[PRIVY COUNCIL.]

BLAKE AND ANOTHER . . . . . APPELLANTS;

AND

BAYNE AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1908. *May* 26.

High Court—Jurisdiction—Appeal to High Court from decision of single Judge of Supreme Court—Administration bond—Sureties—Deed of indemnity by beneficiaries—Dealing with estate—Consent of beneficiaries—Public policy—Solicitor and client—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *secs.* 15-17.

Persons of full age and ordinary intelligence, being entitled to property in equal undivided shares, may commit the management of the property to one of their number, with absolute or qualified authority to deal with it, and such arrangement may be established by proof of conduct and by admissions made in Court as well as by deed.

The solicitors for an administratrix joined in the administration bond as her sureties for a consideration of £75, and at the same time obtained from her and the next of kin (her sisters) a deed of indemnity against all liability for any breaches of duty committed by her, and a charge upon the whole estate to cover the indemnity.

The debts having been paid, the sisters left the property under the absolute management of the administratrix, who mortgaged and otherwise dealt with the property with the result that it thereafter became wholly lost.

Held, on the evidence, that no fiduciary relationship existed between the solicitors and the next of kin and that the deed of indemnity and charge was a good defence.

Held also, on the evidence, that the three sisters, who after payment of debts were entitled to the residue of the estate in equal shares, had consented to enjoy it in specie, and were jointly responsible for the mode in which it had been dealt with and lost, and that the sureties to the bond were not liable for such losses.

*Present. — Lord Loreburn, L.C., Lord Macnaghten, Lord Atkinson, Lord Collins and Sir Arthur Wilson.

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Where sureties to an administration bond cannot be obtained except as a matter of business and for payment, such payment may properly be made by the administrator.

A deed of indemnity given by the beneficiaries under an intestacy to the sureties to the administration bond is not contrary to public policy.

Judgment of High Court: *Bayne* v. *Blake*, 4 C.L.R., 1, reversed, and judgment of Supreme Court of Victoria restored.

APPEAL to His Majesty in Council from the decision of the High Court: *Bayne* v. *Blake* (1).

A preliminary point was taken by the appellants that the High Court had no jurisdiction to entertain an appeal from a decision of a single Judge of the Supreme Court of Victoria.

Their Lordships held that the High Court had the jurisdiction which had been exercised in the case.

The judgments of their Lordships on the substantive matter of appeal was delivered by

LORD MACNAGHTEN. This is an appeal from a decision of the High Court of Australia, reversing a judgment of the Supreme Court of Victoria pronounced by *Holroyd* J. after a trial which lasted twelve days and a reference to the Full Court on a point of law.

The action was brought by the respondents Lila Elizabeth Bayne (who is sometimes called Eliza Bayne) and Mary Bayne to recover £5,000 alleged to be due on a bond entered into by Grace Bayne as administratrix and the appellants Blake and Riggall (who were solicitors and in partnership) as sureties for her. The bond was conditioned for the due administration of the estate of Grace Bayne, widow, who died on 10th June 1885 intestate.

The case of the plaintiffs was that there had been misconduct on the part of Grace Bayne as administratrix, and loss of assets in consequence, and that the sureties were liable for this loss to the extent of the penalty in the bond.

Holroyd J. dismissed the action with costs. The High Court held the sureties liable, condemned them in costs, and directed inquiries.

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

Grace Bayne, the administratrix, and her sisters Mary and Lila Elizabeth were the only children and sole next of kin of the intestate. At the date of their mother's death Grace and Mary, who were twins, were 29 years of age. Lila Elizabeth was 26.

