REPORTS OF CASES

DETERMINED BY THE

HIGH COURT OF AUSTRALIA

1906-1907.

[HIGH COURT OF AUSTRALIA.]

BAYNE AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

BLAKE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 18, 19, 20, 21, 22, 25. *September* 17.

Griffith C.J., Barton and O'Connor JJ.

Administration bond—Sureties—Deed of indemnity by beneficiaries—Concealment from Court—Public policy—Solicitor and client—Confidential relation—Benefit conferred by client on solicitor—Duty of solicitor—Independent advice—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *secs.* 15-17.

In an action against sureties on an administration bond which has been assigned under sec. 17* of the *Administration and Probate Act* 1890 (Vict.), any defence which would be open to the administrator in an action for administration in which breaches of trust or devastavits are charged, is open to the

* Sec. 17 of the *Administration and Probate Act* 1890 provides that the person to whom an administration bond is assigned, his executors or administrators, "shall thereupon be entitled to sue upon the said bond in his or their own name or names as if the same had been originally given to him, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond."

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sureties, and any facts which would establish that, as between the beneficiaries and the sureties, the former are not entitled to claim indemnity from the latter, may be set up as a defence.

Where, as a condition to becoming sureties to an administration bond, the sureties, prior to the execution of the bond, demand and obtain from the beneficiaries an indemnity against any liability under the bond, such indemnity is not *ipso facto* illegal. *Per Griffith* C.J. and *Barton* J.—If the circumstances are such that, if the indemnity were disclosed to the Court, the grant of administration might be refused, and that a stipulation that the indemnity should be concealed from the Court ought to be inferred, such a stipulation will vitiate the indemnity.

In order to establish the fiduciary relationship of solicitor and client which is necessary to exist in order that the principles governing the validity of benefits conferred by a client on his solicitor shall apply, it is not necessary that the formal relation of debtor and creditor should exist, but it is sufficient that, in the particular matter in question, the client should have relied upon the advice of the solicitor and that the solicitor should have known that the client so relied upon his advice.

Two members of a firm of solicitors became sureties to an administration bond, receiving as consideration £75, and, before executing the bond, they required the administratrix and her two sisters, who were the only other beneficiaries, to execute a deed of indemnity against any liability under the bond, and charging all their interests in the estate as security. The sisters had no independent advice. In an action on the bond by the two sisters of the administratrix to whom it had been assigned :

Held, that in the absence of independent advice the sureties could not rely on the deed of indemnity, because, on the facts, the relationship of solicitor and client existed between the sureties and the three sisters.

Held, also, by *Griffith* C.J. and *Barton* J., that the deed was invalid on the further ground that, even if that relationship did not exist between them, (1) it existed between the sureties and the administratrix through whom the bargain, which could not be supported as against her, was made with her two sisters ; and (2) the bargain was one made between solicitors and the *cestuis que trustent* of their client without independent advice for a charge on the trust estate.

Held, further, that the administration bond and the deed of indemnity were independent contracts, and that the impossibility of discharging the defendants from the bond was no answer to a claim to set aside the deed.

Judgment of Supreme Court (*Holroyd* J.) pursuant to answer to question referred by him to the Full Court (*Bayne* v. *Blake*, (1906) V.L.R., 112 ; 27 A.L.T., 143) reversed.

APPEAL from the Supreme Court of Victoria.

Grace Bayne the elder died intestate in Melbourne on 10th June 1885, leaving her surviving three daughters, Grace Bayne, Lila Elizabeth Bayne and Mary Bayne, the two first mentioned being twin sisters. Her estate was valued at about £17,400, and there were unsecured debts to a small amount as well as some secured debts, so that the net value of the estate was about £10,000. On the 23rd July 1885 letters of administration were granted by the Court to Grace Bayne, and were subsequently issued to her. On the 11th June 1886 an administration bond in the ordinary form was executed by Grace Bayne, and by Arthur Palmer Blake and William Riggall as sureties, in compliance with the provisions of the *Administration Act* 1872 whereby they became jointly and severally liable to the then Chief Justice, Sir William Foster Stawell, Knight, his successors and assigns, in the sum of £5,000.

On the 24th March 1904 by order of *Hood* J. the bond was assigned to Lila Elizabeth Bayne and Mary Bayne in order that it might be put in suit, and they thereupon commenced an action against Messrs. Blake and Riggall alleging certain breaches of trust by the administratrix, Grace Bayne, which may be shortly stated as follows:—(1) Failure to distribute within the time allowed by law or at all; (2) payment of a sum of £75 out of the estate to the defendants as a consideration to them for executing the administration bond as sureties; (3) borrowing of money upon the security of mortgages of the real estate resulting in default and foreclosure of the mortgages with consequent loss of the whole to the estate; (4) the continuance of funds upon unauthorized investments in a building society whereby the greater part of the funds were lost to the estate. The plaintiffs claimed as trustees for all persons interested £5,000.

The nature of the defence and of the subsequent pleadings as well as the other material facts are sufficiently set out in the judgment of *Griffith* C.J. hereunder. It is only necessary to mention here that the defendants chiefly relied on a deed of indemnity executed on 20th May 1886.

The action was heard before *Holroyd* J. who found certain facts and referred to the Full Court the question whether the deed of indemnity of 20th May 1886 was void on the ground of

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public policy or not. The Full Court having answered the question in the negative (*Bayne* v. *Blake* (1)), judgment was entered for the defendants with costs.

From this judgment the plaintiffs appealed to the High Court.

H. Barrett and *Arthur*, for the appellants. The deed of indemnity is void as being contrary to public policy. It is opposed to the spirit of the Administration and Probate Acts. The object of requiring a bond with sureties is the public benefit. The Court has always retained the control of administrations in its own hands; that control it has as the delegate of the King, who originally held the goods of intestates and distributed them: *Williams on Executors*, 10th ed., pp. 312, 420; *Court of Probate Act* 1857 (England) (20 & 21 Vict. c. 77), secs. 81, 83; *Hensloe's Case* (2); *In re Kinderlin* (3); *In re Chevalier* (4); *In re Harver* (5); *In re Lucas*; *Parr* v. *Blair* (6); *In re Rainer* (7); *In re Carpenter* (8); *Dodd and Brooks's Probate Practice*, p. 481. An agreement to indemnify a surety to a bail bond is void as against public policy: *Martyn* v. *Blithman* (9). The spirit of an Act will be considered. Thus in *Taylor* v. *Taylor* (10), it was held that an agreement by a candidate for a parliamentary election to withdraw on being paid the expenses he had incurred was contrary to the spirit of the *Electoral Act* 1881 (N.S.W.), and therefore void as against public policy. Sureties will not be dispensed with by the Court on the mere consent of the beneficiaries: *In re Story* (11). That case shows that the Court will not allow the beneficiaries to give up the protection afforded by the Act without knowing what they are giving up. The agreement itself must be looked at to see whether there is any vice in it which lends itself to fraud. In *Redmond* v. *Wynne* (12), an agreement that an architect's certificate was to be final notwithstanding there might be collusion or fraud was held to be *contra bonos mores* and therefore void. This particular indemnity

(1) (1906) V.L.R., 112; 27 A.L.T., 143.
(2) 9 Rep., 38b.
(3) 1 W. & W. (I.E. & M.), 11, at p. 13.
(4) 29 V.L.R., 326; 25 A.L.T., 78.
(5) 14 P.D., 81.
(6) (1900) 1 I.R., 292.
(7) Deane Ecc. Cas., 317.
(8) 20 V.L.R., 159.
(9) Yelv., 197.
(10) 11 N.S.W. L.R., 323.
(11) 28 V.L.R., 336; 24 A.L.T., 80.
(12) 13 N.S.W. L.R., 39, at p. 44.

is so wide that it covers fraudulent maladministration by the administratrix. It is a fraud on the Act and on the Court, and was entered into behind the back of the Court. The fact that the assignee of the bond is allowed to sue makes no difference to the nature of the bond: *Dodd and Brooks's Probate Practice*, p. 13; *Sandrey* v. *Michell* (1). It is just as if the Chief Justice were suing. A creditor cannot recover his own debt by having the bond assigned to him, but he recovers for all the creditors. So the appellants cannot enforce their own private rights in this action, and no defence can be raised which would only be an answer to their private claim. This being a penalty, the full amount of the bond can be recovered: *Archbishop of Canterbury* v. *Robertson* (2); *Dobbs* v. *Brain* (3); *In re Wyld* (4). The object of the Act being the protection of a particular class of persons, any common agreement by them to give up that protection is void: *Devey* v. *Edwards* (5); *Lee* v. *Read* (6); *Barclay* v. *Pearson* (7). The duty imposed is an absolute duty and does not correlate any right in the parties protected to give up their right.

[O'CONNOR J. referred to *Equitable Life Assurance of the United States* v. *Bogie* (8).]

A member of the class can recover although the contract is illegal: *Kaye* v. *Bolton* (9); *Nerot* v. *Wallace* (10); *Kearley* v. *Thomson* (11); *Collins* v. *Blantern* (12). This is not a new head of public policy. It is a new case which comes under the old head of public policy: *Egerton* v. *Earl Brownlow* (13). The administratrix being an officer of the Court, the surety is also an officer of the Court, and there is an analogy between his accepting an indemnity and a sale of an office. See *Brown* v. *Brine* (14); *Gipps* v. *Hume* (15); *Blachford* v. *Preston* (16); *Parsons* v. *Thompson* (17); *Garforth* v. *Fearon* (18). Where monetary considerations

(1) 3 B. & S., 405.
(2) 1 Cr. & M., 690.
(3) (1892) 2 Q.B., 207.
(4) 6 V.L.R. (I.P. & M.), 83.
(5) 3 Addams., 68.
(6) 5 Beav., 381.
(7) (1893) 2 Ch., 154, at p. 166.
(8) 3 C.L.R., 878.
(9) 6 T.R., 134.
(10) 3 T.R., 17.
(11) 24 Q.B.D., 742.
(12) Sm. L.C., 11th ed., vol. I., p. 369.
(13) 4 H.L.C., 1, at p. 246.
(14) 1 Ex. D., 5.
(15) 31 L.J., Ch., 37.
(16) 8 T.R., 89.
(17) 1 H. Bl., 322.
(18) 1 H. Bl., 328.

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come into a matter of this kind the Court is more inclined to deal with it on the ground of public policy: *Taylor* v. *Taylor* (1).

This particular deed of indemnity is void because of the situation of the parties towards one another. The appellants were under the dominion of their sister Grace Bayne, whose duty it was to see that the appellants had independent advice. Then the respondents, being solicitors for Grace Bayne, were bound to see that she had independent advice. Further, as the respondents are seeking to take advantage of the indemnity procured by Grace Bayne from the appellants, it was the duty of the respondents to see that the appellants had independent advice. Although there is a finding that the respondents were not solicitors for the appellants that is more a question of law than of fact. The requisites to support a contract of this sort between a solicitor and his client are stated in *Wright* v. *Carter* (2), viz.:—(1) That the client was fully informed; (2) that he had competent independent advice; and (3) that the price given was a fair one. As to the duty to see that independent advice is had, see *Huguenin* v. *Baseley* (3); *Allcard* v. *Skinner* (4); *Dent* v. *Bennett* (5); *Harvey* v. *Mount* (6); *Hatch* v. *Hatch* (7); *Liles* v. *Terry* (8); *Rhodes* v. *Bate* (9); *Moxon* v. *Payne* (1); *Wright* v. *Carter* (2); *Willis* v. *Barron* (11). The last case shows that it is not necessary that there should be any special employment of a solicitor in order that the principle should apply; it is sufficient that confidence should be placed in the solicitor. See also *Fox* v. *Mackreth* (12); *White and Tudor's Leading Cases*, 7th ed., vol. III., pp. 709, 734; *Ex parte Lacey* (13); *Hamilton* v. *Wright* (14); *McPherson* v. *Watt* (15); *Phosphate Sewage Co.* v. *Hartmont* (16). The consideration was so small as to be practically no consideration. There was no such concurrence in the breaches of trust as relieves the respondents from liability.

(1) 11 N.S.W. L.R., 323.
(2) (1903) 1 Ch., 27.
(3) 14 Ves., 273.
(4) 36 Ch. D., 145.
(5) 4 My. & C., 267.
(6) 8 Beav., 439.
(7) 9 Ves., 292.
(8) (1895) 2 Q.B., 679.
(9) L.R. 1 Ch., 252.
(10) L.R. 8 Ch., 881.
(11) (1900) 2 Ch., 121; (1902) A.C., 271.
(12) 2 Bro. C.C., 400.
(13) 6 Ves., 625.
(14) 9 Cl. & F., 111.
(15) 3 App. Cas., 254, at p. 266.
(16) 5 Ch. D., 394.

