THE PRESUMPTION OF UNDUE INFLUENCE*

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Introduction

The principal purpose of this study is to analyze the nature and effects of the presumption of undue influence. Before entering upon that analysis, however, it will be of value to make several general observations which should serve the dual purpose of focusing attention upon some of the significant characteristics of the subject matter and of drawing attention away from some irrelevant, albeit related, matters which might tend to obfuscate the question in hand.

In the first place, undue influence by reason of which courts of equity interfere to set aside an agreement must be distinguished from duress for which an agreement may be set aside at common law as well. Duress is the compulsion under which a person acts through fear of personal sufferings to himself or to another arising out of actual or threatened bodily restraint or injury.[1] Undue influence, on the other hand, is essentially an abuse of confidence[2] that does not bear the mark of actual or threatened physical harm.[3]

Secondly, the basis of the jurisdiction which the courts of equity exercise to grant relief in cases of undue influence is constructive fraud. An agreement could be set aside because of actual fraud both at law and in equity; but equity extended its jurisdiction by including under the head of fraud transactions which were so opposed to fair dealings between the parties that they ought not to be held binding.[4]

> Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud. It covers different grades of wrong. It embraces contracts illegal, and therefore void at law as well as in equity; transactions voidable in equity because contrary to public policy; *and transactions which merely raise a presumption of wrong, and throw upon the party benefited the burden of proving his innocence and the absence of fault.*[5]

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1 *Halsbury's Laws of England* (3rd ed., Vol. 14), p. 479.

2 Sheridan, *Fraud in Equity* (1956), p. 87.

3 The meaning of "undue influence" is considered at length below.

4 *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.), at p. 953, *per* Lord Haldane, L.C.

5 Pomeroy's *Equity Jurisprudence* (5th ed., Vol. 3, 1941), p. 626 (italics mine)

Thirdly, the existence of undue influence is a question of fact, and an appellate court will not interfere with the findings of the trial judge on such an issue if they are reasonably warranted by the evidence.[6] It would appear, however, that an appellate court will be much less hesitant in reversing a finding that the facts were such as to give rise to a presumption of undue influence.[7]

The fourth general observation is that the cases in which transactions have been set aside on the ground of undue influence fall into two categories: (1) where the court has been satisfied that the conveyance was the result of influence expressly used by the party benefited thereby for that purpose; and (2) where the relations between the parties have been such as to raise a presumption that the party benefited thereby has influence over the other at or shortly before the time of the transaction.[8] It is with the latter category that this paper is concerned.

Further, it is to be noted that the presumption arises in relation to contracts and gifts *inter vivos* but does not apply to testamentary dispositions. Winder[9] explains that distinction as arising from the fact that courts of probate took over the terminology of the Court of Chancery but used it to express a different principle. Thus, the influence vitiating a testamentary act must amount to force and coercion destroying free agency. Undue influence in the ordinary sense is not sufficient and there is no presumption of undue influence in respect of a testator even if he is a member of one of the protected classes known to equity.[10] Canadian[11] and American[12] courts have adopted this distinction.

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6 *Brett v. Brett*, [1938] 3 D.L.R. 539 (Alta. C.A.).

7 *Bradley et al. v. Crittenden*, [1932] S.C.R. 552.

8 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 171, *per* Cotton L.J.

9 Winder, "Undue influence in English and Scots Law" (1940), 56 L.Q.R. 97, at p. 106.

10 *Hindson v. Weatherhill* (1854), 5 De. G. M. & G. 301 (solicitor and client); *Parfitt v. Lawless* (1872), L.R. 2 P. & D. 462 (chaplain-confessor and penitent).

11 *Riach v. Ferris*, [1935] 1 D.L.R. 118 (Can. Sup. Ct.), at pp. 127-8; [1934] S.C.R. 725, at pp. 735-6. And see an interesting case comment in (1938), 16 Can. Bar Rev. 405. See also *Bohan et al. v. Walker* (1927-8), 54 N.B.R. 379, at pp. 393-4, *per* LeBlanc J.: "There seems however to be a distinction in the application of the rule [that is, the presumption of undue influence] between gifts *inter vivos* and a *donatio mortis causa*. The former is irrevocable and strips the donor of his property in his lifetime whereas a *donatio mortis causa*, like a legacy, is revocable."

12 Pomeroy's *Equity Jurisprudence* (5th ed., Vol. 3, 1941), p. 781. And see the case comment in (1900-1), 14 Harv. Law Rev. 73.

Finally, it would be wise, as we proceed, to keep this admonition in mind:

> The law of undue influence at first sight seems easy, but it is in reality one of the most difficult branches of equity, firstly, because psychological considerations must enter into the matter, and secondly, because it requires a most minute analysis of every circumstance before we can see in which category it falls, and where, consequently, the burden of proof falls.[13]

The Presumption: In General

This part contains an analysis of the nature of the presumption of undue influence. It may be useful, therefore, to attempt to define the terms "presumption" and "undue influence".

