misc. 2d 489, 251 N.Y.S.2d 508 (Sur. Ct. 1964), re’o’d on other grounds, 25 App. Div. 2d 776, 259 N.Y.S.2d 475 (1966); In re Tannenbaum’s Will, 30 Misc. 2d 743, 219 N.Y.S.2d 149 (Sur. Ct. 1961); Dick & Benedict: Estoppel at Law and Equity § 169, 171 (1966); Restatement (Second) of Trusts § 256 (1959).} is very relevant. If the record does not show active fraud, dishonesty or bad faith, this should be emphasized.\footnote{See Welsh v. Atlantic Research Associates, Inc., 321 Mass. 57, 71 N.E.2d 580 (1947) (competing employee). See also Annot., 80 A.L.R. 1075 (1932); Annot., 102 A.L.R. 1115 (1936); Annot., 134 A.L.R. 134 (1941); 46 Mich. L. Rev. 112 (1947).}  

B. Particular Fiduciary Relations  

The discussion which follows is primarily concerned with applications of the doctrines already discussed in general terms to various particular types of fiduciaries. The routine duty of a true fiduciary, such as a trustee, executor or guardian to account for his administration, and the law surrounding accounting on the dissolution of a partnership or joint venture are, however, beyond the scope of this work.  

When a fiduciary’s duties are of an official court-supervised nature he acts wisely in seeking the directions of the court before embarking on any course which might involve a charge of disloyalty,\footnote{See Welsh v. Atlantic Research Associates, Inc., 321 Mass. 57, 71 N.E.2d 580 (1947) (competing employee). See also Annot., 80 A.L.R. 1075 (1932); Annot., 102 A.L.R. 1115 (1936); Annot., 134 A.L.R. 134 (1941); 46 Mich. L. Rev. 112 (1947).} and he is usually allowed to charge the cost of such a proceeding to the trust
estate. However, when the problem really involves an exercise of business judgment some courts decline to protect him with instructions.\(^{201}\) In any event, he should make a point of rendering accounts of his administration at the promptest possible intervals, thereby placing on the beneficiaries the burden of objecting\(^{202}\) to alleged irregularities.

Other general matters of possible collateral interest, though not discussed herein, are whether a judicial settlement of account precludes subsequent attack on alleged self-dealing;\(^{203}\) whether courts may authorize him to borrow from the fund he is administering;\(^{204}\) the extent of liability for loss on investments as affected by the fact that they were taken without indication of fiduciary status;\(^{205}\) and the measure of a fiduciary’s liability for selling or changing investments in good faith.\(^{206}\)

1. Trustees Under Express Trusts

The Trustee-Beneficiary Relation. The trustee-beneficiary relation is the historical prototype of the fiduciary concept. The most common examples of the rule that a trustee cannot profit from a breach of trust, which is fundamental,\(^{207}\) are those where he has used trust property for private purposes,\(^{208}\) or acquired for himself an interest he ought to have acquired for the beneficiaries,\(^{209}\) or received commissions on account of transactions entered into as trustee.\(^{210}\)

Even when invested with discretion, the trustee can be made to account for an abuse thereof.\(^{211}\) If the abuse was such as to enable another to profit, that other can be compelled to make reparation.\(^{212}\)


202. See p. 374 supra.

203. See generally Annot., 132 A.L.R. 1522 (1941); Annot., 137 A.L.R. 558 (1941); Annot., 1 A.L.R.2d 1060 (1948); Bambrick v. Bambrick, 165 So. 2d 449 (Fla. 1964).

204. See Annot., 30 A.L.R. 461 (1924).


206. See Annot., 58 A.L.R.2d 674 (1958). Attempts to unify the various laws relating to accounting by trustees and executors are to be found in the Uniform Trustees’ Accounting Act; 9C U.L.A. 277 (1957); Model Probate Code §§ 172-81.


208. Gaskins v. Bonfils, 79 F.2d 352 (10th Cir. 1935) (borrowing trust funds); Loring v. Wise, 226 Mass. 231, 115 N.E. 302 (1917) (retaining interest on trust funds deposited in bank). In Bohle v. Hasselbrock, 64 N.J. Eq. 334, 51 A. 508 (1902), a trustee used part of the cestui’s money to acquire an asset, the balance being paid from his own funds. A constructive trust was impressed on the asset, subject to a lien to secure the trustee’s share.


211. In re Clarenbach’s Will, 23 Wis. 2d 71, 126 N.W.2d 614 (1964) (allocating to self, as life beneficiary, as income, about half of proceeds of sale of trust res in the exercise of discretion).

Although the settlor may relieve the trustee of the necessity of keeping formal accounts, a provision relieving him from a duty to account for his administration will be ignored.\textsuperscript{218} Similarly, exculpatory provisions in the trust instrument purporting to relieve him from liability for a breach of trust are not construed as excusing him from accountability for any profit he had made by such conduct. An exception to the rule of accountability for profits has, however, at times been allowed where by the terms of the trust the trustee is entitled to retain a profit made in its administration.\textsuperscript{214}

A co-cestui of a trust stands in a fiduciary relation to the other cestuis. If he consents to a breach of trust he can be held accountable to the extent of his profit. If he goes further and actively participates in the breach, he can be held liable beyond this for a breach of trust.\textsuperscript{215}

\textit{Profits Where No Breach of Trust is Involved.} The rule against self-dealing is designed to discourage any transaction wherein a fiduciary has divided loyalties,\textsuperscript{210} and is very strictly applied when a trustee under an express trust is involved.\textsuperscript{217} Thus, a trustee who, in his capacity as partner in a brokerage firm received a commission on the loan of trust funds was held accountable therefor to the trust.\textsuperscript{218} Similarly, a trustee who was also a licensed insurer was accountable for commissions on insurance provided for the trust estate.\textsuperscript{219} Further, a corporate trustee that purchased mortgage bonds below par and resold to the trust at par was surcharged for its profit.\textsuperscript{220} It is not material that the profitable conduct did not constitute a breach of trust, or that the profit was no more than his services were reasonably worth.\textsuperscript{221} Bad faith need not be shown.\textsuperscript{222} The rule does not, of course, apply where the terms of the trust instrument authorize such conduct.\textsuperscript{223}

\textsuperscript{213} Wood v. Honeyman, 178 Ore. 484, 169 P.2d 131 (1946). \textit{See also} p. 369 supra.
\textsuperscript{214} 2 A. Scott, \textit{The Law of Trusts} § 170.9 (3d ed. 1967).
\textsuperscript{216} See Magruder v. Drury, 235 U.S. 106 (1914); City Bank & Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943).
\textsuperscript{218} Magruder v. Drury, 235 U.S. 106 (1914).
\textsuperscript{219} Dick & Reuterman Co. v. Doherty Realty Co., 16 Wis. 2d 342, 114 N.W.2d 475 (1962). \textit{See also} Sexton v. Sword S.S. Line, 118 F.2d 708 (2d Cir. 1941).
\textsuperscript{220} Commonwealth Trust Co. Case, 331 Pa. 569, 1 A.2d 662 (1938).
\textsuperscript{221} Magruder v. Drury, 235 U.S. 106 (1914).
\textsuperscript{222} \textit{In re} Kline, 142 N.J. Eq. 20, 59 A.2d 14 (1948); Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377 (1945).
But it does extend to situations where agents or employees of the trustee are enabled to make a profit.

Qualifications Based on Policy: Use of Deposits Awaiting Investment. The strict rule of accountability, regardless of proof of a breach of trust, admits to qualification when its application may deprive the beneficiaries of advantages which corporate trustees are often in a position to exploit on their behalf. An example is the purchase of stock by a corporate trustee for the trust from an affiliated corporation in which it has an interest, or the retention of shares in its own corporation as part of the trust res. These have been categorized as situations where the putative interest of the trustee is too remote or too feeble an inducement to be a determining motive for his conduct, and thus do not fall within the early rule condemning all self-dealing.

The authorities are split as to whether a trustee who is also a banking institution can deposit trust funds awaiting proper investment with its own banking department. Most jurisdictions carry a statutory provision on the point. In New England Trust Co. v. Triggs, a trustee whose duty it was to distribute the corpus on the death of the life beneficiary had reason to anticipate long delay in the final distribution. On the death of the latter he realized the assets and, under the authority of a statute, deposited them in his corporate banking department. The court held the statute did not cover such a situation and that the trustee could, at the option of the beneficiaries, be made to account either for his profits or for the value of the use of the funds. Thus it would seem that such statutes are construed as applicable only to the situations where funds have to be held available for current expenses, or where provision has to be made for the funds while a suitable investment is being negotiated.

2. Agents

The Principal-Agent Relation. The principal-agent relation is sometimes said not to be a "fiduciary" one for the purposes of the

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226. See p. 376 supra.
228. Phelan v. Middle States Oil Corp., 220 F.2d 595 (2d Cir. 1955).
229. "[The law] does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed ... without undertaking to deal with the question of abstract justice in the particular case." Munson v. Syracuse, 103 N.Y. 58, 74, 8 N.E. 355, 358 (1886). See 25 U. Chi. L. Rev. 382 (1958).
rule that a bill for an accounting lies when an abuse of fiduciary relations is involved. It is, of course, fiduciary in the sense that all doctrines relating to self-dealing apply. And, even where there may be an adequate legal remedy, such as quasi contract or conversion, there is seldom difficulty in establishing a fiduciary element if a bill for an accounting is preferred.

As to the principal, though ordinarily he clearly is not a fiduciary, being the reposant and not the recipient of confidence, where he has a duty to render accounts of the amount due to his agent which duty he breaches, the agent may be entitled to an accounting. The reason is, however, complexity of the accounts and not any fiduciary status. The duty of loyalty exists whether or not the agency is gratuitous.

The mere fact that an agreement is couched in agency terms does not of course bring the "agent" under these self-dealing doctrines if in fact he has the contractual right to buy his "principal’s" goods and the right to re-sell for gain.

Status of Sub-Agents. The courts have at times loosely used the term "sub-agent" as referring to an agent appointed by another agent acting on behalf of the principal. Such a person, however, is really nothing but a fellow-agent. Without a showing of any further facts than the profit-making transaction, there would be no basis whatever on which the appointing agent could be made to account. And, the obligation to account to the principal by such a wrongdoer is the same as that of any other agent.

The sub-agent in the proper sense is one appointed by an agent to perform functions the agent has undertaken to perform for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible. An example would be the salesman employed by a realtor. By the weight of modern authority such a person stands in a fiduciary relation to the principal provided he

232. See p. 355 supra.
234. See De Vito v. Perillo, 36 Misc. 2d 791, 231 N.Y.S.2d 83 (Sup. Ct. 1962), holding that where an agent has received and dealt with property of plaintiff, plaintiff is entitled to an accounting without the need to show anything is due.
235. See Bell v. Trickett, 48 Del. Co. 465 (Pa. 1960) (a bill on a single account brought by a grain broker against his client, alleging complicated transactions over a period of months, with payments and advances made by both sides, states a cause of action for an accounting); Goffe & Clarkener v. Lyons Milling Co., 26 F.2d 801 (W.D. Kan. 1928). See also RESTATEMENT (SECOND) OF AGENCY § 436, comment c at 320 (1958).
knows of the principal's existence. To establish that such a defendant is a fiduciary it should be stated and shown that the agent had power, either express or by implication from widespread custom, to so delegate. Without this, there is the possibility that defendant might be held to be a mere agent or servant of the agent, bearing no fiduciary relation to the plaintiff. It does not seem that the profits, as such, derived by a servant or agent of an agent can be recovered from the employing agent absent a showing of participation or benefit. Further, there would seem to be no basis for extending the doctrine of vicarious liability into this field. Any recovery against the agent himself, for the profits made by a true sub-agent, would have to be in tort or contract.

