stated, a resident of the State of New South Wales. Consequently the question stated in the case, should, in my opinion, be answered in the affirmative.

Question answered No. Costs to be costs in the action.

Solicitors for the plaintiff, *Darvall & Horsfall.*

B. L.

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AUSTRALASIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. *v.* HOWE.

Cons *Edmunds* v *Pickering* (1999) 75 SASR 407

[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPELLANT;
PLAINTIFF,

AND

JENKINS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Aug.* 25, 28, 29.

SYDNEY, *Dec.* 15.

Knox C.J., Higgins and Starke JJ.

Trustee and Cestui que Trust—Undue influence—Discharge of claim of beneficiary under will in favour of trustee—Validity—Consideration—Family arrangement.

By his will made in 1882 a testator, who died in 1890, gave his real and personal estate to his wife and his only son, whom he appointed his executors, upon trust to continue his business with the same discretion and control as the testator himself had. He directed that after the death or marriage of his wife his son should hold the trust estate with the like powers and for the same purpose, and that out of the estate the trustees or trustee should pay to each of the testator's four daughters, when they should respectively attain the age of twenty-one years or marry under that age, the sum of £200. He directed that, in the event of the death of his son subsequently to the death of the testator's wife, his estate should be realized and the proceeds divided equally

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among his children, with gifts over in certain events, and that, in the event of his son dying before his mother (the testator's wife), she should have a life interest in the trust estate. The testator's estate was valued for probate at the net value of £2,265 at the date of his death, there being a bank overdraft of about £2,000. The son being unwilling to undertake the trusts of the will and to carry on the business on the terms of the will, it was agreed between him, his sisters and his mother that, in accordance with what they believed to be the intentions of the testator expressed verbally before his death, the business and the premises upon which it was carried on (which was the substantial portion of the estate) should go to the son, the mother should have the testator's house and £3 per week for life, and the daughters should each receive £300, and that the son should take the remainder of the property. Probate was then granted to the mother and son; and in 1895 an indenture was executed by which, after reciting the family arrangement, the daughters agreed (*inter alia*) that, upon payment to them of £300 each on or before a certain day, they renounced in favour of their brother any further claim they might have upon the estate. Payment in full of the £300 to each of the daughters was made, to the plaintiff in 1908, and in 1918 the mother died. In an action instituted in 1919 by one of the daughters against her brother, claiming her share of the estate under the will,

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that the indenture of 1895 was in the circumstances an answer to the daughter's claim:

By *Knox* C.J., on the ground that it was executed in pursuance of a family arrangement made for valuable consideration at a time when the defendant was not in a fiduciary position with relation to his sisters and by which the defendant altered his position to his detriment, and that there was no want of good faith and no undue influence on his part;

By *Starke* J., on the ground that although the defendant was in a fiduciary position with regard to his sisters, the indenture was brought about, not by any abuse by him of that position, but by the desire of all the members of the family to observe the testator's expressed wishes.

Decision of the Supreme Court of South Australia: *Harris* v. *Jenkins*, (1922) S.A.S.R., 59, affirmed.

APPEAL from the Supreme Court of South Australia.

Samuel Jenkins, who died on 21st March 1890, by his last will, dated 9th August 1882, after directing payment of his just debts, funeral and testamentary expenses, provided as follows:—"To my wife Mercy Jenkins I give devise and bequeath all and every my household furniture linen and wearing apparel books plate pictures china horses carts and carriages (other than money or security or for money) which shall be in or about my dwelling-house at the

time of my decease My real and personal estate not hereby otherwise disposed of I devise unto and to the use of my said wife Mercy Jenkins (so long as she continues my widow) and my son George Ley Jenkins upon trust that they continue my said business with the same discretion and control in every respect as I might have used myself And for such purpose employ any portion of my trust estate by way of capital and occupy the premises buildings yards slips machinery tools and appliances and retain or realize my investments and vary the same with the discretion or control in every respect of absolute owners and after my wife's death or other marriage my said son George Ley Jenkins shall himself hold my said trust estate as sole trustee with the like powers and for the same purpose and thereout my said trustees or trustee shall pay to each of my daughters when they shall respectively attain the age of twenty-one years or marry before that age the sum of two hundred pounds free from marital control In the event of the death of my son George Ley Jenkins my wife Mercy Jenkins having died previously I direct that my estate be realized and the proceeds divided equally among my children and in the event of any or either of my children dying and leaving issue then the part that should have belonged to such child or children shall be apportioned between the issue of such deceased child or children who may survive and in the event of my son George Ley Jenkins dying and leaving issue then the share that would have been his shall be equally divided amongst his children who survive my desire being that each of my children shall be equally benefited under this my will Should my son George Ley Jenkins die before the decease of his mother she not having married again then I direct that my wife Mercy Jenkins shall have a life estate in the said trust and I appoint my wife Mercy Jenkins and my son George Ley Jenkins executors of this my last will and testament."

The testator left him surviving his widow, who died on 29th June 1918, his son George Ley Jenkins, and his four daughters. Probate of the will was, on 18th April 1890, granted to the executrix and executor appointed by the will. At that time the assets of the estate were valued at £4,377, and there was a bank overdraft of £2,019; and the net amount upon which duty was payable was sworn at

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£2,265. In July 1919 the plaintiff, Isabel Lyle Harris, the youngest of the four daughters of the testator, brought an action in the Supreme Court against the defendant, George Ley Jenkins, alleging that the defendant had refused to account to her for the real and personal estate of the testator, and claiming a declaration that the plaintiff became on the death of her mother entitled to a one-fifth equal share of the estate, accounts and inquiries as to the estate and payment of what should be found due to her. The defendant, by his defence, relied upon an indenture dated 27th June 1895 made between the four daughters of the testator (who had all attained the age of twenty-one years) of the first part, Mrs. Jenkins of the second part, Mrs. Jenkins as executrix and the defendant as executor of the third part, and the defendant of the fourth part.