A "presumption" is a deduction from a known or ascertained fact, or, as the old writers expressed it, "*ex eo quod plerumque fit*".[14] It is raised either by the law or by the judge. That which is raised by the law or so established as proved admits nothing to the contrary and cannot be repelled. This presumption is called "*juris et de jure*". That presumption which is raised by the judge is usually called a "*praesumptio hominis*", and always admits of proof to the contrary.[15] By and large, the presumption with which we are here concerned is of the latter type.[16]

In 1887, Lindley L.J. stated that, "As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties".[17] This statement contains a distinct note of caution which should not go unheeded. However, the following definition may prove of some value:

> It [undue influence] may be defined as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract [or make a gift].[18]

This may be supplemented by a statement from Pomeroy.

> Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon

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13 Hanbury, *Modern Equity* (4th ed., 1946), p. 680.

14 *Clark v. The King* (1921), 61 S.C.R. 608, at p. 629, *per* Mignault J.

15 *Campbell v. Barrie* (1871), 31 U.C.Q.B. 279 (C.A.), at p. 288, *per* Wilson J.

16 Some of the earlier English decisions held the presumption arising in the case of a gift from a client to his solicitor to be irrebuttable. It will be argued below, that this is no longer good law. See footnote 78.

17 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 183.

18 *Grisshammer v. Ungerer* (1958), 14 D.L.R. (2d) 599 (Man. C.A.), at p. 600, *per* Adamson, C.J.M.

> a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction, on the ground of undue influence, even though there may be no invalidity at law.[19]

Under what circumstances, then, will undue influence be presumed? The immediately preceding quotation points to the key factor, namely, the relationship in which the parties stood at the time of, or shortly before, the transaction. The question for which we must seek an answer, therefore, is: what is the nature of the relationship which gives rise to the presumption? The answers to this question have been variously framed depending, it would seem, upon the aspect of the issue which was being emphasized at the time.

It may be thought and, indeed, it has been said, that undue influence will be presumed wherever the relationship is shown to have been a fiduciary one.[20] The inadequacy and inaccuracy of such a view have, however, been clearly demonstrated. It, in the words of Fletcher Moulton L.J., "illustrates in a striking form the danger of trusting to verbal formulae."[21] To illustrate his point the learned Lord Justice points out that:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him.[22]

It is therefore absurd to conclude that every kind of fiduciary relation warrants application of the doctrine. "The nature of the fiduciary relation must be such that it justifies the interference."[23]

What then is the additional necessary ingredient? These statements of Fletcher Moulton L.J. suggest that a high degree of intimacy is required to bring the doctrine into play. What would appear to amount to the same view is expressed by Lord Eldon who, however, employs the word "confidence" rather than "intimacy".

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19 Pomeroy's *Equity Jurisprudence* (5th ed., Vol. 3, 1941), p. 776.

20 *Ibid.*, at p. 780: "Where an antecedent fiduciary relation exists, a court of equity will *presume* confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be *proved* by satisfactory extrinsic evidence." (italics mine)

21 *In re Coomber, Coomber v. Coomber*, [1911] 1 Ch. D. 723 (C.A.), at p. 728.

22 *Ibid.*

23 *Ibid.*, at p. 729. See also *Smith v. Kay* (1859), 7 H.L.C. 750, at p. 771; 11 E.R. 299, at p. 308, *per* Lord Cranworth.

> It is asked, where is that rule to be found. I answer, in that great rule of the court, that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else.[24]

The next step in our analysis is, therefore, to inquire as to the nature of the confidence that suffices for this purpose. In approaching this question there is a noticeable tendency on the part of the courts to regard the solicitor-client relationship as a useful guideline and standard. In fact, McRuer C.J.H.C. has stated that "It is also clear that wherever the relationship is akin to that of solicitor and client, the doctrine ought always to be applied."[25] If, then, we are able to discern the peculiar characteristics of this particular relationship we will have gained a valuable insight into the thinking of the courts upon the whole question before us.

In the usual case the client seeks the assistance and advice of the solicitor in matters on which the client is largely or totally uninformed. The client thus places himself in a position of dependence and the solicitor in a position of influence. The significance of this is seen in the words of Lord Cranworth where he says that the presumption arises:

> . . . upon the ordinary principal of the Court, which protects an infant, or any other person, who is, from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. My Lords, there is, I take it, no branch of the jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons in a situation of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependant. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances.[26]
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> I believe, if the principle is examined, it will be found most frequently applied in such cases, for this simple reason, that the fiduciary relation gives a power of influence.[27]

In the words of some of the older authorities, the solicitor may be said to be in a position to "exercise dominion" over his client. "The relief", as Sir Samuel Romilly says, "stands upon a general principle, applying to all variety of relations, in which dominion may be exercised by one person over another."[28] The great difficulty

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24 *Gibson v. Jeyes* (1801), 6 Ves. Jun. 267, at p. 278; 31 E.R. 1044, at p. 1050; see also (1919-20), 5 Corn. L.R., at pp. 318-19.

25 *Brown et al. v. Premier Trust Co. et al.*, [1947] 1 D.L.R. 593 (Ont. H.C.), at p. 606.

26 *Smith v. Kay* (1859), 7 H.L.C. 750, at p. 770; 11 E.R. 299, at p. 307.

27 *Smith v. Kay* (1859), 7 H.L.C. 750, at p. 771; 11 E.R. 299, at p. 308.

