H. C. OF A. 1922.

SYMONS v. STACEY.

purpose. Respondent to pay appellant's costs of motion for new trial and of this appeal. Parties to abide their own costs of first trial in any event.

Solicitor for the appellant, *T. A. Okines.*

Solicitor for the respondent, *C. Davenport Hoggins.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WATKINS AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

COMBES AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1922.

HOBART, *Feb.* 16, 17.

MELBOURNE, *Mar.* 24.

Knox C.J., Isaacs, Gavan Duffy and Starke JJ.

Undue Influence—Fiduciary relationship—Transfer of property—Consideration—Independent advice—Burden of proof.

A woman sixty-nine years of age having transferred certain land to the defendants in consideration that the defendants would maintain her for the rest of her life, and the Supreme Court of Tasmania having after her death set aside the transfer as having been procured by the defendants by undue influence, on appeal to the High Court

Held, on the facts, that the transaction was properly set aside:

By *Knox* C.J., *Gavan Duffy* and *Starke* JJ., on the ground that at the time the transfer was made the transferor was under the complete dominion of the defendants, that in the absence of independent advice the transaction could not stand, and that the advice of a solicitor who acted for all parties in the transaction and obtained his original instructions for it from the defendants was not independent advice;

By *Isaacs* J., on the ground that, the transferor being a person who reposed confidence in and was under the influence of the defendants in relation to the property and her financial affairs, and the transaction being shewn to be highly disadvantageous to the transferor and highly advantageous to the defendants, the burden was on them to establish that no undue influence was used by them, and that they had failed to sustain that burden because (1) the transaction was unconscionable in that it gave an unfair advantage to the defendants, (2) it was improvident on the part of the transferor, (3) she had no independent advice, the transaction being such as in fact to require independent advice, and (4) the transaction originated with the defendants.

Decision of the Supreme Court of Tasmania (*Nicholls* C.J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

A suit was brought in the Supreme Court of Tasmania by Algernon James Combes and Arundel Sims, who were beneficiaries under the will of Laura Josephine Reynolds deceased, against Daniel Watkins, who was the executor of that will, and Margaret Watkins, his wife. By the prayer of the bill of complaint the plaintiffs prayed (*inter alia*) that a transfer by Mrs. Reynolds to the defendants of certain land was obtained by the fraud and undue influence of the defendants and was void; and a declaration that all dealings between Mrs. Reynolds and the defendants or either of them with respect to her property, and all gifts made by her to them or either of them, since 1st July 1918 were obtained or induced by the fraud and undue influence of the defendants and were void.

The suit was heard by *Nicholls* C.J., who made a decree declaring that the transfer of the land in question was obtained by the undue influence of the defendants; that such transfer and a certificate of title issued thereon were fraudulent and void as against the persons entitled on the death of Mrs. Reynolds to her real estate; and that a gift by Mrs. Reynolds to the defendant Mrs. Watkins was obtained by undue influence and was fraudulent and void as against the persons entitled on the death of Mrs. Reynolds to her personal estate: and ordering certain accounts and inquiries to be taken on that footing.

From that decision the defendants appealed to the High Court.

The material facts are stated in the judgments hereunder.

Davenport Hoggins, for the appellants.

H. C. OF A. 1922.

WATKINS v. COMBES.

L. L. Dobson and *Griffiths*, for the respondents.

During argument reference was made to *Ball* v. *Mannin* (1); *Hunter* v. *Atkins* (2); *Harrison* v. *Guest* (3); *Henry* v. *Armstrong* (4); *Taylor* v. *Johnston* (5); *Wright* v. *Carter* (6); *Cooke* v. *Lamotte* (7); *Morley* v. *Loughnan* (8); *Powell* v. *Powell* (9).

Cur. adv. vult.

Mar. 24.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. This was an appeal from a judgment of the Chief Justice of Tasmania declaring that a transfer of certain land from one Laura Josephine Reynolds to the defendants was obtained by undue influence, that the said transfer and a certificate of title issued in pursuance thereof were fraudulent and void as against the persons entitled on the death of the said Laura Josephine Reynolds to her real estate, and that a gift by the said Laura Josephine Reynolds to the defendant Ellen Margaret Watkins of £100 was obtained by undue influence and was fraudulent and void as against the persons entitled on the death of the said Laura Josephine Reynolds to her personal estate, and ordering accounts and inquiries to be taken and held on that footing. The grounds of appeal are that the judgment was against the weight of evidence and erroneous in point of law.