The indenture, after reciting the will and the death of the testator, continued as follows :—" And whereas doubts have arisen as to the final distribution of the testator's estate under the said will and the said parties hereto of the first part are satisfied from the testator's intentions expressed during his lifetime that he intended by his said will to leave and believe that he had therefore left his ship-building yard with its appurtenances and the dwelling-house thereon and the implements and machinery connected therewith to his said son absolutely subject only to the interest therein of the said Mercy Jenkins during her widowhood as they do thereby severally admit and acknowledge And whereas in order to avoid all further disputes and difficulties a family arrangement has been made whereby it has been mutually agreed between the said parties hereto the said George Ley Jenkins shall pay to each of the several parties hereto of the first part the sum of three hundred pounds whereof two hundred pounds shall be deemed to represent the legacy of that amount hereinbefore recited and one hundred pounds a payment by the said George Ley Jenkins and that upon payment thereof to the said parties hereto of the first part respectively their several shares and interest under the said will should vest in the said George Ley Jenkins his heirs executors administrators and assigns absolutely And whereas in order the better to carry into effect the said family arrangement the said parties hereto have agreed to enter into and execute these presents

Now this indenture witnesseth that in pursuance of the said arrangement each of the said parties hereto of the first part doth hereby for herself her heirs executors administrators and assigns covenant with the said George Ley Jenkins his executors administrators and assigns and also with the said executors and each of them that upon payment by the said George Ley Jenkins his executors administrators or assigns to her her executors administrators or assigns of the sum of three hundred pounds on or before the thirty-first day of December one thousand eight hundred and ninety-nine such sum will be accepted and received by her her executors administrators or assigns in full satisfaction and discharge of all her share and interest under the will of the testator and all her claims and demands against the said executors or either of them for or in respect of such share or interest or any act deed matter or thing done or omitted to be done by them or either of them under the said will as such executors or trustees or otherwise howsoever And that she her executors administrators or assigns will at the request and cost of the said George Ley Jenkins his executors administrators or assigns execute to the said George Ley Jenkins his executors administrators or assigns all such assignments and other assurances (if any) as may be necessary to vest her said share and interest in him the said George Ley Jenkins his executors administrators or assigns absolutely And will at the request and cost of the said executors or either of them execute all such releases and discharges in the premises as shall be reasonably required And the said George Ley Jenkins doth hereby for himself his heirs executors and administrators and assigns covenant with each of the said parties hereto of the first part and their several executors administrators and assigns And also with the said Mercy Jenkins that he his executors administrators or assigns will well and truly pay to each of the said parties hereto of the first part her executors administrators or assigns the sum of three hundred pounds at or before the time hereinbefore appointed for the payment thereof And it is expressly agreed and declared that nothing herein contained shall be deemed to affect limit or prejudice the interest to which the said Mercy Jenkins is entitled under the said will during her widowhood And it is hereby lastly agreed and declared that an acknowledgement or receipt for the

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sum of three hundred pounds endorsed on the back hereof or referring to these presents signed by any of the said parties hereto of the first part her executors administrators or assigns and attested by one or more witnesses shall in the absence of fraud be deemed sufficient evidence of such payment and shall until the execution of any such further assurance as aforesaid effectually vest the share of the party signing the same in the said George Ley Jenkins his executors administrators or assigns."

The defendant alleged that he had paid the £300 to each of his sisters and that the plaintiff had duly signed an acknowledgment of the receipt of that sum by her, and contended that the share of the plaintiff was thereby effectually vested in him. He also alleged that in 1918, when his three other sisters brought an action against him for the same relief as that claimed by the plaintiff, he compromised that action relying upon the representations of the plaintiff that the claim of the three sisters was dishonest and immoral, that the indenture of 27th June 1895 was morally binding upon all the parties to it, and that the plaintiff confirmed and ratified that indenture and renounced and abandoned any interest she had in the testator's estate. The defendant further alleged that on 10th June 1919 the plaintiff compromised her claim on receipt of £200 from the defendant. By counterclaim the defendant claimed a declaration that the share and interest of the plaintiff under the will duly and effectually vested in the defendant.

By her reply the plaintiff alleged (*inter alia*) that at the time the indenture of 27th June 1895 was executed she was not aware of her reversionary interests under the will, that she relied upon the plaintiff to advise and protect her, that neither the will nor the position of the estate was explained to her, and that she had no independent advice.

The action was heard by *Buchanan* J., who ordered that judgment should be entered for the defendant on the claim and counterclaim. On appeal the Full Court varied that order by ordering that the plaintiff's claim should be dismissed, and by making a declaration, on the counterclaim, that the share and interest of the plaintiff under the will of the testator were duly and effectually vested in the defendant: *Harris* v. *Jenkins* (1).

(1) (1922) S.A.S.R., 59.

From that decision the plaintiff now appealed to the High Court. The other material facts appear in the judgments hereunder.

Cleland K.C. (with him *Blackburn*), for the appellant. The deed of 27th June 1895 is still impeachable, notwithstanding the circumstances of time and delay, on the following grounds:—The transaction was a purchase by the trustee from the beneficiaries of the trust estate and was not a family arrangement (*Talbot* v. *Staniforth* (1)).

[HIGGINS J. referred to *Greenwood* v. *Greenwood* (2).]

It was not proved that the defendant gave either full value or all information to the beneficiaries (*Thomson* v. *Eastwood* (3); *Dougan* v. *Macpherson* (4)); nor was it proved that the transaction was a righteous one (*Gordon* v. *Gordon* (5); *Harvey* v. *Cooke* (6)), or that the parties were at arms length and were agreeing with the fullest information (*Williams* v. *Scott* (7)); nor was it proved that the deed was explained to the sisters or that the plaintiff knew what her rights were or what she was doing, or that, having independent advice, she parted with her rights deliberately and with full knowledge and irrespective of what those rights were (*Sturge* v. *Sturge* (8); *In re Roberts*: *Roberts* v. *Roberts* (9)). Compliance with those requisites of proof should be enforced with the utmost jealousy so that interest shall not conflict with duty (*Lagunas Nitrate Co.* v. *Lagunas Syndicate* (10)). The transaction was a purchase of a reversionary interest (*Fry* v. *Lane* (11); *Rees* v. *De Bernardy* (12); *Sales of Reversions Act* 1879 (S.A.) (42 & 43 Vict. No. 142)). The defendant was a person in whom the plaintiff reposed confidence (*Watkins* v. *Combes* (13)). If the deed is out of the way, delay in itself does not prejudice the plaintiff's rights; for the trust estate is still in the hands of the defendant. There was no laches, nor was there any acquiescence, because the plaintiff did not know of her rights until she had independent advice on 28th May 1919, and the writ was issued in

(1) (1861) 1 John. & Hem., 484, at pp. 500, 502-503.
(2) (1863) 2 DeG. J. & S., 28.
(3) (1877) 2 App. Cas., 215, at pp. 233-234, 236.
(4) (1902) A.C., 197, at pp. 202, 204.
(5) (1816-21) 3 Swans., 400, at p. 477.
(6) (1827) 4 Russ., 34, at pp. 53, 58.
(7) (1900) A.C., 499, at pp. 503-508.
(8) (1849) 12 Beav., 229, at pp. 234-236, 238-239, 244-245.
(9) (1905) 1 Ch., 704.
(10) (1899) 2 Ch., 392, at p. 442.
(11) (1888) 40 Ch. D., 312, at pp. 320-322.
(12) (1896) 2 Ch., 437, at p. 444.
(13) (1922) 30 C.L.R., 180.