Brokers. A broker, whether it be of real estate, stocks, merchandise or insurance, is a fiduciary in relation to his client. There is a reservation, however. When it is known to both buyer and seller that the broker is merely acting as a middleman whose sole purpose is to bring the parties together to arrange a deal, he cannot be made to account for compensation received as a secret profit from either party at the suit of the other party, even if the plaintiff did not know that he was to receive this secret commission. Nor does the broker thereby forego his right to compensation from either party. Thus, where a vendor promised a commission to anyone of five hundred brokers who produced a buyer, and one such broker made a bid in the name of a corporation he controlled, which fact was known to the vendor, as a finder or middleman the broker qualified for his commission. His only function was to submit a bid. The reservation, however, can be overcome by a showing that he participated in the

239. Restatement (Second) of Agency § 428 (1958). In Keller v. American Chain Co., 255 N.Y. 94, 174 N.E. 74 (1930), a buyer of goods agreed to act as agent of the seller for the purpose of paying freight charges. He appointed a sub-agent for this purpose. The sub-agent, on discovering that the buyer was obtaining rebates, agreed to give this information to the seller for a consideration. The sub-agent's assignee's suit to recover this consideration failed because the sub-agent could not act adversely to his principal.

240. See Cowan v. Eastern Racing Ass'n, 330 Mass. 135, 111 N.E.2d 752 (1953), wherein the court held that where an agent employs an agent or a servant to assist him on his own account, the person so appointed is a mere agent of the agent.


bargaining process to the slightest degree.\textsuperscript{244} However, when such participation is shown, the cases merely hold the broker to have forfeited his right to compensation from the party who did not know of the conflicting interest. It would be rash to assert that commissions so received can be recovered as secret profits.\textsuperscript{245}

While there is no objection to a broker secretly agreeing with the party not his client to share his commission or some of it (this being a secret loss rather than profit)\textsuperscript{246} a secret agreement to pool commissions between brokers respectively representing the two contracting parties is regarded as self-dealing.\textsuperscript{247} It is entirely possible that such a transaction would afford a basis for recovery of excess commissions so gained.

\textit{Realtors.} Recovery of profits against a realtor is most commonly had where defendant, engaged to secure property for his principal, buys it for himself and sells, sometimes through a dummy, to the principal at a secret profit;\textsuperscript{248} or where, with directions to sell, he secretly sells to himself and re-sells at a profit.\textsuperscript{249} In at least one jurisdiction, the seller’s realtor has been made to account for the profits of a re-sale when, though his purchase was not secret, the broker failed to make full disclosure of his knowledge of prevailing market values.\textsuperscript{250}

It has been possible for one who is not the realtor's client to state a case for recovery of his profits. Such a person has been held to stand in a fiduciary relation to both parties to the transaction.\textsuperscript{251} Thus, where a realtor lied to his principal, the vendor, as to the price which a purchaser would pay and, through a dummy, obtained a substantial portion of the land his client thought he was selling to the purchaser at a cheaper price, a constructive trust was impressed on the land for the benefit of the purchaser. The court reasoned that by not communicating the purchaser’s offer to his client the realtor had defrauded the purchaser.\textsuperscript{252} Thus there may be a fiduciary duty to faithfully communicate offers to the non-client offeror.

\textsuperscript{244} Crane v. Colonial Holding Corp., 57 S.W.2d 316 (Tex. Civ. App. 1933).
\textsuperscript{245} See Annot., 14 A.L.R. 464 (1921).
\textsuperscript{247} Howard v. Murphy, 70 N.J.L. 141, 56 A. 143 (1903). See also \textit{Restatement (Second) of Agency} § 391, comment c at 213 (1958).
\textsuperscript{250} Iriart v. Johnson, 75 N.M. 745, 411 P.2d 226 (1966).
\textsuperscript{251} See United Homes, Inc. v. Moss, 154 So. 2d 351 (Fla. 1963); Swift v. White, 256 Iowa 1013, 129 N.W.2d 748 (1964) (obiter).
\textsuperscript{252} Harper v. Adamet, 142 Conn. 218, 133 A.2d 136 (1957).
California has no difficulty in impressing a constructive trust on the intermediary in this type of fraud even where he was not the agent of the plaintiff, the Code being broad enough to extend this remedy to any victim of fraud.\textsuperscript{253} This may present a difficulty, however. If the realtor can be made to account for his profits to the defrauded purchaser, who was not his client, and he has actually defrauded both parties, there is the question whether the purchaser's successful suit for his profits will preclude any subsequent suit by his client for the same profits. For this reason it is submitted that any action by the defrauded non-client should be in tort for deceit, and accountability for profits — an obligation quite independent and arising from his fiduciary status — confined to his client.

The rule which provides that when the subject matter of an agency is sold or is disposed of, the agency terminates, does not relieve a realtor of liability when he has made a sale which is still in escrow. If he secretly buys the vendor's equity at a discount and takes over his obligation he must account for his profit even though his client, the vendor, receives exactly the price he asked.\textsuperscript{254} A Texas court, however, influenced by the settled doctrine that for purposes of his commission the realtor has "sold" when he has produced a purchaser willing and able to buy, has held that once an earnest money contract has been executed the realtor's agency is ended, and with it the fiduciary status. Hence he is not accountable for profits indirectly resulting from false representations made to his former principal after that date but before title has passed to the vendee.\textsuperscript{255} The better reasoning, however, is that the fiduciary status continues as long as he improperly remains in a position to exploit an opportunity he should exploit for his principal. He owes a duty not to take advantage of a still subsisting confidential relation.\textsuperscript{256}

Stockbrokers. The relationship between a stockbroker and his client, unlike that of banker and depositor, is ordinarily one of principal and agent.\textsuperscript{257} Secret profits resulting from a purchase of stock for his

\textsuperscript{253} See Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959).
\textsuperscript{254} Manzel v. Selka, 179 Cal. App. 2d 612, 4 Cal. Rptr. 78 (1960).
\textsuperscript{255} Jones v. Allen, 294 S.W.2d 259 (Tex. Civ. App. 1956). But see McPherson v. Real Estate Comm'r, 162 Cal. App. 751, 329 P.2d 12 (1958), where a purchaser told the realtor, who originally acted for the seller, that he did not want the property, and did not care what the realtor did with it so long as he got his deposit back, though he was able to complete the transaction. The seller, informed that the realtor intended to resell, made no objection. Defendant was held in error in finding the realtor to have made a secret profit on the resale, this having been made as agent for the original buyer and not for his former client.
\textsuperscript{256} See \textit{Restatement (Second) of Agency} § 396 (1958).
\textsuperscript{257} Levzidger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 396 S.W.2d 570 (Mo. 1965) (holding relationship to be fiduciary in nature); Selcow v. Floersheimer, 20 App. Div. 889, 248 N.Y.S.2d 934 (1964). As to the fiduciary status of investment
client\textsuperscript{258} or from a sale of stock to himself\textsuperscript{259} without a proper disclosure\textsuperscript{260} can be recovered. These doctrines, however, may be considerably modified by local practice or by a known custom of the broker involved.\textsuperscript{261}

An agreement to buy and carry stocks for the client is regarded as more than an agreement to procure and furnish the shares when required, being an engagement actually to purchase and hold such shares. Whether the purchase is on margin or otherwise, most jurisdictions regard the legal title to the stock so purchased as vesting in the client.\textsuperscript{262} But the broker fulfills his duty if he merely keeps sufficient stock of the same kind available.\textsuperscript{263} And if the broker sells his own stock to the client he can retain title thereto until paid.\textsuperscript{264}

As to the accountability of a broker for profits derived from an illegal stock transaction, such as gambling in futures on margin, the authorities are not in harmony.\textsuperscript{265} The best view seems to be suggested by the Restatement of Agency:

(3) An agent who has received the proceeds or profits of an act committed by him on behalf of and at the direction of the principal and for which the principal is criminally responsible is under no duty to deliver them to the principal if the crime is more than a minor offense.\textsuperscript{266}

If this type of activity is proscribed chiefly for the protection of persons such as the plaintiff client, and is not regarded as seriously criminal, to disallow recovery would be to impose too great a penalty for the

\textsuperscript{258} Birch v. Arnold & Sears, Inc., 288 Mass. 125, 172 N.E. 571 (1934); Kinney v. Glenny, 231 App. Div. 311, 247 N.Y.S. 119 (1931). In Norris v. Beyer, 124 N.J. Eq. 284, 1 A.2d 460 (1938), where a broker, in clear abuse of a confidential relationship, invested the proceeds of a sale of his client's securities in speculative non-income producing stocks, charging a commission on such purchases, the court, while calling him a constructive trustee, awarded to the client the present value of the original securities plus the income they would have yielded her to date. The decree, which was affirmed, appears to be in the nature of a surcharge for losses caused rather than an accounting of profits.


\textsuperscript{261} See Hall v. Paine, 224 Mass. 62, 112 N.E. 153 (1916), holding voidable purchases of client's stock by a broker for himself notwithstanding a local custom of which client was ignorant, but holding not voidable such purchases by broker acting as broker for other customers, this being authorized by custom and by a rule of the local exchange. See also Annot., 79 A.L.R. 592 (1932).


\textsuperscript{263} Sackville v. Wimer, 76 Colo. 519, 238 P. 3.152 (1925).

\textsuperscript{264} Id.

\textsuperscript{265} See Lovejoy v. Kaufman, 16 Tex. Civ. App. 377, 41 S.W. 507 (1897) (broker accountable for money actually received from third person); but see Carey v. Myers, 92 Kan. 493, 141 P. 602 (1914) (broker not accountable for profits).

\textsuperscript{266} Restatement (Second) of Agency § 412(3), comment c at 269 (1958). See generally pp. 404-06 infra, as to unconscionability of plaintiff's conduct as defense.
forbidden activity. However, against this it could be urged that in no case would the broker be able to recover losses.

**Attorneys.** The relation of attorney and client is a highly fiduciary one. Transactions between them during the existence of the relationship are jealously scrutinized by the courts and are, in most jurisdictions, presumptively fraudulent. This presumption has been harnessed to deprive an attorney of his share of profits derived from a joint venture entered into with his client. To rebut such a presumption it is helpful, though not essential, to show that the client took independent legal advice. It follows that where the attorney has acquired an interest antagonistic to those of his client the client can compel an accounting of profits.

Attorneys for trustees of an express trust owe the same duties to the beneficiary thereof as do the trustees. If they acquire any part of the trust estate in breach of their fiduciary duty they are accountable for profits.