28 *Huguenin v. Baseley* (1807), 14 Ves. Jun. 274, at pp. 285-6; 33 E.R. 526, at p. 531.

inherent in any attempt to establish the exact nature of this power is, however, clearly indicated by the Master of the Rolls in *Cooke v. Lamotte*.[29]

> It is very difficult to lay down with precision what is meant by the expression 'relation in which dominion may be exercised by one person over another'. That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated, that one may obtain considerable influence over the other.[30]

One would assume that the marked tendency to proceed by way of analogy from the solicitor-client relationship has been induced primarily by the fact that it is *the* confidential, influence-producing relationship with which judges are most familiar. It is this high degree of familiarity that enables them to presume that in such a relationship the necessary confidence will have been reposed and that, as a consequence, the solicitor stood in a position of "considerable influence" *vis-a-vis* the client. Once that much has been presumed the next step, that of presuming that any benefit derived by the solicitor from a transaction between the parties was obtained by the undue exercise of such influence, is an "easy" one.[31] In fact, it is automatic. Looked at in this way the problem becomes one of determining the types of relationships where the courts possess sufficient experience[32] and adequate knowledge to enable them to say that such a relationship is normally characterized by the existence of "that type of confidence" and "that kind of influence" which warrant the presumptions. An analysis of the types of relationships that fall into this category will be made later. Suffice it to say at this point that where such a relationship is shown to have existed at the relevant time the dual presumptions are raised.

Where, on the other hand, the relationship was not such as to give the plaintiff the benefit of the presumption of confidence reposed and influence acquired, he has to prove these things as facts in order to raise the presumption of undue influence. For this purpose the plaintiff must produce satisfactory extrinsic evidence. The type of evidence that is likely to be of greatest avail to the plaintiff is that which tends to indicate a high degree of dependence on his part with the attendant position of domination on the part of the defendant. Thus, circumstances indicating the inferiority of the plaintiff's "bargaining" position are useful. Such circumstances include old or tender age, physical or mental infirmity, financial distress, illiteracy, ignorance of business affairs, ignorance of property

29 (1851), 15 Beav. 234; 51 E.R. 527.

30 *Cooke v. Lamotte* (1851), 15 Beav. 234, at p. 240; 51 E.R. 527, at p. 530.

31 The sense in which this step is an "easy" one is discussed below.

32 *Clarke v. Hawke* (1865), 11 Gr. 527, at p. 544.

rights and values, humbleness of social station, poverty and eccentricity.[33] One might expect, of course, to find two or more of these present in a particular case. It must be emphasized, however, that the mere showing of such conditions of weakness does not necessarily bring the doctrine into play. For it is only by establishing to the court's satisfaction the necessary dependence-domination relationship that the plaintiff can acquire the advantage of the presumption. He can enhance his position considerably by showing that the transaction was a most improvident one, the kind of transaction that would probably only be entered into by a person over whom influence was unduly exercised.[34] His cause will be advanced as well by a showing that he did not have independent advice at the relevant time. In *Fry v. Lane*[35] Kay J. said:

> The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction . . . The circumstances of poverty and ignorance of the vendor, and the absence of independent advice, throw upon the purchaser, when the transaction is impeached, an onus of proving, in Lord Selborn's words, that the purchase was "fair, just, and reasonable".

It is worth risking repetition to emphasize that in seeking to gain the benefit of the presumption the plaintiff is not required to show any actual fraud or wrong-doing of any sort by the defendant. Indeed, the impugned transaction may have been quite untainted. This fact will not prevent the doctrine from being applied, however, once the appropriate relationship has been satisfactorily proved.[36]

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33 *Kerr on Fraud and Mistake* (7th ed., 1952), pp. 225-6, cited in *McElroy v. Woods et al.* (1964), 45 D.L.R. (2d) 379, at p. 389. And see Sheridan, *Fraud in Equity* (1956), at pp. 80-84.

34 The insufficiency of this fact alone, however, is clearly indicated by Lindley L.J., in these words: "Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors . . . It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects." *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at pp. 182-3. At a later point in the same judgment, however, the learned Lord Justice observed that: ". . . if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift." *Ibid*, at p. 185.

35 (1888), 40 Ch. D. 312, at p. 322.

36 In *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), Lindley L.J. set aside a gift because of the unrebutted presumption in spite of the fact that: "In this particular case I cannot find any proof that any gift made by the plaintiff was the result of any actual exercise of power or influence on the part of the lady superior or of Mr. Nihill, apart from the influence necessarily incidental to their position in the sisterhood." *Ibid.*, at p. 183.

One can readily see, therefore, that it can work a considerable hardship on an innocent defendant. The reasons why the courts are prepared to run this risk are examined later.

Some Relationships Giving Rise to the Presumption

This section is devoted to an analysis of some of the more common types of relationships that give rise to the presumption. It is by no means intended as an exhaustive survey. Rather it is hoped that the few examples discussed will help to clarify the foregoing general propositions and enable us to gain a greater insight into the nature of the confidence, dependence, superiority and influence around which the doctrine is centered.

(*a*) *Solicitor and Client*:

In *Wright v. Carter*[37] it was laid down that a gift by a client to his solicitor raises the presumption of undue influence because of the fiduciary relation subsisting between them, and the onus is on the solicitor to prove that the donor in making the gift was uninfluenced by that relation. Furthermore, *Demerara Bauxite Co. v. Hubbard*[38] shows that the presumption is not destroyed merely by the termination of the relation of solicitor and client in a strict sense, but continues as long as the confidence naturally arising from the old relation is proved, or may be presumed, to continue.