Grace Bayne, the intestate, was the widow of a man in the building trade who had died three or four years before her leaving a good deal of house property in Melbourne. With the exception of one lot of trifling value, the property was in mortgage, but it was worth about £10,000 over and above all incumbrances. Mrs. Bayne apparently succeeded to the property under her husband's will. But no particulars of her title are given. She managed the property herself, let it and collected the rents. She attended regularly at the office of Messrs. Blake and Riggall, who were the mortgagees' solicitors, to pay the interest on the mortgages as her husband had done. Besides this, Messrs. Blake and Riggall seem to have acted for her professionally on some occasions. There is nothing to indicate that the business in which they were employed for her was anything more than ordinary business connected with the management of house property in the occupation of monthly or weekly tenants. There is absolutely nothing tending to show or to suggest that Mrs. Bayne was a friend, or even an acquaintance, of either Blake or Riggall or ever treated them as her confidential advisers or consulted them or either of them in reference to the settlement or disposition of her property or in connection with any provision for her children.

On the death of Mrs. Bayne, Grace, the eldest daughter, called at Messrs. Blake and Riggall's office to inquire whether they had made a will for her mother. She was told they had not. Mr. Blake explained what had to be done in order to obtain administration, and then he handed the matter over to his principal clerk, a Mr. Tomlins. On 23rd July 1885 a grant of administration was obtained in favour of Grace Bayne, the eldest daughter. There were very few debts and they were all paid "immediately" after Mrs. Bayne's death. "The creditors when my mother died," says Grace Bayne, "were paid off at once." The mortgage debts already referred to—£600 on one of the houses and £4,700 on the rest—seem to have been debts contracted by Mr. Bayne,

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probably on account of advances to him in his business. There is nothing to show that Mrs. Bayne made these debts her own, or was liable for them except in a representative character. The security seems to have been ample and the mortgagees appear to have been perfectly satisfied with their position.

The estate was valued at £10,000 or thereabouts. Besides furniture and effects in the house occupied by Mrs. Bayne and her daughters, it consisted of the house property already mentioned and moneys in the hands of the Melbourne Permanent Building Society, who acted as bankers for their customers. They supplied the administratrix with what she required in the way of cash. Questioned as to how she got money from them before letters of administration were issued, she "always got money," she replied, when she "went for it."

Although the grant of administration was dated 23rd July 1885 the letters of administration were not issued until nearly a year afterwards. The delay was occasioned, it seems, principally by the inability of the administratrix to procure sureties. She had no friends who would accept the position. So she applied again to Blake and Riggall. She was told that there were guarantee companies who undertook that sort of business, and were accepted as sureties by the Court. Mr. Tomlins was instructed to ascertain on what terms the guarantee of such a company could be obtained. These companies, of course, as *Griffith* C.J. observes, "derive their income from the sums or premiums paid to them as a consideration for entering into the contracts of suretyship" (1). Three companies were applied to. The lowest terms were those offered by the Union Trustee Company of Australia. That company required a commission of £100, being 2 per cent. on the penalty of the bond, together with an indemnity by the next of kin. No company it seems "was willing to undertake the business without such an indemnity." So it is sworn, and there is no contradiction on the point. Grace, or one of her sisters, thought the commission rather high. Then, at Mr. Tomlins' suggestion, Messrs. Blake and Riggall were offered as sureties at a reduced commission of £75 on the same terms as regards indemnity as those demanded by the Union Trustee Company.

(1) 4 C.L.R., 1, at p. 17.

Grace on behalf of herself and her sisters accepted the proposal. A deed of indemnity was prepared and engrossed and handed to Grace for the consideration of her sisters and herself. Before it was executed Mr. Tomlins, by Mr. Blake's direction, made an appointment for the purpose of reading it over and explaining it. He called upon the Misses Bayne at their house on 20th May 1886 in the evening. He found the sisters at home, the dining room table cleared and the deed upon it. The deed was short and simple. It stated accurately the legal position and rights of the three sisters. Mr. Tomlins read it over aloud and explained it carefully. He was there about three-quarters of an hour. It was purely a business interview. The three sisters all listened attentively. Though Grace did most of the talking, both the younger sisters seemed very intelligent. So Mr. Tomlins judged from the part they took in the conversation. Then the deed was executed. But it was left with Grace and her sisters because it was suggested by Mr. Tomlins that perhaps under the circumstances the Court would accept the two younger sisters as sureties, and so the commission might be saved. Mr. Tomlins was to consult counsel on this point. He did so, but the opinion was adverse. A few days afterwards Grace brought the deed back to Messrs. Blake and Riggall's office. They executed the bond on 11th June 1886 and thereupon the letters of administration were issued.