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July 1919. There were no subsequent acts of confirmation, or, if there were, the plaintiff was not then better informed of her rights (*Bullock* v. *Downes* (1); *Harvey* v. *Cooke* (2); *Rees* v. *De Bernardy* (3)).

[HIGGINS J. referred to *De Bussche* v. *Alt* (4).]

The plaintiff had no enforceable right until the testator's widow died in 1918 (*In re Timmis*; *Nixon* v. *Smith* (5)), and there was no duty on her to assert her rights until her interest fell into possession (*Life Association of Scotland* v. *Siddal* (6); *Price* v. *Blakemore* (7); *Salter* v. *Bradshaw* (8)). There is no estoppel, because the defendant by carrying on the business did not change his position to his prejudice, for he was only carrying out the trusts of the will; because the plaintiff made no representation of fact, and because whatever she said or did at any time which might otherwise have prejudiced her was induced by the non-disclosure by the defendant of material facts, in breach of his duty as trustee (*George Whitechurch Ltd.* v. *Cavanagh* (9); *Porter* v. *Moore* (10); *Doey* v. *London and North-Western Railway Co.* (11); *Balkis Consolidated Co.* v. *Tomkinson* (12); *Harvey* v. *Cooke* (13)). For a family arrangement to stand, there must be full disclosure, and honest intention is not sufficient.

[KNOX C.J. referred to *Stewart* v. *Stewart* (14); *Dimsdale* v. *Dimsdale* (15).]

[Counsel also referred to *Evans* v. *Benyon* (16); *Butler* v. *Carter* (17); *Bentley* v. *Mackay* (18); *Mehrtens* v. *Andrews* (19); *Rochefoucauld* v. *Boustead* (20).]

Napier K.C. (with him *Thomson*), for the respondent. The indenture of 27th June 1895 was a deed of family arrangement whereby it was intended to provide for a distribution of the testator's estate according to what was known to all the parties to be his

(1) (1860) 9 H.L.C., 1, at p. 19.
(2) (1827) 4 Russ., at p. 58.
(3) (1896) 2 Ch., at p. 444.
(4) (1877-78) 8 Ch. D., 286, at p. 314.
(5) (1902) 1 Ch., 176, at p. 184.
(6) (1861) 3 DeG. F. & J., 58.
(7) (1843) 6 Beav., 507.
(8) (1858) 26 Beav., 161.
(9) (1902) A.C., 117, at p. 145.
(10) (1904) 2 Ch., 367, at p. 373.
(11) (1919) 1 K.B., 623, at p. 629.
(12) (1893) A.C., 396, at p. 411.
(13) (1827) 4 Russ., 34.
(14) (1838-39) 6 Cl. & Fin., 911.
(15) (1856) 3 Drew., 556.
(16) (1887) 37 Ch. D., 329, at p. 336.
(17) (1868) L.R. 5 Eq., 276.
(18) (1862) 8 Jur. (N.S.), 1001.
(19) (1839) 3 Beav., 72.
(20) (1897) 1 Ch., 196.

desire, instead of according to the uncertain intention expressed by the will (*Williams* v. *Williams* (1); *McCaul* v. *Fraser* (2)). It was entered into not merely as a moral duty but as a provision for the testator's widow and the plaintiff. If the indenture be considered as having been entered into before the defendant became a trustee, there is no onus upon the defendant of establishing the propriety of the arrangement (*Clark* v. *Clark* (3)). The situation of the parties raised no inference of undue influence (*In re Coomber*; *Coomber* v. *Coomber* (4)). In order that non-disclosure should vitiate the deed, the evidence must show that the consent of the plaintiff was obtained by the concealment of some material facts; and there is no such evidence. If the object of the arrangement was to distribute the estate according to the known desire of the testator instead of according to the terms of his will, the effect of the will and the value of the plaintiff's interest under it are irrelevant in determining the character and validity of the agreement (*In re Roberts*; *Roberts* v. *Roberts* (5); *Mahomed Buksh Khan* v. *Hosseini Bibi* (6)).

[STARKE J. referred to *Haskew* v. *Equity Trustees Executors and Agency Co.* (7).]

[Counsel also referred to *Gregory* v. *Gregory* (8); *Turner* v. *Collins* (9); *Browne* v. *McClintock* (10).]

Cleland K.C., in reply, referred to *Pusey* v. *Desbouvrie* (11).

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

KNOX C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia dismissing the plaintiff's appeal against the judgment of *Buchanan* J., whereby it was ordered that judgment be entered for the defendant (the present respondent) on the claim and on the counterclaim with costs. After an exhaustive

(1) (1866-67) L.R. 2 Ch., 294.
(2) (1914-15) 34 N.Z.L.R., 680.
(3) (1884) 9 App. Cas., 733.
(4) (1911) 1 Ch., 723.
(5) (1905) 1 Ch., 704, at p. 710.
(6) (1888) L.R. 15 Ind. App., 81, at p. 93.
(7) (1919) 27 C.L.R., 231, at p. 235.
(8) (1815) Coop. G., 201.
(9) (1871) L.R. 7 Ch., 329, at p. 341.
(10) (1873) L.R. 6 H.L., 434, at p. 471.
(11) (1734) 3 P. Wms., 315.

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examination of the evidence adduced at the trial, the learned Chief Justice of South Australia expressed the conclusions at which he had arrived on the main controversy in the case in the following words (1):—"In my opinion the judgment of *Buchanan* J. ought to be affirmed. The daughters of the testator were entitled under the terms of his will to an equal share with the defendant in the residue of the estate besides legacies of £200 each. The will was badly drawn and unjust in its effect. The mother was provided with nothing, except a gift of furniture during her son's lifetime, unless she survived him, which was against all probabilities. The son took nothing during his life, but was to carry on the estate as a trustee until his death. The testator himself did not realize the effect of the document. He knew that he had given his daughters legacies of £200 each, and thought or at least intended that the shipbuilding business was to go to his son. A day or two before his death he expressed the wish that his daughters should have another £100 each. His wife and son told him they would see to it. Apart from the ship-building yard and the business, his estate was a small one. A few vacant allotments of land, a few shares in companies and a few book debts, worth all told about £400, were all he had. There was not enough, as he must have known, to pay his daughters £300 each. He was therefore throwing a heavy charge in their favour on the business. Besides, there was a large overdraft at the bank—more than £2,000—to be satisfied. The business cannot have been a lucrative one with such an overdraft, and only £80 to come in from creditors. The family could see the state of affairs for themselves. They could see what work was doing in the shipyard. As the defendant said, his sisters knew as much about the estate as he did. He told them of the overdraft. They had the will read to them. They were informed of their father's wishes and intentions. They had the friendly counsel of their father's adviser, Mr. Smith, and of Captain McKay. The defendant was loath, to use the plaintiff's own words to Mr. Evan, to carry on the business. He wished to be off, and that the estate should be realized. He was under no fiduciary obligation to his mother and sisters at the time. (See *Clark* v. *Clark* (2), a case at least as strong as this, because the