[GRIFFITH C.J.—There cannot be concurrence where the person said to have concurred had not the means of knowing that the acts concurred in involved breaches of trust: *Buckeridge* v. *Glasse* (1); *Crichton* v. *Crichton* (2); or where his judgment was misled: *Whistler* v. *Newman* (3); *Hughes* v. *Wells* (4).]

There has not been such a delay as disentitles the appellants to succeed: *In re Garnett, Gandy* v. *Macaulay* (5); *Sleeman* v. *Wilson* (6). Delay does not matter until there has been independent advice.

[Counsel also referred to *New Zealand Loan & Mercantile Agency Co.* v. *Smith* (7).]

Isaacs A.G., *Higgins* K.C., and *Weigall*, for the respondents.

[The Court intimated that they did not desire to hear argument on the abstract question of the right of a surety to an administration bond to take an indemnity.]

Where there is a pre-existing fiduciary relation, transactions between a trustee and a *cestui que trust* will in some cases not be upheld except under very special circumstances.

In this case, however, there was no pre-existing fiduciary relation. The very transaction which is now impeached is part of one transaction, the other part of which the appellants seek to preserve. They cannot do so; they cannot both approbate and reprobate: *Roe* v. *Mutual Loan Fund Limited* (8); *Bankes* v. *Jarvis* (9). The action is not against the respondents as solicitors but is merely a common law action upon a bond, to which there is a common law defence, and thereupon the appellants say that the indemnity set up in that defence is contrary to public policy. There is no case in which it has been held that, there being in a document creating a trust a limitation of the liability of the trustee, the *cestui que trust* can disregard the limitation and at the same time take the benefits. As to the bond the parties were at arms' length. The mere fact that the respondents had been solicitors to the mother of the appellants does not affect the

(1) Cr. & Ph., 135.
(2) (1896) 1 Ch., 870.
(3) 4 Ves., 129.
(4) 9 Hare, 749, at p. 773.
(5) 31 Ch. D., 1.
(6) L.R. 13 Eq., 36.
(7) 15 A.L.T., 92.
(8) 19 Q.B.D., 347.
(9) (1903) 1 K.B., 549.

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matter. Assuming that there was a fiduciary relationship created by the suretyship and that the respondents were solicitors to the family, the only right the appellants would have would be to rescind the transaction into which they had been led by the respondents without the necessary safeguards which the law requires. If a family solicitor were asked to become trustee of a will, and only consented to do so on condition that he should be indemnified against certain things, the beneficiaries could not afterwards repudiate the indemnity.

[GRIFFITH C.J.—A more analogous case would be that of an executor refusing to act unless the beneficiaries indemnified him.]

In that case the beneficiaries could not repudiate the indemnity. The parties were all *sui juris*. The suretyship was for the benefit of all the parties interested.

[GRIFFITH C.J.—Was there not a representation to the Court that the sureties had entered into a fiduciary position towards all the persons interested in the estate? Are not the trustees estopped from denying that they had entered into that position?]

At most they would be estopped as regards the Court. The bond is that the respondents will be sureties for the administratrix, but that does not in any way affect the right of the *cestuis que trustent* to act in any way they please. The representation to the Court is subject to all the contractual rights that have been created. A distinction exists between an agreement made before, and one made after, the creation of a trust. In this case immediately before the indemnity was given there was no legal or equitable obligation between the appellants and the trustees: *Burland* v. *Earle* (1). The parties cannot be put back in their original position and therefore there can be no rescission: *Buckley on Companies*, 8th ed., p. 662; *In re Cape Breton Company* (2), affirmed on the facts *sub nom. Cavendish Bentinck* v. *Fenn* (3); *Seton on Decrees*, 6th ed., vol. III., p. 2342; *Plowright* v. *Lambert* (4); *Clarke* v. *Dickson* (5); *Urquhart* v. *Macpherson* (6). There was no fiduciary relationship between the appellants and the respondents.

(1) (1902) A.C., 83.
(2) 26 Ch. D., 221; 29 Ch. D., 795.
(3) 12 App. Cas., 652.
(4) 52 L.T.N.S., 646.
(5) E.B. & E., 148.
(6) 3 App. Cas., 831.

[GRIFFITH C.J.—The respondents employed the administratrix as their agent to get the indemnity from the appellants who were completely under the influence of the administratrix. That indemnity is the only bargain made with the appellants. Should it not be set aside on that ground ?]

If the respondents did not know that that influence existed, and there is no evidence that they did, there would be no ground for setting aside the indemnity. The relationship between the administratrix and her two sisters was not such that the Court would say the influence of the administratrix was undue.

[GRIFFITH C.J.—My difficulty is to see that there was only one transaction. There was one agreement between the administratrix, the sureties and the Court, and another between the appellants and the sureties.]

Both agreements sprang out of the one transaction—the one contract.

[GRIFFITH C.J.—Suppose the indemnity could not be supported as between the administratrix and the appellants, could it be supported between the respondents and the appellants ?]

There is no reason why it should not be supported. Even if it could not, the whole transaction must be set aside. The parties must be remitted to their original position. *Cestuis que trustent* must get no advantage from their trustee just as the trustee can get no advantage from them. The conduct of the appellants in reference to the breaches of trust amounted to a concurrence and it has been so found. As to the mortgage transaction, the mortgagee refused to advance any money without the consent of the appellants. The money was obtained, and the appellants cannot hold the sureties liable without paying back the money.

If the deed of indemnity be void on the ground of illegality, there is no doubt that it is as if it never existed, and the appellants can recover on the bond. But if the deed be voidable, it cannot be treated as if it had never existed having regard to what took place afterwards. To rescind the transaction is one thing, to force upon the respondents a contract which they never made is another: See *Burland* v. *Earle* (1). There is no fiduciary relation between the sureties to an administration bond and the

(1) 71 L.J. P.C., 1, at p. 8.

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beneficiaries. The obligation of the sureties is one of contract. If there is any fiduciary relation, it is between the Chief Justice and those on whose behalf he has taken the bond. The only statutory obligation on the sureties is to give the bond, and having given it, the ordinary law comes in and works the consequences of the bond. There is no privity between the sureties and the beneficiaries.

It is not illegal to break a trust, that is to say, a trustee can make a contract by which he undertakes to break a trust provided the beneficiaries indemnify him. An act done with the consent of all the beneficiaries is not a breach of trust, and it is only in respect of breaches of trust that the sureties are liable. A beneficiary who, knowing the facts, concurs in a breach of trust cannot afterwards complain: *Fletcher* v. *Collis* (1); *In re Somerset*; *Somerset* v. *Earl Poulett* (2); *Lewin on Trusts*, 11th ed., pp. 1155, 1168. From the time the fifteen months' account was filed there was no relation of solicitor and client except in respect of specific dealings, and Grace Bayne was the only client. As to the mortgages, the respondents obtained the consents of the appellants, not as solicitors for Grace Bayne, but as solicitors for the mortgagees. From some time in 1886 the duties of administratrix were over, and Grace Bayne simply held as trustee for herself and her sisters, and therefore the obligations of the bond were at an end. The administration ended when the beneficiaries were entitled to demand a transfer. If the beneficiaries show actively that they wish the property to be kept, then the administration is at an end. The case of a gift from a client to his solicitor is essentially different from a case where there is value on both sides. The Court has not to deal with the *quantum* of risk the sureties took. There was responsibility by the sureties to creditors secured and unsecured, so that there was some risk at any rate.

[GRIFFITH C.J.—Any contract having a tendency to affect the administration of justice is illegal and void: *Lound* v. *Grimwade* (3); *Elliott* v. *Richardson* (4). If a contract is made with the intention that it shall be concealed from the Court and the Court

(1) (1905) 2 Ch., 24.
(2) (1894) 1 Ch., 231, at pp. 265, 274.
(3) 39 Ch. D., 605.
(4) L.R. 5 C.P., 744.

may be induced to do something which otherwise it would not have done, is not the contract illegal ?]

There is no evidence of an intention to conceal this deed of indemnity from the Court. The respondents would have had no objection to its being disclosed, and if it had been disclosed the Court would not have been induced to act otherwise than it did. At most the concealment would have been a ground for upsetting the administration. The Court would have no right to refuse to accept a guarantee society as a surety with an indemnity of this sort. All the Act requires and all the Court is concerned with is that the bondsmen are efficient. See sec. 15 of the *Administration and Probate Act* 1890.

[GRIFFITH C.J.—Is not the effect of this transaction to create a bond with a secret defeasance ?]

No. A defeasance would require another bond between the Chief Justice and the sureties, so that an action could not be brought on the bond. There is no difference between an indemnity by the beneficiaries and an indemnity by third persons, or by one of the creditors.

[Counsel also referred to *Staniar* v. *Evans* (1); *Broom's Legal Maxims*, 7th ed., p. 344; *Pollock on Contracts*, 7th ed., p. 332.]

Arthur in reply. The deed of indemnity is void as being against public policy. It is a fraud on the Court, and knowingly a fraud. The administratrix and the respondents consulted together to do a thing which the Court would not have permitted. There was an obligation to disclose the deed to the Court. Sureties to an administration bond are in a fiduciary relation to the beneficiaries: *In re Carpenter* (2). The sureties have more than contractual duties, otherwise the beneficiaries would not have a right to bring a *quia timet* action: *Holden* v. *Black* (3); *Mulholland* v. *Smith* (4). If the deed of indemnity is only voidable it can be set aside, but the bond will remain. The deed and the bond are severable, and the bond is required by law. A contract made by a trustee at the time he undertakes the trust that

(1) 34 Ch. D., 470.
(2) 20 V.L.R., 159.
(3) 2 C.L.R., 768.
(4) 20 V.L.R., 403.

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he is to receive remuneration must be fair: *Robinson* v. *Pett* (1); *In re Sherwood* (2); *Ayliffe* v. *Murray* (3); *Townley* v. *Sherborne* (4); *Sawyer v. Sawyer* (5); *Bolton* v. *Curre* (6).

[GRIFFITH C.J. referred to *Moore* v. *Frowd* (7).]

Cestuis que trustent must know all their rights which arise out of a transaction with their trustee: *In re North Australian Territory Co., Archer's case* (8). The mere fact that *cestuis que trustent* know beforehand of proposed breaches of trust is not concurrence, nor is mere consent concurrence: *Fletcher* v. *Collis* (9). There cannot be concurrence if the party does not understand what is being done, and what is its legal effect: *Kempson* v. *Ashbee* (10). The doctrine of approbation and reprobation does not apply to an agreement between a solicitor and his client under which the solicitor is to become trustee for the client.

[Counsel also referred to *Goddard* v. *Carlisle* (11); *Gibson* v. *Jeyes* (12); *Corley* v. *Lord Stafford* (13); *Smith* v. *Kay* (14); *Dawson* v. *Lawes* (15); *Burrows* v. *Walls* (16).]

Isaacs A.G., by permission, referred to the following cases:— *Bainbrigge* v. *Browne* (17); *Cradock* v. *Piper* (18); *Lincoln* v. *Windsor* (19); *Broughton* v. *Broughton* (20); *Mara* v. *Browne* (21); *Chillingworth* v. *Chambers* (22); *Moxham* v. *Grant* (23); *Paterson* v. *McNaghten* (24); *Wildes* v. *Dudlow* (25); *Evans* v. *Benyon* (26); *Sheffield Nickel and Silver Plating Co.* v. *Unwin* (27).

Cur. adv. vult.

Sept. 17.