"The evidence of Mr. Tomlins," *Holroyd* J. observes, "left no doubt on my mind that the effect of the deed of indemnity was fully and clearly explained to them" [the plaintiffs] "and that they perfectly understood what risk they were incurring when they signed it. Any suspicion of their having been persuaded into signing it either by Grace Bayne or her solicitors was entirely dissipated by their conduct. In truth, they were as eager as their sister was to get rid of the interference of sureties and could not or would not realize that their interests might need safeguarding when placed in their sister's hands."

It is important to note the position of the estate when the deed of indemnity was signed. All the debts had been paid. There was no liability outstanding. The mother's estate was clear. The three sisters were equally entitled to it and every part of it

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in the actual state and condition in which it was. Without the consent of her two sisters it was neither the duty nor the right of the administratrix to convert the estate into money for the purpose of division or investment. The two younger sisters must have known perfectly well at the time that they were entitled to an equal share with their elder sister. In fact, they admit it. But they desired, as the learned Judge says, that the elder sister should take the place of their mother and that she "should have the sole and absolute control of the property without themselves inquiring of what it consisted or what was being done with it." They were living "together in perfect harmony." The younger sisters had implicit confidence in the good sense and business capacity of the elder sister. The elder sister, as she says, knew that the property was theirs as much as hers. For a while the arrangement worked very well. Grace managed everything just as their mother had done in her lifetime, and everything was perfectly satisfactory.

In 1889, some four years later, the three sisters went to England and stayed there two years or so. The trip cost them about £2,200. The money, or the greater part of it, was drawn from the building society. The manager of the society and his agent were employed to collect the rents during their absence. On their return in 1891 they stopped for two or three months at the Grand Hotel and there they fell in with a Mr. Baylee, who is described as "an agent." He spoke to Grace Bayne about a corner block which abutted on their property. It belonged to a building society called the Premier. It seems that at this time, though Grace was not aware of the state of things in the State from which she had been absent so long, the value of property in Melbourne was going down. "The beginning of 1891," it appears, "was the end of the land boom in Melbourne." Probably the building society and their agent were not unwilling to secure a purchaser before things got worse. However that may be, Grace was tempted to buy this corner lot and agreed to purchase it for £4,900. That was the beginning of all the trouble and the origin of the mischief which has given rise to this litigation. For as Mary Bayne said "everything was right" up to the time they came back from England and they were "quite satisfied" with

what Grace did up till then. Grace was asked at the trial how she thought she was going to pay for this new purchase as there was already a mortgage for £4,700 outstanding. She had said before "I often ask myself what put it into my mind to buy the property." All she could say in answer to the question addressed to her was, "I do not know. I did not understand why I did it at all. I cannot understand why I wanted to buy the corner block at all. It altered all my plans. I cannot give any explanation why I leapt into this speculation."

To pay for this purchase and to clear off the existing mortgage, it became necessary to mortgage the greater part of the real estate which the three sisters derived from their mother. The money was obtained from Messrs. Smith and Tyler, who were transferees of the mortgage for £4,700. On 2nd September 1891 Grace Bayne, with the consent in writing of her two sisters, who are described in the memorandum of consent as being together with Grace "the only next of kin of . . . . Grace Bayne deceased, entitled by law to share her property," executed a mortgage in favour of Smith and Tyler on the property included in the old mortgage, and the property bought from the Premier Building Society for the purpose of securing the sum of £10,000 and interest. And the mortgage was duly registered.

The next thing that Grace Bayne did after her return from England was to buy a residence for her sisters and herself. A house was found which they all liked very much. The sum asked was £3,500. The price was thought too high and the negotiation dropped. After some little time the owner came forward and offered to take £3,000, and Grace agreed to buy it for that sum. For this purchase too Grace and her sisters could only pay by mortgaging it, together with a house called "Avaland," which was not comprised in Smith and Tyler's mortgage and was then unincumbered. On 1st October 1891 Grace, with the consent in writing of her two sisters, executed a mortgage in favour of one James Landale on "Avaland" and on their intended residence, which they called "Alcazar," for the purpose of securing the sum of £3,000 and interest. And that mortgage also was duly registered.