(1) (1922) S.A.S.R., at pp. 69-71. (2) (1884) 9 App. Cas., at p. 742.

nominated executor there was the partner of the testator, and the transaction was the purchase by him of the testator's share of the partnership business before he had renounced probate.) To induce the defendant to waive his objections and undertake the trust, an arrangement was proposed based on the father's death-bed wishes. The daughters were each to have £300 and he was to take the estate saddled with all its burdens, including the support of the mother. On the faith of that he accepted the trust and proved the will, but with the reservation that if he could not make a success of it he was to be at liberty to throw up the task. The arrangement was founded on valuable consideration moving from the defendant. He was altering his position to his detriment by giving up his right to go away and work solely for the benefit of himself and his wife and children. It does not appear that the value of the estate was brought to the notice of the daughters, and I have felt some difficulty on that score, but after full reflection I have come to the conclusion that in the peculiar circumstances of this case the value of the assets was not material. The daughters were willing to take the amounts fixed for them by their father; the mother was to be maintained by the defendant. The plaintiff says the sum to be paid to the mother was mentioned, namely £3 per week. This is highly probable, for it was the actual amount paid by the defendant until after the outbreak of the War. Three pounds per week was a generous allowance. It would be about eight per cent. on the total net value of the estate if it had been realized. The subsequent agreement of 2nd April 1895, signed by the daughters, and the indenture of 27th June 1895, signed by all parties, were merely in affirmance of the first arrangement. The original consideration operated. To hold otherwise would do an injustice to the defendant. He could not be restored to his original position. He performed his part of the bargain. His sisters accepted the money he had agreed to pay, and gave him a quittance. The high price obtained from the Government for the shipyard property in 1917 is irrelevant to the question at issue. The validity of the transaction is to be determined on the facts as they existed in 1890. I do not think any principle of equity is violated by holding the arrangement to be valid. It was not a purchase by the defendant when he was in any

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fiduciary relation with his sisters. It was a true family arrangement made before the office of executor had been accepted. There is nothing to suggest any want of good faith, or any undue influence, on the part of the defendant. His attitude was natural and reasonable in the circumstances in which he was placed. The material facts were the provisions of the will and the wishes of the testator in variance of those provisions expressed during his lifetime. The sisters had these before them, and for the sake of their mother and their brother they decided to give effect to the latter."

I agree entirely with these conclusions, and with the reasons given by the learned Chief Justice in support of them; and in these circumstances I think it is unnecessary for me to do more than state that I am of opinion that this appeal fails and should be dismissed.

HIGGINS J. The Courts enforce contracts; but they refuse to enforce, they even set aside contracts, if obtained by force or fraud or mistake or abuse of influence. Where A is in a fiduciary position towards B, and B contracts with A, under his influence, to give up to him B's property or rights, the contract will be set aside unless A show affirmatively that B was fully protected by such precautions as a prudent man would take as to his own transactions. The burden is on A to prove that this protection was given.

In this case, one of four sisters sues her brother—her only brother—the surviving executor and trustee of her father's will, for a declaration that she became entitled on her mother's death to one-fifth share of the estate left by her father, and for accounts and payment. The defendant sets up in defence a deed of family arrangement, dated 27th June 1895. The plaintiff replies that at that time she was not aware of her reversionary rights under the will, that she relied on the defendant to advise and protect her, that the will was not explained to her or the position of the estate and that she had no independent advice in making the agreement. A similar action was brought by the plaintiff's three sisters, and it was compromised by the payment by the defendant of £2,000 to each of the three.

There are many other allegations in the lengthy pleadings; but I confine myself to the position as it now stands, under the findings

of the learned Judge of first instance. That Judge had an opportunity, which we have not, of seeing the parties and watching their conduct at the trial; and although this Court has power on the appeal to form its own view of the facts, it ought to be very chary as to disturbing his finding that "where there is a conflict between the evidence of the defendant and that of the plaintiff and her sisters I accept that of the defendant." Judgment was given for the defendant; and in consequence of this strong finding as to veracity, Mr. *Cleland*, counsel for the plaintiff appellant, has, in effect, confined his argument to facts as stated by the defendant and as appearing in the documents.

The examination of the witnesses seems to have been unnecessarily protracted—the trial took some seventeen days; but the salient points were few. The chief difficulty in the case is in disentangling the vital facts from the mass of irrelevancies and repetitions, in separating the grain from the chaff, in apprehending the essentials of the position, in considering them steadily and as a whole. The testator made his will in 1882, and did not die until 21st March 1890. It was read out (the defendant states) by Mr. Smith (a friend who had prepared it) on or about the day of the testator's death, in the presence of the widow, the four daughters and the son (the defendant). The widow and the son were appointed executors and trustees. The household furniture, &c., were given absolutely to the widow; the trustees were to continue the business; after the widow's death or remarriage the son was to be sole trustee; out of the trust estate the trustees were to pay to each daughter at twenty-one £200; "in the event of the death" of the son, "the wife having died previously," the estate was to be realized and the proceeds divided equally among the children (or their issue); if the son should die before the widow died or remarried, then the widow was to have "a life estate in the said trust." The will, on its face, seemed to postpone distribution until George should die as well as the mother; and it was, to say the least, doubtful whether the mother or George or anyone had a right to enjoy the income in the meantime. If there was no such right, there was an intestacy as to the income, and the mother would be entitled to one-third thereof and the five

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children to two-thirds in equal shares. Probate was granted to the widow and George on 10th April 1890.