The following judgments were read:—

GRIFFITH C.J. This is an action brought by the assignees of an administration bond against the sureties, to recover assets

(1) W. & T. L.C., 7th ed., vol. II., 606, at p. 624.
(2) 3 Beav., 338.
(3) 2 Atk., 58.
(4) W. & T. L.C., 7th ed., vol. II., p. 690.
(5) 28 Ch. D., 595.
(6) (1895) 1 Ch., 544.
(7) 3 My. & C., 45.
(8) (1892) 1 Ch., 322.
(9) (1905) 2 Ch., 24.
(10) L.R. 10 Ch., 15.
(11) 9 Price, 169.
(12) 6 Ves., 266.
(13) 1 De G. & J., 238.
(14) 7 H.L.C., 750.
(15) Kay, 280.
(16) 5 D.M. & G., 233.
(17) 18 Ch. D., 188.
(18) 1 Mac. & G., 664, at p. 678.
(19) 9 Hare, 158.
(20) 2 Sm. & G., 422.
(21) (1895) 2 Ch., 69, at p. 92.
(22) (1896) 1 Ch., 685, at p. 703.
(23) (1899) 1 Q.B., 480, at p. 484.
(24) 2 C.L.R., 615, at p. 626.
(25) L.R. 19 Eq., 198, at p. 200.
(26) 37 Ch. D., 329.
(27) 2 Q.B.D., 214, at p. 223.

alleged to have been lost to the estate by reason of breaches of duty committed by the administratrix in her administration. The bond, which is dated 11th June 1886, was executed in compliance with the provisions of the *Administration Act* 1872 by Grace Bayne the administratrix and the defendants as her sureties upon the grant to her of administration of the real and personal estate of her mother, who had died intestate in 1885. The penalty of the bond was £5,000, and the condition was in the usual form, namely, that if the administratrix should well and truly collect and administer according to law the property lands and hereditaments goods chattels and credits of the intestate at the time of her death which should come to the power or control hands or possession of her as such administratrix or to any other person or persons for her . . . then the said obligation should be void and of none effect or else should remain in full force and virtue.

In February 1904, by order of *Hood* J., the bond was assigned to the plaintiffs, who are sisters of the administratrix, and are, except creditors, the only other persons entitled in distribution to the intestate's estate. Sec. 28 of the *Administration Act* 1872 (now sec. 17 of the *Administration and Probate Act* 1890) enacts that the person to whom the bond is assigned "shall thereupon be entitled to sue upon the bond in his own . . . name . . . as if the same had been originally given to him, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond." As pointed out by *Holroyd* J., from whose decision this appeal is brought, the words "shall be entitled to recover" and "recoverable" must be limited to matters in respect of which the persons for whose benefit the assignee is suing as trustee are entitled to relief against the administrator, *i.e.* claims to which the administrator would have no defence in an action against him. I think, therefore, that any defence which would be open to the administrator himself in an action for administration in which breaches of trust or devastavits are charged is open also to the sureties in an action on the bond. So, also, I think that in an action against the sureties any facts which would establish that, as between the

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beneficiaries and the sureties, the former are not entitled to claim indemnity from the latter, may be set up as a defence. For instance, if the beneficiaries executed a release to the sureties, that release might be pleaded in a defence to an action on the bond, so far as it is brought for their benefit. So, if they entered into a valid contract of counter-indemnity, that contract might be set up either by way of counterclaim, or possibly as a direct defence to avoid circuity of action. From this point of view, the circumstance that the assignees of the bond are themselves beneficiaries is only formally material, to the extent that the release or contract would be alleged to have been made by the plaintiffs being themselves the beneficiaries, instead of by beneficiaries for whom the plaintiffs are trustees. From another point of view, however, the fact that the contract on which the assignees are suing is not a private contract made with them, but a statutory contract made with the Court, may be very important.

The breaches of the condition of the bond alleged in the statement of claim may be shortly stated as follows:—(1) Failure to distribute within the time allowed by law or at all; (2) payment of a sum of £75 out of the estate to the defendants as a consideration to them for executing the bond as sureties; (3) investment of assets in the purchase of land, and borrowing money upon the security of mortgages of the real estate resulting in default and foreclosure by the mortgagees; (4) the continuance of funds upon an unauthorized investment in a building society.

The defendants, by their defence, did not deny the facts alleged to constitute these breaches of condition, except that they said that the money advanced to the administratrix by way of mortgage was not advanced to her as administratrix. But they set up and relied upon a deed of 20th May 1886, *i.e.*, antecedent to the bond, made between the administratrix and the plaintiffs of the one part and the defendants of the other part, by which, after reciting that the administratrix and the plaintiffs had requested the defendants to execute the bond in order that the administratrix might obtain administration, and that the defendants had consented to do so upon the administratrix and the plaintiffs entering into the agreement indemnity and charge thereinafter contained, it was witnessed that in consideration of

the premises and of the defendants entering into the bond, the plaintiffs, in case the administratrix should not duly faithfully honestly and properly administer the estate of the intestate according to law, did thereby jointly and severally covenant with the defendants and each of them that they the plaintiffs or either of them would not at any time thereafter bring or cause to be brought by any person or persons on behalf of them or either of them against the defendants or either of them any actions suits accounts claims demands or other proceedings whatsoever for or on account of any maladministration of the estate of the intestate by or on the part of the administratrix; and further that, in consideration of the premises and of the defendants entering into the bond, the administratrix and the plaintiffs and any two of them and each of them jointly and severally covenanted with the defendants and each of them that they the administratrix and the plaintiffs would at all times thereafter keep indemnified the defendants and each of them from all actions suits accounts claims demands and other proceedings whatsoever as aforesaid, and all costs charges damages and expenses whatsoever at any time thereafter incurred or sustained by the defendants or either of them by reason of or in consequence of any account claims demands or other proceedings whatsoever or any matter or thing in any wise relating to the bond in case of such maladministration by or on the part of the administratrix. By the same deed the administratrix and the plaintiffs respectively charged their respective shares and portions of the estate of the intestate and the proceeds of any sale thereof, if sold, with the payment to the defendants and each of them of all costs charges damages and expenses which might at any time thereafter be incurred or sustained by the defendants or either of them by reason or in consequence of any maladministration of the estate.

The defendants further set up as a matter of law that the administratrix held the estate as a trustee for herself and the plaintiffs, and with a right and duty to deal with it in any way agreed upon by her and the plaintiffs, and alleged that the administratrix in respect of the matters complained of acted either at the express request of the plaintiffs or with their consent, and as a trustee for them and herself. They also pleaded

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acquiescence by the plaintiffs in the acts of the administratrix now complained of.

In reply the plaintiffs pleaded that the alleged deed of 20th May 1886 was executed by them at the request of the defendants at a time when the defendants were acting as the solicitors and legal advisers of the administratrix and of the plaintiffs, and that the plaintiffs had no independent legal or other advice with reference to the execution of the deed, and were ignorant of the effect of it. They also alleged that the defendants represented to them before execution of the deed that it was a mere matter of form. The plaintiffs further set up as a matter of law that the deed was contrary to the provisions of the *Administration and Probate Act* 1890, and corresponding prior enactments, and was against public policy and illegal and void. No particulars of this reply were asked for or given.

The defendants by their rejoinder set up as a matter of law that the plaintiffs could not rely upon the facts alleged as avoiding the deed inasmuch as they had received the full benefit of it without asserting any right of avoidance, and further that the deed was binding until set aside, and that no claim to set it aside had been or could be made in this action or in any action on the bond, and that such an action could not under any circumstances be successfully maintained. The last objection raises an interesting question of pleading. Strictly speaking, the pleadings should probably have taken the following form: The defendants, having set up the deed, should have alleged that the plaintiffs were suing for their own exclusive benefit, and have claimed to recover from them by way of indemnity a sum equal to any sum which the plaintiffs might recover in the action, and to set off one sum against the other. I am disposed to think that this would have been a direct defence as avoiding circuity of action, and not one by way of counterclaim. Again, strictly speaking, the proper way to meet such a defence would have been by amendment of the statement of claim, setting up the facts alleged in the reply and claiming to have the deed set aside. I do not think that it would have been necessary in this case to join any additional parties for the purpose of this amendment, although, if the bond had been assigned to a stranger, it would have been necessary to join the

beneficiaries as parties, either in the same or in another action. The point of illegality is properly a matter of reply. The whole matter was, however, fully investigated at the hearing before the learned Judge, and I think that this Court ought to deal with it on the footing that all necessary amendments were made to raise the question of the plaintiffs' right to have the deed of May 1886 set aside or declared invalid. The learned Judge referred to the Full Court the question of law whether the deed of indemnity was invalid as contrary to public policy. The Full Court held that it was not invalid on that ground. The only ground of invalidity argued before them, however, was that arising upon the bare fact that it was an indemnity given to sureties to an administration bond. The plaintiffs sought to apply the analogy of an indemnity given to a surety for the appearance of a person held to bail on a criminal charge. It is settled that a contract to give such an indemnity is void as against public policy: *Herman* v. *Jeuchner* (1); *Consolidated Exploration and Finance Co.* v. *Musgrave* (2). I see no reason to dissent from the opinion of the Full Court on that point. The rights of persons entitled in distribution upon intestacy are purely civil rights, and the analogy of bail in criminal cases has no application. So far from its being contrary to public policy that a surety in respect of civil rights should be entitled to protect himself by a contract for indemnity, the law itself ordinarily implies such a contract on the part of his principal. And it is a well-known fact that companies have for many years been in existence, the object of which is to guarantee the faithful performance of contracts relating to civil rights. Such companies, the business of which is to act as sureties for others, derive their income from the sums or premiums paid to them as a consideration for entering into the contracts of suretyship. Before this Court, however, the objection of illegality was put on a further ground, namely, that, having regard to the provisions of the law which requires that, before a grant of administration is made, security shall be given to the Court and to the Court's satisfaction for the protection of persons entitled in distribution, a contract which has the effect of a representation to the Court that such security has been given, when in reality it has not, is illegal within the rule

(1) 15 Q.B.D., 561. (2) (1900) 1 Ch., 37.

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stated by Lord *Lyndhurst* in *Egerton* v. *Earl Brownlow* (1), "It is admitted, that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void." I have no doubt that this is an accurate statement of the law. (See *Lound* v. *Grimwade* (2)). And I think that an agreement including a stipulation that an untrue representation should be made to the Court that security had been given for the protection of the next of kin of an intestate would be invalid. But here a distinction must, I think, be drawn. If the next of kin are *sui juris*, I know of no reason why they should not request some person to become surety for the intended administrator, or why they should not agree to indemnify the person who acts as surety at their request from the liability incurred under the bond. If the Court were informed of such an agreement it would probably not disapprove of it, and in such a case, there being no reason why the agreement should be concealed from the Court, there would be none for supposing that it was a term of the agreement that it should be so concealed. But if, on the other hand, the agreement were made under such circumstances that if it were disclosed to the Court the grant would probably be refused or even might be refused, I think that a stipulation that the agreement should be concealed would properly be inferred, and that such a stipulation would vitiate the agreement. How far such a rule would apply to the present case depends upon the facts, to which it will be necessary to refer in some detail.

The case divides itself into two parts; first, the question whether the deed of indemnity relied upon by the defendants is valid; for, if it is, they have a complete defence to the action; and, secondly, if it is invalid, whether the plaintiffs have established any breaches of trust as between themselves and the administratrix. For the sureties are, of course, not liable to any greater extent than their principal. Of the two objections made to the deed one, as already stated, was overruled by the Full Court. On the other, which depended upon the alleged relationship of solicitor and client between the plaintiffs and the defendants, the learned Judge was of opinion that that relationship had not been established by the evidence. I will deal first with this branch of

(1) 4 H.L.C., 1, at p. 163.

(2) 39 Ch. D., 605.

the case. The effect of the evidence as to the state of things existing after the death of the plaintiffs' mother is thus stated by the learned Judge in his interlocutory judgment of 18th September 1905. The plaintiffs at that time were young ladies of full age, but quite unacquainted with business matters. "While the mother of the Misses Bayne was alive she managed her property and her household affairs by herself, and without in any way consulting her daughters or giving them any information. When she died, Miss Grace Bayne, although a twin with one of her sisters and only three years older than the other, wished and thought it her duty to take her mother's place as far as possible towards her sisters. They desired that she should do so and should have the sole and absolute control of the property without themselves inquiring of what it consisted or what was being done with it, or being in any way troubled about household affairs. The plaintiffs have told us that they were ready to obey their sister Grace in everything, to sign whatever documents she requested them, and without knowing their contents; and even went so far as to permit her to dictate what they should eat and drink, and what clothes they should wear. Messrs. Blake and Riggall, had been the solicitors of the deceased Mrs. Bayne, and after her death Miss Grace went to them, and gradually learnt, as she says, that it was necessary for her as the eldest daughter to take out letters of administration, and that for that purpose she would be obliged to enter into a bond with sureties for the performance of her duty:" and again in his judgment of 31st October: "The apparently simple issue so raised" (*i.e.* whether the failure of the administratrix to realise and distribute the estate within a year constituted a violation of the bond) "really opens up the whole question of the relation between Miss Grace Bayne and her sisters in respect of the property to which they were equally entitled in distribution after payment of the debts of the deceased. What was that relation? I have already pointed out in my interlocutory judgment what position she wished to occupy. To put it briefly in her own language, she wished to take her mother's place as far as possible towards her sisters; and they, judging from their own account of what they did and said as well as what they left undone and unsaid, thoroughly acquiesced in whatever she thought right.