The facts admitted by the answers of the defendant or proved by evidence on the hearing are as follows :—In the year 1917 Mrs. Reynolds was registered proprietor in fee simple of the land comprised in the transfer the validity of which was challenged by the plaintiffs in the proceedings and of certain other lands at Moonah near Hobart, on which were erected three houses. Two of these houses were let at rentals amounting to 26s. 6d. a week and in the third house Mrs. Reynolds lived. At and before this time she was living apart from her husband. In addition to the real property mentioned she had £80 to her credit in the Hobart Savings Bank

(1) (1829) 3 Bli. (N.S.), 1.
(2) (1832) 3 Myl. & K., 113.
(3) (1855) 6 DeG. M. & G., 424.
(4) (1881) 18 Ch. D., 668.
(5) (1882) 19 Ch. D., 603.
(6) (1903) 1 Ch., 27, at p. 50.
(7) (1851) 15 Beav., 234.
(8) (1893) 1 Ch., 736, at p. 751.
(9) (1900) 1 Ch., 243.

and £50 invested on mortgage. At the end of November or early in December 1917 Mrs. Reynolds, who was then sixty-nine years of age, went on a visit to Western Australia. At this time and for some years before, Messrs. Dobson, Mitchell & Allport acted as her solicitors and held the title deeds of her land for safe custody, and one David Saunders, an estate agent, collected her rents and managed her property. On 21st November 1917, a few days before she left Tasmania, Mrs. Reynolds executed a will prepared for her in the office of Messrs. Dobson, Mitchell & Allport, whereby she appointed Saunders and P. R. Henry, a clerk employed by her solicitors, trustees and executors, and disposed of all her real and personal property in favour of the plaintiffs and their respective children. On the same day she entered into an agreement (prepared by Saunders) with the defendant Daniel Watkins for the execution of alterations and repairs to two of her houses, and signed an order addressed to her tenants directing them to pay their rents to Saunders. A few days after Mrs. Reynolds left Tasmania Saunders instructed the defendant Daniel Watkins not to do any work on Mrs. Reynolds property during her absence. When she arrived in Melbourne Mrs. Reynolds wrote a letter to Saunders and later, on 13th December, wrote to him from Perth asking for a remittance. Both these letters were of a friendly character. She also wrote several letters to the defendants (or their daughter), and it appears from these letters that they had complained to her about Saunders's action in stopping the work on the cottages. In one of her letters to the defendants Mrs. Reynolds invited them to stay in her house until the work was finished. On her return to Hobart in January or February 1918, Mrs. Reynolds went to her own house, which had been left in charge of a caretaker, and after a few days left there and went to stay at Mrs. McPartlan's in Hobart. While there she wrote the following letter to Saunders :—" 192 Goulburn St. Mr. D. Saunders. Dear Sir, I am staying here since Friday night I left for Hobart Saturday evening and stayed at a respectable house Argyle Street till Sunday morning when I arrived at 10 o'clock where I am staying here for a week Mrs. Berry came yesterday evening and brought some clothes &c. evening I am not coming out for a few days when I think I will go to the Huon to Mrs. Baileys for a

H. C. OF A. 1922.

WATKINS v. COMBES.

Knox C.J. Gavan Duffy J. Starke J.