The presumption against dealings for value is more restricted. It does not apply where the solicitor buys property from, or makes some other bargain with his client, in respect of which no confidence is resposed and in respect of which the solicitor has no special knowledge.[39] That is not to say, however, that a solicitor is free from the doctrine in respect of all transactions not involving matters that he is specifically employed by his client to look after. The test is well stated by Parker J. in *Allison v. Clayhills*:[40]

> In considering whether this onus lies upon him, the test appears to me to be the proper answer to the question whether in the particular transaction, he owes his client any duty in the contemplation of a court of equity. If he owes his client any duty in the particular transaction, the equal footing on which the parties to any bargain should stand is impaired or destroyed, and the solicitor is, I think, solicitor *in hac re* within the meaning of the decisions although not retained to act as solicitor in the transaction or, indeed, in any pending transaction at all.

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37 [1903] 1 Ch. 27.

38 [1923] A.C. 673.

39 *Montesquieu v. Sandys* (1811), 18 Ves. 302, at p. 313; 34 E.R. 331, at p. 335.

40 (1907), 97 L.T. 709, at pp. 711-12, cited in Sheridan, *Fraud in Equity* (1956), pp. 91-2.

(*b*) *Doctor and Patient*:

Doctor and patient is another such relationship.[41] In *Dent v. Bennett*[42] a medical attendant obtained from his patient, who was eighty-five years of age, an agreement to pay him £25,000 for services completed two years before, the regular charge for which had been previously paid. This agreement was executed privately, without the intervention of any third party, and carefully concealed until after the patient's death. It is instructive to note the words used by Lord Cottenham in setting aside the agreement:

> . . . and when I find an agreement, so extravagant in its provisions, secretly obtained by a medical attendant from his patient, of very advanced age, and carefully concealed from his professional advisors and all other persons, and have it proved that the habits, views, and intentions of the testator were wholly inconsistent with those provisions, I cannot but come to the conclusion that the medical attendant did obtain it by some dominion exercised over the patient.
> . . . The relation does not cease because the patient has not medicine actually administered to him at the time, any more than the relation of attorney and client ceases because no suit may be actually in progress. If it were otherwise, I do not know that it would have made any difference; but I think that the existence of the relation of medical attendant and patient is not only proved by the evidence, but by the very agreement itself.[43]

(*c*) *Trustee and Beneficiary*:

In *Brown et al v. Premier Trust Co. et al.*,[44] in the Ontario High Court, a solicitor, acting in that capacity, who was also general manager of a trust company, consulted in 1934 with an elderly doctor and his wife concerning their wills and advised them of the advantages of having a trust company handling their affairs and acting as executor of their estates. By the beginning of 1935 he had established himself in the couple's confidence *qua* solicitor and trust company manager, and they decided (the doctor's health being bad) to turn over their affairs to the trust company and to act on the solicitor's advice in making their wills. Contemporaneously the solicitor entered into a contract with the doctor for the sale to him of a block of speculative common shares of the trust company and this transaction required the conversion of more than half of the doctor's assets which were in the form of high-class securities. The doctor died in 1938 and his beneficiaries succeeded in an action commenced in 1945 to have the transaction set aside. McRuer C.J.H.C. based his decision on the ground that the doctor was

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41 *Billage v. Southee* (1852), 9 Hare 534; 68 E.R. 623. And see *Mitchell v. Homfray* (1881), 8 Q.B.D. 587.

42 (1838), 4 My. & Cr. 269; 41 E.R. 105.

43 (1838), 4 My. & Cr. 269, at pp. 277-8; 41 E.R. 105, at pp. 108-9.

44 [1947] 1 D.L.R. 593.

wholly dependant upon the defendants in seeking advice on his investments and that the defendants from their relation to him, were in a position to exercise "deeprooted influence over him". The defendants having chosen to mix the confidential relationship with that of vendor of shares, when the propriety of the transaction is called in question, the onus is on them to establish its perfect fairness and equity.[45]

(*d*) *Religious Adviser and Devotee*:

The leading case in this area is *Allcard v. Skinner*,[46] the facts of which are as follows:

> In 1868 the plaintiff, a woman about thirty-five years of age, was introduced by her spiritual adviser, one Nihill, to the defendant, who was the lady superior of a Protestant institution known as "The Sisters of The Poor". Nihill was the spiritual director and confessor of this sisterhood. Three years later the plaintiff became a sister and took the vows of poverty, chastity and obedience. The vow of poverty was strict and required the absolute surrender of all individual property, there being no direction, however, as to whom the property was to be donated. The plaintiff remained a sister for eight years until 1879 during which time she gave property to the value of about £7000 to the sisterhood. She left the sisterhood in 1879 by which time all but £1,671 of the money had been spent by the defendant upon the purposes of the institution. The plaintiff took no action until 1885, but in that year she sued for the recovery of the £1,671 on the ground that it had been procured by the undue influence of the defendant.

The plaintiff would have succeeded had her claim not been barred by her laches and acquiescence after she had left the sisterhood.[47] And this is so regardless of the fact, as found by the Court of Appeal, that no personal pressure had been exerted on the plaintiff and no unfair advantage taken of her position, but that the only explanation of the gift was her own willing submission to the vow of poverty.[48] Nevertheless, the court held that her gifts were in fact made under pressure that she could not resist, she being bound by the rule that no sister was to seek advice from any outside person without the superior's permission.