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"The mother of these ladies had after her husband's death dealt with her property and conducted her affairs exactly as it pleased her, and, as they believed, greatly to the benefit of herself and those who were to succeed her. She relieved her daughters from all domestic cares and responsibilities, and provided for all their wants.

"The plaintiffs believed Miss Grace to be quite capable of doing the same thing; and did not desire that her authority should be controlled in any way. What their mother had done in her own right and of her own free will, they were willing that their sister should be empowered to do for herself and for them at her discretion, without asking their permission for any of her intromissions with the estate, or being liable to account to them for any losses occasioned by her maladministration. Perhaps an arrangement of this kind could have been legally effected, and Miss Grace Bayne constituted a trustee for her sisters of their distributive two-thirds shares on the very unusual terms aforesaid in consideration of her undertaking the arduous and, as the event has proved, perilous task to which she was invited."

As to the relationship between the plaintiffs and the defendants, I will deal with the case upon the basis of the evidence given for the defendants. The defendant Blake, who was examined on commission, deposed as follows:—

"I was formerly in practice as a solicitor in Melbourne from 1874 to 1888. I carried on partnership with Mr. Riggall my co-defendant as the firm of Blake and Riggall. I knew Grace Bayne the intestate named in the pleadings in this action. I had acted for her professionally. I had known her for four or five years. It might have been more. I knew Grace Bayne the daughter from her coming to the office with her mother. I knew no more of her than that. I never to my knowledge saw either of the plaintiffs, neither during the mother's life or since. I never acted as solicitor for the plaintiffs or either of them nor to my knowledge did my firm so act. In fact I am sure they did not. The intestate died on 10th June 1885. After her death Grace the daughter called upon me and I saw her. She wanted to know if I had made a will for her mother. I told her that I had not. She wanted advice as to what she should do to obtain representa-

tion to her mother's estate. I explained to her what steps she would have to take. It was proposed that she herself should be the administratrix as the eldest daughter. It was arranged that my firm should apply for a grant of administration on her behalf. After that I placed the matter in the hands of Mr. John Edwin Tomlins my managing common law and chancery clerk. I instructed him to do what was necessary. I don't believe I ever saw her again in connection with the matter beyond the one interview referred to either in connection with this business or at all. The matter was attended to entirely by Tomlins under my supervision. He reported progress to me from time to time. Tomlins had been in my employ for many years. I had always found him most capable, efficient, and reliable—an admirable clerk thoroughly competent to attend to this matter. I believe the intestate's estate was valued for the purpose of the grant at £10,000 or thereabouts. A grant of administration was obtained to Grace Bayne the letters being dated 23rd July 1885. It was necessary before the letters of administration were issued for the administratrix to enter into a bond for £5,000 with two sureties. I instructed Mr. Tomlins to ascertain on what terms he could get a guarantee company to give the necessary bond because the administratrix had a difficulty in obtaining the two sureties. He applied for the firm to various guarantee societies. The Union Trustee Co. (The Union Trustee Co. of Australasia Ltd.) offered the best terms. Their terms were two or two and a half per cent. —I forget which—provided she got her sisters to join with her in indemnifying the Company against all liability under the bond. No company to whom we applied were willing to undertake the business without such an indemnity. On 12th March 1886, my firm wrote a letter to Grace Bayne, administratrix, of which the Exhibit 'A' now produced to me is a copy. On referring to this copy letter I see the terms were two per cent."

Exhibit A contains the following:—"We do not anticipate they (*i.e.* the sisters) will have any objection to this (*i.e.* signing the document), as it merely means that they will have to place implicit trust in you with respect to their share in the estate."

The witness proceeded:—"On 14th May 1886, my firm wrote

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to the administratrix a letter of which the Exhibit 'B' now produced to me is a copy."

In this letter defendants offered to act themselves as sureties at the rate of one and a half per cent., which would save her twenty-five pounds, if she wished them to take the position instead of a guarantee company. The letter proceeded: "If we act we will require you to join with your two sisters in an undertaking not to bring any action against us for maladministration. This really applies to your sisters and is under the circumstances merely formal. It will be a similar document to that we arranged for you to give to the guarantee company. Please let us hear from you and if you prefer our acting make an appointment to call here with your sisters to have the document properly explained and executed." The witness proceeded: "We certainly should not under any consideration have consented to become sureties without the undertaking mentioned in the letter. In other words, we required the same terms as the guarantee societies or as I call them trustee companies except that we were willing to lower the rate of commission. All this time Tomlins was in communication with the administratrix. I heard from him that the proposal in the letter of 14th May was accepted by her and her sisters. I thereupon gave instructions to one of my clerks named East, to prepare the necessary deed of indemnity. He prepared and submitted a draft to me and I revised it. I afterwards had it engrossed and handed the engrossment to Tomlins to get executed. I gave him special instructions to explain the effect of the document to the administratrix and her sisters, and to see that they understood it. . . . I learnt from Tomlins on the following day that the deed had been executed. He told me he had thoroughly explained the deed to the administratrix and her two sisters, and that they thoroughly understood the effect of it. They retained it for several days and asked Tomlins to ascertain in the meantime if the two sisters would be accepted as sureties, so Tomlins informed me. He told me I believe that it was his own suggestion that the two sisters might be accepted as sureties. The opinion of counsel was then taken by my firm as to whether an application to the Court to accept the sisters as sureties would be entertained. The opinion was adverse. My firm then wrote to

the administratrix a letter dated 27th May 1886, of which the Exhibit 'D' now produced to me is a copy."

Exhibit "D" is as follows: "Dear Madam, As arranged with you yesterday we have spoken to counsel, who does not think that the Court will allow your sisters to become sureties. It would be a novel application but we will make it if you wish us to do so. Possibly the Judge might allow your sisters to take the place of one of the sureties. This would not reduce the commission however, as the other surety would still have to justify in the sum of £5000, so that no real advantage would come from such a result. Please instruct us." The witness proceeded: "Following this letter the indemnity deed was delivered to my firm by the administratrix with a request that we would execute the bond. . . . At this time the administratrix and her two sisters were so far as I am aware living together. They were all about the same age. I retired from practice in October 1888. Beyond what I have deposed to I know nothing at all about the matters in question in the action. Except as appears in the letter of 14th May 1886, I never made any representation to the administratrix or her sisters that the deed was a mere matter of form. So far as I am aware certainly no misrepresentation was ever made by me or anyone in connection with the indemnity deed. Before this action was brought I never heard of any complaint made by either the administratrix or her sisters of any matters in connection with the business. I have stated all that I know about the transaction."

Mr. Tomlins, referred to in defendant Blake's evidence, deposed as follows: "In 1885 I was managing common law clerk for Blake and Riggall. I joined their office in 1873 and I was managing clerk about 18 months afterwards. I remember Mrs. Grace Bayne. She had been a client of the firm's. I remember the incident of her death. Shortly after her death letters of administration were granted to Miss Grace Bayne, and our firm was employed, and it was part of my duty to attend in the matter under Mr. Blake's superintendence. Certain proceedings were taken for fixing the duty and some little time elapsed in passing the statement of assets and liabilities before the bond was entered into. I cannot explain for the lapse of

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time that occurred but I think there was some trouble in valuing the real estate. After probate was granted and before the deed or statement of assets I had several interviews with Miss Grace Bayne. I explained to her that it would be necessary for her to find two sureties of £5,000 each for the administration of the estate, and I asked her if she had any friends or anybody whom she thought would act in that capacity. The interviews were in my own room in the office. She said she did not know of anyone at that particular time and that she would consider the matter or make some inquiries to see if she could get anybody. She told me afterwards they would not be able to get any sureties. I then told her that there were companies who took up that business on commission and that if she liked I would inquire what the terms would be for a bond in regard to her administration. She acquiesced in that and desired me to do so. I think I saw three different companies. The Land and Guarantee Co. was one, The Australian Alliance Co. and The Union Trustee Co. were the others. I inquired of these companies how much they would charge for signing a bond for the administration of the estate shortly explaining that it was a lady who was administering and her two sisters who were beneficiaries and that there were certain mortgages and encumbrances existing on the real estate. The best offer I had was from The Union Trustee Co. which if I recollect rightly was two per cent. Mr. Mackiehan, the manager of The Union Trustee Co., said I would require to have an indemnity from the sisters for the due administration by Miss Bayne. I got a proposal form from Mr. Mackiehan (exhibit 4) and I wrote a letter to Miss Bayne (exhibit 2) which is in my handwriting enclosing exhibit 4. . . . "Exhibit 4 is the form that was sent to the Baynes and it was returned to me afterwards.

"A few days afterwards I think Miss Bayne brought the proposal Ex. 4 back to me. I forget the exact words used at the interview in discussing the matter but the substance of it was that Miss Bayne said the £100 was rather a big amount to pay the sureties. She had a cheque for £100 with her which she gave to me and I handed it to the accountant pending seeing whether we could get anything lower. From time to time I told Mr. Blake how the matter was progressing. Messrs. Blake and

Riggall became sureties at my suggestion. After speaking to Mr. Blake I wrote to Miss Bayne telling her that we would act. I wrote in the name of the firm. I think I had told Miss Bayne before writing that I would ask Mr. Blake if he would act, and having communicated with him I wrote the letter (14th May) after which Miss Bayne called at the office. I told her Blake and Riggall would be prepared to act as stated in the letter if she and her sisters approved. She said they did approve and she would be glad if Blake and Riggall would act. I told Miss Bayne that she and her sisters would have to sign the same document The Union Trustee Co. had asked for. She said there would be no objection to that. I told Miss Bayne that I would like myself to go down and explain the deed to her sisters. I was very busy in the office at the time: we had a heavy litigation and I had been in Court all day and I would come down and explain to them. The document then, I believe, was engrossed. It is Exhibit 6. That document was engrossed after Miss Bayne told me she would like Blake and Riggall to act and I handed it to her. My recollection is that I handed her that document to take home to show her sisters and to read. That was before it was signed. I made an appointment then to go down to their house after they had tea, not the following day but the day after that I think. I said that I would be down at seven or seven-thirty. I went down from 7.15 to 7.30. Their house was in Victoria Parade, East Melbourne. They had the deed there. My recollection is that I saw Miss Grace Bayne first. I forget whether I was let in by a servant or not. I know I saw Miss Grace Bayne. I had seen the other two young ladies before. I think I had seen her sisters, one of them at any rate in the office. I was admitted into the house and went into a room and there were present with me Miss Bayne and the two plaintiffs. The Document Ex. 6 was on the table. Everything had been cleared off the table. It was the dining room. I forget if there was a pen and ink there but Ex. 6 was on the table. I said I had come down to read over and explain the document under Mr. Blake's instruction to them, and I read it through aloud to them. They were listening attentively. They were intellectual ladies as far as I could judge. I explained to them—I said: 'I suppose Grace has already

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let you know that there is a difficulty in getting outside sureties and Blake and Riggall are going to act and it has been agreed that you should all sign the same documents that the company would have got from you.' I said:—'This is a similar document and if you sign this you will be relying on Grace entirely and you will be charging your own shares if she does anything wrong—for anything she may do.' I said:—'You will have to rely upon your sister if you sign this document.' I thought that they had discussed the matter before. They signed the document then after I explained it to them. I know I made that clear. I said if they signed this they would have to rely entirely on Grace and they would be charging their shares if she did anything wrong. I witnessed their signatures in their presence. I do not think Arthur Blake and William Riggall signed until afterwards. We did have a discussion. I forget which one of the young ladies said it seemed a lot of money to pay. I do not think it was Grace. I forget which one of the young ladies said it was—£75 seemed such a lot of money to pay. I said the company wanted to charge more. The companies wanted £100 but I think Blake and Riggall acting was really a saving to the estate of £25. Then I said I did not know really whether the Court would feel disposed to accept the two young ladies.

"'To accept you as sureties for your sister. It would be a novel application. I never heard of it. If you like I will speak to counsel and see what he thinks.' They said they would be very glad if I did. I left the deed with them then. I said I will see counsel and ask him what he thought about the matter and let them know. I did so. I had been there about three-quarter of an hour or something about that time. It was strictly a business interview and I was not there except for business. I had not been in the house before nor have I been since. I did see counsel. I think I spoke to Mr. Woolf about it and asked him what he thought and as a result of that I wrote the letter, which is in evidence."