week or so In the meantime we will see how events will turn out they may be gone by then to Sydney After I left Nellie Watkins called at Mrs. Arnolds but Mrs. Arnold told her I had gone to Bridgewater and Mrs. Mr. and Nellie called again to see me unsuccessfully If you have any message please send on here to me In the meantime send a message to Murdocks for two bags cow chaff to go out by Gasbly to Messrs. L. J. Reynolds Bayswater care of Bay Road first opportunity and place to my account till I you and oblige. Please send a note of £1 to my account by Mrs. McPartlan *Mrs. Berry delivery this letter* to me and receiving it from Mrs. L. J. Reynolds. L. J. Reynolds, Hobart." It appears from this letter that at this time Mrs. Reynolds was avoiding the Watkins family and still looked to Saunders as having the management of her affairs and trusted him. Mrs. Reynolds stayed for some time at Mrs. McPartlan's and subsequently at the house of Mrs. Lowe at Sandy Bay, and it appears that the defendants visited her at both these places. In the month of June 1918 Mrs. Reynolds returned to her own house and the defendants went to live in the same house, agreeing to rent some of the rooms from her. An agreement for a lease for a year from 1st July 1918 was drawn up by Mr. Richardson, a solicitor, and signed by Mrs. Reynolds and the defendant Daniel Watkins. From this time until her death Mrs. Reynolds lived in the same house with the defendants, and the defendant Daniel Watkins negotiated or assisted in every transaction which was undertaken in connection with her property. On 5th July 1918 Mrs. Reynolds obtained her title deeds from Messrs. Dobson, Mitchell & Allport; and in the same month, in the company of the defendant Daniel Watkins, she called on Saunders and demanded her papers and her account, saying that she was going to put all her affairs into the hands of the Trustee Company. Up to this time she had made no complaint to Saunders about his conduct of her business. The defendants admit that from this time they "assisted Mrs. Reynolds in the management of her affairs and collected her rents on her behalf." In October 1918 Mrs. Reynolds borrowed £300 from the Hobart Savings Bank on mortgage on portion of her land. The negotiations for this loan were conducted by the defendant Daniel Watkins, who represented that the money was required

for the purpose of building a house on the property. The money was drawn in progress payments, and paid to the credit of an account in the names of Mrs. Reynolds and the defendant Daniel Watkins, on which either could operate. In the month of November 1918 Mrs. Reynolds executed a will which was prepared by Mr. Richardson; the plaintiffs were the sole beneficiaries under this will, and defendant Daniel Watkins was sole trustee and executor. The suggestion to appoint him came from Mr. Richardson after Mrs. Reynolds had refused to appoint the Trustee Company.

In February 1919 a loan of £170 on the security of other land of Mrs. Reynolds ($22\frac{3}{10}$ perches) was arranged for her by the defendant Daniel Watkins; and in April 1919 a sale of this land to S. G. Loone was arranged by the defendant Daniel Watkins, who instructed Messrs. W. F. Stephens, Smith & Ife, solicitors, to act on Mrs. Reynolds's behalf in the completion of the matter. Part of the purchase-money was applied in paying off the mortgage on this land, and the balance was paid to Mrs. Reynolds by open cheque for £149 16s., which she cashed at the bank. In the month of May 1919 a further sum of £70 was borrowed from the Savings Bank on the security previously given to it, the transaction being negotiated by the defendant Daniel Watkins. Proceeds of these transactions amounted to nearly £700 in addition to the sum of £82 7s. 8d. which stood to the credit of Mrs. Reynolds's account in the Savings Bank when she ceased to employ Saunders. In reply to interrogatories as to the application of this money, the defendants answered that portion of the money derived from the sale and mortgages, amounting to about £350, was applied in payment of wages and material for the erection of the house above referred to, and as to the balance said that they believed the same was applied either by Mrs. Reynolds or the defendants for the benefit and interest of Mrs. Reynolds. In his evidence the defendant Daniel Watkins admitted that £100 of the amount borrowed was paid into the bank account of the defendant Ellen Margaret Watkins.

On 14th July 1919 Mrs. Reynolds executed a transfer to the defendants of the land comprised in the mortgage to the Savings Bank subject to the mortgage and further charge; and on the same day an agreement was executed by which the defendants covenanted

H. C. OF A. 1922.

WATKINS v. COMBES.

Knox C.J. Gavan Duffy J. Starke J.

as follows, viz. :—"(1) That they or either of them or the survivor of them will during the term of the natural life of the said Laura Josephine Reynolds supply the said Laura Josephine Reynolds with all necessary board and lodgings food clothing medical attendance medicine and other necessaries suitable and requisite for the said Laura Josephine Reynolds and necessary to the position in life of the said Laura Josephine Reynolds. (2) That they or either of them or the survivor of them will pay the principal sum of three hundred and seventy pounds and interest and other moneys due to the Hobart Savings Bank under the said memorandum of mortgage and will keep the said Laura Josephine Reynolds indemnified in respect thereof. (3) That they or either of them or the survivor of them will on the decease of the said Laura Josephine Reynolds provide for and pay all funeral and other necessary expenses in connection therewith. (4) That they will take all necessary steps for securing to the said Laura Josephine Reynolds the due performance of the covenants hereinbefore contained in respect of this agreement by registering this agreement and deed of covenant in such manner as shall eventually secure the due performance hereof. Provided lastly and it is hereby agreed that the covenants hereinbefore contained shall not apply to the piece of land shown in the plan drawn hereon and there surrounded by red boundary lines but that the said Daniel Watkins and Ellen Margaret Watkins shall be at liberty to sell the same together with the cottage thereon erected and from the proceeds thereof to pay the said principal sums and interest due on the said memorandum of mortgage hereinbefore mentioned and the said Daniel Watkins and Ellen Margaret Watkins do and each of them doth hereby charge the said land comprised in the said certificate of title with the due performance by them of all the covenants and agreements therein contained and on their part to be observed and performed." According to the joint answer of the defendants, this transfer and agreement "were carried out by the firm of W. F. Stephens, Smith & Ife, who were instructed by the defendant Daniel Watkins," and "subsequently the said Laura Josephine Reynolds and Daniel Watkins called on the said firm in pursuance of the said instructions and the