Several informative statements may be garnered from the judgments delivered in this case. For instance, Lord Justice Lindley observed that:

> The influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far.[49]

45 *Ibid.*, at pp. 606 and 610.

46 (1887), 36 Ch. D. 145 (C.A.).

47 *Ibid.*, at p. 189.

48 *Ibid.*, at pp. 183-4.

49 *Ibid.*, at p. 183.

And in delivering the trial judgment, Kekewich J. who decided in favor of the defendant upon finding that the presumption had been rebutted, said:

> The more powerful influence or the weaker patient alike evokes a stronger application of the safeguard, and there can be no case more urgently requiring it than one of the influence of a priest, director, or mother superior of a convent, over an emotional woman, residing within the convent walls, and subject to its discipline.[50]

(*e*) *Familial Relationships*:

This part will conclude with a brief analysis of some of the relationships of a family or domestic character which give rise to the presumption and some which do not.

(i) Parent and Child

There is no rule of equity that a parent or person *in loco parentis* may not accept a benefit from his child, even when that child is still under parental influence, so long as the benefit is conferred with a deliberate and unbiassed intention. In most transactions of this type, however, a parent is presumed to have exercised undue influence over his child, so long as the child is underage, or not emancipated from the parent's control.[51] Furthermore, the parental influence against which the courts seek to protect the child is not necessarily the influence arising from fear or coercion, but includes that from kindness and affection.[52] The important thing is "that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control.[53]

In *Lancashire Loans Ltd. v. Black*[54] it was said that emancipation from the relationship which gives rise to the exceptional influence possessed by a parent over a child is a question of fact to be determined on the evidence. The transaction impugned there took place seventeen months after the daughter had come of age and after she had married and left her parental home. Nevertheless, it was held that the parental dominion had not ceased and the transaction was set aside. Greer L.J. observed:

> The influence arising out of the relationship of mother and daughter is, in my judgement, one in which it is most likely that the influence of the mother in persuading the daughter to take a certain line of

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50 *Ibid.*, at p. 158.

51 *Wright v. Vanderplank* (1856), 8 D.M. & G. 133; 44 E.R. 340; *Bainbrigge v. Browne* (1880), 18 Ch. D. 188.

52 *Turner v. Collins* (1871), 7 Ch. App. 329, at p. 340.

53 *Archer v. Hudson* (1844), 7 Beav. 551, at p. 560; 49 E.R. 1180, at p. 1183, *per* Lord Langdale, M.R.

54 [1934] 1 K.B. 380 (C.A.), at p. 421.

> action will have a greater effect, and will continue to operate for a longer period than in the case of influence arising from any other relationship.[55]

The principles applicable to a parent apply to a person standing *in loco parentis* who receives a benefit from the person under his protection, as in cases of benefits conferred on an elder brother or sister, step-father, step-mother, or uncle, standing *in loco parentis*, or on a guardian or ex-guardian.[56] In order to raise the presumption in such a case it would appear to be essential that a position of quasi-parenthood or guardianship be proved. The mere fact of relationship by blood or marriage is irrelevant.[57]

It may happen that the roles may become reversed with the child assuming a position of dominion over the parent or similarly situated person. In such a case benefits conferred upon the child will be presumed to have been induced by undue influence. This, of course, is in accordance with the general principle applying to all relations wherein the party seeking to avoid the transaction is able to prove the necessary confidential relationship.

(ii) Other Relationships

One would have thought the husband and wife relation to be a prime candidate for application of the doctrine. Indeed, Girouard J. of the Supreme Court of Canada has said that:

> Experience teaches us and the law reports establish abundantly that married women, in nearly all cases, are under the control and influence of their husbands and rarely can resist their mere demands and requests, much less their solicitations and supplications, and that these generally prevail, while threat and violence seldom do.[58]

Neither the English nor Canadian courts, however, apply the doctrine in such a case.[59] This is probably an outgrowth of the thinking underlying the general movement toward the emancipation of women which began in the latter part of the last century.[60] What is, perhaps, a more practical reason is that presented by Farwell L.J.:

> Upon principle, it is clear that business could not go on if in every transaction by way of a gift by a wife to her husband the onus were

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55 *Ibid.*, at p. 422.

56 See generally, Halsbury's *Laws of England* (3rd ed., vol. 17), p. 679.

57 Sheridan, *Fraud in Equity* (1956), p. 95.

58 *Cox v. Adams* (1904), 35 S.C.R. 393, at p. 413.

59 The doctrine was applied to the husband and wife relation by the Supreme Court of Canada in *Stuart v. Bank of Montreal*, [1908-9] S.C.R. 516, but on appeal the Privy Council disapproved of the application of the principle; see [1911] A.C. 120 (P.C.), at p. 126. The latter decision has been followed in *Bank of Montreal v. Holoboff*, [1924] 3 D.L.R. 418 (Sask. C.A.), and in *Luchak v. Sitko* (1956), 3 D.L.R. (2d) 682 (Alta. C.A.).

60 *Howes v. Bishop*, [1909] 2 K.B. 390, at p. 394, *per* Farwell, L.J.