Now, the main defence to the claim for such a declaration and relief as sought is the deed of 27th June 1895. The parties to the deed are (1) the four daughters, (2) the widow, (3) the widow and son, (4) the defendant. It recites the will, the death, probate, and that all the children had attained twenty-one: "and whereas doubts have arisen as to the final distribution of the testator's estate under the said will and the said parties hereto of the first part" (the daughters) "are satisfied from the testator's intentions expressed during his lifetime that he intended by his said will to leave and believe" (*sic*) "that he had therefore left his ship-building yard with its appurtenances and the dwelling-house thereon and the implements and machinery connected therewith to his said son absolutely subject only to the interest therein of the said Mercy Jenkins during her widowhood as they do hereby severally admit and acknowledge And whereas in order to avoid all further disputes and difficulties a family arrangement has been made whereby it has been mutually agreed between the said parties hereto the said George Ley Jenkins shall pay to each of the several parties hereto of the first part" (the daughters) "the sum of three hundred pounds whereof two hundred pounds shall be deemed to represent the legacy of that amount hereinbefore recited and one hundred pounds a payment by the said George Ley Jenkins and that *upon payment thereof* to the said parties hereto of the first part respectively their several shares and interest under the said will should vest in the said George Ley Jenkins . . . absolutely." Then the indenture witnessed that the daughters severally covenanted with George that *upon payment* of the sum of £300 on or before 31st December 1899 that sum would be accepted in full satisfaction of all her share under the will and all claims, &c., and execute any further assurance necessary to vest the share in George, and any release; and George covenanted with each of his sisters and with the widow to pay the £300 at or before that date; and it was declared that "nothing herein contained shall be deemed to affect limit or prejudice the interest to which the said Mercy Jenkins" (the widow) "is entitled under the said will during her widowhood";

and that a receipt signed by any daughter should be deemed sufficient evidence of such payment and should vest the share of the party signing in George. This deed was executed by all six on 27th June 1895; and the four daughters signed a receipt for £200 in part payment. The plaintiff signed a receipt for the full £300 in 1908, when the last £30 of the £100 was paid to her. Each of the sisters has signed a receipt for her £300.

It will be noticed that under the deed the share of each sister was to vest in the defendant on full payment of the £300, and not before; and that the share of the plaintiff would not vest in the defendant till the full payment by him of the additional £100 which he was to pay—that is to say, till 1908. Apart from the deed, however, the interests of the plaintiff and the other daughters did not vest in them in possession under the will till the death of the defendant as well as of the widow. The widow did not die until 29th July 1918. The agreement contained in the deed was for the release of reversionary interests in the business and assets of the testator to the defendant, including plant and machinery, shares in companies, and vacant lands, in addition to the land used for the business and the dwelling-house built on the land. Reading the obscure recital as to doubts in the way most favourable to the defendant, it appears that the daughters were satisfied that the testator actually intended to leave the business and the assets thereof (including the dwelling-house) to the defendant, although this intention was not expressed in his will; and they assumed that under the will the widow was actually intended to have a life interest during her widowhood. But there is not the slightest indication in the deed that the testator intended the daughters to get £300 each instead of the £200 given by the will. The extra £100 was to be paid by the defendant himself as part of the bargain for the release. Nor is there the slightest indication in the deed, or through all the evidence, that the possibility of an intestacy as to the income until the death of the widow and of George was ever before the minds of the parties.

What, then, is the principle to be applied when a trustee purchases, or bargains for the acquisition of, the interest of his beneficiary? When a trustee sells trust property to himself, the transaction is absolutely void: but when he buys from his beneficiary,

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the sale will not be upheld unless the trustee proves conclusively that the beneficiary and himself were "at arm's length," and that no confidence was reposed in him; that the transaction was for the benefit of the beneficiary; and that full information was given to the beneficiary of the value of the property, and of the nature of his interest, and of all the circumstances (see *Underhill on Trusts*, 7th ed., p. 315; *Pickering* v. *Pickering* (1); *Thomson* v. *Eastwood* (2)). In this case, there is no evidence whatever of these facts. The widow and her daughters leant, as to business matters, wholly on the defendant, their only male relative within reach. The defendant in his evidence admitted that his mother and sisters, in the discussions as to the deed, relied on what he said, and trusted him. The daughters, including the plaintiff, got under the deed a promise of only £100 as a consideration for their release of their interests. There is not the slightest evidence that the value of the business as an income-producing concern, or the value of the other assets, was disclosed to the daughters, or that the effect of the obscure will and its true interpretation were disclosed or even discussed. The daughters had no independent advice. Their brother was sole manager of the business for a considerable time before the father's death; and if he did not know the state of the business before that death, and after the death until the date of the deed, no one knew. The brother said at the trial that he then had no idea of the annual net profits before or since the death; and he did not try to find out, did not try to refresh his memory. He did not know at the trial what his "income" was from the business; so that he has not shown that the deed of 1895 was for the advantage of the beneficiaries. But he does not say that he did not know at the several relevant times. Moreover, if he was ignorant as to the value of the property or business, it was his duty to advise his sisters not to execute the deed unless the value were ascertained somehow, and the nature of their interest under the will. In many cases the plaintiff has been able to show that some specific piece of information, material to the bargain, has been actually withheld by the trustee; but such a withholding is not essential to the rights of the beneficiary to set aside the transaction. In the case of a person in a fiduciary position

(1) (1839) 2 Beav., 31. (2) (1877) 2 App. Cas., at p. 236.

agreeing to take property of his beneficiary in consideration of a covenant to pay an annuity to the beneficiary, Lord *Eldon* said: "It was negligence not to make that inquiry, which any man buying an annuity would have made" (*Gibson* v. *Jeyes* (1)). In *Pusey* v. *Desbouvrie* (2) a wealthy freeman of London bequeathed to his only daughter a sum of £10,000 on condition that she should release her orphanage part in his personal estate—a share in his personal estate payable to her under the custom of London. The son was appointed executor; and he told his sister that she could elect between the two benefits; but he did not tell her what was the value of the personalty or what would be the amount of her orphanage part. The daughter said that £10,000 was enough, and released her orphanage part and received the £10,000 legacy. She was twenty-four years of age; but subsequently, having married, the daughter and her husband sued to set aside the release, alleging that her orphanage part would have amounted to more than £40,000, as the testator left more than £100,000 personalty, and had compounded with his wife as to her share under the custom, and had made advances during his lifetime to the son. There was no allegation that the son knew the amount of personalty, or knew that the orphanage part of his sister would have been so great. The son put in a plea of the release. The Lord Chancellor said that there was no fraud; "but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this, then, and not till then, she was to make her election" (3). For this reason, the plea was not allowed as a defence in itself, but it was to stand for an answer saving the benefit of the plea till the hearing. In other words, when a trustee makes a bargain with his beneficiary for property subject to the trust, the bargain must be watched "with infinite and most guarded jealousy"; and the trustee must show that as much precaution was taken to secure a fair bargain for the beneficiary as a prudent man would take in making a bargain for himself. (See also *Smedley* v. *Varley* (4).) *Erskine* L.C., in *Morse* v. *Royal* (5), even suggested that a transaction

(1) (1801) 6 Ves., 266, at p. 279.
(2) (1734) 3 P. Wms., 315.
(3) (1734) 3 P. Wms., at p. 321.
(4) (1857) 23 Beav., 358.
(5) (1806) 12 Ves., 355.