said Laura Josephine Reynolds ratified the said instructions." It is this transfer which the plaintiffs seek to set aside.

It appears further that Mr. Ife informed the defendants before the transfer to them was registered that they could not deal with the land except in accordance with the agreement during Mrs. Reynolds's lifetime. Owing to Mr. Ife's illness there was some delay in lodging a caveat to protect Mrs. Reynolds's interest, and the defendants on 1st August 1919 borrowed from one Davidson the sum of £70 on the security of a mortgage of the land. The equity of redemption transferred by Mrs. Reynolds appears to have been worth between £700 and £1,000. There is no evidence of any business transactions except those referred to above having been undertaken by Mrs. Reynolds or by anyone on her behalf in the period between her return to Tasmania about January 1918 and her death, which took place in November 1919. The following extracts from the evidence of the defendants and their witnesses throw some light on the nature of the relation existing between Mrs. Reynolds and the defendants during the last eighteen months of her life. The defendant Daniel Watkins said :—" I was with her in these transactions because she was my friend and I was hers. We were always with her." Arthur Roe, a witness called for the defendants, said : " She (Mrs. Reynolds) and the Watkinses seemed very happy together . . . she used to lean quite a lot on the Watkinses." Thomas Henry McGuire, another witness for the defendants, said that in the presence of the defendant Daniel Watkins Mrs. Reynolds told him that she had handed over all her affairs to Watkins and he had complete control of them. Mr. Ife, the solicitor who prepared the transfer, said that Mrs. Reynolds told him that the Watkinses were her only friends and had been very kind to her.

A great part of the evidence adduced at the hearing was directed to the condition, mental and physical, of Mrs. Reynolds during the last two years of her life. In the view which we take of the case it is sufficient to say that taking the evidence as a whole the conclusion is that during the year 1919 Mrs. Reynolds was failing both physically and mentally. Probably her condition in both respects was variable, but, having regard to the evidence of Mr. Ife, Dr. Crowther and Dr. MacGowan, we think it cannot be said

H. C. OF A. 1922.

WATKINS v. COMBES.

Knox C.J. Gavan Duffy J. Starke J.

that at the time when she executed the transfer now in question she was incompetent to transact business. But, assuming that she was competent to transact business, we have to consider whether, in view of the relation which existed between her and the defendants, this transfer or the gift of £100 should be allowed to stand. We have come to the conclusion that during her residence with the defendants after her return from Western Australia Mrs. Reynolds's mind was entirely under the dominion of the defendants, and that she was therefore, as they well knew, incapable of dealing with them on a footing of equality. A disposition of property by her to either of them, whether voluntary or for valuable consideration, made while this relation continued and without the benefit of independent advice, cannot stand.

The defendants have failed to prove either that Mrs. Reynolds was removed from their influence at the time of the transaction impeached or that she had independent advice in connection with that transaction. Mr. Ife acted for both Mrs. Reynolds and the defendants in the transaction, and obtained his instructions originally from the defendant Daniel Watkins, and, although he discussed the matter with Mrs. Reynolds and gave her certain advice with regard to the form of the documents, it is impossible to treat his advice as "independent" within the meaning of the rule. Moreover, when Mr. Ife suggested to her that a trustee should be appointed for the purpose of protecting her interests, she refused to accept his advice, but notwithstanding this he proceeded to carry out the transaction. It appears too that the defendants were present throughout the interview between Mr. Ife and Mrs. Reynolds. Some advice was also said to have been given by the medical men who were called in to witness Mrs. Reynolds's signature, but neither of them was in a position to give her the necessary independent advice. Dr. Crowther did not know how much property she had or the value of what she was giving, and assumed that her lawyer had advised her; whilst Dr. MacGowan had not read the deed, and knew no more than that he had been told it was practically an assignment of her property or of some of it, and understood that she had her own legal adviser who would look after her. As for the merits of the

bargain he says he knew very little. He took it that the lawyer would look after that.