> on the husband to shew that the wife had had independent advice: such a position would render married life intolerable.[61]

This seemingly anomalous non-application of the principle is made to appear even more so by the fact that it has been held to apply in the case of engaged couples, at least in regard to benefits conferred upon the fiance. In *In re Lloyds Banks*,[63] Maugham J. expressed the view that a young woman engaged to be married generally reposes the greatest confidence in her future husband.[64] And in *Bradley v. Crittenden*[65] Lamont J. was prepared to hold, in the circumstances of that case, that the rule applied where the donor and donee are not formally engaged but the donor is greatly in love with the donee and desires to make her his wife. All of which serves to underline, if nothing else, the high degree of uncertainty that tends to characterize the principle in its application.

Reasons for the Presumption

> They [courts of equity] have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors; although there has been no proof of the actual exercise of such influence, and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible.[66]

This statement is a fitting introduction to our present inquiry for two reasons. In the first place, it points directly to the primary motivation behind the doctrine, namely, the protection of dependant persons. This equitable public policy is widely canvassed in the leading authorities.[67] It is as understandable a motive as it is an obvious one. On the other hand, the statement also indicates

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61 *Ibid.*, at p. 402.

62 *Page v. Horne* (1848), 11 Beav. 227; 50 E.R. 804; *Cobbett v. Brock* (1855), 20 Beav. 524; 52 E.R. 706.

63 (1930), 47 T.L.R. 38, cited in *Bradley v. Crittenden*, [1932] S.C.R. 552, at p. 566.

64 "It may be that the rule once reflected the state of the market, which operated to make a girl reluctant to refuse anything to her fiance, but the changed social circumstances of today render unreal this presumption, which ought to be dropped." Sheridan, *Fraud in Equity* (1956), at p. 96.

65 [1932] S.C.R. 552, at p. 567.

66 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 183, *per* Lindley, L.J.

67 For example, *Bradley et al. v. Crittenden*, [1932] S.C.R. 552, at 559, *per* Duff, J.; *Huguenin v. Baseley* (1807), 14 Ves. Jun. 274; 33 E.R. 526, at p. 531, *per* Sir Samuel Romilly, and at p. 532, *per* Lord Eldon; *Gibson v. Jeyes* (1801), 6 Ves. Jun. 267; 31 E.R. 1044, at pp. 1049-50, *per* Lord Eldon; *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 171, *per* Cotton, L.J.; and *Wright v. Vanderplank* (1856), 8 D.M. & G. 133, at p. 137; 44 E.R. 340, at p. 342, *per* Knight Bruce, L.J.

that the reasons underlying the doctrine are, perhaps, not as apparent as one might have suspected. If the fact of undue influence were readily provable there would be little or no reason to invoke the presumption. Those deserving protection could be given it and the public interest could be served by setting aside impeached transactions on a showing that influence was exercised unduly. Undue influence, however, is not easily proved. In fact, Lindley L.J. expressed the view that it may, in certain cases, be impossible to prove. This would appear to be because the influence is often a very subtle one in sharp contrast with the obviousness of duress. Indeed, the parties themselves may not even be aware that such influence is being exerted. Such considerations help one to appreciate why equity found it necessary to forge that formidable tool, the presumption.[68]

Some definitions of the doctrine and the reasoning behind it are couched in terms which indicate that some basic principles of contract law are not absent from the minds of judges when they approach this question. It has been said, for example, that a transaction will be set aside on the ground of undue influence because it was not the result of the free exercise of the plaintiff's will[69] or because he did not enter into it voluntarily and deliberately, knowing its nature and effect.[70] Finally there is the frequently quoted statement of Lord Eldon in *Huguenin v. Baseley*[71] to the effect that it is not whether the dependant party had the intention of entering into the transaction that is of fundamental importance. Rather it is how that intention was produced.

Presumption Rebuttable

Wherever the plaintiff succeeds in raising the presumption, the onus of proof rests on the party who seeks to uphold the transaction to show that the other performed the act or entered into the transaction voluntarily, and deliberately, knowing its nature

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68 It is of interest to note the way in which Lord Eldon viewed the matter: "It is necessary to say broadly, that those, who meddle with such transactions, take upon themselves the whole proof, that the thing is righteous. The circumstances, that pass upon such transactions, may be consistent with honest intentions; but they are so delicate in their nature, that parties must not complain of being called on to prove, they are so." *Gibson v. Jeyes* (1801), 6 Ves. Jun. 267; 31 E.R. 1044, at p. 1049. "... if the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud." *Hatch v. Hatch* (1804), 9 Ves. Jun. 292, at p. 297; 32 E.R. 615, at 617.

69 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 171.

70 *Kerr on Fraud and Mistake* (7th ed., 1952), at p. 226.