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The result of these speculations on the part of the three sisters was disastrous.

The value of property in the State continued to fall. Banks failed. There came a period of extreme depression. The mortgagees pressed for their money, and at last foreclosed. And the whole of the property comprised in the two mortgages of 1891 was lost.

The Melbourne Permanent Building Society had gone into liquidation in the bad times, and there was a loss of about £700 in respect of the moneys in the hands of the society at the time of its failure.

The sisters, having thus lost their means of livelihood, consulted more than one legal adviser. Ultimately an action, which was apparently a friendly action, was brought by the two younger sisters against Grace. Then they procured the administration bond to be assigned to them, and thereupon the present action was launched.

The acts of misconduct alleged to have been committed by Grace Bayne in the administration of her mother's estate were these :—

(1) Payment of £75 as commission to Blake and Riggall out of the intestate's estate.

(2) Leaving moneys, part of the intestate's estate, in the hands of the Melbourne Permanent Building Society.

(3) The two mortgages of 1891, and the transactions of which they formed part.

The defence to the action was twofold. The defendants maintained :—

(1) That the payment of the commission was necessary and not improper, and that the losses complained of did not result from misconduct on the part of Grace Bayne in her capacity of administratrix, but from the acts and conduct of the persons who were absolutely entitled to the property derived from the intestate and in actual enjoyment of it, after the estate had been fully and properly administered.

(2) That if and so far as there was any misconduct on the part of Grace Bayne in her capacity as administratrix,

the deed of indemnity was a full and complete answer to the claim.

It seems to their Lordships that the defendants must succeed on either of these grounds of defence.

Holroyd J. did not deal with the first because he thought that such a defence could not be set up in the absence of a formal deed. In this respect their Lordships think that the learned Judge was in error. There seems to be no reason why three persons of full age and ordinary intelligence, being entitled to property in equal undivided shares, should not commit the management of that property to one of their own number with authority to deal with it, whether the authority so conferred be qualified or absolute. And there seems to be no reason why such an arrangement, if otherwise unobjectionable, should not be established by proof of conduct and by admissions made in Court just as well as by a solemn deed duly signed, sealed, and delivered.

The case on the part of the plaintiffs seems to be founded in a great measure upon a view of the interest of a next of kin in an intestate's estate which was advanced in the case of *Cooper* v. *Cooper* (1), and rejected by the House of Lords. "It was very much pressed on your Lordships," said Lord *Cairns* L.C., in that case, "that the interests of a next of kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the Statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors, and for the facility of division. For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to

(1) L.R. 7 H.L., 53, at p. 64.

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every item forming the personal estate of the intestate, subject only to those paramount claims of creditors."

The opinion expressed by Lord *Cairns* and the other noble and learned Lords in *Cooper* v. *Cooper* (1), goes a long way to dispose of the whole case set up on behalf of the plaintiffs. Subject to the payment of debts, the whole estate was the absolute property of the three next of kin. The furniture and effects were theirs; the money was theirs; the houses were theirs. The debts were paid immediately after the death. If the next of kin chose to leave the whole estate just as it was in the hands of the eldest sister and under her absolute control (as the evidence shows, and as *Holroyd* J. finds it was their desire and intention to do), there was no reason why effect should not be given to their wishes. As long as they lived together there was no reason for dividing the furniture. There was no reason for dividing the money. It was applied honestly and equally for their common benefit. There was even less reason for dividing the house property. It was managed by Grace, as they wished it to be, and by her alone. Moreover, it seems from a bill of costs put in evidence that the title was never transferred into the name of the administratrix until the property was dealt with by the mortgages of 1891, and then the consent of the two younger sisters was required by the mortgagees and by the Registrar of Titles. In the ordinary course of things it would not have been possible for the administratrix to have dealt with it alone and without the consent of her two younger sisters. There is evidence that all the sisters were strongly against selling the houses which had been built by their father. A partition of the property and re-adjustment of the mortgages would have been profitable to the solicitors, but to no one else. It would have made no difference so long as the absolute control of the property was in the hands of the eldest sister, and they would have it so.