This being the position, we are of opinion that neither the transfer of the land nor the gift of the £100 to the defendant Ellen Margaret Watkins can be permitted to stand, and that the order made by the Chief Justice should be affirmed.

ISAACS J. The decree (1) sets aside, on the ground of undue influence, a gift of £100 to Ellen Margaret Watkins in February 1919 and the transfer of 1 acre 2 roods 9 perches of land in July 1919, and (2) grants general administration with the usual directions. This appeal is against the first part of the decree. The appellants contended that undue influence was not proved, and, if proved, that Mrs. Reynolds had subsequently confirmed her acts; that fraud alleged in the pleadings as distinct from undue influence was withdrawn at the trial, was negatived by the learned Chief Justice of Tasmania, and in any case was not established by the evidence. The respondents argued as to undue influence that it was proved affirmatively, and that at all events it was not disproved by the appellants, on whom it was said the burden rested. As to fraud, they maintained it was not withdrawn and, on the facts, should have been found.

With regard to fraud considered as distinct from undue influence, I am of opinion the respondents have failed. It should be strictly proved. The Court below has not found it. As I read the judgment it negatives fraud, but I can see no evidence which would justify any finding of fraudulent misrepresentation or concealment. The learned Chief Justice of Tasmania avowedly founded his judgment on "undue influence," adding the legal consequences that the transactions in question are "fraudulent and void as against the persons entitled" &c. This case must depend on whether or not the finding as to undue influence should be supported.

The evidence does not, in my opinion, support affirmatively the exercise of undue influence. So far as there is any direct evidence on the subject the contrary is deposed to. If the burden of establishing that fact as a matter of proof rests on the respondents, I should hold they must fail. It is necessary, therefore, in the first

H. C. OF A. 1922.

WATKINS v. COMBES.

Isaacs J.

place to consider whether that burden falls on the appellants, as the respondents contend, by reason of the actual relation existing in February 1919 and July 1919 between Mrs. Reynolds and the appellants.

To appreciate that relation at the crucial periods, it is necessary to have regard to an earlier time. Mr. Watkins and Mrs. Reynolds had known each other for many years, but the material commencing point of time is 1916, when Watkins returned from New South Wales and went to live at Moonah. As the bill does not challenge any transactions prior to 1st July 1918, I shall content myself with saying that after carefully considering the various incidents proved between 1916 and 1st July 1918, I see no reason for doubting, up to that time, Mrs. Reynolds's capacity, physical and mental, to understand and transact her affairs and to dispose of her property. She exhibited in her letters of 11th January and 15th January 1918, a resolute determination to have her own way, and a power of memory and will that indicates perfect competency. Nor, up to that period, is there any trace of influence being exerted. Indeed, it is in the letter of 15th January 1918 that I find the first indication of any suggestion that the Watkinses should stay in her house at all—the suggestion was hers, and was apparently spontaneous. On 1st July 1918 an agreement of tenancy was made between Mrs. Reynolds and Watkins whereby he rented from her for one year three rear rooms in her house and a back verandah, at 8s. per week. This was prepared by a solicitor named Richardson. There are no circumstances indicating anything wrong about this agreement, and there is evidence supporting its propriety. But about this time Mrs. Reynolds began to alter her business arrangements. She discharged Saunders, who had been her business man for some years; and I do not think it material to discuss whether she was justified in this or not. She also left Messrs. Dobson, Mitchell & Allport, who had been her solicitors for several years and who had prepared her will in November 1917. She went thenceforth to other solicitors when any legal business had to be done by her. In October 1918 occurred the first of the events which appear to me important in determining the relation of Watkins towards Mrs. Reynolds. This was a mortgage of her land to the Hobart Savings

Bank for £300, of which £172 was paid into a joint account of herself and Watkins. I commence with this transaction, and take into consideration particularly the following facts and circumstances: (1) the admitted fact that Watkins assisted her in negotiating the loan, and jointly held part of the proceeds; (2) the passage in her letter of 28th October 1918 (not 1919) to Mrs. Arnold where she refers to Watkins as her "manager" who will henceforth collect the rent; (3) that in making her new will of 14th November 1918 she went to Richardson, who had been Watkins's own solicitor some time before in an appeal, and had been employed to prepare the tenancy agreement of 1st July 1918; (4) that she really accepted Richardson's suggestion that Watkins should be the executor and trustee of her will; (5) the admitted part that Watkins took in arranging the loan and mortgage with Dance in February 1919, and the sale to Loone in April 1919, with the extraordinary arrangements made with regard to the money produced by both these transactions; and (6) Watkins's admitted participation in negotiating the second mortgage for £70 to the Hobart Savings Bank in May 1919.