Perhaps the most frequent application of the doctrine of accountability in this area occurs where the attorney buys in an interest adverse to his client in property which is the subject of litigation at a forced sale. Where the acquisition is based on information obtained through

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270. See Gold v. Greenwald, 247 Cal. App. 2d 296, 55 Cal. Rptr. 660 (1967), where the attorney was a business woman of considerable acumen and experience in the type of transaction involved.
271. Curtis v. Fabianich, 200 A.2d 382 (D.C. Ct. App. 1964) (the presumption of invalidity to extend to contracts for compensation executed during the attorney-client relationship when the position of trust is well established and the litigation involved is reaching its culmination); Trafelet v. M & C Motors, Inc., 15 Ill. App. 2d 534, 146 N.E.2d 711 (1957).
272. Odyke v. Kent Liquor Mart, Inc., 40 Del. Ch. 316, 181 A.2d 579 (1962). In Rothman v. Wilson, 121 F.2d 1000 (9th Cir. 1941), the doctrine was applied to render accountable for profits an attorney who, due to lack of confidence in his legal ability, did no legal work for plaintiff but received a share of the fees of plaintiff's attorney, with whom he had an office-sharing arrangement, as a reward for having been instrumental in bringing the opportunity, the subject of the relationship to the notice of the client. An attorney can recover a loan made to his client but cannot profit therefrom. Davanne Realty Co. v. Brunne, 67 N.J. Super. 500, 171 A.2d 97 (1961).
his retainer, 274 there is a disability which is often held to continue after termination of his employment. The attorney has at times been held for rents and profits accruing to him through the purchase of such an interest. 275 However in Kelly v. Weir 276 the court declined to extend the doctrine to an attorney who had, after termination of his employment, acquired a fractional interest in land sold to satisfy a judgment the government had obtained against his former client. He persuaded the court that he had made great efforts to help the client save his land but that the client had refused to be helped.

3. Servants

Acquisitions and Earnings from Other Sources During the Employment Term. The servant, in the sense of one who merely renders services, cannot be classified as a true fiduciary. 277 Though he can be held accountable for gains derived from sources other than his employment during the employment term the early holdings, where-under he was almost invariably so accountable, 278 are presently of historical interest only, being a relic of feudalism. The general test of a master’s right to recover in modern times is controlled by the answer to the question of whether the acquisition was made in breach of his employment duty. 279 To penalize “moonlighting” today would smack of involuntary servitude.

A presentation of the fact situations which will yield an affirmative answer to as many of the following questions as possible — suggested by way of a checklist rather than as rules of law — should go far to present a cause of action for recovery of the servant’s profits by the master:

274. See Tuab Mineral Corp. v. Anderson, 3 Ariz. App. 512, 415 P.2d 910 (1966), holding proper a purchase at judicial sale of property in which former client was interested, provided no information acquired in professional capacity is used to prejudice of client.

275. Some courts do not apply the doctrine where the attorney has been open and above board in informing the client. See Annot., 20 A.L.R.2d 1280, 1309 (1951).


277. Amerada Petroleum Corp. v. Burling, 231 F.2d 862 (10th Cir. 1956), holding employee of mining corporation for specific and limited purposes not to be a constructive trustee of interests acquired. But see In re Burris, 263 N.C. 793, 140 S.E.2d 408 (1965) (where a servant deliberately acquires an interest adverse to his employer, a discharge for disloyalty is justified); E.W. Bruno Co. v. Friedberg, 21 App. Div. 336, 250 N.Y.S.2d 187 (1964) (a manager of an importing business guilty of disloyalty in not informing his employer when knowledge reaches him that a foreign exporter with whom the employer is doing business is planning independent methods of distribution of its exports within the country); Rasbury v. Bainum, 15 Utah 2d 62, 387 P.2d 239 (1963).

278. See Annot., 13 A.L.R. 905 (1921); Annot., 71 A.L.R. 933 (1931).

279. See Essex Trust Co. v. Enwright, 214 Mass. 507, 102 N.E. 441 (1913), holding that where a newspaper reporter, having learned in his employment of the peculiar value to his employer, by reason of the way the printing press was built in, of a lease, acquired the renewal thereof for himself he held it as trustee for the employer.
Were any confidential disclosures made to defendant as a servant?  
Did defendant contract to devote all his time and skill to plaintiff?280

Were the acquisitions derived from competition with plaintiff?281

Was the transaction in performance of a duty assigned to him by plaintiff?282

Was the transaction one of a type habitually performed by him for plaintiff?288

Was the transaction of a kind which constituted part of plaintiff's business?  
Was the transaction an opportunity plaintiff could have exploited for himself?284

Did defendant use plaintiff's facilities for the purpose of the acquisition?285

Did plaintiff pay defendant's expenses while on the enterprise?288

Was the operation during employment hours?287

Was defendant enabled to make the acquisition by reason of his servant status?288

Did he use plaintiff's funds to acquire it?288

Did he refrain from making a disclosure?289

Preparations During Employment for Competition on Termination. Absent a contract stipulation, an employee may, provided he

280. See Clarke v. Kelsey, 41 Neb. 766, 60 N.W. 138 (1894); Elco Shoe Mfrs. v. Sisk, 260 N.Y. 100, 183 N.E. 191 (1932). But an obligation to devote one's entire time to one's employment is not today construed to embrace time normally devoted to rest and recreation. See Durwood v. Dubinsky, 361 S.W.2d 779 (Mo. 1963).


282. See Whitten v. Wright, 206 Minn. 423, 289 N.W. 509 (1929).


284. Id.


286. See Whitten v. Wright, 206 Minn. 423, 289 N.W. 509 (1929).

287. See Clarke v. Kelsey, 41 Neb. 766, 60 N.W. 138 (1894); Horn Pond Ice Co. v. Pearson, 267 Mass. 256, 166 N.E. 640 (1929), affirming an interlocutory decree in a suit to impress a constructive trust on a lease secured by employees who had been approached by lessor under the earlier lease to plaintiff employer who had become acquainted with them as a result of their employment.

288. See Reading v. Attorney-General, [1951] A.C. 507 (use of army uniform to conceal smuggling activities). In Chalupiak v. Stahlman, 368 Pa. 83, 81 A.2d 577 (1951), defendant, employed to prepare a deed for plaintiff, discovered that plaintiff did not have title and so informed him. Plaintiff ignored this. Defendant then acquired the land at bargain rates from the true owner. He was held accountable on being reimbursed for the price he had paid. Perhaps the fact that he was a local justice of the peace and performed some draftsmanship services for the community may have influenced the holding that he was a "fiduciary."


does not use confidential information or trade secrets of his employer, freely compete with him after termination of his employment.\(^{291}\) There is a trend, however, which seems to favor extension of the fiduciary concept to these situations.\(^{292}\) Whether or not this is a wholesome development,\(^{293}\) it is clear that a servant who, during his employment, solicits for himself business opportunities which his employment requires that he solicit for his employer, should be accountable for profits so gained after the employment is terminated. The rule is not altered by the fact that the employer would not have been able to exploit such an opportunity before the effective date of the employee's termination of the service.\(^{294}\) Thus one who uses his employer's funds while still in his employ (without disclosing his plans to compete) to promote customer goodwill, some of which is to be channeled into the competing enterprise when he quits, and who solicits other employees to enter the competing enterprise, is guilty of disloyalty.\(^{295}\)

Employees, on termination, often take "terminal leave." This is really a lump-sum payment for accumulated annual leave on separation from service and while on such leave, it is not improper to exploit skills gained during employment. Further an employee can, provided he does not compromise his employer's interest, make preparations for activities to begin at the beginning of his terminal leave even while actively employed.\(^{296}\)

**Right to Inventions as Between Employer and Employee.** When one is employed to exercise his general inventive talents, or to invent a particular item, he must, if he succeeds during the term of his employment, turn over the invention to his employer.\(^{297}\) This is so because in inventing he is simply performing his contract.\(^{298}\) He has, in effect, sold, in advance, the fruits of his inventive powers.\(^{299}\) Where, on the other hand, a servant not specifically employed to invent, uses his

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293. See Marine Forwarding & Shipping Co. v. Barone, 154 So. 2d 528 (La. 1963).
296. United States v. Bowen, 290 F.2d 40 (5th Cir. 1961). See also Safeway Stores v. Wilcox, 220 F.2d 661 (10th Cir. 1955), holding precluded from competition with his ex-employer one who, though no longer in active employment, remained on the payroll for the purpose of qualifying for separation benefits and pension rights.
master's facilities during employment hours to develop an invention for which he takes out a patent, the master is entitled to a non-exclusive right to use the invention called a shopright.\(^{300}\) And, the fact that most of the experimental work was done out of employment hours does not, when the master's facilities are used, necessarily rule out shoprights.\(^{301}\) To establish a right to shoprights, the important features to present are: the extent to which the master's facilities were used (with particular emphasis on access to confidential materials); the extent to which co-operation of any fellow employee was made use of; the amount of employment time devoted to the perfection of the invention;\(^{302}\) facts from which assent can be implied that the master was to have the use of it;\(^{303}\) the extent to which employment itself furnished the opportunity for the conception of the inventive idea,\(^{304}\) and the extent to which the original idea was that of the master, the defendant merely applying his skills towards its perfection.\(^{305}\) Some courts do, however, make an exception to the rule permitting shoprights where the employee has applied for a patent before using his employer's facilities.\(^{306}\)

4. Executors, Administrators, Personal Representatives

Relationship to Decedent's Successors and Creditors. A person administering the assets of a decedent, especially perhaps where the beneficiary thereof is an infant,\(^{307}\) is an officer of the court.\(^{308}\) He stands in a fiduciary relation to those entitled to succeed to the decedent\(^{309}\) and to the decedent's creditors.\(^{310}\)

303. See Le-Fiell v. United States, 162 Ct. Cl. 865 (1963) (where the inventor is more than a mere employee, being in effect the alter ego of the employer, the latter may be found entitled to the ownership of the invention); De Jur-Amresco Corp. v. Fogle, 119 F. Supp. 262 (D.N.J. 1954); Barlow & Seelig Mfg. Co. v. Patch, 232 Wis. 220, 286 N.W. 577 (1939).
305. See Standard Brands, Inc. v. United States Partition & Packaging Corp., 199 F. Supp. 161 (E.D. Wis. 1961) (mere withholding of shoprights insufficient for decree that defendant assign patent); See also International Carrier-Call & Television Corp. v. Radio Corp. of America, 142 F.2d 493 (2d Cir. 1944).
310. In Marshall v. Carson, 38 N.J. Eq. 250, 48 Am. R. 319 (1884), executors who had purchased for themselves land of the estate at a public sale (having breached their duty to sell the land to pay debts) were held, as to land which had been re-sold to bona fide purchasers, accountable for profits at the suit of unpaid creditors as well as beneficiaries.
The most frequent areas of disloyalty resulting in the administrator's liability to account for his profits are: use of estate funds for private purposes; purchase for self of claims against the estate; purchase of estate assets for self (some allow exception where only personality is involved or where the officer is an heir and the sale is for the purpose of making a distribution of assets) and use of decedent's real estate. Under the latter, a few jurisdictions hold him only for the rental value; and exceptions have been allowed where the occupation was necessary for the protection of, or accrued to, the benefit of the estate, as where the heirs, devisees or creditors have waived their rights to hold him for such occupation.

Continuation of a decedent's business without legal justification will carry with it accountability for profits as well as loss of compensation. But the proper purchase of the business at a valuation by a corporation formed by the fiduciary does not seem open to criticism.

