[HIGH COURT OF AUSTRALIA.]

HASKEW . . . . . APPELLANT;
DEFENDANT,

AND

THE EQUITY TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1919.

MELBOURNE, *Oct.* 7, 8, 13, 14, 15.

Barton, Isaacs and Rich JJ.

Gift—Rescission—Undue influence—Independent advice.

Where it is sought to set aside a gift on the ground that it has been obtained by undue influence exerted by the donee, under whose control and dependent upon whom the donor was, there is no rule of law which absolutely requires that in order to support the gift the donor must have had independent advice.

So *held* by *Isaacs* and *Rich* JJ.

Kali Bakhsh Singh v. *Ram Gopal Singh*, L.R. 41 Ind. App., 23; 30 T.L.R., 138; I.L.R., 36 All., 80, followed.

Spong v. *Spong*, 18 C.L.R., 544, explained.

In an action seeking to set aside certain transactions in the nature of gifts on the ground of undue influence exerted upon the donor by the donee,

Held, upon the evidence, that undue influence had been established, and that the transactions were properly set aside.

Decision of the Supreme Court of Victoria (*Cussen* J.): *Equity Trustees, Executors and Agency Co. Ltd.* v. *Haskew*, (1918) V.L.R., 571; 40 A.L.T., 80, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought by William Dutton against his daughter, Mary Elizabeth Haskew, in which the plaintiff alleged that the

H. C. OF A. 1919.

HASKEW v. EQUITY TRUSTEES, EXECUTORS AND AGENCY CO. LTD.

defendant and her son, James Haskew, by undue influence, procured the plaintiff to execute certain documents and to transfer to the defendant a large amount of property and assets, and claimed a declaration that such documents were void, delivery up and cancellation of such of the documents as were in the possession of the defendant, an order that the defendant do all necessary acts and things to revest in the plaintiff the property or assets transferred or placed in the defendant's control, accounts of the proceeds of any of the said property or assets sold or disposed of by the defendant, all necessary accounts and inquiries, payment of the amount found due to the plaintiff on the taking of such accounts, and an injunction to restrain the defendant from dealing in any way with the said property or assets. The plaintiff also claimed as moneys had and received by the defendant to the use of the plaintiff certain specified sums of money. Shortly after the bringing of the action the plaintiff died, and the action was thereafter continued by his executor, the Equity Trustees, Executors and Agency Co. Ltd.

The action was heard by *Cussen* J., who found that the execution of the documents in question by Dutton was procured by undue influence exerted over him by the defendant, and he gave judgment for the plaintiff substantially as asked: *Equity Trustees, Executors and Agency Co. Ltd.* v. *Haskew* (1). In stating his reasons for judgment the learned Judge stated it to be a principle of law that "where a person weak through age or other causes is entirely under the control of and dependent upon another or others, no considerable gift of property in favour directly or indirectly of that other or of those others will be permitted to stand unless he is or they are prepared to show both entire freedom of will and also the intervention of an indifferent competent person," and he cited *Spong* v. *Spong* (2) as an authority supporting that proposition. He also held that the circumstances were such as brought the case within that principle, and that the defendant had failed to establish what was required by it. He further found that, even if the onus rested on the plaintiff of establishing that the transactions in question had been brought about by the undue influence of the defendant, it had done so.

(1) (1918) V.L.R., 571; 40 A.L.T., 80.

(2) 18 C.L.R., 544.

From that decision the defendant now appealed to the High Court.

Starke and *Dixon*, for the appellant. The relationship of father and child does not by itself throw upon a child the onus of establishing that a gift to the child by the father was not procured by undue influence (*Beanland* v. *Bradley* (1)). *Cussen* J. did not apply his mind to the question whether in fact a confidential relationship existed, but from the circumstances he presumed that it did exist. There is no rule of law that in order to support such a gift as this there must have been the intervention of an independent adviser. *Spong* v. *Spong* (2) is not an authority in support of such a rule.

[ISAACS J. referred to *Linderstam* v. *Barnett* (3).

[RICH J. referred to *Smith* v. *Kay* (4) ; *Parfitt* v. *Lawless* (5).]

Assuming that the onus of proving undue influence was upon the plaintiff, it has not been established. There is no proof of coercion of the will of Dutton to do that which he did not intend to do (*Wingrove* v. *Wingrove* (6) ; *Baudains* v. *Richardson* (7)).

Bryant (with him *Davis*), for the respondent. There was ample evidence to support the finding of *Cussen* J. that there was as a fact undue influence, and that the relation between Dutton and the appellant was one of confidence.

BARTON J. In this appeal the result turns upon the question of evidence of undue influence, for we hold that the relation between the old man and his daughter, the appellant, was not of a kind from which undue influence would be presumed. But we think, apart from any such presumption, that the learned Judge who presided at the trial had good ground for his finding that the affirmative evidence of undue influence was such as to impel him to the decision which he gave, and we ourselves quite agree with that decision upon the facts before His Honor. It is not necessary now, under the circumstances which have arisen, to give a reserved judgment upon those facts.

(1) 2 Sm. & G., 339.
(2) 18 C.L.R., 544.
(3) 19 C.L.R., 528.
(4) 7 H.L.C., 750, at p. 779.
(5) L.R. 2 P. & M., 462, at p. 469.
(6) 11 P.D., 81.
(7) (1906) A.C., 169, at p. 184.