71 (1807), 14 Ves. Jun. 274, at p. 299; 33 E.R. 526, at p. 536.

and effect, and that his consent to perform the act or become a party to the transaction was not obtained by reason of any undue advantage taken of his position or of any undue influence exerted over him.[72] The onus may be a very heavy one. It would appear, however, that it can be more easily discharged in some cases than in others depending, it would seem, upon the actual quality of the relation,[73] the size of the benefit conferred[74] and the presence or absence of those other circumstances which tend to strengthen the presumption.[75] It would appear to be strongest in the case of the solicitor receiving a gift from a client.[77] Even there, however, it is not irrebuttable.[78]

In all cases where the presumption arises it would seem that the surest way to rebut it is by showing that the donor had independent advice and that the confidential relationship between the parties had ceased at the time of the transaction. In *Allcard v. Skinner*, Lindley L.J. seems to have thought that only by proving both of these things could the onus be discharged. But this view is excessively severe on the defendant and does not seem to have gained general favour. For example, in *Mitchell v. Homfray*,[79] Lord Selborne pointed out that where the confidential relation is shown to have come to an end no more need be shown by way of rebuttal. And Lord Hailsham in *Inche Noriah v. Allie Bin Omar*[80] expresses a more moderate view by suggesting that where the relation is still subsisting, proof of independent advice is only one of the methods by which the presumption can be rebutted. His Lordship

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72 "It is necessary to say broadly, that those, who meddle with such transactions take upon themselves the whole proof, that the thing is righteous." *Gibson v. Jeyes* (1801), 6 Ves. Jun. 267; 31 E.R. 1044, at p. 1049, *per* Lord Eldon.

73 Sheridan, *Fraud in Equity* (1956), at p. 90.

74 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 185.

75 See references in footnote 32.

76 *Allcard v. Skinner* (1887), 36 Ch. D. 145, at p. 158, *per* Kekewick, J.

77 Indeed, Lord Eldon has expressed the opinion that it is almost impossible for a solicitor to retain such a benefit once it is impeached: see *Hatch v. Hatch* (1804), 9 Ves. Jun. 292, at p. 296; 32 E.R. 615, at p. 617.

78 In *Tomson v. Judge* (1855), 3 Drew. 306; 61 E.R. 920, it was held that there was an absolute rule that a gift by a client to his solicitor is void. This view was also expressed *obiter* in the Ontario case, *Re White, Kerstan v. Tane* (1875), 22 Gr. 547, cited in *Words and Phrases, Legal Maxims, Canada*, (2nd. ed., Vol. 5), at p. 534. However, such a view was expressly dissented from in *Wright v. Carter*, [1903] 1 Ch. D. 27. See also *Brown et al. v. Premier Trust Co. et al.*, [1947] 1 D.L.R. 593 (Ont. H.C.), at p. 607, *per* McRuer, C.J.H.C.

79 (1881), 8 Q.B.D. 587, at p. 591.

80 [1929] A.C. 127, at p. 135.

was very much concerned with emphasizing that it is the end rather than the means that is of importance.

> . . . and in cases where there are no other circumstances this [the showing of independent advice] may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgement already cited of Cotton, L. J. [that the gift was the result of the free exercise of independent will], and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer.[81]

At the very least, therefore, it can be said that the presumption of undue influence can be rebutted by showing either that the confidential relation has ceased or, if it was still subsisting, that the plaintiff had independent advice.[82] To be sufficient for this purpose, the independent advice must, at least, be given with a knowledge of all relevant circumstances and must be such as a competent and honest advisor would give if acting solely in the interests of the donor.[83] It is not clear, however, whether it is necessary to show that such advice was actually followed. In *Powell v. Powell*[84] Farwell J. held that such a showing was necessary.

> Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need of protection.

However, some doubt was cast upon the validity of this view by Lord Hailsham, who in the *Inche Noriah* case stated, in effect, that their Lordships were not prepared to affirm that independent advice, when given, does not rebut the presumption, unless it be shown that the advice was taken.[85] It cannot be doubted, in any event, that the defendent's position will be very much strengthened by showing that the advice was followed. In fact, such a showing should guarantee success.

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81 *Ibid.*

82 *Powell v. Powell*, [1900] 1 Ch. 243, at pp. 245-6, *per* Farwell, J.: "The donee must show (and the onus is on him) that the donor was either emancipated or was placed, by the possession of independent advice, in a position equivalent to emancipation." It has been also suggested that a defendant may uphold a transaction for consideration by showing that the bargain was fair; see Sheridan, *Fraud in Equity* (1956), pp. 100, 104.

83 *Donnelly v. Jesseau* (1936), 11 M.P.R. 1 (N.B. Sup. Ct.), at pp. 8, 9, *per* Harrison, J.

84 [1900] 1 Ch. 243, at p. 246.

85 *Inche Noriah v. Shaik Albe Bin Omer*, [1929] A.C. 127 (P.C.), at p. 135.

Effect of a Non-displaced Presumption

Where the defendent is unable to rebut the presumption the transaction will be set aside unless some other defence is available to him. In this connection it is important to recognize against whom the inference of undue influence operates. Lord Eldon laid down a clear and very stringent rule in this much quoted statement:

> . . . and I should regret, that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others . . . and Lord Hardwicke observes justly, that, if a person could get out of the reach of the doctrine and principle of this Court by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud.
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> No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the Equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow.[86]

This rigid principle subsequently underwent some considerable reformulation. The more moderate form which it takes at present is well defined by Fry J. in these words:

> Clearly it [the presumption] operated against the person who is able to exercise the influence . . . and, in my judgement, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity. But, in my judgement, it would operate against no others; it would not operate against a person who is not shown to have taken with such notice of the circumstances under which the deed was executed.[87]

It should also be observed that the right to have a transaction set aside for fraud or undue influence does not cease on the death of the defrauded or dependent party but passes to his representatives.[88]

In the opening paragraph of this section it was suggested that a party may be permitted to retain the benefits derived even though unable to discharge the onus. This will be so where he can successfully plead laches and acquiescence. The action to impeach a transaction for undue influence is not one of those to which the Statute

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86 *Huguenin v. Baseley* (1807), 14 Ves. Jun. 274, at p. 289; 33 E.R. 526, at p. 532.