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of bargain between trustees and beneficiaries was so jealously guarded and so difficult to uphold that it might be better embraced under the rule that makes a purchase by a trustee from himself absolutely void.

It has been urged, however, that even if these views of the equitable principles applicable are correct in the ordinary case of a trustee purchasing or bargaining for the property of his beneficiary, this was not such a case—that it was a mere family arrangement, an arrangement whereby the widow, daughters and son carried out the verbal intentions of the testator instead of the intentions expressed in the will. It might be sufficient to say that this deed was not a deed merely to carry out the verbal intentions expressed by the testator, as distinguished from the intentions expressed in the will. Even assuming that the parties meant to carry out a verbal intention to give the business and assets thereof (including the dwelling-house) to George, subject to the (alleged) interest of the widow during widowhood, the release covers the shares in companies, vacant lands &c., which were not comprised in the (alleged) verbal intentions; the £100 additional to be paid to the daughters under the deed was not (according to the deed) within the verbal intentions—it was to be paid by George out of his own pocket; the father had expressed a verbal intention that the widow should have an interest for life, but the deed did not give it to her—she got £3 per week and afterwards £2. But, in the second place, the same principles are applicable to a family arrangement, if the trustee is concerned in it, as to a direct sale to the trustee of an interest in the trust estate: and those principles prevent the Courts from upholding the deed of arrangement if the necessary facts as to the nature of the rights and as to the value of the rights released by the beneficiary are not disclosed to the beneficiary (*Watkins* v. *Combes* (1); *Stapilton* v. *Stapilton* (2); *Williams* v. *Scott* (3)).

There are two cases on which counsel for the defendant particularly rely; but, to my mind, they are easily distinguishable. In *In re Coomber*; *Coomber* v. *Coomber* (4), a testator left all his property

(1) (1922) 30 C.L.R., 180.
(2) 1 Wh. & Tud. L. C. (8th ed.), pp. 234, 241, 247.
(3) (1900) A.C., at p. 508.
(4) (1911) 1 Ch., 174, 723.

to his wife. His son H. had been for some years sole manager of certain retail beer stores. The testator had expressed verbally a wish that H. should have the business. The widow called in her solicitor and got him to draw up an assignment to H., as a gift, without consulting H.; and the solicitor ascertained that she fully understood the nature and consequences of the act. In an action brought by another son to set aside the assignment because of the fiduciary position of H., it was held by *Neville* J. and by the Court of Appeal that the action should be dismissed. But there had been no bargain between H. and his mother—it was a gift, "the spontaneous fruit of her own generosity"; and "the gift was not based on value in any way at all" (1). The mother wished the business and premises to go to the son, whatever the value; and she knew precisely what she was doing. In *McCaul* v. *Fraser* (2) the so-called agreement which was attacked was not necessary to give the son, who was sole trustee, title to what he got at all. This son had, by the will, full right to divide the whole estate among such of the children of the testator and in such manner as he in his discretion should think fit. He could have taken the whole estate for himself, but he preferred to call a family council and arrange a distribution to which his brothers and sisters assented. As *Stout* C.J. said (3), "if he had chosen he could have sold the land and not treated some of the family as generously as he did." And *Sims* J. (4), speaking for the Full Court on appeal, referred to *Taylor* v. *Allhusen* (5) as an authority to the effect that the defendant might have appointed the whole estate to himself.

So far, I have dealt with the deed alone—the only substantive ground of defence on which the defendant relies—apart from acquiescence and laches. But counsel for the defendant opened up in their evidence certain negotiations which preceded the deed, from the death of the testator until the deed was executed; and these negotiations seem to me to make the case against the defendant even stronger than if he had merely relied on the recitals in the deed as estopping the plaintiff. These previous negotiations were not relied on in

(1) (1911) 1 Ch., at pp. 727, 729.
(2) (1914-15) 34 N.Z.L.R., 680.
(3) (1914-15) 34 N.Z.L.R., at pp. 684-685.
(4) (1914-15) 34 N.Z.L.R., at p. 691.
(5) (1905) 1 Ch., 529.

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the defence; but this evidence of negotiations could not have been objected to by counsel for the plaintiff at the trial; and, being admitted, it must be considered. I accept defendant's own version of the negotiations as correct. Within a day or two after testator's death, in the presence of the mother, son and the four sisters, Mr. Smith read out the will, once only; and the position in which the defendant was placed was discussed (not the difficulties of construction of the will, not the value of the business or of the assets). The defendant said he would not "take on" the trust—it would mean working for the sisters as well as for his own family; they had better sell the whole business. The mother said:—"If the property is sold, what is to become of me? I'll lose my home; it will break my heart." The will, it is to be noticed, gave no power to sell. The defendant said he could do far better in Honolulu—"I am off." Mother and daughters pleaded with him not to sell; and then defendant said he would try it for a year or two on the understanding that he would pay the sisters £300 each in accordance, as he then said, with the testator's death-bed wish; and if he saw that the business was going to be successful he would "square them up"; otherwise, he would throw up the business. Then the defendant and the mother proved the will, 18th April 1890. The business was carried on; the defendant retained £3 per week, and gave his mother £3 per week, in spite of the big bank overdraft (over £2,000). The business was so successful that the defendant decided—three years after the death—to exercise what he calls repeatedly his "option" to buy it; but he never disclosed to his sisters how far the business was successful, how it stood as an income-producing concern; and he does not remember telling them the value of the land and buildings. The defendant says: "I have no reason to think that any of my sisters knew what father was making out of the business." An agreement to carry out the exercise of the option was drawn up by Mr. Smith, and signed by the daughters on 2nd April 1895; but this was put into legal form by a solicitor employed by the defendant, and thus the deed on which the defendant relies in his pleadings was signed on 27th June 1895. The agreement signed on 2nd April 1895 contains a similar recital as to the testator's intentions in favour of the business and assets and

dwelling-house going to the son, although it is very doubtful whether the testator, even according to the defendant's own version of the conversations, ever intended more than the "slip" to go to the defendant; and the same wrong assumption was made that the will gave to the widow the life interest. But the deed of 27th June 1895 must be accepted as showing the final intentions of the parties.

My conclusion from this evidence is that the "option" meant to be given to the defendant was given under the pressure of the threat of a sale which the will did not allow, and of consequent ruin; and, as a matter of law, the "option" could not have been enforced against the mother and daughters if they had resisted in 1895. I am strongly inclined to think, also, that such a bargain as alleged, on the part of a trustee—to take on the trusts if the beneficiaries would give him an option to acquire the property and business for a stated price if the business were successful—should be treated as void as being against public policy; but this point it is unnecessary to decide. I concur with the view of *Parsons* J. that the deed of 1895 could not have been upheld, if attacked immediately.