H. C. OF A. 1919.

HASKEW v. EQUITY TRUSTEES, EXECUTORS AND AGENCY CO. LTD.

Isaacs J.

The result will be that the appeal will be dismissed without costs.

ISAACS J. I agree with what my learned brother has just said, that the appeal should be dismissed without costs. The learned Judge from whom this appeal comes decided in favour of the respondent on two grounds. The first ground rested on the evidence of a fiduciary relation which imposed on the present appellant the onus of displacing the presumption of undue influence. His Honor held that that presumption could not be displaced unless she showed that the donor executed the documents which were in controversy of his own free will and with independent advice. His Honor thought that that was sufficient to dispose of the case. Then his Honor also held, and this is the second ground, that, if it were necessary to regard the onus as being thrown upon the present respondent, that onus had been discharged and that the respondent had affirmatively shown that undue influence had been exerted. As I have said I agree with what my brother *Barton* has said, namely, that the facts affirmatively show undue influence.

In ordinary circumstances I would not think it necessary to say any more, but, having regard to the very great importance of the subject and to the view which has been taken in the judgment under appeal of a case decided by this Court (*Spong* v. *Spong* (1)), which is supposed to decide that independent advice was necessary, I propose to say something about that case. It was decided by the learned Chief Justice, my brothers *Gavan Duffy*, *Powers*, *Rich* and myself. The head-note includes a statement that in the absence of independent advice the transaction should be set aside. But neither the decision nor the head-note must be understood as asserting a general rule of law that independent advice is requisite. There is a passage in the judgment of *Griffith* C.J., cited from *Griffiths* v. *Robins* (2), which would justify the opinion that in such a case the rule of law was that independent advice was necessary, but when the judgment in the case of *Griffiths* v. *Robins* is carefully examined and reference is made to the observations of the learned Judge who decided it in the later case of *Pratt* v. *Barker* (3), it

(1) 18 C.L.R., 544.

(2) 3 Madd., 191.

(3) 1 Sim. 1, at p. 4.

will be found that there is no such rule of law laid down in *Griffiths* v. *Robins*. In the case of *Linderstam* v. *Barnett* (1) I had occasion to consider the question of independent advice, and I there referred to the decision of the Privy Council in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (2), where it was laid down that there is no rule of law absolutely requiring independent advice. A fuller report of that case is to be found in the *Indian Law Reports* in 1914 (3), and I will do no more than refer to pp. 89, 91 and 92 of that report. Besides stating the law on that subject, Lord *Shaw* for the Judicial Committee referred to a previous judgment of the Privy Council in *Mahomed Buksh Khan* v. *Hosseini Bibi* (4). I refer to pp. 698, 699 and 700 of the Calcutta report without reading them. If those references are carefully read it will be found that the issue is, Was it really the act of the party comprehending what he did and the result of his or her own free will? and that the question of independent advice is a subsidiary question the answer to which frequently comes in to help to determine the ultimate issue in the case. I mention that, in the first place, so that no misconception may exist as to our decision in *Spong* v. *Spong* (5), and, secondly, for the benefit of those who hereafter may have to consider the question of undue influence.

RICH J. I agree with what my brother *Barton* has said with regard to this case. In *Spong* v. *Spong* (5) I did not subscribe to any statement that independent advice was necessary. I there cited *Smith* v. *Kay* (6), referred to in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (7), just mentioned by my brother *Isaacs*.

In cases such as this the principle on which relief is given by Courts of Equity applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. In certain well-known relationships influence is presumed; in all other cases where those relationships do not subsist, the confidence and the influence must be proved extrinsically; but when they are proved

(1) 19 C.L.R., 528.
(2) 30 T.L.R., 138.
(3) I.L.R. 36 All., 80.
(4) I.L.R. 15 Calc., 684; L.R. 15 Ind. App., 81.
(5) 18 C.L.R., 544.
(6) 7 H.L.C., at p. 779.
(7) I.L.R., 36 All., at p. 91.

H. C. OF A. 1919.

HASKEW v. EQUITY TRUSTEES, EXECUTORS AND AGENCY CO. LTD.

extrinsically, the rules of reason and common sense, and the technical rules of a Court of Equity, are just as applicable in the one case as in the other.

Appeal dismissed. Order that all moneys and securities held by the appellant or her solicitor be delivered to the respondent.

Solicitors for the appellant, *W. B. & O. McCutcheon.*
Solicitors for the respondent, *Harwood & Pincott.*

B. L.

Aff *Westralian Powell Wood Process Ltd* v *R* (1921) 29 CLR 458

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;
RESPONDENT,

AND

THE WESTRALIAN POWELL WOOD PROCESS LIMITED . . . . } RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1919.

MELBOURNE, *Oct.* 16, 17, 24, 28, 29.

Barton, Isaacs, and Rich JJ.

Patent—Application of Commonwealth Act to State patents—Licence to use patented invention—Right acquired before commencement of Commonwealth Act—Licence granted after commencement—"In the Commonwealth"—Right of licensee to determine contract—Time for giving notice of intention to determine—Patents Act 1903-1909 (*No.* 21 *of* 1903—*No.* 17 *of* 1909), *secs.* 4, 6, 87B (2).

Practice—Costs—Payment into Court with denial of liability—Costs of issues on which parties successful.

By sec. 4 of the *Patents Act* 1903-1909 the term "patent" is defined to mean, except where otherwise clearly intended, "letters patent for an invention granted in the Commonwealth."