From these circumstances particularly, and they are strengthened by the general course of events, which need not be further specified, I come to the conclusion that Mrs. Reynolds, though by no means incapable of transacting business, and though quite competent to make up her own mind in general affairs of a comparatively simple and ordinary character, had by February 1919, and still more by June 1919, come to depend very much on Watkins and his wife as her reliable and trustworthy advisers, and had come to regard them as persons, not only kindly disposed towards her, but so kindly disposed that they were willing and competent to help her in the financial difficulties in which she found herself, and which were becoming more and more embarrassing. In short, Watkins was by this time regarded by Mrs. Reynolds as her able and disinterested business man, in whom, in the language of some of the cases, she "reposed confidence," and whose advice she sought and acted on as being the best for her interests. He undoubtedly possessed "influence" over her within the accepted meaning of that term. His wife cannot, in the circumstances, be dissociated from him.

H. C. OF A. 1922.

WATKINS v. COMBES.

Isaacs J.

Her personal attention was an additional factor. It is essential to observe that the "confidence reposed" and the "influence" that existed were with reference to Mrs. Reynolds's property and her financial arrangements. (See *In re Coomber* (1).) Mrs. Reynolds was sixty-nine years of age, and was not in good health. She was living apart from and at variance with her husband. She had, so far as appears, no relatives except the present respondents and their children; and they were far away. Her affairs were somehow becoming more and more entangled, her property encumbered, her liabilities increasing, her money disappearing, and her apprehensiveness must have been great lest she should ultimately and perhaps speedily fall into utter want and helplessness. More than ever must she have come to look to the advice and assistance of Watkins and his wife to extricate her and to secure her from destitution in her remaining years. This is similar to *Griffiths* v. *Robins* (2) and *Sharp* v. *Leach* (3).

In these circumstances she appears to have come ultimately to the conclusion—by what means is the problem—that her best course on the whole was to make the arrangement set out in the deed of 14th July 1919. The solicitor employed was Mr. Ife, who had acted for both parties in the Loone sale. But in the present appellants' answer they say as to this:—"The said transfer and the said agreement were carried out by the firm of W. F. Stephens, Smith and Ife, who were instructed by the defendant Daniel Watkins. Subsequently the said Laura Josephine Reynolds and Daniel Watkins called on the said firm in pursuance of the said instructions, and the said Laura Josephine Reynolds ratified the said instructions." I entertain no doubt, from the evidence of the solicitor and of the medical men, that Mrs. Reynolds, at the moment she put her hand to the deed in question, understood in a general way that she was giving her property to the appellants, and that they in return undertook to clear away her liabilities and maintain her in comfort for the rest of her days. But that leaves entirely open the question of whether she sufficiently understood the transaction, so as to be aware of the value of what she gave and the value of what she was

(1) (1911) 1 Ch., 723.
(2) (1818) 3 Madd., 191, at p. 192.
(3) (1862) 31 Beav., 491.

getting in return, and the further question of whether she was led to execute the deed by the "undue influence" of the appellants. I have already said that "undue influence" has not been proved affirmatively; and so it becomes a question of law as to the burden of proof.

It is not the law, as I understand it, that the mere fact that one party to a transaction who is of full age and apparent competency reposed confidence in, or was subject to the influence of, the other party is sufficient to cast upon the latter the onus of demonstrating the validity of the transaction. Observations which go to that extent are too broad. The first thing to ascertain in such a case is the true character of the transaction impeached. Is it a gift to the "confidant" of importance? If so, the burden at once is cast on the confidant to satisfy the Court that the transaction was free from "undue influence" but was the free outcome of the donor's uninfluenced will (*Spong* v. *Spong* (1) and cases there cited). Is it an ordinary sale for full value? If so, no such burden rests on the "confidant" but the party impeaching it has to show affirmatively the exercise of undue influence.