Upon this evidence, the first question to be determined is whether the relationship between the plaintiffs and the defendants at the time of the execution of the deed of indemnity was

the relationship of solicitor and client in the sense in which that expression is used in the cases dealing with the application of the doctrine of undue influence to transactions between solicitor and client. The learned Judge was of opinion that there was no evidence of defendants having personally advised either of the plaintiffs or having in any other way acted as their solicitors. There is no doubt that they acted as the solicitors for the administratrix in all matters relating to the grant of administration. Possibly, perhaps even probably, the relation of solicitor and client did not exist between the defendants and the plaintiffs in the sense that the latter were personally liable to be sued for any costs incurred in respect of the advice given by the defendants. But, in my opinion, the confidential relationship to which the rules as to undue influence attach, may arise without the existence of the formal relation of debtor and creditor. The law on this point was very fully considered in the case of *Willis* v. *Barron* (1). In that case the question was as to the validity of a deed by which the plaintiff, a married woman, had surrendered a general power of appointment without any consideration. Before executing the deed she had asked the advice of a Mr. Skinner, who was her husband's solicitor, and who was also a trustee for her. Skinner's son took a substantial benefit under the deed. *Cozens-Hardy* J. was of opinion that the facts did not establish that fiduciary relation of solicitor and client between the plaintiff and Skinner to which special disabilities are attached by law, and he thought that the fact of his being a trustee for her was not material (2). His judgment was reversed by the Court of Appeal (3). *Lindley* M.R. said that the question was whether it was the duty of Skinner to see that the plaintiff had independent advice in the transaction which was impeached. And that, he said, mainly depended upon this—whether he stood in such a confidential relation to her as rendered it his duty to take such care. After referring to the facts of the case he proceeded (4).

"Then the question arises, What was Mr. W. M. Skinner's duty to Mrs. Joseph Willis with reference to this matter? She said that

(1) (1902) A.C., 271.
(2) (1899) 2 Ch., 578.
(3) (1900) 2 Ch., 121.
(4) (1900) 2 Ch., 121, at p. 130.

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she trusted him—she looked upon him as her confidential adviser and her solicitor. She did not employ him as such. He was employed by the other members of the family, but she looked to him to carry out the matter in a proper way, and to give her such assistance as occasion might require. He did that to a certain extent. He suggested that she should consult some other solicitor, but he did not point out to her her real position. He says that he explained the deed to her. I will assume that he did this to the full extent which he asserts, but unquestionably he never gave her any advice showing her that the proposed alteration in the deed could not be made without either a lawsuit or her consent. He never explained it to her that the alteration was so adverse to her interests that it would be unadvisable for her to execute the new deed or to concur in it without further consideration. He did not consider that it was his duty to do that; he thought his duty was only to explain the deed to her. In that, I think, he adopted too low a standard of his duty in the position in which he was placed, and considering the extent to which he knew he was trusted by all parties in the preparation of the deed.

"We have been invited to take the view which was adopted by *Cozens-Hardy* J. that Mr. W. M. Skinner stood in an indifferent position, that he was a solicitor merely carrying out a bargain already made between the parties, and that it was no business of his to consider that bargain or the interests of those who had made it. Considering his relation to the plaintiff, it is, I think, impossible to accept that view of his position, and that is the key to the whole of the case."

Rigby L.J. said (1): "But, even if he thought he was not acting as her solicitor, the important matter is whether she was placing confidence in him as her solicitor. She had employed him *de facto* as her solicitor in reference to the trouble which had arisen between her husband and herself, and even in the matter of the settlement he undertook on September 30, 1891, to act towards her in a manner which I think is conclusive that he was really acting as her solicitor. No doubt in his own mind he drew the distinction that he was giving her information, not advice.

(1) (1900) 2 Ch., 121, at p. 134.

In my opinion a man cannot split his duty in that way." And again (1): "I will assume that the plaintiff knew what she was doing, and that she executed the deeds with the full knowledge of their contents. But the rule of law is that a person who enters into a transaction which results in benefiting the solicitor employed in it, or a member of his family, cannot be bound by it unless he has had independent advice in the matter."

In the House of Lords The *Earl of Halsbury* L.C. said (2): "Here was a young woman without advice . . . . She goes to this gentleman and asks him for advice. He says he did not know she came to him as a solicitor. He says there was no entry in his book making her his client. It seems to me that that is really blinding one's eyes to the course of human events. She went to him as a friend. In one sense she did not go to him as a solicitor at all, I agree; but she went to him as the natural person to whom to apply for protection. He says that he stated the facts and he did not advise her. I will not juggle with words. I know what she went for, from the statement of both of them—she went there to consult a friend. He was a solicitor too, and he was her trustee. Was he under no duty to his *cestui que trust* to tell her what her rights were, and what the rights were which she was giving up? My Lords, it seems to me I confess, hardly susceptible of argument. He was under a duty as a friend, as a solicitor, and as her trustee, to take care that she thoroughly understood what was the supposed error which had been made in the first instance, and to make her understand what the effect of what she was doing was."

Lord *Macnaghten* said (3):—"Putting out of consideration the fact that Mr. Skinner's son got a great advantage, I must say I think, even if the person who was the ultimate remainderman had been no connection of Mr. Skinner, there would have been ample ground to set aside this deed, considering that Mr. Skinner was her family solicitor, the person to whom she would naturally go for advice, and that he was also her trustee. It makes it rather stronger when you see that the effect of this alteration was to make certain, or almost certain, a gift in favour of Mr.

(1) (1900) 2 Ch., 121, at p. 135. (2) (1902) A.C., 271, at p. 276.
(3) (1902) A.C., 271, at p. 281.

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Skinner's son which was contingent and doubtful until the deed was executed."

Lord *Shand* said (1):—"I think, looking at the circumstance that there was a great disadvantage to Mrs. Willis in the execution of this deed in which she was renouncing valuable interests—at the circumstance that at the same time a benefit was being given to Mr. Skinner's own son by that act of renunciation, and at the circumstance of Mr. Skinner's position as law agent, as I think she was entitled to take him as being at the time—looking at these circumstances, I am clearly of opinion that nothing short of putting the interests of this lady into other hands would have satisfied the case, or have avoided the legal result which now follows."

Lord *Davey* said (2):—"My Lords, the next question I ask is, What was the position of Mr. William Moore Skinner? Mr. Skinner was her husband's solicitor, and indeed he was the solicitor for the whole family, and not only for the whole family, but it appears that he also attended Mrs. Brown, the plaintiff's mother, when she was on her deathbed, and I think made Mrs. Brown's will for her. But he was more than that. He was also a very intimate family friend of the Willis family, including the plaintiff and her husband, and was a trustee under the original settlement. My Lords, I think it is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is *primâ facie* entitled to look to her husband's solicitor, the solicitor of her husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman.

"Now, my Lords, the result of the evidence upon my mind, without going into details, is that this lady did in fact rely upon Mr. William Moore Skinner to advise and assist her as her solicitor. . . . Therefore, I take it to be clear that he was the only solicitor acting for her in the matter, and that he was the solicitor who prepared and perused and settled the deed on behalf of all parties. Indeed, Mr. Skinner seems to have accepted that situation, and to have taken some pains to explain the contents of the deed to the plaintiff. But, as *Rigby* L.J. says, that

(1) (1902) A.C., 271, at p 282.

(2) (1902) A.C., 271, at p. 283.

was not enough. She required not only explanation as to the meaning of the deed, but what she wanted was, or what she had a right to look for was, advice as to her rights."

It follows in my opinion from the passages which I have quoted that it is sufficient, in order to establish the fiduciary relationship, to show that the party relied upon the advice of the solicitor in the matters in question, and that the solicitor knew that he was so relying, whether he could or could not have made a charge against him for his advice. In the present case it is clear upon Tomlins' evidence that the plaintiffs did rely upon the advice which he gave them, and that he knew it; and it cannot be suggested that the defendants are in any better position than if they had given the advice personally, instead of doing so through their clerk and agent Tomlins.

In *Rhodes* v. *Bate* (1), *Turner* L.J. made some observations which are very relevant to the present case in more respects than one. After referring in detail to the facts of the case, which was one in which the plaintiff sought to set aside certain documents which she had executed in favour of the defendant, who was a certificated conveyancer, and had on behalf of the plaintiff taken an active part in the examination of the accounts of the trustees under her father's will, and was aware of the amount and value of her property, he said (2):—"I think that the evidence on the part of the defendant Bate establishes that the plaintiff signed the bill of exchange, promissory notes and memoranda, and executed the bonds and deeds in question freely and voluntarily, and without pressure or solicitation on the part of this defendant; that their contents were fully explained to her, and that she perfectly understood them and their nature, purport, and effect, and the consequences of her signing and executing them." The learned Lord Justice then continued: "I have thought it right to enter thus minutely into the facts of the case for three reasons; first, because the case in my view of it is of no little importance in its bearing upon the principles of the Court with reference to cases of persons standing in confidential relations; secondly, because, in my opinion, our judgment must very much depend upon how far the facts of the case warrant the application of

(1) L.R. 1, Ch., 252. (2) L.R. 1 Ch., 252, at p. 257.

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those principles; and, thirdly, because the case may well be considered to involve to some extent, at least, a question of character.

"With respect to the first of these reasons, I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the Court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence. And, as to the nature of the benefit, the injury to the party by whom the benefit is conferred cannot depend upon its nature."

In *Allcard* v. *Skinner* (1) the principle on which the Court acts in setting aside voluntary gifts executed by persons on the ground of undue influence is thus stated by *Cotton* L.J. (2): "The question is—Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes—First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to

(1) 36 Ch. D., 145.

(2) 36 Ch. D., 145, at p. 171.

exercise an independent will and which justifies the Court in holding that the gift was really the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In the same case *Lindley* L.J., said (1):—"The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such a case the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made. *Huguenin* v. *Baseley* (2) was a case of this kind. The defendant had not only acquired considerable spiritual influence over the plaintiff, but was intrusted by her with the management of her property. His duty to her was clear, and it was with reference to persons so situated that Lord *Eldon* used the language so often quoted and so much relied on in this case. He said (3):—'Take it that she (the plaintiff) intended to give it to him (the defendant): it is by no means out of the reach of the principle. The question is, not, whether she knew, what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.' This principle has been constantly recognized and acted upon in subsequent cases, but in all of them, as in *Huguenin* v. *Baseley* itself, it was the duty of the donee to advise and take

(1) 36 Ch. D., 145, at p. 181. (2) 14 Ves., 273.
(3) 14 Ves., 273, at p. 299.

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care of the donor. Where there is no such duty the language of Lord *Eldon* ceases to be applicable.

"*Rhodes* v. *Bate* (1) was determined on the same principle as *Huguenin* v. *Baseley*, the Court having come to the conclusion that the relation of the defendant to the plaintiff was really that of a solicitor to his client."

In *Wright* v. *Carter* (2), *Stirling* L.J. referring to the case of *Hatch* v. *Hatch* (3), decided by Lord Chancellor *Eldon*, said (4):—"With reference to that case, I desire to say that I have always understood that Lord *Eldon's* judgment contained an accurate statement of the law of the Court as it stood at the time when that judgment was delivered, and that it continues to be an accurate statement of the law as it stands at the present time; and I think it is a clear authority for these two propositions: First, that transactions of gift between solicitor and client are watched and scrutinised by the Court with the utmost jealousy. This doctrine is one founded on important reasons of public policy; and the result is that, before such a transaction can be upheld, the Court must be satisfied that, as Lord *Eldon* puts it, 'it is an act of rational consideration, an act of pure volition, uninfluenced.' In other words, the Court, in dealing with such a transaction, starts with the presumption that undue influence exists on the part of the donee, and throws upon him the burden of satisfying the Court that the gift was uninfluenced by the position of the solicitor. Secondly, this presumption is not a presumption which is entirely irrebuttable, though it is one which is extremely difficult to be rebutted. Lord *Eldon* puts it that it was 'almost impossible' to uphold such a gift in the case of the relationships which he specified, one of them being that of attorney and client. Now, it has been laid down in recent cases, and particularly in two cases in this Court—*Mitchell* v. *Homfray* (5) and *Liles* v. *Terry* (6)—that in order to uphold a gift of this kind the donor must have competent independent advice in conferring the gift. That is to say, the transaction cannot be upheld unless that condition is satisfied."

(1) L.R. 1 Ch., 252.
(2) (1903) 1 Ch., 27.
(3) 9 Ves., 292; 7 R.R., 195.
(4) (1903) 1 Ch., 27, at pp. 56, 57.
(5) 8 Q.B.D., 587.
(6) (1895) 2 Q.B., 679.