5. Parents and Guardians

Parents. A parent has no right, as natural guardian of his child, to deal with the child's separate property as his own and such action can lead to a recovery of his profits as a constructive trustee.

In a situation where minor children have contributed to the purchase of a home, title being taken by the parent, it seems that whether or not the parent can be held as a resulting trustee should depend on the extent to which the amount of the contribution made by each child can be established. However, the modern tendency, in situations of this nature, though not involving a parent as defendant, is to hold the interest of all contributors to be equal if a showing is made of some substantial contribution by each.

311. See In re Doroski's Estate, 29 Misc. 2d 639, 217 N.Y.S.2d 636 (Sup. Ct. 1961) (accountability for sum used plus either interest at highest legal rate or profits derived from use thereof at plaintiffs' election).


319. See Easley v. Easley, 117 Okla. 227, 245 P. 831 (1926), holding that where a parent received a sum of money to buy land for the child and took title in his own name he held the land as a constructive trustee for the child.

320. See 222 S.W.2d 541 (Mo. 1949).

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There is no reason why the general rule that the value of services rendered under a mistake as to status can be recovered in quasi contract\textsuperscript{322} would not extend to enable recovery of the value of services mistakenly rendered to a person believed to be the plaintiff's parent. The analogy to the situation of a putative marriage is patent.

Guardians. The ancient variances in the obligation of guardians, depending on whether they were guardians in chivalry, in socage, testamentary or appointed by chancery belong to the past. Modern statutory law typically sets out a uniform pattern of responsibility for all guardians.\textsuperscript{323} A guardian's fiduciary status\textsuperscript{324} and consequent accountability for profits\textsuperscript{325} is well settled. It is worth noting, however, that since an inflexible application of the doctrine forbidding purchase by a fiduciary of the property of his beneficiary can at times operate to the prejudice of a ward (as for example where the guardian, as a friend or relative is willing to pay an inflated price for some asset) local legislation frequently softens the doctrine insofar as concerns a guardian.\textsuperscript{326}

One who takes possession of the assets of an infant without proper authority is accountable for his profits as a guardian \textit{de son tort}.\textsuperscript{327} This doctrine is commonly invoked to estop a defendant who has so acted from relying on the invalidity of his appointment as a defense to a suit for an accounting.\textsuperscript{328} A parent can, of course, be made accountable on this basis if he intermeddles with the child's property without authority.\textsuperscript{329} The usual procedure to obtain an accounting from such a defendant is in equity, and not in the probate courts.\textsuperscript{330}

6. Partners and Joint Adventurers

The Relation, and How it Can Be Established. A joint adventure is a combination for a specific enterprise in which profit is jointly sought.\textsuperscript{331} The concept is of comparatively recent development, and

\textsuperscript{322} See F. Woodward, Quasi Contracts § 184 (1913).
\textsuperscript{323} See Uniform Veterans' Guardianship Act, 38 U.S.C. (1964), as to the impact of state and federal legislation on guardians.
\textsuperscript{324} See In re Howard's Estate, 135 Cal. App. 2d 535, 284 P.2d 966 (1955); In re Phillips' Guardianship, 144 Neb. 183, 13 N.W.2d 99 (1944); Meloy v. Nashville Trust Co., 177 Tenn. 340, 149 S.W.2d 73 (1941).
\textsuperscript{325} See Finn v. Dunbar, 71 Miss. 576, 13 So. 30 (1893); In re Cliff's Estate, 135 Misc. 4, 237 N.Y.S. 633 (Sup. Ct. 1929).
\textsuperscript{326} See Model Probate Code § 230(b) (1947); In re Howard's Estate, 133 Cal. App. 2d 535, 284 P.2d 966 (1955).
\textsuperscript{327} See Annot., 25 A.L.R.2d 752 (1952).
\textsuperscript{328} See Harbin v. Bell, 54 Ala. 389 (1875).
\textsuperscript{329} See Pennington v. L'Hommeliieu, 7 N.J. Eq. 343 (1848).
\textsuperscript{330} See Miske v. Habay, 1 N.J. 368, 63 A.2d 883 (1949).
\textsuperscript{331} Swann v. Ashton, 330 F.2d 995 (10th Cir. 1964); Blackmer v. McDermott, 176 F.2d 498 (10th Cir. 1949); Kuzel v. State Farm Mutual Auto. Ins. Co., 20 Wis. 2d 558, 118 N.W.2d 470 (1963).
the decisions are not yet sufficiently crystallized to admit of an all-inclusive definition.\(^{332}\) For the purposes of recovery by one adventurer of profits made by the other, no practical purpose would be served by separate discussion of joint adventurers and partnership. The same doctrines control.\(^{333}\) The fiduciary nature of the relation is well settled.\(^{334}\)

To establish the existence of a partnership or joint adventure relation for the purpose of suits between the parties themselves it is essential to prove an agreement to enter this relation.\(^{335}\) This may be shown by implication from the circumstances\(^{336}\) as a reasonable deduction from the acts or declarations of the parties.\(^{337}\) It is also necessary to show that both parties made or undertook to make some contribution, either of services,\(^{338}\) property or funds\(^{339}\) or any combination thereof\(^{340}\) with the object of making a profit.\(^{341}\) It is not necessary that the contributions be equal in value.\(^{342}\) And, a showing of a common proprietary interest in these contributions\(^{343}\) helps to establish the relation. Some courts also require a showing of an agreement, express or implied, to share losses.\(^{344}\) And, some require a showing of a mutual right of control over the subject matter.\(^{345}\)

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332. Davis v. Webster, 136 Ind. App. 286, 198 N.E.2d 883 (1964), holding that where the nature of the undertaking is such that no losses other than loss of time and labor are likely, an agreement to share profits may suffice to qualify the relation as a joint venture. See generally Taubman, What Constitutes a Joint Venture, 41 CORNELL L.Q. 640 (1956).


338. See Heald v. Erganian, 377 S.W.2d 431 (Mo. 1964), holding an agreement that property should be purchased with the funds of one, who was to take title, on its sale the profits to be divisible between grantee and another in return for his effort in negotiating transactions, to be in the nature of a joint venture. But see Escoe v. Johnson, 110 Ga. App. 293, 138 S.E.2d 330 (1964). See also De Witte v. Calhoun, 221 Cal. App. 2d 473, 34 Cal. Rptr. 491 (1963), holding that the presumption that joint venturers will share losses as they agreed to share profits inapplicable where one contributes services only.


341. Woodson v. Gilmer, 205 Va. 487, 137 S.E.2d 891 (1964). Though a mere agreement to share profits is not sufficient, if a purchase is made by persons who are to resell and divide the profits, a joint venture is created. R.C. Gruck & Co. v. Tankel, 24 Misc. 2d 841, 199 N.Y.S.2d 12 (Sup. Ct. 1960). See also People v. Grier, 53 Cal. App. 2d 841, 128 P.2d 207 (1942).


Evidence which would be helpful to prove the existence of the relation, the variety of which admits of limitless possibilities, would include a showing of a contractual stipulation, oral or otherwise, relating to profit-sharing; a showing of past transactions in respect of which defendant has accounted to plaintiff; a showing of negotiations prior to the coming into existence of the relation indicative of the parties' intent; and a showing that plaintiff never received any emoluments of any kind for his contribution. It is not necessary to establish any specific agreement as to how the profits were to be divided. And although what the parties call themselves is not conclusive, it is of course highly relevant to prove or disprove their intent to be associated as partners or joint adventurers.

Even if the relation cannot be established, the fact situation may well show that defendant must account for his profits on the basis of a fiduciary relation having arisen. That is, the status of a fiduciary or quasi-fiduciary might have arisen even where the relationship has not been voluntarily assumed by an agreement, express or implied. Unless the parties were at arm's length, one who acquires property by reason of an understanding with another as to how he is to use it is readily classifiable as an agent or trustee.

Profits Resulting from Disloyalty. The duty of good faith owed by partners and joint adventurers to one another is not restricted to persons who have actually entered into the relationship. It extends to all stages of their association. Though some have said that with regard to the preliminary negotiations the rule of caveat emptor applies and that each may thus secure whatever share in the enterprise


347. Receipt of emoluments is not, however, conclusive to disprove the relation. See Williams v. Herring, 183 Iowa 127, 165 N.W. 342 (1917).


350. See Whittle v. Ellis, 122 So. 2d 237 (Fla. 1960) (attorneys sharing offices and secretarial expenses, one doing some legal work for the other for which some right to compensation undisputed). See generally Annot., 81 A.L.R.2d 1420 (1962).

351. See Porter v. Cooke, 127 F.2d 853 (5th Cir. 1942). But see Jacobs v. Escoett, 265 App. Div. 111, 37 N.Y.S.2d 789 (1942), holding not to support an accounting a arrangement whereby one would advance capital plus living expenses of the other, who would receive half net profit, there being no agreement to share losses.

he can,\textsuperscript{353} the sounder and majority position is that frank disclosure and honest dealing is required even at this stage.\textsuperscript{354} This is recognized in the Uniform Partnership Act.\textsuperscript{355}

Proof of bad faith and consequent recovery of profits resulting therefrom can, by way of illustration, be made by showing that the defendant misrepresented the cost of property he was bringing into the enterprise;\textsuperscript{356} or that he sold his interests therein to his colleagues,\textsuperscript{357} or purchased their interests in the enterprise\textsuperscript{358} without making a full and fair disclosure; or that he derived gains from the secret use of funds or facilities of the enterprise;\textsuperscript{359} or secretly purchased for private gain assets he should have acquired for the enterprise\textsuperscript{360} such as a right to renew the lease of its premises;\textsuperscript{361} or that he received secret commissions from a third party dealing with the enterprise.\textsuperscript{362}

Whether the act of engaging in other activities for gain carries with it accountability for profits usually depends on the extent to which these activities are shown to be in competition with the business of the enterprise.\textsuperscript{363} Proof that the activity complained of was of a nature entirely unrelated to the business will usually negative liability. But this may not be so on a showing that defendant has expressly or impliedly agreed to devote all of his time to the business of the enterprise.\textsuperscript{364}

A close question is often presented when defendant, with his own funds, purchases an asset which would be suitable for the purposes of the enterprise. Here the test is whether he took advantage of his fiduciary position in any way. A showing of the following would be probative of accountability for gains: that the acquisition was within the contemplated scope of the enterprise; that he refrained from making a full disclosure to his colleagues; or that the acquisition would have been of value to the enterprise.\textsuperscript{365}

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358. Smith v. Roberts, 182 Ill. App. 227 (1913); see also Osburn v. Haines Enterprises, Inc., 246 Ore. 614, 425 P.2d 537 (1967), where disclosure was held a defense.
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After the enterprise has ended, the duty of loyalty is of course no longer present.\textsuperscript{366} Any ex-member is free to make full use of information and skills obtained while engaged in the venture provided no fraud or infringement on rights which remain preserved can be shown. But while the enterprise is in process of liquidation obligations of good faith continue.\textsuperscript{367}

Ordinarily, a partner or joint adventurer required to account for gains derived from disloyalty has the right to share in such profit in the proportion which his interest in the enterprise bears to the total assets.\textsuperscript{368}