87 *Bainbrigge v. Browne* (1881), 18 Ch. D. 188, at p. 197.

88 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 187.

of Limitations in terms applies. But it does very closely resemble an action for money had and received where laches and acquiescence may be relied upon as a defence.[89] Transactions liable to be set aside on the ground of undue influence have always been treated as voidable and not void. As with other transactions, the party seeking to avoid it must do so within a reasonable time. It is important to recognize, however, that the reasonable time is considered in reference not to the date of the transaction but to the date at which the relation which invalidates the transaction ends. In other words, the party seeking relief must do so within a reasonable time after the removal of the influence under which the transaction was undertaken.

> If he does not the inference is strong, and if the lapse of time is long the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it.[90]

Furthermore, where the plaintiff's ignorance as to his rights is the result of his own resolution not to inquire into them, such ignorance will not be an answer to an equitable defence based on laches and acquiescence.[91]

The scope of this paper does not permit an inquiry into the questions of "total failure of consideration" and "*restitutio in intergrum*". However, it may be pointed out that in setting aside transactions because of an unrebutted presumption of undue influence the courts are not unmindful of possible equities in the defendant. For example, in *Allcard v. Skinner* it was held that the plaintiff, who had been a member of an Anglican sisterhood, would have been entitled to have her gift to the sisterhood set aside were it not for her laches and acquiescence. In such event, however, she would have been permitted to recover only that part of the donated property which the sisterhood still possessed. And in *Wright v. Vanderplank* the defendant was held entitled to retain a certain percentage of the rents which he had received from property conveyed to him by his daughter (the plaintiff's deceased wife), by way of allowance for her education and his expenditure on her behalf.

It would seem that the ultimate effect of the presumption may just be to recover to the plaintiff such benefits conferred as appear, in the circumstances, to be excessive or for the retention of which

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89 *Ibid.*, at p. 186.

90 *Ibid.*, at p. 187. See also *Wright v. Vanderplank* (1856), 8 D.M. & G. 133; 44 E.R. 340, and *Mitchell v. Homfray* (1881), 8 Q.B.D. 592.

91 *Allcard v. Skinner* (1887), 36 Ch. D. 145 (C.A.), at p. 188.

the party so benefited is unable to show justifiable grounds. To the extent that this is so the potential hardships inflicted by the doctrine will be mitigated.

Summary and Conclusion

1. If the person seeking to avoid a transaction can show that there was a relationship presumed to be one of confidence between him and the other party or between him and the person at whose instance the transaction took place, there is a presumption that the confidence was abused.

2. A precisely similar presumption of abuse of confidence ensues from proof of the existence of a relationship which, though not presumed to be one of confidence, was in fact one in which one party confided in the other, and the transaction regarded some matter in respect of which there was that confidence.

3. The doctrine was developed in equity for reasons of public policy and in the light of the great difficulty involved in proving the undue influence.

4. The immediate effect of the presumption is to place upon the party seeking to uphold the transaction the onus of proving that the confidential relation had ceased, that the party conferring the benefit had competent independent advice, or that the bargain was fair.

5. The fact that there was no abuse of confidence will assist the defendant in discharging the onus but will not prevent the presumption from arising.

6. Where the presumption is not rebutted the impugned transaction will be set aside both as regards the party thereto and third parties deriving benefits thereunder. However, third parties who acquire such benefits for value and without knowledge of the influence exerted will be protected.

It would seem to be beyond question that persons in a state of dependence are as susceptible to undue influence today as they ever were. Similarly, the task of proving undue influence is probably as onerous as it ever has been. Therefore, there would be no merit in a suggestion that the doctrine is obsolete and should be disregarded. That is not to say, however, that the doctrine is not open to criticism and could not be rendered more equitable in application.

The obvious criticism of the rule is that it, like the Statute of Frauds and much of the law regarding infants' contracts, may provide the incubator in which fraud may flourish and grow. Thus,

it may have the effect of inflicting considerable hardship on entirely innocent defendants. Of course, the courts are not unmindful of this possibility. In *Bradley v. Crittenden*,[92] Lamont J. observed that:

> The rule of equity which places on the donee the burden of proving both the gift and the independence of the donor's will in making it, may be a harsh one and, in individual cases, may lead to hardship. The courts, however, have found it necessary to maintain it in order to prevent those in a position to exercise undue influence from taking advantage of their position under circumstances in which proof thereof would be impossible.

In the course of this study it has been shown that modifications have taken place in several areas which render the doctrine less stringent in its application and effect than was the case in the days of Lord Eldon who, if he may not be regarded as the "father of the presumption", may certainly be considered to be its most ardent propagator. Further to these one may suggest that the courts guard against any undue extension of the class of relations in which confidence will be presumed, and that a high standard of proof be maintained regarding the repose of confidence where it is not presumed. Finally, it is to be hoped that in determining the benefits which a plaintiff is entitled to recover, due regard will be had for the equities of the defendant.

92 [1932] S.C.R. 552, at p. 569.