The specific acts alleged as breaches of duty may be dealt with shortly.

As regards the commission of £75, it is clear that the letters of administration could not have been issued without the aid of persons who would only give their assistance as a matter of

(1) L.R. 7 H.L., 53.

business and for payment. Blake and Riggall consented to act for a smaller commission than that which guarantee companies required. It was not suggested that any other persons would have done what was required more cheaply. It was not disputed that the commission would have been properly payable out of the estate if a guarantee company had been employed. It is therefore difficult to see what objection there can be, so far as the plaintiffs are concerned, to the commission paid to Blake and Riggall coming out of the estate. But, in fact, in the circumstances of the present case it is immaterial whether the payment be treated as coming out of the estate or out of the shares of the next of kin. The plaintiffs knew about the payment and assented to it.

It is still more difficult to understand the charge of misconduct in leaving moneys in the hands of the building society. The learned Chief Justice says it was an "unauthorized investment." It is difficult to see what the meaning of that expression is. As the three sisters were the absolute owners of the money, and were of mature age, they were perfectly free to deal with it as they pleased. There could be no question of authorized or unauthorized investment. In point of fact, the money in the hands of the building society at the date of the intestate's death—amounting in all to £2,188 0s. 8d.—was applied for the common benefit of the three sisters. It was evidently all drawn out long before the failure of the society. No accounts were in evidence on the appeal to this Board, but it appears that Grace Bayne drew out money to pay the intestate's debts and to discharge a mortgage debt of £600 (probably a charge on the house called "Avaland") besides £210, £1,000, and £660, or £1,870 in all, for the expenses attending the visit to England.

The money in the hands of the society at the time of the failure amounted to £1,232, and the evidence is that that sum did not represent moneys deposited by the intestate in her lifetime.

There remains the charge in respect of the mortgages of 1891. It is perfectly clear that the two purchases made by Grace in 1891 after the visit to England, and the mortgages created for the purpose of paying for them, had nothing to do with the administration of the intestate's estate. They were speculations

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on the part of Grace Bayne, carried out with the consent and concurrence of her younger sisters. The result would have been just the same if the real estate derived from the intestate had stood in the joint names of the three sisters as proprietors. But there are two things connected with this part of the case which it would not be right to pass over in silence, and which show that it is difficult, if not impossible, to place any reliance upon any statement made by Grace or by her sisters without some corroboration. Grace Bayne swore in one part of her evidence that she was advised by Mr. Riggall to buy the corner lot which was bought from the Premier Building Society. And Grace and her sisters came prepared to swear, and did swear, that two documents marked Exhibit 8 and Exhibit 9, purporting to be signed by Mary and Lila Elizabeth in the presence of a Mr. Savage, who was then the accountant in Blake and Riggall's office, and on which the Registrar of Titles acted as evidencing the consent of the younger sisters to the mortgages of 1891, were both of them forgeries. Mr. Riggall was called, and absolutely denied the story which Grace told about the advice which she said he gave her. The Judge believed him and not the lady. So far from advising Grace to make that foolish purchase, when she came to Mr. Riggall in order to get the means to pay for it, he tried to dissuade her. He remonstrated with her. "Do you think it wise," he said, "for you and your sisters, who have enough to live on, and have your properties mortgaged now, to go and mortgage them still more to buy another place?" "She replied," says Mr. Riggall, "that she had gone into the matter thoroughly, and that the property that was being bought would add very greatly to the value of their own." Mr. Riggall, of course, had nothing more to say. He declares, on oath, that it was an entire untruth to say he advised it. "My advice," he said "was not asked in any way in connection with the purchase. Miss Bayne did not take very kindly to the suggestion that I made. I volunteered the advice, and I got a little snubbed." Later on Grace was told that there was a flaw in the title, and that she could get out of the bargain if she chose. Her answer was: "I have begun it, and I will go on with it." She was, as she says,

"self-reliant," and needed "restraint." But Blake and Riggall were not her trustees or her guardians.