\textit{Accounting of Profits Prior to Dissolution.} It is now clearly settled that a suit to recover profits resulting from a partner's or joint adventurer's disloyalty can be brought without seeking a dissolution.\textsuperscript{369} It is a clear exception to the rule\textsuperscript{370} that no action lies by one partner against another without a dissolution of the partnership. Where the wrong is not only a breach of contract, but a tort, and particularly where the tort is of such a nature that it terminates the relationship, wrongfully destroys it and results in the conversion by the defendant of the entire assets to his use, a suit will also lie in tort if the person wronged so elects.\textsuperscript{371}

\textit{Continuation of Business after Termination But Before Liquidation.} The general rule is that when the purpose of the partnership or joint adventure is fulfilled, or the associates have agreed to put an end to their relationship, or the relation is factually terminated for another reason, such as death, the enterprise must be liquidated and the assets distributed. Anyone who does continue the enterprise is accountable for the pro rata share of profits so gained which would have accrued to the others had the relation been continued.\textsuperscript{372} A question which does not seem to have been uniformly settled is whether the

\textsuperscript{368} See Annot., 118 A.L.R. 640 (1939).
\textsuperscript{372} For a discussion of rights in profits earned by partnership or joint adventure after death or dissolution see Annot., 118 A.L.R. 12 (1932).
division of profits so acquired must be on the basis of the relative contribution of the parties to the venture — whether it must be based on their original agreement. For the first position, it could be argued that this duty to account is one that the law imposes, and is thus no longer a consensual one. Therefore it would be unjust to base recovery on an agreement which is dead, or indeed on any other basis than the extent to which defendant was enriched by the use of plaintiff's property. If plaintiff had contributed nothing but skills and services which he ceased to contribute after the termination, would it be fair to permit him to continue to participate? For the alternative position, it could be urged that it is the status created by the original agreement which is being continued, and to posit the distribution of these profits on any other basis would be to make a new agreement for the parties; and further that it would be difficult if not impossible to evaluate contributions which consist only of labor when applying the "relative contribution" basis.\(^{373}\)

Many courts allow the plaintiff to elect between recovering his share of the profits or taking the value of his share in the joint enterprise with interest.\(^{374}\) Of course any such election must be as to the whole. He could not claim surrender of some assets and a share of the profits as to other post-termination activities.\(^{375}\)

The rule allowing profits does not apply where the parties have expressly stipulated that a withdrawing partner is not to participate in profits after his withdrawal.\(^{376}\) It may be helpful as a guide to the presentation of a suit of this nature to indicate some of the types of fact situations where a recovery may well be denied as against the equities. These would probably include a situation where defendant had been receiving compensation under the agreement, and the profits he has made do not exceed the amount he would have so received had the agreement still been alive;\(^{377}\) where the profits can be shown to have been derived from some source other than the plaintiff's contribution;\(^{378}\) or where the plaintiff's contribution is so slight as to be negligible;\(^{379}\) or where the profit can be shown to have derived from the use of assets brought into the enterprise after the actual termination.


\(^{375}\) See Schneider v. Schneider, 347 Mo. 102, 146 S.W.2d 584 (1941).


date. Most courts do not extend the rule to the situation where the plaintiff contributed skills and services only.380

_Election to Share in Profits under the Uniform Partnership Act._ The Uniform Partnership Act381 gives a partner, or his representative if he is dead, an election where a business is continued after the death or retirement of one of the partners. The retiring partner, or the representative of the decedent partner, can have the value of his interest at the day of dissolution ascertained and receive as an ordinary creditor such value, with interest; or, if he so elects, he may recover the profits attributable to the use of his right in the property of the dissolved partnership.

When the representative of the decedent and the surviving partner are the same person, he can, in his representative capacity, elect the first alternative. If he does so, and pays to the estate of the decedent the value of decedent’s interest, those entitled to succeed to the estate of the decedent partner have no claim for the profits derived from the continuance of the business.382

It is submitted that the same election is available when the enterprise does not qualify as a partnership but is merely a joint venture.383 However, the retiring adventurer, or the representative of the decedent adventurer should take care to make his election known promptly. Otherwise he may well be faced with a defense of laches, estoppel or acquiescence when he decides to seek the profits of the enterprise.

7. _Corporate Officers_

_**Relationship to Stockholders.**_ Corporate officers of course stand in a fiduciary relation to the corporation which they serve.384 Dominant or controlling shareholders are similarly regarded as occupying a fiduciary status, although some say to the corporation itself385 and some say to the minority shareholders.386 Thus a sale of control in breach of a duty to the minority can carry with it accountability for profits.387

381. _Uniform Partnership Act_ § 42.
387. See p. 399 supra.
A derivative suit in equity is the usual way in which profits derived from an abuse of this fiduciary status are recovered for the corporation itself and not for the shareholders. Initially, the complainant must show that he has exhausted his remedies within the corporate structure. This is done by averring and proving that he has made demand on the corporation to bring suit to remedy the wrong that has been done to it and the demand has been declined, or by establishing facts which show that such demand would be a futility. An example of the latter would be a showing that a controlling majority of directors is involved in the wrongdoing. The corporation, which is actually the real party plaintiff in interest, must be joined as a party defendant. And, a shareholder has no individual right of action for a wrong done to the corporation unless he can show separate damage to himself as an individual. Many courts require the complainant also to show that he has unsuccessfully sought action on the part of shareholders unless he can show why such an attempt would be a futility.

In this area, there are a number of problems to which the courts have not given uniform answers. To remind the practitioner to check the case and statute law controlling in the jurisdiction in which he proposes to file his complaint, some of these are listed:

Must the complainant show that he owned stock at the time of the commission of the wrong?

Does this requirement exist when a continuing wrong is involved?

Is it material that he no longer owns any stock?

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392. United Copper Sec. Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917).
398. See Gresov v. Shattuck Denn Min. Corp., 40 Misc. 2d 569, 243 N.Y.S.2d 760 (Sup. Ct. 1963), holding complainant who had disposed of his stock had no standing to sue even though he had before trial reacquired some shares.
Is it material that he acquired stock purely for the purpose of instituting suit? 399

Is equitable ownership in the stock sufficient? 400

If he acquired the stock as transferee of one who participated in, acquiesced in or sought to get corporate ratification of the conduct complained of, does this taint his stock so as to preclude him from seeking relief? 401

How substantial must his holding be? 402

Is a holding of stock in a parent or holding corporation sufficient? 403

Should guilty or acquiescing stockholders share in the recovery, as they of course do if the profits are awarded to the corporation, or can the court in a proper case ensure that they do not share without jeopardizing the rights of corporate creditors to this fund? 404

The fiduciary principle is not applied to corporate officers with all the strictness applied to trustees. Transactions between corporate officers and the corporation are not impeachable as self-dealing, absent a showing of unfairness or non-disclosure. Today, for example, transactions between corporations and their subsidiaries with interlocking directorates are very usual. Such directors are not held accountable for profits of other contracting entities if they act in good faith and with reasonable care in the making of policy decisions affecting their corporation. 405 The rule does not, of course, protect them from accountability for an unreasonable exploitation of the assets of one such corporation to benefit another, however. 406 A director may deal with his corporation if at the same time the corporation acts through other directors or officers in the transaction. In such event the transaction

402. The fact that complainant only holds a trifling share in the corporation may well indicate that he is bringing the suit for improper motives. Hence, legislation requiring him to put up security for costs if his holding is below a certain value in case the suit is unsuccessful is not uncommon. See Kane v. Central Am. Min. & Oil. Inc., 235 F. Supp. 559 (S.D.N.Y. 1964); Citizens Nat'l Bank v. Peters, 175 So. 2d 54 (Fla. 1965).
403. See Comment, Suits by a Shareholder in a Parent Corporation to Redress Injuries to the Subsidiary, 64 HARV. L. REV. 1313, 1314 (1951).
can be vitiates on proof of unfairness causing injury or proof of bad faith on either side.

Examples of the most common situations where a cause of action can be presented for recovery of profits made by a corporate officer are the following:

Sale of own property to corporation: Show that there was a duty at the time of acquisition by the officer to acquire it for the corporation; or that the corporation was not represented by other officers in the transaction in which it acquired the property.

Contract made with corporation for private gain: Show that the composition of the board representing the other bargaining "party" was not properly constituted: e.g., that defendant voted for the contract as one of this board; if possible, that his vote was not a redundant one, that others voting were not disinterested; that he concealed material facts, including his interest; that the transaction was disadvantageous to the corporate interests; or that the contract was never ratified by the shareholders.

Engaging in similar or competing enterprise: Show that there was a use of corporate personnel, facilities or funds or secrets, enticements of customers or personnel of corporation, receipt of secret commissions on transactions with the corporation.

Use of corporate office or opportunity for private profit: Show that it was a corporate opportunity by showing that the corporation had been seeking it, that its funds were involved in its acquisition or that its personnel were used in acquiring it; if it could have been accepted, if it could not have been ex-
exploited for lack of funds, that defendant made no effort to obtain necessary financing;\(^\text{424}\) that defendant acquired the opportunity while about the corporate business or was selected to exploit the opportunity as its agent.\(^\text{425}\)

Insofar as not controlled by statute, the old rule was that a corporate officer was not accountable to a shareholder for profits made by a purchase, and re-sale at a gain, of stock of the corporation without a showing of fraud or at any rate misrepresentation.\(^\text{426}\) Today, however, the trend is otherwise. A fact picture presenting many, if not all, of the following features stands an excellent chance of imposing liability: non-disclosure to the selling shareholder of facts relating to the value of the stock;\(^\text{427}\) access to inside information available to defendant;\(^\text{428}\) instigation by him of the transaction;\(^\text{429}\) failure to fully acquaint plaintiff shareholder with the true financial picture where he lacked the skills of the ordinary market manipulator;\(^\text{430}\) use of a straw man or dummy to conceal identity of the buying corporate officer.\(^\text{431}\)

The picture would of course be incomplete without mention of the federal legislation\(^\text{432}\) which permits recovery by a corporation or by any security owner on its behalf, any profit made by a corporate officer or by a more than ten percent beneficial owner on "short-swing" transactions. Here, there need be no showing that defendant made use of inside information.\(^\text{433}\) Although the volume of litigation — and no doubt the amount of wealth that has been diverted into corporate


\(^{425}\) For a discussion of the accountability of corporate directors or officers for profits from activities beyond the corporate powers, but involving the use of information and opportunities available to them by reason of their position in the corporation, see Annot., 153 A.L.R. 665 (1944). There must be shown a tie-in between the property in dispute and the business of the corporation before an opportunity can be held to have been seized. Equity Corp. v. Milton, 42 Del. Ch. 425, 213 A.2d 439 (1965).


\(^{427}\) Compare Reed v. Riddle Airlines, 266 F.2d 314 (5th Cir. 1959), with Strong v. Repide, 213 U.S. 419 (1908).

\(^{428}\) See Fox v. Cosgriff, 66 Idaho 371, 159 P.2d 224 (1945).


\(^{433}\) See Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir. 1965).
coffers — is tremendous,\textsuperscript{434} it is of too specialized a nature to be proper for discussion in a general survey of profit-recovery doctrines.