The Chief Justice of South Australia has relied on the case of *Clark* v. *Clark* (1); but it must not be overlooked that in that case the person who bought from the beneficiaries, though named as executor, renounced probate—never became executor; whereas in this case the defendant took out probate, became executor, and at the time of the deed was executor; and his title as executor to the assets related back to the death of the testator. He was in a fiduciary position from the first.

But the defendant has raised the points of acquiescence and of laches. According to *Turner* L.J., as approved by the Lord Chancellor, in *Life Association of Scotland* v. *Siddal* (2), "length of time where it does not operate as a statutory or positive bar operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not as I conceive distinct propositions. They constitute but one proposition and that proposition, when applied to a question of this description, is that the cestui que trust assented to the breach of trust. A cestui que trust whose interest is reversionary is not bound

(1) (1884) 9 App. Cas., 733.

(2) (1861) 3 DeG. F. & J., at pp. 72-74.

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to assert his title until it comes into possession . . . . He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession." It is not true that "if a cestui que trust knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be held barred by acquiescence if he does not promptly do so." The Lord Justice was not prepared to say that "where the trust is definite and clear a breach of trust can be held to have been sanctioned or concurred in by the mere knowledge and non-interference on the part of the cestui que trust before his interest has come into possession." "Acquiescence . . . imports knowledge, . . . and . . . full knowledge": "a cestui que trust cannot be bound by acquiescence unless he has been fully informed of his rights and of all the material facts and circumstances of the case." According to *Thesiger* L.J. in *De Bussche* v. *Alt* (1) acquiescence while an act is in progress must go as far as estoppel; acquiescence after the act is completed must go as far as a release — to be a valid defence; and *Hall* V.C. spoke to the same effect (2). Delay—mere delay apart from acquiescence — is no bar to an express trust such as this is. The case of *Thomson* v. *Eastwood* (3), in the House of Lords, is highly significant. A testator died in 1808, leaving a will whereby C. was given land subject to a trust to pay £3,000 to J.R. The legacy became payable in 1824. In 1833 J.R. executed a release of the legacy in consideration of £300 paid to him, doubts having been raised as to his legitimacy; but he would have been entitled to the legacy even if illegitimate. J.R. died about 1835; his only next-of-kin came of age in 1849. Her suit—or rather the suit of her assignee under an assignment of 1863—was not launched until 1872; and it was held that notwithstanding the delay of twenty-three years since she came of age, the delay of thirty-nine years since the release, the delay of forty-eight years since the legacy became payable, and the delay of sixty-four years since the will came into operation, the trust should be enforced, and the release of 1833 declared void; but

(1) (1878) 8 Ch. D., at p. 314. (2) (1878) 8 Ch. D., at p. 306.
(3) (1877) 2 App. Cas., 215.

interest was limited to six years before suit. Now, in the present case, the interest of the plaintiff under the will was reversionary until, at earliest, the death of the mother, June 1918; it is, indeed, still reversionary, if (as I read the will) the estate is not distributable until the death of the defendant as well as of the mother. Under the deed the share of the plaintiff was not to vest in the defendant until full payment of the £300, and there was not full payment until 1908. Apart from the reading of the will and of the deed of 27th June 1895 in her presence, it does not appear that the plaintiff knew her rights under the will, or knew that there was any ground for impeaching the transaction embodied in the deed, until her interview with Mr. Waterhouse, the first independent adviser that she had. On 24th May 1919 the plaintiff learnt from the defendant that he had paid to his other three sisters £2,000 each, in compromise of their action against him. On 28th May the plaintiff came to Mr. Evan, the defendant's solicitor, and said that she wanted to sign a document to the effect that she had no claim against her brother in respect of her father's estate, and did not intend to make any; for the plaintiff had been stirred to anger by her sisters' claim against the defendant. Mr. Evan said, very properly, that she ought to have independent advice on the matter. He wrote out a short statement of the facts, and took a typed copy of it to Mr. Waterhouse, introducing the plaintiff; and in the statement of facts it is to be observed that he did not rely on anything that took place before the deed. What took place in the conversation between the plaintiff and Mr. Waterhouse is not disclosed, except that Mr. Waterhouse read over to the plaintiff several times the will and the deed; but after a quarter of an hour Mr. Waterhouse came to Mr. Evan and said: "I have been into that matter with Mrs. Harris and she is going to make a claim against Mr. Jenkins, because it is her duty to do so." After some negotiations for a settlement the writ in this action was issued on 4th July 1919. There is not, on these facts, any laches or acquiescence such as to bar the plaintiff of her rights.

Nor is there any ground, alleged or proved, for saying that the parties cannot be restored substantially to the position in which they stood at the time of the deed. The defendant has made some

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additional purchases of land, and some improvements; but there is nothing to prevent justice from being done to the defendant, after inquiries and accounts, even if the plaintiff should elect not to affirm what has been done by the defendant.

In my opinion, the plaintiff is entitled to a declaration of her rights under the will, and to an order for execution of the trusts notwithstanding the deed, and for payment, in due time, of what should be found due to her under the will.

STARKE J. Samuel Jenkins was a ship-builder "in a small way of business." The defendant was his son, "who had worked for him until he was twenty-one years of age, and then had gone abroad for a couple of years. On his return the father wished the son to remain and assist him, and he consented to do so if a small slip were installed in the ship-building yard. The father agreed; and the son designed and constructed the slip himself," and practically managed the business from that time. I take these facts substantially from the judgment of *Murray* C.J. In 1882 Samuel, the father, made a will giving his real and personal property to his wife and his son upon trust to continue his business with the same discretion and control as the testator himself had. He directed that after the death or marriage of his wife his son was to hold his trust estate with the like powers and to pay thereout to each of his daughters in certain events a sum of £200. In the event of the death of his son subsequently to the death of his wife, then the testator directed that his estate be realized and the proceeds divided equally among his children, with gifts over in certain events. And should his son die before his mother, the testator's wife, then the testator directed that she should have a life estate in the said trust.

The testator died in March 1890, leaving his widow, his son (the defendant) and four daughters. The widow and two unmarried daughters, one of whom was the plaintiff, were members of the testator's household. The son had an establishment of his own near-by, and the other daughters were married and resided with their husbands.