The cases on the subject are not always consistent in their statement of the position. Without specifying illustrations, it is sufficient to say that varying expositions by Judges of eminence leave problems somewhat indecisive. This arises from the circumstance that conclusions of fact sometimes become intermingled with what are properly directions in law by the tribunal which has to determine both. At times that leads to difficulty, and, as I view it, the present case is an instance. Fortunately, the Privy Council has, in several cases, dealt with the subject, and has laid down rules and principles by which a Court should be guided. The first in logical order, because it relates to the burden of proof, is *Poosathurdi* v. *Kanappa Chettiar* (2). That was a case arising on the Indian Contract Act, but in the judgment Lord *Shaw* makes it very clear that whether in any particulars that Act differs from the English law on the subject, no such differences had any bearing on the issues in that case. The learned Lord says:—"It is a

(1) (1914) 18 C.L.R., 544.

(2) (1919) L.R. 47 I.A., 1; 43 Madras, 546.

H. C. OF A. 1922.

WATKINS v. COMBES.

Isaacs J.

mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue.' It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid. And where the relation of influence, as above set forth, has been established, and the second thing is also made clear, viz., that the bargain is with the 'influencer' and in itself unconscionable; then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. These general propositions are mentioned, because, if laid alongside of the facts of the present case, then it appears that one vital element—perhaps not sufficiently relied on in the Court below, and yet essential to the plaintiff's case—is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself, or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue." The observations as to independent advice must be read with the statement of the law on that subject laid down by the same learned Lord in another case to be presently mentioned. But it is clear from what has been quoted that first you have to establish the relation, next to see that the bargain is with the "influencer," and then that it is "unconscionable" or, as it is sometimes called, "unrighteous" in the sense indicated in the closing words of the passage quoted.

Now, in this case, the gift of £100 is one where the burden obviously rests on the appellants, and they have not sustained it. There is

no pretence of advice; it was, it is said, a sudden gift, and there is much variance as to the attendant circumstances. As to the land, the value of the property, even after deducting the amount of the mortgages, was about £1,000 to £1,200. To counterbalance this, there was absolutely nothing but the personal joint covenant of the appellants to maintain and look after the transferor, the property itself remaining free to be disposed of, as was practically demonstrated by the appellants themselves. The cost of maintenance is not shown, except that an attendant could be got at £3 3s. a week. Apart from the benefactions of Mrs. Reynolds, Watkins was in the very trough of impecuniosity; and I agree with the view that his joint covenant for maintenance was practically worthless. It is true that Mrs. Reynolds, who died about four months after the transfer, was apparently properly cared for in the meantime; but that is not sufficient. The transaction was highly disadvantageous to Mrs. Reynolds and highly advantageous to the appellants, and was one which calls for very clear and satisfying evidence on their part that no undue influence was in fact exerted.

How does a Court require this to be proved? This has been stated by the tribunal of final authority for us. In *Mahomed Buksh Khan* v. *Hosseini Bibi* (1) some general rules were laid down by the Privy Council for determining the issue of undue influence. Lord *Macnaghten*, in delivering the judgment, said (2):—"When undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same, though the circumstances differ, and, as a general rule, the same questions arise." (1) "The first and practically perhaps the most important question is, was the transaction a righteous transaction—that is, was it a thing which a right-minded person might be expected to do?" (2) "Then there comes the question—was it an improvident act? That is to say, does it show so much improvidence as to suggest the idea that the lady was not mistress of herself, and not in a state of mind to weigh what she was doing." (3) "Then was it a matter requiring a legal adviser?" The learned Lord then, in the case before him, comes

(1) (1888) L.R. 15 I.A., 81; 15 Calc., 684.

(2) (1888) L.R. 15 I.A., at p. 92; 15 Calc., at p. 698.

H. C. OF A. 1922.

WATKINS v. COMBES.