\textit{Profits Derived by Controlling Stockholders from Sale of Control.} Control stock, for various reasons, often sells for a better price than the ordinary market price. Although holders thereof, whether corporate officers or not, are ordinarily entitled to sell for whatever price they can realize, they can be made to account for profits when the sale can be shown to have been in abuse of a fiduciary relation. The theory underlying this fiduciary status of the controlling stockholder is sometimes said to be that control itself is a corporate asset in which all stockholders are entitled to participate.\textsuperscript{435}

Examples of fact situations probative of this abuse of fiduciary relation are various. Among them would be a showing that the defendant sold at a premium to a purchaser he knew, or may fairly be presumed to have had good reason to know, would “loot” the corporation;\textsuperscript{436} and the fact that an officer resigns from office within a very short time after the transaction is indicative that the price he received included a reward for his surrender of control. A showing that he did not disclose, or misrepresented to plaintiff minority shareholders the price he was receiving is also probative of the abuse.\textsuperscript{437} Also probative would be a showing that he persuaded plaintiff to let him handle the sale of plaintiff’s stock, misrepresenting that he would sell it for the same price that he was to receive for his own control stock.\textsuperscript{438}

It has been suggested that the judicial reluctance to impose a general rule of liability in these cases is properly overcome only where the circumstances of the transaction point to a reasonable likelihood of economic detriment and damages have actually been sustained.\textsuperscript{439}

\textit{Promoter’s Profits.} The promoter of a corporation stands in a fiduciary relation to the corporation,\textsuperscript{440} to its stockholders\textsuperscript{441} and to those persons who it is anticipated will buy stock in the future.\textsuperscript{442}

\textsuperscript{434} For the case law up to the year 1953 regarding \textit{Securities Exchange Act} provisions concerning liability of directors, officers, and principal stockholders for profits on short-swing speculation in corporations’ stock, see Annot., \textit{40 A.L.R.2d} 1346 (1955).

\textsuperscript{435} \textit{See} Dunnett v. Arn, 71 F.2d 912 (10th Cir. 1934).

\textsuperscript{436} \textit{See} Levy v. Feinberg, 29 N.Y.S.2d 550 (Sup. Ct. 1941), rev’d, 38 N.Y.S.2d 517 (1942).

\textsuperscript{437} Sautter v. Fulmer, 258 N.Y. 107, 179 N.E. 310 (1932).

\textsuperscript{438} Stanton v. Hample, 272 F. 424 (9th Cir. 1921).


\textsuperscript{440} Davis v. Las Ovas Co., 227 U.S. 80 (1913); Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10 (1908); Brewster v. Hatch, 122 N.Y. 349, 25 N.E. 505 (1890); Wilson v. McClenny, 262 N.C. 121, 136 S.E.2d 569 (1964).

\textsuperscript{441} Hayward v. Leeson, 170 Mass. 310, 57 N.E. 655 (1900).

\textsuperscript{442} 26.
As a theoretical abstraction, however, it is true that the promoter can emerge with a bulging wallet and no liability to account for profits by floating his corporation with an independent board of directors who transact with him after a full disclosure, or by procuring ratification of the transaction by every stockholder. There is no reason why, in such an arm’s length transaction, he cannot drive as hard a bargain as he can get. Ordinarily, however, it should not be difficult to show that he has in some way influenced this “independent” body he has himself selected to exploit his project. But if the body was truly independent, it seems that the corporation cannot recover his profits even if later subscribers, non-recipients of the non-disclosure, can show injury. To this, however, the qualification should be added that if, at the time this full disclosure was made, the intent of the corporation was to invite the public to subscribe for shares, there is authority to support a corporate recovery of the promoter’s profits on the theory that the corporation presently suing (embracing uninformed newcomers) and not the original corporation, is the body that has been wronged.

Those who have gone to the trouble and expense of forming a corporation to exploit some advantage they have acquired are often not content to make a full disclosure, pocket their profits and retire from the scene. In addition to the legitimate reward for their activities to which they are indeed entitled they very naturally want, for a time at least, to remain on the inside and get the most that they can get out of the enterprise they have brought into corporate existence. Many and varied are the devices used to achieve this purpose. Whatever it be, the usual result is to enable them to acquire, on the basis of being paid an exaggerated price for their contribution to the enterprise, a block of stock which they can either market at a profit or exploit through the control it gives them to the detriment of innocent purchasers of the stock which has been so diluted.

Can they ever be accountable for profits when they, as promoters, have acquired the entire capital stock as the only members of the corporation? As long as they remain the sole members, the corporation clearly cannot have an action. It is said that the corporation is estopped by its consent to or ratification of the transaction com-

444. Burbank v. Dennis, 101 Cal. 90, 35 P. 444 (1894); Densmore Oil Co. v. Densmore, 64 Pa. 43 (1870).
446. Compare Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N.E. 653 (1905), with Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U.S. 206 (1908).
447. See, above, note 444.
plained of. More soundly, perhaps, it can be said that no disclosure is needed when one deals with oneself, or that a person cannot owe a fiduciary duty to himself or cannot defraud himself. But where the promoters constituted the entire personnel of the corporation at the time of the profitable transaction, and it can be shown that they intended later to enlarge its membership by inviting public subscriptions, a strong argument can be made that the corporation can, when so enlarged, recover on the theory that it is to this presently existing corporation that the fiduciary duty was owed. Perhaps even a stronger case can be made for recovery at the suit of the victimized newcomers.

Measure of Recovery. When a promoter is held accountable for his profits must he account for the difference between the price he paid (plus the value of his services) and the price he received from the corporation, or merely for the difference between the market value at the time of the transaction of what he furnished and the price he received? A decree for the former figure, which may well be a lot higher than the latter, is likely to follow if it can be established either that he had, at the time of its acquisition, formulated in his mind the promotion scheme, or that he had selected the prospective personnel of the proposed corporation. Possibly a mere showing that he had acquired the asset for the purposes of a re-sale would suffice. The test is whether he was occupying a fiduciary status at the time he made the acquisition. A showing that he misrepresented the amount he had paid would also strongly influence a decision that he must account for his entire profit.

It should be noted that when he receives payment in stock, the test of the value of the price so received is its market value at the time of its receipt and not its par value.

448. See Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N.E. 653 (1905).
449. For a discussion of the liability of a promoter to a corporation on account of profits as affected by fact that all outstanding stock was held by promoter or by persons who knew the facts, see Annot., 85 A.L.R. 1262 (1933).
450. See Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U.S. 206 (1908), dictum of Justice Holmes declining to rule as to whether the new members had a personal claim, though denying recovery to corporation itself.
452. See Pietsch v. Milbrath, 123 Wis. 647, 102 N.W. 342 (1904).
454. See Densmore Oil Co. v. Densmore, 64 Pa. 43 (1870); Henderson v. Plymouth Oil Co., 16 Del. Ch. 347, 141 A. 197 (1928).
As to who may sue for the recovery of a promoter’s profits, suit can be brought either by the corporation itself,\textsuperscript{457} by its receiver on behalf of its creditors,\textsuperscript{458} or by injured shareholders.\textsuperscript{459}

8. Other Situations of Possible Fiduciary Status

Flexibility of the “Fiduciary” Concept. “Fiduciary” status, abuse of which grounds a suit for profits, is not restricted to trustees, executors, guardians and others labeled “true” fiduciaries. Some say that a fiduciary or confidential relationship — the terms being regarded as synonymous — exists wherever one has reposed confidence in another. They extend it to physician, priest, and all others bound by ties of intimacy and trust.\textsuperscript{460} If defendant is not a “true” fiduciary, it is sounder, however, to insist on a showing that the one who has gained the confidence of the plaintiff purported to act or advise with the other’s interests in mind.\textsuperscript{461} Mere respect for another’s judgment or trust in his integrity, which proves to have been misplaced, should not be enough to qualify a relationship as fiduciary or confidential. Most business deals involve a repose of confidence to some degree in the other party to the transaction; and without a showing that the trusting party had reason to believe the trusted party was acting in the other’s interest, and not his own, even the advanced mores of today hardly seem to warrant imposing the status of a fiduciary on such a reposing of confidence.\textsuperscript{462}

However, the authorities do not entirely support this. The courts studiously avoid confining the concept of a confidential relationship within the strait-jacket of any strict definition. This is of value in that it enables them to keep the law in line with changes in the contemporary ethical codes; but it has the unhealthy effect of shrouding deals involving large sums of money with an element of uncertainty. Conduct which one chancellor may well regard as a trivial out-smarting

\textsuperscript{457} See Piggly Wiggly Delaware, Inc. v. Bartlett, 97 N.J. Eq. 469, 129 A. 413 (1925).
\textsuperscript{458} See McCandless v. Furlund, 296 U.S. 140 (1935).
\textsuperscript{461} A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind. Restatement of Restitution § 166, comment d at 676 (1937).
by a person at arm's length with another may, in the eyes of another court, be construed as a breach of a confidential relation carrying with it, through the medium of a constructive trust, the heavy burden of accounting for profits. The courts of California have headed the field in their readiness to find constructive fraud.\(^{463}\) Though some difference in levels of judicial morality is inevitable, firm insistence on the requirement that plaintiff must have reasonably believed defendant to have been acting in plaintiff's interest, and not his own, would help to make this branch of our remedial justice more predictable.

By reason of the very flexibility of the fiduciary concept, and of the practical importance for the purpose of profit-recovery of a showing of abuse of a confidential relation, representative examples are presented below, first of the more conservative holdings in this area, then of the more liberal and very possibly the currently favored view.

**Examples of the Restrictive Approach.** Many courts indicate that the mere existence of a moral,\(^{464}\) domestic\(^{465}\) or blood\(^{466}\) relationship is not sufficient to warrant its classification as "fiduciary" for the purpose of profit-recovery doctrines. They require a showing of confidence reposed on the one side and domination or influence on the other. And, where the relationship is merely a business one, proof must be presented to show that plaintiff reposed more trust in defendant than is ordinarily the case in a single business transaction.\(^{467}\) Mere failure to perform a contractual obligation is not regarded as fraud or

\(^{463}\) See Berg v. King-Cola, Inc., 227 Cal. App. 2d 338, 38 Cal. Rptr. 655 (1964); Ornbaum v. Main, 198 Cal. App. 2d 98, 17 Cal. Rptr. 631 (1961); Gross v. Needham, 184 Cal. App. 2d 446, 7 Cal. Rptr. 664 (1960); Kent v. First Trust & Sav. Bank, 101 Cal. App. 2d 361, 225 P.2d 625 (1950); Estate of Arbuckle, 98 Cal. App. 2d 562, 220 P.2d 950 (1950); Bolander v. Thompson, 57 Cal. App. 2d 444, 134 P.2d 924 (1943). The California view is statutorily based: "Every one who voluntarily assumes a relation of personal confidence in another is deemed a trustee . . . 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, obtain any control." Cal. Civ. Code \(\S\) 2219 (West 1954). For the purposes of Cal. Civ. Code \(\S\) 2224 (West 1954), which provides that one who gains a thing by fraud is an involuntary trustee, a constructive fraud issuing from breach of an oral promise by a promisor who occupies a confidential relationship with promisee is sufficient. Briggs v. Nilson, 226 Cal. App. 2d 342, 38 Cal. Rptr. 68 (1964).