The charge of forgery by which the plaintiffs endeavoured to bolster up their case is more serious and equally baseless. Mr. Savage was called. He declared that the documents by which the plaintiffs testified their consent to the two mortgages of 1891 were executed by them in his presence after they had been duly read over. *Holroyd* J. believed Mr. Savage and seems to have thought this part of the plaintiffs' story absurd. This is what he says about it: "Now comes the most extraordinary part of this case. Miss Grace Bayne denies positively that Savage saw her two sisters sign Exhibit 8, and is equally positive that the signatures Mary Bayne and Eliza Bayne to Exhibits 8 and 9 respectively are not in the writing of either of her sisters. Miss Lila has sworn that the signature Eliza Bayne to Exhibit 8 and to Exhibit 9 are neither of them hers, and that the signature Mary Bayne to each is not that of her sister Mary. Miss Mary has sworn, as to both Exhibits 8 and 9, that the signature Eliza Bayne is not her sister's Lila, and that she doubts about her own, but is positive that she never signed a document before Mr. Savage in Blake and Riggall's office or anywhere else. I must say that the imputation of forgery and perjury which are conveyed by the plaintiffs' repudiation of their signatures, seems to me wildly improbable, and when the evidence is sifted, rests upon no other ground than want of recollection. They receive no countenance from the comparison of handwriting. I believe that the plaintiffs did voluntary sign the Exhibits 8 and 9."

Holroyd J. thought that the deed of indemnity was a defence to the action. He found that the deed had been fully explained to the plaintiffs and "that there was really no evidence of Messrs. Blake and Riggall having personally advised either of the plaintiffs, or having in any other way acted as their solicitor." But he felt some difficulty as to whether the deed was not void on the ground of public policy, and he reserved that question for the determination of the Full Court.

The judgment of the Full Court was given by *Madden* C.J.

"We therefore cannot," said the Chief Justice of Victoria, "see anything in this transaction contrary to the spirit of any provision

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which is enacted in the interests of the whole public, or, in fact, to anything which even indirectly or collaterally is enjoined to be observed by this Court in these matters" (1).

After this ruling judgment was pronounced dismissing the action with costs.

It is not necessary to say anything more on the point reserved for the Full Court. It was raised again in the High Court, and dealt with at some length there. *O'Connor* J. agreed with the opinion of *Madden* C.J., nor did the Chief Justice dissent from it in substance. The learned Chief Justice, however, thought "it was an implied term of the arrangement that the indemnity should not be brought to the notice of the Court" (2). *O'Connor* J. did not agree in that view; nor do their Lordships.

In reversing the judgment of *Holroyd* J. the High Court differed not so much on questions of fact as on the proper inference to be drawn from the circumstances of the case and the position of the parties.

They thought that Messrs. Blake and Riggall were the family solicitors of the Misses Bayne. They thought that Blake and Riggall were to all intents and purposes the solicitors of the plaintiffs, that in reliance upon them as their solicitors the plaintiffs executed the deed of indemnity and that, having regard to the fiduciary relation which in their opinion subsisted between Blake and Riggall and the plaintiffs, the deed could not be supported in the absence of independent advice. Even if Blake and Riggall were not to be considered the solicitors of the plaintiffs the result they thought would be the same, because Grace Bayne was instrumental in procuring the deed and Blake and Riggall were certainly her solicitors. They therefore thought that there was "a taint of fraud" about the deed of indemnity, and that it must be declared void; and holding that a breach of trust had been committed in paying commission to Blake and Riggall and in leaving part of the estate in the hands of the building society, and not being satisfied that the plaintiffs understood what they were doing in giving their consent to the mortgages of 1891, they discharged the order of *Holroyd* J. and directed further inquiries.

(1) (1906) V.L.R., 112, at p. 119; 27 A.L.T., 143, at p. 146.

(2) 4 C.L.R., 1, at p. 41.