In the same case he said (1):—"I now pass on to consider the deed of March 14th, 1901. That cannot be treated as a transaction of gift pure and simple. It has been treated in argument as a transaction of sale, and I am prepared so to regard it. Now, here I am differing from the opinion of the learned Judge who dealt with this case in the Court below; but, with the utmost respect, I confess I cannot agree with him in the view which he took that this was a good deed. Here, again, an onus, but of a different kind, is cast upon Mr. Carter. The rules of the Court require this to be proved in a transaction of sale in which the solicitor is a purchaser—first, the client must be fully informed; secondly, he must have competent independent advice; and, thirdly, the price which is given must be a fair one. The onus of proving all this lies on the solicitor."

In the same case *Cozens-Hardy* L.J. said (2): "Assuming that the transaction is to be treated as a sale by the plaintiff to his solicitor, Mr. Carter, and to Miss Blanch Wright and Mr. Nevill Wright, I am clearly of opinion that it rests upon Mr. Carter to justify the sale and to show that 'the transaction was perfectly fair, that the client knew what he was doing, and that a fair price was given.' Those are the words of *Kindersley* V.C. in *Tomson* v. *Judge* (3), and, so far as I am aware, that statement of the law is consistent with all the authorities."

When, therefore, it is once established that the relation of solicitor and client exists, as I think it is in the present case, the transaction cannot be supported, if it is a gift, without proof of independent advice, and, if it is a sale or a contract upon consideration, without further proof of adequacy of the consideration.

These, then, being the principles to be applied, how do they affect the present case? What was the real nature and effect of the deed of May 1886? The defendants had agreed with Grace, the intended administratrix, to enter into a statutory contract with the Court as sureties for her for £5,000 in consideration of a premium of £75. The bond was to be presented to the Court as an effectual obligation which would operate to protect the bene-

(1) (1903) 1 Ch., 27, at p. 60. (2) (1903) 1 Ch., 27, at p. 61.
(3) 3 Drew, 306, at p. 313.

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ficiaries as well as the creditors of the intestate. They would, as already pointed out, have been entitled as against the administratrix herself to indemnity for any breaches of trust that she might commit, but they were not entitled to anything more. As against the plaintiffs they were entitled to nothing by way of indemnity. So far as regards the legal effect of the transaction upon the face of the documents themselves, assuming the deed to be valid, it is clear that the defendants incurred no real liability whatever. The unsecured debts due by the intestate were trifling, while the value of the estate was understood to be about £10,000, over the whole of which the defendants obtained a charge. As regards the plaintiffs they incurred no liability. The only real consideration, therefore, for the £75 paid to them, and for the charge upon the estate and the covenant of indemnity, was the lending of their name to the bond so as to induce the Court to believe that all persons beneficially interested in the estate were properly secured. If the agreement to become sureties can under these circumstances be regarded as a consideration for the charge of all the interest of the plaintiffs in the estate and for their covenant of indemnity, it was in my opinion an entirely inadequate one. It is not in controversy that the plaintiffs had no independent advice, and in my opinion (though the fact is not material: *Rhodes* v. *Bate*(1); *Barron* v. *Willis* (2)) they did not understand what they were doing. I think they probably believed the statement in defendants' letter of 14th May, that the deed was a mere formality. For these reasons I am of opinion that the defendants have failed to establish the onus cast upon them, and cannot set up the deed of 20th May 1886, as an answer to the action, unless the plaintiffs are estopped by conduct, or prevented by some rule of law, from alleging its invalidity.

I have been led to deal with this aspect of the case at greater length than I should otherwise have done by the circumstance that I am differing from the conclusion of the learned Judge upon a question of mixed law and fact of considerable general importance with regard to the duties and obligations of solicitors. But, in truth, I think it is not material in the present case whether the direct relationship of solicitor and client did or did not exist

(1) L.R. 1 Ch., 252.

(2) (1900) 2 Ch., 121.

between the defendants and the plaintiffs. It is clear that it existed between the defendants and Grace. It is equally clear that, under the rules established by the cases to which I have referred, and many others, the defendants could not rely upon the deed of indemnity as conferring on them as against her any rights greater than the law would imply from the relation of principal and surety. In other words, that deed could, to that extent, have been set aside as far as related to her at her suit. On what ground? Because, under the circumstances, the Court would consider it as having been obtained by means which are regarded by the Court as tainted with fraud. But, being invalid on this ground as to Grace, how can it be supported as against the plaintiffs? In my opinion the original fatal taint runs through the whole transaction. If Grace is regarded as the agent of the plaintiffs in entering into the arrangement for the execution of the deed, the representations which are affected by that taint were made to them through her as well as to herself. And, being sufficient to avoid the deed as to her, they must also avoid it as to her principals. If, on the other hand, she is regarded as the defendants' agent, she must be taken to have procured the execution by means of the same representations transmitted through her to the plaintiffs. In this view the controlling influence which, as found by the learned Judge, she actually had over them, would be imputable also to her principals the defendants.

There is still another way of regarding the matter. In my opinion the validity of a bargain made by a solicitor with a trustee client, by which he obtains from a *cestui que trust*, through his client the trustee, a charge upon the trust estate, must be determined upon the same principles as if the charge had been given by the client himself. For all these reasons, that the relationship of solicitor and client in fact existed between the plaintiffs and the defendants; that, even if it did not, it existed between the defendants and Grace, through whom the bargain which cannot be supported as against her was made with the plaintiffs; and that the bargain was one made between solicitors and the *cestuis que trustent* of their client for a charge upon the trust estate; I think that, there having been an absence of proper independent advice, the deed cannot be held valid as against the

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plaintiffs, unless, as I said just now, they are estopped by conduct or prevented by some rule of law from disputing its validity. From this point of view the case must be regarded as an action by the plaintiffs as individuals, claiming to have the deed set aside.

There is nothing in the evidence to establish any adoption of the deed by the plaintiffs after knowledge of their right to avoid it. But it is contended that the deed, being from the present point of view voidable and not void (which is not disputed by the appellants' counsel), it is so intimately connected with the obligation of suretyship which the defendants undertook, and of which they could not get rid, that the plaintiffs cannot elect to avoid part of the transaction, since the defendants cannot be reinstated in their original position. There is no doubt as to the general rule that a party cannot both approbate and reprobate, and that, when a party has taken advantage of a contract so far as it is beneficial to him without attempting to repudiate it, and it is impossible to restore the other party to his original position, he cannot seek to destroy a particular part of the contract on the ground that it was induced by fraud, or is voidable (not being void) on any other ground: *Urquhart* v. *Macpherson* (1). Assuming, however, in the present case that the plaintiffs have taken advantage of the contract of suretyship within the meaning of this rule (which is, in my opinion, open to grave doubt), I think that there are two answers to the objection. The first is that in the present case the transaction is not in substance, any more than it is in form, one contract, but comprises two independent contracts between different parties and governed by different considerations of law. One contract is that between the defendants and the Court, which is evidenced by the administration bond. The other is that between them and the plaintiffs, which is evidenced by the deed of indemnity and charge. It is true that the defendants entered into the one in the belief that the other was valid. But, in my opinion, the latter contract must be regarded in law as collateral to the former, just as much as if a surety were induced to enter into an administration bond by a false representation of fact made by one of the next of kin. In such a case an action for

(1) 3 App. Cas., 831.

deceit or an action to compel the making good of the representation might, according to the circumstances, lie against the person who made it. But it is clear that the claim which could be enforced in such an action could not be set up as a direct defence, either in whole or part, to an action by an assignee of the administration bond, but would have to be set up as a separate and independent claim, and the validity of the claim would depend on ordinary principles of law.

The other answer is this:—The relationship between the surety to an administration bond and the Court and the beneficiaries is one established by law, and the incidents of it are determined by the law applicable to such relationships, except so far as such incidents are altered by a valid contract between the surety and persons competent to contract with him. The validity of such a contract must also be determined on the ordinary principles of law. In this respect the relationship is, in my opinion, analogous to that of a trustee, the obligations of whose office are established by law, but may be modified under certain circumstances. There is singularly little authority to be found on this point. In *Moore* v. *Frowd* (1), however, Lord *Cottenham* L.C. made some observations on the question of how far a trustee may, on accepting his office, stipulate for a modification of the rules of law to which he would otherwise be subject, which in my opinion state the true rule applicable to such a case. The point in that case was whether trustees who were solicitors were entitled to profit costs for legal work done by them in the administration of the trust, or only to costs out of pocket. The Lord Chancellor said (2):—

"The first question is, whether the deed of trust disposes of this question; because the parties may, by contract, make a rule for themselves, and agree that a trustee, being a solicitor, shall have some benefit beyond that which, without such contract, the law would have allowed; but, in such a case, the agreement must be distinct, and in its terms explain to the client the effect of the arrangement; and the more particularly, when the solicitor for the client, becoming himself a trustee, has an interest, personal to himself, adverse to that of the client. It is not easy, in such a case, to conceive how, consistently with the established rules

(1) 3 My. & C., 45. (2) 3 My. & C., 45, at p. 48.

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respecting contracts between solicitors and their clients, a solicitor could maintain such a contract, made with his client, for his own benefit, the client having no other professional adviser, and in the absence of all evidence, and of any probability, of the client, (a woman, too) having been aware of her rights, or of the rule of law, or of the effect of the contract; but the necessity for following up these considerations does not arise in this case, unless the deed contains a distinct agreement for this purpose."

The Lord Chancellor then dealt with the terms of the deed in question, and proceeded (1):—"There is nothing in either of these provisions which is peculiarly applicable to the case of the solicitor being also a trustee. It cannot, therefore, be assumed that the intention was to provide for some other mode of dealing with that union of characters, than what the law would have enforced; and still less that, under such provision, a solicitor dealing with his client can be permitted to claim that which, without, at least, a specific contract with the client, and proof that the client was fully cognizant of her legal rights independently of such contract, and of the effect and legal consequences of the act upon such legal rights, he would not be entitled to claim."

When a trustee is appointed by the Court, he may stipulate on his appointment that the ordinary rules shall be modified in his favour: *Brocksopp* v. *Barnes* (2), and if he desires such modification must do so. Of this an instance is to be found in the decree in the case of *Marshall* v. *Holloway* (3), where the modification is set out at length. But, in the absence of an agreement sanctioned by the Court, or an agreement which is not open to the objections referred to by Lord *Cottenham* in *Moore* v. *Frowd* (4), the ordinary obligations and disabilities incidental to the office of a trustee follow upon the acceptance of the office. And in my opinion, as I have said, the same principles apply to a surety under an administration bond. The obligations in such a case arise under a statutory agreement with the Court, and should, I think, be regarded as arising by operation of law. An agreement to modify these obligations must therefore be regarded, not as an incident of and inseparable from the statutory obligation, but as

(1) 3 My. & C., 45, at p. 49.
(2) 5 Madd., 90.
(3) 2 Swans. 432, at pp. 452-3.
(4) 3 My. & C., 45.

extrinsic and collateral to it. For these reasons I am of opinion that the doctrines which forbid approbation of part of a contract and reprobation of another part of it have no application to the present case. If this were not so, it would follow that, if a person is induced on the occasion of the appointment of a trustee in part for himself to enter into improper stipulations for the benefit of the trustee, neither he nor other beneficiaries would be entitled, even if the settlor had been induced to enter into them by the grossest fraud, to escape from these stipulations after the trustee had incurred obligations under the trust, except on the condition of annulling the appointment, a condition which might be practically impossible of performance; nor could he obtain any relief unless the circumstances were such that an action for deceit would lie. I cannot think that the arm of the Court is so short. In such a case I think the Court would give relief on one or other or both of the grounds which I have stated.

With regard to the objection as to illegality which, if sustained, would make the deed of indemnity void and not merely voidable, I am of opinion, as I have already said, that an agreement under which a representation is to be made to the Court to the effect that the rights of beneficiaries in an intestate estate have been secured by an administration bond in usual form, when in fact no effective security has been given, is obnoxious to the rule stated by Lord *Lyndhurst* in *Egerton* v. *Earl Brownlow* (1). It is to my mind clear from the evidence of Tomlins, already quoted, that all the parties understood (as to the plaintiffs so far as they understood anything about the matter) that the Court would not grant administration to Grace unless a bond in the usual form were executed by independent and competent sureties. The deed of indemnity was not brought to the notice of the Court, and it is at least probable that, if it had been, the grant would not have been made. I think that under these circumstances the proper inference is that it was an implied term of the arrangement that the indemnity should not be brought to the notice of the Court. If this view of the facts is correct, the indemnity was part of an unlawful contract, and was altogether void. I have some doubt, however, whether this point is sufficiently raised by the pleadings,

(1) 4 H.L.C., 1.