\(^{467}\) See Thompson v. Mobil Producing Co., 163 F. Supp. 402 (D. Mont. 1958), holding that a complaint alleging defendant employee, a geologist, given confidential data by plaintiff option-holder, to have advised him that the oil prospects for the property involved were bad, and to have later enabled his employer to acquire this land by "converting" this information states no cause of action absent any allegation that the defendant was given an interest in the property, or holds any property on which a constructive trust can be impressed.
abuse of confidence.\footnote{468} Thus the mere fact that an employee’s remuneration is to be based on a proportion of the employer’s profits is held not to render the latter a fiduciary for the purpose of presenting a case for an accounting in equity when a discovery can be had at law.\footnote{469} Where plaintiff, anxious to enlist the co-operation of a defendant whose credit rating would be helpful, gave him information about the finances of a business and how it could be acquired (there being nothing intrinsically confidential about this) the proof was held insufficient for a finding of a confidential relationship.\footnote{470} Similarly, mere negotiations for a joint purchase, without any repose of confidence shown, have been held to not preclude a negotiator from acquiring the property for himself.\footnote{471} Some hold that even a banker does not make himself a fiduciary by giving advice to experienced business men.\footnote{472}

Leading among the jurisdictions taking this more conservative approach is Massachusetts, where one employed to buy land for another can buy it with his own funds without being held as a constructive trustee.\footnote{473} Consistent with this, one who is employed merely to appraise goods and advise as to the price at which plaintiff should buy can buy the goods himself with impunity, even if he lied as to their value.\footnote{474} Mutual respect and confidence does not make a business relationship fiduciary.\footnote{475} However, even in Massachusetts, a construc-

\footnote{468. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965). An agreement whereby a distributor advances funds to a producer and is to have the right to distribute the products and recoup himself out of the profits, though it imposes a limited duty to account, does not create a “fiduciary” relationship. Fleischer v. W.P.I.X., Inc., 30 Misc. 2d 17, 213 N.Y.S.2d 632 (Sup. Ct. 1961). A contract whereby plaintiffs, in return for a share of profits, licensed defendant to use its name, prestige, and prior experience in sales in relation to Mothers’ Day, defendants being permitted to represent themselves as, or acting for, plaintiff does not establish a fiduciary relationship. National Committee on Observance of Mothers’ Day, Inc. v. Kirby, Block & Co., 17 App. Div. 2d 390, 234 N.Y.S.2d 432 (1962). Allegations that plaintiff was promised a royalty interest in any likely prospect lease he disclosed, that he pointed out some excellent prospects, that some of these were acquired by defendant, do not state a cause of action for the imposition of a constructive trust absent a showing of a fiduciary relationship existing before, and apart from, the agreement. Karnei v. Davis, 409 S.W.2d 439 (Tex. 1966). An agreement that after purchasing land defendant will re-sell to plaintiff does not create a fiduciary relationship. Mortell v. Beckman, 16 Ill. 2d 209, 157 N.E.2d 63 (1959); Atkinson v. Atkinson, 225 N.C. 120, 33 S.E.2d 666 (1945).}


\footnote{471. Appleman v. Kansas-Nebraska Natural Gas Co., 217 F.2d 843 (10th Cir. 1954); Beckett v. Pierce, 157 Fla. 184, 25 So. 2d 486 (1946).}

\footnote{472. Lonsdale v. Speyer, 174 Misc. 532, 19 N.Y.S.2d 746 (Sup. Ct. 1938).}

\footnote{473. See Berenson v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610 (1950), where, however, the court declined to extend this to a broker who, having told plaintiff stock was available and offering to buy it as his agent, bought it for himself. The status of broker apparently made the difference. But see Hamberg v. Barsky, 355 Pa. 462, 50 A.2d 345 (1947), holding a mere undertaking to acquire a lease for another creates a confidential relation.}


tive trust will be decreed where information confidentially given has been misappropriated for gain.\textsuperscript{476}

\textit{Liberal Approach.} In courts taking a less restrictive approach to the fiduciary or confidential concept, though the necessity of a showing of confidence reposed and abused is not ignored, far more weight is placed on the existence of a moral,\textsuperscript{477} social,\textsuperscript{478} domestic,\textsuperscript{479} or even business\textsuperscript{480} relation between the parties. The origin of the confidence reposed, often said to be immaterial,\textsuperscript{481} seems in fact to be highly instrumental in contributing to the proof that confidence was reposed in the defendant. Thus when it is sought to establish a defendant accountable for his gains by reason of his abuse of a confidential relation, the more complete the evidentiary picture of the relations of the parties, the better. Factors such as if they have known each other a long time, if their families have exchanged visits, if they have had previous business deals or have done favors for each other in the past all contribute towards proving whether there was a confidence reposed. Information disclosed by the plaintiff is viewed as having great weight; some holding that a confidential relationship automatically arises when, during negotiations, plaintiff discloses facts about his business or as to the know-how of a process he uses.\textsuperscript{482}

The significant difference between a technical fiduciary relation and a confidential relation is one of proof. If the defendant is a true fiduciary, the fact that a confidence was reposed and abused is, for practical purposes, established by showing the profitable transaction. If he is not a true fiduciary, the burden of proving both these elements is on the plaintiff.\textsuperscript{483}

\textsuperscript{476} Barry v. Covich, 332 Mass. 338, 124 N.E.2d 921 (1955); Horn Pond Ice Co. v. Pearson, 257 Mass. 256, 166 N.E. 640 (1929). \textit{See} Broomfield v. Kosow, 349 Mass. 749, 212 N.E.2d 556 (1965), holding that though a mere repose of confidence does not render a business association fiduciary in nature, such a status may arise where the reposee knows of the reposant's reliance on his truthfulness.

\textsuperscript{477} \textit{See} Nelson v. Dodge, 76 R.I. 1, 68 A.2d 51 (1949); Annot., 14 A.L.R.2d 638 (1948).


\textsuperscript{481} Dornay Construction Corp. v. Doric Co., 221 Md. 145, 156 A.2d 632 (1959); Sojourner v. Sojourner, 247 Miss. 342, 153 So. 2d 803 (1963).

\textsuperscript{482} \textit{See} Heyman v. A.R. Winarick, Inc., 325 F.2d 584 (2d Cir. 1963); Speedy Chemical Products, Inc. v. Carter's Ink Co., 306 F.2d 328 (2d Cir. 1962); Schreyer v. Casco Prods. Corp., 190 F.2d 921 (2d Cir. 1951); Hoeltke v. C.M. Kemp Mfg. Co., 80 F.2d 912 (4th Cir. 1936).

Fiduciary de son Tort. The power of a court to impress a constructive trust on the proceeds of wrongdoing knows no limit.\(^{484}\) Thus anyone who without authority assumes the management of any property can be made to account for the profits derived therefrom as a trustee de son tort.\(^{485}\) This doctrine is most commonly invoked, however, against one who without authority intermeddles with the estate of a decedent,\(^{486}\) with the subject matter of an express trust\(^{487}\) or who without authority assumes the role of a guardian.\(^{488}\)

The practical impact of this doctrine needs little emphasis. If the defendant has made a profit from the use of plaintiff’s property and no possible ground for presenting a case for equitable relief, such as the need for an injunction or the complexity of the accounts can be presented, it should simply be pleaded that, as an intermeddler, he has become a constructive trustee who should be made to account for his profits.\(^{489}\)

Investment Advisers. An investment adviser must disclose to his clients a practice of buying-in stocks for himself shortly before recommending their purchase as long-term investments and then re-selling, so profiting by the market raise resulting from the client’s purchase. Such a person is a fiduciary and his conduct, whether or not it would support an action of deceit, warrants “equitable or prophylactic relief.”\(^{490}\) It is entirely possible, therefore, that if it could be established that his profit resulted from the specific breach of his duty to the plaintiff, a case for the recovery of his profits would be presented.\(^{491}\) However,

\(^{484}\) See Katzman v. Aetna Life Ins. Co., 309 N.Y. 197, 128 N.E.2d 307 (1955), denying summary judgment in a suit by a widow for the proceeds of her husband’s life insurance, brought against named beneficiary on the ground of the husband having fraudulently induced her to pay the premiums and having changed the beneficiary without notice to her.

\(^{485}\) See United States v. North State Lumber Corp., 54 F. Supp. 825 (E.D.S.C.), aff’d, 141 F.2d 1020 (4th Cir. 1944), holding that one who wrongfully collects rents belonging to another can be made a constructive trustee thereof. See also Ex parte Morton, 261 Ala. 581, 75 So. 2d 500 (1954).


\(^{488}\) See p. 389 supra.

\(^{489}\) See Bevels v. Hall, 246 Ala. 430, 21 So. 2d 325 (1945), holding that wrongful assumption of control of property and receipt of profits therefrom is ground for the imposition of a constructive trust.

\(^{490}\) SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963). See also SEC v. Torr, 35 F. Supp. 315 (S.D.N.Y.), rev’d on other grounds, 87 F.2d 446 (2d Cir. 1937), holding that when one gives advice to buy stock under circumstances leading recipient to believe the advice is disinterested, suppressing the fact of adviser’s own interest, recipient is imposed on and deceived. In SEC v. Capital Gains Research Bureau, 300 F.2d 745 (2d Cir. 1961), rev’d on other grounds, 375 U.S. 180 (1962), injunction was denied for want of proof.

the fact that the trustee of an investment fund is the same person as the adviser does not present a "self-dealing" situation and does not violate the Investment Company Act.402

Though a fiduciary may not, of course, sell his office for gain, this does not apply to an investment adviser because the controlling statute specifically provides for the termination of the contract in such event.403

**Bailees.** Though at one time a bailment was described as a delivery of goods in trust, clearly it is not strictly a trust. Title remains in the bailor.404 However, the rule which imposes on a trustee the burden of fully disclosing all transactions attacked extends to a bailee as a quasi-trustee.405

If a bailee has wrongfully profited from the use of the chattel or has sold it, a cause of action can be presented on the basis of a quasi-contract. If, on the other hand, plaintiff seeks to present the suit on the theory that a constructive trust was established, a confidence reposed and abused must be shown406 since a bailee, as such, is not a fiduciary.407 A mere showing that he had functions to perform with the chattel, though it may well be enough to form a basis for injunctive relief408 or even a mandatory injunction to restore it to plaintiff,409 is probably not enough to establish an equitable duty to account for profits.500 "Just as the butcher, the baker and the candlestick maker do not occupy a fiduciary relation toward every customer who has too much faith in human nature or is too busy or too careless . . . to count

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**Act of 1940, 28 Geo. Wash. L. Rev. 214 (1959); Shulman, Civil Liability and the Securities Act, 43 Yale L.J. 227, 242 (1933).**

492. 15 U.S.C. §§ 80a-1 et seq. (1964). See Saminsky v. Abbott, 41 Del. Ch. 320, 325, 194 A.2d 549, 551 (1963), wherein the court considered that to appoint a receiver for this reason until the fund is freed of its "conflict of interest" would "invite an excursion into a judicial never-never land." See also 51 Calif. L. Rev. 232 (1963); 37 S. Cal. L. Rev. 359 (1964).

493. SEC v. Insurance Securities, 254 F.2d 642 (9th Cir. 1958).


495. Ursitti v. Swid, 71 N.Y.S.2d 208 (N.Y. City Ct. 1947), holding plaintiffs entitled to pre-trial examination to discover what bailee knew about allegedly converted goods regardless of where onus of proof of conversion lay.