Their Lordships are unable to agree with the conclusion at which the High Court arrived, or with the reasons on which that conclusion is founded. They do not think that Messrs. Blake and Riggall can be regarded as the family solicitors of the Misses Bayne in the sense in which that expression is ordinarily or properly used. Messrs. Blake and Riggall were certainly not solicitors of the plaintiffs, nor did they, in their Lordships' opinion, stand in any confidential relation towards them. It is not suggested by the plaintiffs in the evidence they gave. Mary Bayne says:—"I never personally consulted any of the firm or any of their subordinate officers or clerks about anything whatever. . . . To my knowledge my sister Lila never consulted Blake and Riggall on any occasion."

Their Lordships agree with *Holroyd* J. in thinking that the deed of indemnity was fully and properly explained to the plaintiffs, that they perfectly understood it, and that no independent advice could have made the matter clearer or have been of any advantage whatever. The law applicable to cases where benefits are obtained by persons standing in a fiduciary relation to the donor is well settled. The principles applicable to those cases are clear. But each case must depend upon its own circumstances; and their Lordships are unable to see an analogy between the present case and the cases cited in the judgment of the learned Chief Justice.

Having regard to an expression which occurs in the judgment of the learned Chief Justice, and which possibly may be misunderstood, their Lordships think it right to say that in their opinion no "taint of fraud" attaches to the conduct of Messrs. Blake and Riggall. Whether they were morally justified in taking so large a fee for doing that which in their opinion at the time involved neither risk nor trouble, is not a question with which their Lordships are concerned. It is, however, only fair to them to observe that they do not seem to have been particularly anxious to get the job. Apparently it was undertaken rather for the convenience of their client, when other means failed, than for their own pecuniary advantage. And clearly they showed no disposition to make costs out of their client or out of the administration of the estate.

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Their Lordships are of opinion that the conclusion at which Mr. Justice *Holroyd* arrived was right. They will, therefore, humbly advise His Majesty that the appeal ought to be allowed, the judgment of the High Court discharged with costs, and the judgment of *Holroyd* J. restored.

The respondents will pay the costs of the appeal.

Foll *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 62 ALJR 389 | Foll *Oceanic Sun Line Special Shipping Co Inc v Fay* 79 ALR 9 | Foll *Voth v Manildra Flour Mills Pty Ltd* 97 ALR 124 | Dist *Ranger Uranium Mines Pty Ltd v BTR Trading (Qld) Pty Ltd* 75 FLR 422 | Cons *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538

Appr *Oceanic Sun Line Special Shipping Co Inc v Fay* 165 CLR 197 | Foll *Kimberley NZI Finance Ltd v Ferguson* [1988] WAR 288 | Cons *Voth v Manildra Flour Mills Pty Ltd* 65 ALJR 83 | Discd/Foll *Green v Aust Industrial Investment Ltd* 25 FCR 532 | Appl *Ranger Uranium Mines Pty Ltd v B T R Trading (Qld) Pty Ltd* (1985) 34 NTR 1

[HIGH COURT OF AUSTRALIA.]

MARITIME INSURANCE CO. LTD. . . APPELLANTS;
DEFENDANTS,

AND

GEELONG HARBOR TRUST COMMISSIONERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1908.

MELBOURNE, *June* 19.

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

Practice—Staying action—Cause of action arising out of jurisdiction.

Where an action was brought within the jurisdiction of the Supreme Court of Victoria in respect of a cause of action arising out of the jurisdiction,

Held, that a stay was properly refused, the injustice which would be occasioned to the plaintiffs by a stay being as great as the injustice which would be occasioned to the defendants by allowing the action to proceed.

Logan v. *Bank of Scotland* (*No.* 2), (1906) 1 K.B., 141 ; and *Egbert* v. *Short*, (1907) 2 Ch., 205, considered and applied.

Judgment of Supreme Court: *Geelong Harbor Trust Commissioners* v. *Maritime Insurance Co.*, (1908) V.L.R., 257 ; 29 A.L.T., 243, affirmed.

APPEAL from the Supreme Court of Victoria.

The Geelong Harbor Trust Commissioners brought an action