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although it appears upon the defendants' own evidence. On the whole, and having regard to the fact that particulars of the illegality alleged were not asked for, I am inclined to the view that the Court ought to refuse to give effect to the deed on this ground. (See *Gedge* v. *Royal Exchange Assurance Corporation* (1) and the cases there cited by *Kennedy* J.). But I prefer to rest my judgment on the application of the doctrine of *Huguenin* v. *Baseley* (2) with which I have already dealt.

The deed of indemnity being out of the way, the only question remaining is whether the plaintiffs have established any breaches of trust committed by the administratrix which have resulted in a loss to the estate, and of which they can complain. It is not disputed that the acts complained of resulted in diminution of the estate, or that they were breaches of trust unless the plaintiffs consented to them. Of this the onus of proof is on the defendants. With respect to the contention that the relation of administratrix had determined, and had been susperseded by the relation of trustee and *cestui que trust*, *Holroyd* J. expressed himself as follows — "Here there was no definite agreement of any kind between the three ladies, although there was abundance of evidence of what they would have liked, or what they were willing to have consented to or approved. To use again an expression of Miss Grace's, they allowed things 'to drift,' and thus her sisters fell into a habit of unquestioning acquiescence in all her acts. I do not think that this acquiescence could cancel the bond even as regards the distributive shares of the plaintiffs, and substitute for it, as Mr. Higgins argued, an unwritten trust for breaches of which the defendants would not be liable as sureties." And I see no reason to dissent from his conclusion. This, however, does not conclude the matter, for the beneficiaries, who were *sui juris*, were capable of consenting to acts of the administratrix, and so precluding themselves from afterwards complaining of them.

With regard to the failure to distribute within the time allowed by law, no loss to the estate was proved. With regard to the payment of the £75 as a premium to the defendants, the learned Judge found as a fact that the sum was paid out of the estate, and held that such payment was a breach of trust. Before us it

(1) (1900) 2 Q.B., 214. (2) 14 Ves., 273.

has not been disputed that the payment out of the estate was improper. The only other point to which the learned Judge directed his attention as to this breach was whether it was covered by the deed of indemnity, and he thought that it was. No evidence was given that the plaintiffs consented to this payment in any real sense. In my opinion, therefore, this breach was established. The fourth breach, which alleged the continuance of funds upon an unauthorized investment and a consequent loss, was also established. On this point the learned Judge said: "It is not denied that the estate of the deceased Mrs. Bayne consisted in part of money deposited with the Melbourne Permanent Building Society; and that her daughter Grace after becoming administratrix from time to time withdrew from, and also deposited with, the said society divers sums of money until some date in the year 1893, when the society went into liquidation. If this action lies, the loss will be a matter for inquiry." With respect to these two matters therefore the plaintiffs are entitled to relief in this action.

With regard to the purchase of land and the mortgages different and much more difficult questions arise. The defendants set up two documents alleged to be signed by the plaintiffs consenting to the acts in question. The plaintiffs denied the genuineness of their signatures, but after full inquiry the learned Judge came to the conclusion that they were genuine, and that the plaintiffs could not therefore complain of the acts as breaches of trust, although the documents were signed at the instance of the defendants themselves. He thought that the deed of indemnity, which he held to be valid, did not cover breaches of trust to which the defendants themselves were parties.

If the question were whether the mortgages made by the administratrix, being *primâ facie* breaches of trust, were such as between the plaintiffs and defendants, it would be a matter for grave consideration whether, having regard to the original relationship of solicitor and client between them, the defendants could rely upon the documents executed by the plaintiffs at their instance and without any independent advice, and which in that view would operate, if at all, by way of estoppel, as discharging them from their (supposed) fiduciary obligations to the plaintiffs. But in

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my opinion this is not the real question. The real question is, as I said at the outset, whether as between the plaintiffs and the administratrix these transactions were breaches of trust. The question must of course be determined upon evidence admissible in a suit between the plaintiffs and the defendants.

In my opinion the mere fact that the plaintiffs signed these documents is not conclusive as determining the question whether the transactions were, as between the administratrix and the plaintiffs, breaches of trust. Reference has already been made to the nature of the relationship existing between the three sisters, and it is quite consistent with the fact of the signatures being genuine that they were obtained under such circumstances that the administratrix could not rely upon them. Again, it was open to the learned Judge upon the evidence before him to find as a fact that the plaintiffs, when they signed the documents, did so with a full knowledge of what they were doing, or to find that they did not know what they were doing. This question of fact was, in my opinion, distinctly raised upon the pleadings and evidence, and has not been decided.

As to this part of the case, therefore, the necessary relevant facts have not been found. And I do not think it would be proper for us to exercise the function of a Court of first instance with regard to it. As this question should be further considered, I will say no more about the facts.

It follows from what I have said that in my opinion the plaintiffs were entitled to a declaration that the deed of indemnity of 20th May 1886 was void as against them, and to judgment for the recovery of such sum, not exceeding £5,000, as represents the amount by which their shares in distribution were diminished by breaches of duty on the part of the administratrix to which the plaintiffs were not proved to be consenting parties.

The judgment appealed from should therefore be discharged, and the following declaration and judgment substituted: Declare that the deed of 20th May in the pleadings mentioned is void as against persons beneficially interested in the estate of the deceased, and that the plaintiffs as representing such persons other than the administratrix are entitled to recover from the defendants such sum, not exceeding £5,000, as represents the amount by

which the shares of such persons in distribution were diminished by reason of the failure of the administratrix duly to administer the estate, but so that no sum shall be recoverable in respect of any diminution of the share of any such person by reason of any failure in which such person concurred. Adjourn further consideration. Order the defendants to pay the costs of the suit up to and including the hearing, but not including the costs of the reference to the Full Court.

The cause must be remitted to the Supreme Court for further hearing accordingly.

The respondents must pay the costs of this appeal.

BARTON J. I have had the opportunity of reading the judgment just delivered, and I do not think it necessary to say more than that I fully concur in it.

O'CONNOR J. The vital question in this case is whether the indemnity deed of the 20th May 1886 is binding on the plaintiffs. If it is they cannot succeed, if it is not they are entitled to judgment. Whether that judgment can be entered at the present stage of proceedings, and if so in respect of what portion of the claim, are questions involving considerations which I shall deal with later.

The plaintiffs contend that the indemnity is not binding on them, for three reasons:—It is against public policy, and therefore void; it is contrary to the *Administration and Probate Act*, and therefore illegal. Finally, it is a transaction by which the defendants, then standing in a fiduciary relation to the plaintiffs as their legal advisers, obtained a pecuniary advantage from the plaintiffs without having provided for them that independent competent advice which the Courts have always held to be essential to the validity of such a transaction. The defence that a contract is void as against public policy is one that always demands careful investigation. The judgments of the English Courts are full of warnings against too lightly setting aside the deliberate agreement of parties on such a ground. *Sir George Jessel* M.R., in illustrating that position in the case of *Printing and Numeral Registering Co.* v. *Sampson* (1), says:—

(1) L.R. 19 Eq., 462, at p. 465.

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"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Although the phrase "void as against public policy" as used in this connection is difficult to define, and the Courts have always refused to limit its operation by exhaustive definition, the law recognizes certain classes of contracts as being within the prohibition. In reference to these, *Anson*, in his book on *Contracts*, at p. 212 (10th ed.), correctly expresses the law. "We may say then that the policy of the law has, on certain subjects, been worked into a tolerably definite set of rules, but no Court has any longer the power to extend its application." In other words the Courts will not declare a contract to be void as against public policy unless it comes within one of the classes of cases which the law has already recognized as being in violation of public policy. These classes are to be found enumerated in any text book on contracts. It is not necessary to mention them in detail, because there is only one of them within which the deed in question could be brought—that is the class which includes "agreements which tend to pervert the course of justice." Within that class Mr. Arthur contends that this indemnity comes, and he puts his argument in this way. The appointment of the administratrix is under order of the Court, and the execution of the bond to the Chief Justice by the administratrix and two sureties is a condition which the Court will enforce as ancillary to its order. The Court has jurisdiction to modify the bond as to the amount of penalty, the persons who are to be sureties, and their number, and it can be put in suit only under order of the Court. It is contended that under these circumstances the deed of indemnity is a fraud on the Court, because in effect it nullifies the bond as a protection to the beneficiaries. The bond on its face gives them the benefit

of two sureties as a substantial guarantee that the administratrix will do her duty, whereas the obligations of the sureties being practically cancelled by the indemnity, the sureties afford in reality no protection to the beneficiaries in the event of maladministration. If it were a term of the indemnity that it should be concealed from the Court, or if it were part of the agreement under which the bond and indemnity were executed that the Court should be in any way or at any time misled as to the real nature of the obligations of the sureties towards the beneficiaries, it would be difficult to escape the conclusion that an indemnity executed under such circumstances would be against public policy as perverting the course of justice. But in this case I can see no evidence of any agreement to conceal the execution of the indemnity or the real position of the beneficiaries from the Court. Such an agreement is certainly not to be implied from the indemnity itself, nor are the circumstances of the transaction such that any such agreement must necessarily be implied from them. If the indemnity is to be held void as being an attempt to interfere with the course of justice, it can only be so held on the ground that the transaction itself, however honestly intended and carried out, is an attempt to interfere with the course of justice. What amounts to an interference with the course of justice is well exemplified by the cases referred to in *Lound* v. *Grimwade* (1) by *Stirling* J., as follows:—"Now in *Egerton* v. *Earl Brownlow* (2), Lord *Lyndhurst* says:—'It is admitted, that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void.' And he accepts that as an accurate statement of the law, though he doubtless applies it to a state of circumstances widely different from those which occur in the present case. Upon this principle it has been repeatedly held that agreements tending to affect the course of legal proceedings are illegal, even although those proceedings may not be strictly criminal in their nature. Thus an agreement to pay money in consideration of the withdrawal of opposition to the discharge of an insolvent has been held to be illegal: *Hall* v. *Dyson* (3); *Hills* v. *Mitson* (4). In *Elliott* v. *Richardson* (5),

(1) 39 Ch. D., 605, at p. 612. (2) 4 H.L.C., 1, at p. 163.
(3) 17 Q.B., 785. (4) 8 Ex., 751. (5) L.R. 5 C.P., 744.

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an agreement by a shareholder in a company which was being compulsorily wound up that he would endeavour to postpone the making of a call was held to be illegal on the ground that it amounted to an interference with public justice; see especially the judgment of Mr. Justice *Willes* (1) with which the other Judges (*Keating* J., and *M. Smith* J.) agreed. *A fortiori*, must an agreement which tends to interfere with the course of criminal proceedings be illegal."

Of the same class of agreement as those specified by Mr. Justice *Stirling* was that under consideration in *Herman* v. *Jeuchner* (2), where a defendant in a criminal case who had been ordered to find bail for his good behaviour during a specified period deposited money with his surety upon the terms that the money was to be retained by the surety during the specified period for his own protection against the defendant's default, and at the expiration of that period was to be returned. *Sir William Baliol Brett* M.R., in holding that the agreement was illegal, says with reference to it (3):—"To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the Court: at least, this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognisance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality."

In all these cases there existed the element of an interference with the course of justice in some matter then under the consideration of the Court, or in respect of some order made by the Court. In this case that element is entirely absent. Administration was granted in the ordinary way subject to the statutory bond. The administration however could not be issued to the administratrix until the bond required by the *Adminis-*

(1) L.R. 5 C.P., 748.

(2) 15 Q.B.D., 561.

(3) 15 Q.B.D., 561, at p. 563.

tration and Probate Act had been executed. No application was made to the Court in reference to the bond or the sureties. In obedience to the requirements of the section the bond was executed, and it was certainly a compliance with the section. Its legal effect was to give a remedy against the sureties to every one interested in the administration in the event of a failure by Miss Grace Bayne to duly administer. There is no rule or principle of law which would prevent any person interested in the administration from releasing his rights against the sureties after they had accrued. There is no difference in principle between an agreement to release rights after they have accrued, and an undertaking by an individual or individuals not to insist upon rights, to be conferred under a bond about to be executed. The bond gave every beneficiary and every creditor the right against the sureties to be secured against maladministration. When it was executed there were creditors, well secured no doubt, as well as beneficiaries interested in the estate. Although by the indemnity the beneficiaries had in effect given up their rights, the bond still remained as a protection to other persons interested in the estate, namely, the creditors. There are, no doubt, cases in which the law will not permit an individual to give up a statutory right although the right is for his benefit. These are cases in which the statutory right is conferred on the individual in the public interest as well as for his own benefit. Individuals are not allowed in such cases to contract themselves out of the benefit of the Statute. An instance of that class is to be found in the case of the *Equitable Life Assurance of the United States* v. *Bogie* (1) determined by this Court at Brisbane in December last, where it was decided that a policy holder in an insurance company could not make a valid contract waiving certain rights given to policy-holders in Queensland by the *Life Assurance Act* 1901 (Queensland). But in the Act now under consideration there are no provisions express or implied indicating an intention to confer the rights given by the bond in the public interests as well as for the benefit of those interested in the estate. Nor are the interests of the public in any way concerned in the

(1) 3 C.L.R., 878.