Isaacs J.

to the conclusion "that the transaction was so simple as not to need legal advice." (4) "Lastly, did the intention of making the gift originate with Shahzadi" (the donor)? I have inserted the numbers for convenience of reference. In *Kali Bakhsh Singh* v. *Ram Gopal Singh* (1) Lord *Shaw*, for the Judicial Committee, in a most valuable passage makes it clear that independent advice is not strictly a legal necessity. Its absence is a fact to be taken into consideration, and is frequently a very potent fact. His Lordship is in agreement with Lord *Macnaghten* in the case above cited. After referring to the following sentence in the judgment of the subordinate Judge: "It is needless to cite authorities that such a gift cannot stand unless it is proved that the lady had independent advice," Lord *Shaw* says (2):—"In their Lordships' opinion there is no rule of law of the absolute kind here indicated. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the *issue whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction.* If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts—which include *the nature of the thing done* and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand." I had occasion in *Linderstam* v. *Barnett* (3) to refer to and apply that passage.

Taking in hand the principles laid down by the Privy Council as those which are to guide us, I deal with them in order:—(1) The gift was not a righteous one in the sense stated by Lord *Macnaghten*, but was "unconscionable" in the sense stated by Lord *Shaw*, because, upon the evidence, there was no sufficient reason for deliberately taking away her property from her nephew and niece and giving the whole of it to strangers. Here the falsity of the statement in the deed as to prior maintenance of Mrs. Reynolds by the appellants becomes very important. I consider the

(1) (1913) L.R. 41 I.A., 23; 30 T.L.R., 138; 36 All., 81.
(2) (1913) L.R. 41 I.A., at p. 31; 30 T.L.R., at p. 139.
(3) (1915) 19 C.L.R., 528.

statement deposed to that her reason for this act was that her own people never took any notice of her is altogether insufficient. If she had really wished to do this, her manifest course was to alter her will and retain her own property until her death. There was nothing which could naturally call upon a right-minded person to do what she did. (2) As to improvidence: the nature of the deed indicates so complete a surrender of the means of sustenance as to suggest, unless otherwise proved, that she could not have been in a state of mind to weigh the act and its consequences for herself. (3) Then as to independent advice: I may add to what I have said, that the matter was by no means simple. Her affairs were complicated. The value of her property was apparently never told to her—particularly its value after providing for the mortgages. The means of discharging the mortgages was not brought to her knowledge. The effect of a mere personal covenant and the possibility or impossibility of registering such a covenant as against the land was never stated to her. It was distinctly a case for independent advice, for her training and situation were such as to require information on all these points. It is impossible to conclude, as was found in *Mahomed Buksh Khan's Case* (1) and in *Linderstam's Case* (2), that, had there been independent advice, the result would have been the same. And, in addition, I cannot regard Mr. Ife as an "independent adviser." In *Coomber's Case* (3) *Moulton* L.J. (who was afterwards a member of the tribunal in *Kali Bakhsh Singh's Case* (4)) said: "All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act." Mr. Ife was not unconnected with Watkins, from whom he received his first instructions in this matter, nor was his advice such as is described in the cases referred to. (4) Lastly, as to the originating of the gift: I am quite unable to be satisfied that it originated with Mrs. Reynolds. The process of denudation was progressive, and altogether out of proportion to anything that is even suggested to have been done for her. The presence of the

(1) (1888) L.R. 15 I.A., 81; 15 Calc., 684.
(2) (1915) 19 C.L.R., 528.
(3) (1911) 1 Ch., at p. 730.
(4) (1913) L.R. 41 I.A., 23; 30 T.L.R., 138.

H. C. OF A. 1922.

WATKINS v. COMBES.

Isaacs J.

appellants with her was habitual, and I do not doubt the impulse came from them.

There remains only the question of confirmation. This, in the circumstances, is impossible. The influence continued, there was no independent advice, and nothing was done which could be construed as an act of ratification. All that is relied on is that Mrs. Reynolds in conversation expressed her happiness and satisfaction with what she had done and the treatment she was receiving. That is insufficient.

The appeal, in my opinion, should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *C. Davenport Hoggins.*

Solicitors for the respondents, *Dobson, Mitchell & Allport.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McKELLAR . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1922.

MELBOURNE, *Feb.* 23, 24.

SYDNEY, *April* 26.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

War-time Profits Tax—Assessment—Capital of business—Change of ownership of business—Time in respect of which value of capital to be ascertained—Business carried on by executor—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 4, 7, 12, 14, 15, 16, 17.

Sec. 17 (1) of the *War-time Profits Tax Assessment Act* 1917-1918 provides that "the amount of the capital of a business shall be taken to be the amount of its capital paid up by the owner in money or in kind, together with all accumulated trading profits invested in the business, with the addition or subtraction of balances brought forward from previous years to the credit or debit respectively of profit and loss account."