496. See Hollywood Motion Picture Equip. Co. v. Furer, 16 Cal. 2d 184, 105 P.2d 299 (1940), holding allegations that an inventor handed to defendant patterns for manufacture of castings for his invention, and that defendant sold castings made by him in competition with plaintiff, stated a cause of action.

497. See Young v. Mercantile Trust Co., 140 F. 61, aff'd, 145 F. 39 (2d Cir. 1906); Ashley v. Denton, 11 Ky. (1 Littell) 86 (1822); Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S.E. 795 (1895).

498. See Wood v. Rowcliffe, 3 Hare 304, aff'd, 2 Ph. 382 (1847), enjoining defendant from disposing of non-unique chattels handed to her "as agent."

499. See J. Pomeroy, Specific Performance § 14 (3d ed. 1926), stating that to distinguish this from agency would be refining technicality to an absurd degree.

500. But see Montgomery v. United States, Nat'l Bank, 220 Ore. 553, 349 P.2d 464 (1960), where the court, using the language of constructive trust, impressed a lien to the extent of 10% on account of a hypothecation of turkeys' bailee.
his change,” so also the mere agreement of a bailee to count the goods, keep records and issue regular statements does not establish any “repose of confidence” necessary to establish a confidential relation.601

Escrow Holders. Whether the escrow consists of money or of some instrument, an escrow holder is not technically an agent of either party to the transaction until the event occurs which terminates the escrow relation.602 But he is a fiduciary for both.603

When an escrow holder is entrusted with funds with an obligation to produce a like sum on the termination of the escrow, can the parties claim a preference on his bankruptcy? Early authority holds him to be a mere debtor.604 But later authority takes the position that if the money can be “traced” it does not vest in the bankrupt’s trustee; it is rather, held on the terms of the escrow agreement.605 It would, however, be logical to say tracing doctrines cannot be used to give them a preference unless he is either a bailee or a trustee.

The question then remains whether an escrow holder who misuses the fund to make a profit can be made to account for it. Despite an early holding that a stakeholder is not accountable for profit made from the use of money entrusted to him,606 it is submitted that the fiduciary status of the escrow holder would render him so accountable. Whether recovery could be had by the depositor of the fund or by the person for whom the funds are intended on the happening of the event should, if the analogy of the risk of loss through embezzlement is applied, depend upon when the profit was made.607 Logically, if the proof shows the gains to have been made partly before the event terminating the escrow and partly after, they should be divided proportion-
Pledges. A pledgor cannot be heard to deny the equitable rights of the pledgee in the pledge.\textsuperscript{508} Though it seems anomalous to regard one enjoying equitable rights as a fiduciary for the holder of the legal rights, such is the situation between pledgor and pledgee. Mutual obligations of a fiduciary nature are involved.\textsuperscript{509} By reason of this fiduciary status a pledgor cannot purchase the subject matter at a nonjudicial sale absent statutory authority or consent of the pledgor, the conflict between interest and duty being apparent.\textsuperscript{510} In the event of such an improper purchase the pledgor, if he chooses to ratify, can hold the pledgee liable for the fruits of the transaction.\textsuperscript{511}

The duty of the pledgee, absent contrary agreement, to account for the increase or profit accruing to him as a result of his possession of the chattel\textsuperscript{512} is now established as a fiduciary one\textsuperscript{513} even though it was not always regarded as such in early times.\textsuperscript{514} On this basis, there is little room for doubt that if he has profited by a misappropriation of the pledge the profits can be recovered.\textsuperscript{515}

Mortgagee in Possession. In jurisdictions which still cling to the title theory of a mortgage, the mortgagee theoretically has the right to possession. He seldom exercises this right because, due to his duty to account for the rents and profits and to keep the property in repair, possession is more of a burden than a benefit unless it is essential to protect his security.\textsuperscript{516} Some title theory states now do, however, deny this right to possession\textsuperscript{517} and in a lien theory state the mortgagee may acquire the right to possession by the terms of the mortgage.

\textsuperscript{508} \textit{In re} Pan American Life Ins. Co., 88 So. 2d 410 (La. 1956).
\textsuperscript{509} See Annot., 79 A.L.R. 201 (1931).
\textsuperscript{510} Linker v. Batavian Nat'l Bank, 244 Wis. 459, 12 N.W.2d 721 (1944).
\textsuperscript{511} See Annot., 37 A.L.R.2d 1381 (1954).
\textsuperscript{512} Restatement of Security § 27 (1941).
\textsuperscript{514} See Wade v. Markwell & Co., 118 Cal. App. 2d 410, 258 P.2d 497, 37 A.L.R.2d 1363, describing pledgee as "akin to a fiduciary"; L. Jones, The Law of Pledges § 398 (1883), citing authorities using the language of quasi contract to explain this liability; Annot., 32 Am. St. R. 711, 724, where the right to an accounting in equity seems to be restricted to situations where there is a complexity in the accounting situation.
\textsuperscript{515} South Shore Thrift Corp. v. Nat'l Bank, 276 N.Y. 465, 12 N.E.2d 546 (1938).
\textsuperscript{516} See Carter v. McHaney, 373 S.W.2d 82 (Tex. 1963).
\textsuperscript{517} See Williams v. Marnor, 321 Ill. 283, 151 N.E. 880 (1926); Stewart v. Baldwin, 99 Ala. 489, 25 So. 640 (1899).
When in possession, the mortgagee is regarded as a quasi-trustee of the rents and profits he receives.618 He must apply them in reduction, first of interest on the debt, and then of principal;619 and this duty can be enforced by a subsequent or junior lienor.620 Many states require him to account on an annual basis so that any surplus receipts over interest due can be deducted from the principal debt and thus reduce the interest payable thereon for the ensuing year.621

When he acquires the property at a sale after foreclosure any accountability to the mortgagor or to junior lienors is of course ended. He then holds as owner.622

Life Tenants. A life tenant is regarded as occupying a fiduciary relation to the remaindermen.623 He must not use the property in such a way as to reduce the value of the estate of those to come after him.624 If he does so, he can be made to account for his profits625 if the remedy at law is inadequate or equity is given jurisdiction because an injunction is sought.626 If, however, the property contains a mine, well or the like which was in operation at the time his estate commenced, he need not account for profits derived from its exploitation.627 If the remainder is a contingent one, though it is entirely possible that the remainderman could get an injunction against threatened acts of waste, to allow him damages or profits would be an absurdity.

Co-remaindermen owe similar fiduciary duties to each other.

Co-tenants. At common law, and in most jurisdictions absent special circumstances such as the use of the land for mining or farming, a co-tenant is not accountable for his own use of the premises so held except to the extent that he actually receives more than his proportionate share of its rents and profits from a third person.628 Though

520. Id. For a discussion of the duty of a mortgagee to account for rents and profits or for use and occupation for benefit of the owner of equity of redemption or a junior lienor, see Annot., 46 A.L.R. 139 (1927).
there is some difference of opinion, it seems sound to apply the same rule to receipts derived from materials taken from the land, provided the defendant can set-off the value of his labor.\textsuperscript{529}

There is often said to be no trust relationship between co-tenants as such.\textsuperscript{530} However, if one seeks to recover a share of the gains made by co-tenant, he might do so by trying to establish the existence of an agency — that defendant had agreed to operate the property so held for their mutual profit and so stands in a fiduciary relationship.\textsuperscript{531} Further, when the parties have derived their estate from the operation of the laws of succession, whether through a will\textsuperscript{532} or by intestacy,\textsuperscript{533} the modern trend is to decree an accounting on the basis of a fiduciary relation.\textsuperscript{534}

In the area of recovery of profits, it is settled that a co-owner of a copyright may use the work or license a third person to use it without the consent of the others, but he must share his profit.\textsuperscript{535} As to tenants by the entireties, local statutes should be consulted.\textsuperscript{536}

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tenant in common who has sole possession must account for the reasonable value of the others' right to use which can be modified by express agreement.
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\textsuperscript{529} See Annot., 40 A.L.R. 1400 (1934); Annot., 5 A.L.R.2d 1368 (1948).

\textsuperscript{530} Britton v. Green, 325 F.2d 377 (10th Cir. 1963).

\textsuperscript{531} Id. See Carter Oil Co. v. Crude Oil Co., 201 F.2d 547 (10th Cir. 1953), holding that if one co-tenant comes into possession of funds belonging to his co-tenant, he then stands in a fiduciary relation with respect thereto.


\textsuperscript{535} See Kendell v. Moscow, 20 Misc. 2d 551, 194 N.Y.S.2d 154 (Sup. Ct. 1959), holding that allegations that plaintiff and defendant agreed to share the profits of a book in the writing of which they collaborated, and that defendant had contracted with a publisher for publication on a royalty basis without disclosing plaintiff's interest would not state a cause of action for an accounting of profits against the publisher, but could support a cause of action against the individual defendant on a basis of joint venture. Because the rule operates to facilitate the dissemination of works owned by more than one person without ordinary detriment to the others, the revisers of the copyright law do not recommend a change. \textit{See Report of the Register of Copyrights on the Copyright Law Revision 88 (1961). But see} Kupferman, \textit{Copyright Co-owners, 19 Sr. John's L. Rev. 95 (1945)}, wherein the writer suggests that, as long as the co-owners have an equal opportunity to dispose of the rights involved, and in the absence of fair dealing it would be reasonable to allow them to retain their own profits, and that if they would have it otherwise they can do so by contract. It would probably be more reasonable, however, to view the situation as one in which they must have impliedly agreed that any gains derived from the exploitation of their joint toil are to be shared.

**Holders of Governmental Office.** The fiduciary status of governmental employees, officials of political subdivisions or administrative commissions and their consequent accountability for profits resulting from self-dealing is axiomatic. Although a taxpayer's action is commonly the remedy, injunctive relief may be sought against misconduct of this nature, with the proper party plaintiff in a suit for profits being the governmental entity the defendant serves. However, a taxpayer's suit has been allowed for this purpose.

Since a public officer's liability for funds with which he is entrusted is in many states an absolute one, many jurisdictions do not hold him accountable for interest derived from the investment unless the use of the funds amounts to a misappropriation. However, even where there is no controlling statute, the majority and sounder view is to hold him accountable for interest.

There is some authority for recognition of a correlative fiduciary duty on the part of the public doing business with public officers to deal fairly and frankly with such officers. And, since the federal labor law has imposed a fiduciary type responsibility on officers of labor organizations a showing of a breach of this duty will also support a recovery of profits.

537. See United States v. Carter, 217 U.S. 286 (1910); United States v. Drum, 329 F.2d 109 (1st Cir. 1964) (Department of Agriculture poultry inspector); Bishop v. United States, 265 F.2d 657 (5th Cir. 1959) (employee of War Assets Administration Regional Office).
540. See Terry v. Bender, 143 Cal. App. 2d 198, 300 P.2d 119 (1956) (injunction against payment of compensation to city attorney whose official conduct was alleged to be permeated with self interest).
543. See Annot., 5 A.L.R.2d 257 (1949); see also Annot., 104 A.L.R. 1402 (1936).
544. See Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1951), holding accountable for profits members of a syndicate who engineered a sale to a political entity through the use of influence and political prestige.