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relinquishment by a beneficiary of the rights given him against the surety by the administration bond.

The position has been well stated by the learned Chief Justice in the Court below in his judgment (1) where he says:—"It seems perfectly clear that, if there was no agreement at all which would have any collateral effect on that arrangement, there would be nothing more to be said if afterwards any of those to be protected by force of that bond chose to dispense with the protection which is afforded for their advantage. That is a condition of things which does not concern anybody else. The persons concerned in the property—the creditors and beneficiaries—are the only persons who have any interest in the matter at all. The rest of the community gain nothing and lose nothing by it." I have thus come to the conclusion that there is nothing in the indemnity itself, nor in the agreement under which the bond and indemnity were executed, which tends to pervert justice, and that it cannot on that ground be held to be invalid as being against public policy.

But it is further contended that the indemnity is contrary to the *Administration and Probate Act* 1890, or as Mr. Arthur phrases it, against the spirit of that Act. There being, as I have pointed out, no question of public policy involved in the release by the beneficiaries of the obligation of the sureties towards them under the bond, the only matter to be considered is whether the Act has expressedly or impliedly prohibited such an agreement as that under which the bond and indemnity were executed. The Act contains no prohibition express or implied against such an agreement, and on this aspect of the case I entirely concur in the conclusion at which the Supreme Court of Victoria arrived, and in the reasons for that conclusion set forth in the judgment of the learned Chief Justice.

There still remains, however, the most difficult question in the case, that is, whether the indemnity is invalid because the defendants stood in a fiduciary relation to the plaintiffs at the time of its execution, and did not take the precaution of seeing that the plaintiffs had the benefit of competent independent advice as to the transaction. My learned brother the Chief Justice has

(1) (1906) V.L.R., 112, at p. 118.

dealt very fully with this aspect of the case, and in his view I entirely concur. For that reason I do not think it necessary to state my opinion in respect to it with much detail. If the relation of solicitor and client did exist between the defendants and the plaintiffs, the law imposed upon the former a special duty towards their client, the due fulfilment of which was a condition precedent to the validity of the transaction. A very concise statement of what the special duty involves is contained in the judgment of *Stirling* L J. in *Wright* v. *Carter* (1):—"The rules of the Court," he says, "require this to be proved in a transaction of sale in which the solicitor is a purchaser—first, the client must be fully informed; secondly, he must have competent independent advice; and, thirdly, the price which is given must be a fair one. The onus of proving all this lies on the solicitor." The rule itself is only an application of the general principle on which the Courts exercise a vigilant control over the making of contracts under circumstances in which undue influence may have been exercised by one of the parties. The relation of solicitor and client being of a fiduciary character, the object of the Court is to ensure that the bargain in which the solicitor obtains an advantage for himself is fair to the client, and has been made by the client with a full knowledge of his rights. There are no doubt cases in which the generality of that statement of Lord Justice *Stirling* must be restricted. *Vaughan-Williams* L.J., in the same case (2), says:—"I say, 'If and so far as competent independent advice was necessary,' because I am not prepared to lay it down that, in every case of purchase, competent independent advice is necessary as distinguished from the advice of the purchasing solicitor. It may be that a particular transaction of purchase appears to be so manifestly fair that independent advice is not necessary." Having regard to the fact that the defendants were in all probability running no risk and incurring no liability, and that to cover any possibility of risk they had the security over all the plaintiffs' interest in the estate, the transaction amounted practically to their obtaining £75 out of the estate for the use of their names on the bond. Without throwing any doubt on the absolute good faith of the defendants, all through the transaction it seems to me that the rule as laid down by

(1) (1903) 1 Ch., 27, at p. 60. (2) (1903) 1 Ch., 27, at p. 54.

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Stirling L.J., must be applied to a bargain of that kind. If the relation of solicitor and client did exist between the plaintiffs and the defendants at the time of the transaction, it is clear that it cannot stand, because the clients had no independent advice. But then the question arises, has it been shown in this case that the plaintiffs at the time of the execution of the indemnity stood in the relation of clients to the defendants? It is true that the formal relation of solicitor and client between Miss Lila and Miss Mary Bayne and the defendants had never been created. Miss Grace Bayne was no doubt the defendants' client in a contractual sense; hers was the name on the books, costs were charged against her, and not against her sisters. And she, not her sisters, were liable to be sued if she failed to pay. But that by no means settles the question. The fiduciary relation of solicitor and client may exist between the parties to a transaction although no formal employment or retainer exists. What is necessary to constitute that fiduciary relation is explained by the Judges in *Barron* v. *Willis* (1) in the Court of Appeal, and in the House of Lords, the case so fully cited by my learned brother the Chief Justice. The facts from which the Appellate Courts in that case inferred the existence of the fiduciary relation are stated by Lord *Davey* in the House of Lords (2).

"My Lords, the next question I ask is, What was the position of Mr. William Moore Skinner? Mr. Skinner was her husband's solicitor, and indeed he was the solicitor for the whole family, and not only for the whole family, but it appears that he also attended Mrs. Brown, the plaintiff's mother, when she was on her deathbed, and I think made Mrs. Brown's will for her. But he was more than that. He was also a very intimate family friend of the Willis family, including the plaintiff and her husband, and was a trustee under the original settlement. My Lords, I think it is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is *primâ facie* entitled to look to her husband's solicitor, the solicitor of her husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman.

(1) (1900) 2 Ch., 121.

(2) (1902) A.C., 271, at p. 283.

"Now, my Lords, the result of the evidence upon my mind, without going into details, is that this lady did in fact rely upon Mr. William Moore Skinner to advise and assist her as her solicitor."

The fact that Mr. William Moore Skinner was an intimate friend of the Willis family, and was a trustee under the original settlement, no doubt entered into the consideration of the Court in that case. But the absence of any such facts in this case cannot affect the application of the principle of that case in so far as it lays down the law that the fiduciary relation of solicitor and client may exist although there is no formal or contractual relation of that kind. That principle I take to be this, that, where a party to a bargain with a solicitor, in which the solicitor obtains a personal benefit, regards him as his legal adviser in that transaction and is under all the circumstances reasonably justified in so regarding him, and in relying upon his advice, and where the solicitor knows, or, under all the circumstances, ought to know that the other party is so regarding him and is so relying on his advice, it will be taken by the Court that the relation of solicitor and client exists between them, although that relation has never been formally created. The facts from which the fiduciary relation can be inferred, if it is to be inferred in this case, are not in dispute. I adopt Mr. Tomlins' evidence as giving an accurate account of the interview at the plaintiffs' house when the deed of indemnity was explained to the three sisters and executed; and I may here observe that his authority to bind the defendants in all he did in this matter is clearly established. The effect of Mr. Tomlins' evidence may be summarized as follows:—Blake and Riggall had been solicitors for the plaintiffs' mother for many years, and after her death were Miss Grace Bayne's solicitors, and were then acting for her and advising her in the business of the administration. In other words, that they were and had been for years the family solicitors. On the occasion of his visit to the Bayne household Mr. Tomlins, as representing Blake and Riggall, went expressly to explain to the plaintiffs the meaning and effect of the deed of indemnity and why they were asked to execute the deed; while there he was consulted by the plaintiffs as to whether the objects of the deed

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of indemnity could not be attained by the plaintiffs themselves becoming sureties instead of the defendants, and he then advised them and afterwards obtained counsel's advice for them on that question.

The letters written by the defendants through their clerks to Miss Grace Bayne about the same time, and quoted at length by my learned brother the Chief Justice, are entirely in accord with Mr. Tomlins' account. Applying, then, the principle to be gathered from *Barron* v. *Willis* (1) to the defendants' own account of the transaction, the conclusion is to my mind irresistible that these ladies, the plaintiffs, being without any knowledge of the affairs of the estate or of business generally, and ignorant of the rights which the law gave them for the protection of their interests against maladministration of their mother's estate, regarded the defendants as the family solicitor to whom they might apply for advice as to their position and their rights, that they regarded Mr. Tomlins' explanation of their position and rights and his opinion as to the best method of carrying out the wishes of the three sisters with regard to overcoming the difficulty of obtaining sureties as the advice of their family solicitor, and that they put implicit faith in that advice ; that Tomlins must have known that his advice was being so regarded by all three sisters, and that he accepted that view of his position, and in fact acted as legal adviser, not only to Grace Bayne, but to the plaintiffs in all that related to the transaction which resulted in the execution of the bond and deed of indemnity. Under these circumstances the fiduciary relation of solicitor and client was established as effectually for the purposes of the principle under consideration as if the defendants had been formally retained by the plaintiffs.

That being so, it was the defendants' duty to see that the plaintiffs had competent independent advice, and as they failed in that duty the deed must be held to be invalid. The deed being invalid, the next question is what are the plaintiffs' rights, if any, under the bond ? It was contended by the defendants that the bond and the deed were two inseparable parts of one transaction and that in respect of that transaction the plaintiffs were not at liberty to approbate and reprobate at the same time. That they could not

(1) (1900) 2 Ch., 121 ; (1902) A.C., 271.

repudiate the indemnity and take advantage of the bond. But in my opinion the doctrine relied on by the defendants cannot apply for this one reason, if for no other. Although the documents were prepared and executed under the one agreement, they are in themselves entirely separable and separate documents and between different parties. The deed of indemnity is between the plaintiffs and the defendants, and is invalid because the defendants have not fulfilled the obligations which their fiduciary relation to the plaintiffs imposed on them. But the Chief Justice is a party to the bond, the promise to pay is made to him, and it cannot be treated as void without his release or concurrence. He, representing as he does all parties interested in the administration, cannot be affected by the invalidity of the indemnity. The bond therefore can be enforced as if no deed of indemnity existed. The question then follows in respect of what acts of maladministration have the defendants become liable under the bond. I agree that they can be liable only for such acts of maladministration as the plaintiffs would be entitled to charge against their sister, the administratrix. The payment of £75 out of the estate as consideration for the defendants allowing the use of their name to the bond is clearly a breach of duty by the administratrix in which the defendants took part, and for that they must be liable. Grace Bayne's dealings with the money in the Melbourne Permanent Building Society was also a breach of her duty for which the defendants are liable, but under that head there has been no inquiry as to the amount of damages. On that question the case must go back for investigation. As to the two remaining breaches alleged, namely, the Exhibition Street land and the mortgages and other transactions connected with it, and the purchase of Alcazar there is, I think, evidence upon which the learned Judge might well have found that the plaintiffs had so far acquiesced in those transactions that they are now prevented from treating them as breaches of duty by the administratrix. But His Honor does not seem to have investigated that issue. He has found as a fact, and the finding is obviously right, that the plaintiffs signed the authority to their sister to execute the necessary documents in these transactions. But he, apparently, did not come to any determination, in the view he took it became unnecessary to do

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so, on the question whether the plaintiffs had that knowledge of their rights, and of the nature of the transaction which is essential to constitute such acquiescence as would prevent them from treating the transactions as breaches of duty by the administratrix. Unless there has been such acquiescence or concurrence on the part of the plaintiffs in these breaches the defendants are liable to make good the losses arising from them. It will be necessary, therefore, to have these transactions further investigated from that point of view.

I agree, therefore, that the deed of indemnity must be declared invalid, and the case must go back for hearing on the matters I have mentioned. I entirely concur in the order as formulated by my learned brother the Chief Justice at the end of his judgment.

Judgment appealed from discharged, and declaration and judgment as above substituted. Adjourn further consideration. Defendants to pay costs up to and inclusive of hearing, but not of reference to Full Court. Case remitted to Supreme Court for further hearing. Defendants to pay costs of appeal.

Solicitor, for appellants, *F. S. Stephen*, Melbourne.

Solicitors, for respondents, *Blake and Riggall*, Melbourne.

B. L.