The net value of the testator's estate for the purpose of duty was sworn in 1891 at the sum of £2,265, but the precise value

attributed to the ship-building business does not clearly appear in the duty statement. The will was prepared by an old friend of the testator, Mr. G. W. Smith, and after the death of the testator a family meeting was apparently held to hear it read, the widow and all the testator's children being present. Its contents apparently caused some surprise. Statements of the testator appear to have been recalled at the time, by the widow and others, to the effect that the testator really had no business apart from the slip, that the slip should go to his son, who had built it, and that the daughters should have £300 each. No one then questioned that such statements had in fact been made by the testator. The defendant said he could not continue the business on the terms of the will: it meant working for five families beside his own—that is, for his mother and his four sisters. He had no objection to working for his mother, but he did not see why he should work for all the others as well. It was therefore better, in his opinion, to sell the whole business. The mother was strongly opposed to the sale, and asked if the property were sold what would become of her—she would, she said, lose her home. The daughters also desired the continuance of the business for their mother's sake. As a result of this discussion and "with the light derived from the subsequent course of events," the family, as *Buchanan* J., who tried the case, found, agreed to honour the intentions of the testator, as those intentions had been verbally expressed, namely, that the business should be carried on, that the mother should have the house and an income of £3 per week out of the proceeds of the business, and that the daughters should receive, as their shares of their father's estate, £200 each out of the business as soon as it could stand the withdrawal of such sum, and, if it proved successful, should further receive an additional £100 which the testator had desired should be paid to them. The implication of the finding and judgment is that the son took the remainder.

It is undoubted that the mother had the use of the house, and also received an income of £3 per week until 1915, when it was reduced to £2 per week with her full consent. In 1895, when moneys became available from the business, documents were drawn up to carry out the arrangement. The friend of the family, Mr. G. W. Smith

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was consulted; and he drew up an agreement dated 2nd April 1895, for the purpose of carrying out the desires of the members of the family. This agreement recites that "doubts having arisen as to the final distribution of our late father's estate, *wherein we think it was his intention that the ship-building yard with its appurtenances and the dwelling-house thereon and the trade and implements and machinery of trade should become the absolute property of our brother*, George Ley Jenkins, subject to our mother's life interest therein, we" (the daughters of the testator) "do agree with our mother . . . and our brother . . . that on payment to each of us of the sum of £200 bequeathed to us by our late father and a further sum of £100 each (£300 in all) we and each of us . . . forego and renounce any further claim in the property above specified and we also agree to execute any further documentary evidence that may be necessary to put our brother . . . into full possession of the property subject to our mother's interest for life." This document was signed by the daughters of the testator. In June 1895 a formal agreement was executed by the daughters, the widow and the defendant; it was drawn up by a firm of solicitors, and is called a deed of family arrangement. It was executed by all the parties in the presence of Mr. G. W. Smith. The agreement recites that doubts had arisen as to the final distribution of the testator's estate under the will and *that the daughters were satisfied from the testator's intentions expressed during his lifetime that he intended by his said will to leave, and that they believe that he had therefore left the ship-building yard with its appurtenances and the dwelling-house thereon, and the implements and machinery connected therewith to his son absolutely*, subject only to the interest therein of his widow during her widowhood. It also recites that to avoid further disputes a family arrangement had been made whereby the son was to pay the daughters £300 each, of which £200 should be deemed to represent the legacy of £200 under the testator's will, and that upon payment thereof the daughters' shares under the will should vest in their brother, the son of the testator. Each of the daughters then covenanted with the brother that upon payment to her of £300 on or before 31st December 1899 such sum would be accepted in full satisfaction and discharge of all her share and interest under the

will; the daughters add covenants of further assurance necessary to vest their shares in their brother. Nothing in the agreement, it is declared, shall prejudice the interest of the widow under the will during her widowhood. The learned primary Judge found that the sum of £300 was paid to each of the daughters, and the fact seems well established on the evidence.

The defendant carried on the business, "added more land to the shipyard and spent money on improvements." As *Murray* C.J. remarked, "after the execution of the family arrangement everything appears to have gone on quietly for more than twenty years." But in February 1918 the ship-building yard and slip were acquired under the *Harbours Act* 1913 and the compensation fixed at £17,000. This appears to have roused three of the daughters of the testator; for in September a writ was issued on their behalf claiming the same relief as is claimed by the plaintiff in the present action. In these proceedings the plaintiff supported her brother, the defendant, and made a statement in writing to which I shall hereafter refer. The defendant, however, settled with the other sisters, and paid them £2,000 each. Naturally the plaintiff became dissatisfied, and ultimately brought this action alleging that the moneys paid by the Harbours Board of South Australia to the defendant were part of the testator's estate, and claiming in substance the execution of the trusts of his will.

But the real question is, whether the plaintiff is bound by the agreements of April and June 1895. The Courts of law, it must not be forgotten, do not prohibit persons from stripping themselves entirely of their property if the transaction is the purely voluntary and perfectly understood act of the donor, and the donor's mind is unaffected by undue influence. (See *Eldon* L.C. in *Huguenin* v. *Baseley* (1).) Undue influence, however, is not established by the mere proof of a relation of confidence between the donor and the donee. My brother *Isaacs*, in *Watkins* v. *Combes* (2), cites a passage from a judgment of Lord *Shaw* (in *Poosathurdi* v. *Kanappa Chettiar* (3)) which is very appropriate in this connection:—"Up to that point

(1) 1 Wh. & Tud. L. C. (8th ed.), at pp. 269, 273, 276.
(2) (1922) 30 C.L.R., at p. 194.
(3) (1919) L.R. 47 Ind. App., 1; 43 Madras, 546.

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'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But . . . 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." "The question," as Lord *Eldon* says in *Huguenin* v. *Baseley* (1), "is not whether she" (the donor) "knew what she was doing, had done, or proposed to do, but how the intention was produced." The defendant, in my opinion, clearly stood in a position of confidence towards his sister, and I should be loath indeed to narrow the salutary principles of equity based upon abused confidence or undue influence. We are dealing not with the case of a trustee for sale selling to himself (*Williams* v. *Scott* (2)), but with a benefit given to a person standing in a relation of confidence to the donor. Both *Buchanan* J. (who tried the case) and *Murray* C.J. found, as I read their judgments, that undue influence was not, in point of fact, exercised by the defendant in procuring the agreements of April and June 1895. This conclusion is entitled to great weight, but I have examined the evidence in detail for myself, remembering, of course, that *Buchanan* J. was in a much better position to arrive at a just conclusion on the matter than is possible for any member of a Court of appeal. Moreover, it is to be noticed that two persons who could have given most important evidence were not available: the mother was dead and G. W. Smith was unable to appear in Court. The result of my examination of the evidence leads me to the conclusion that the agreements of April and June 1895 were brought about by the desire of the family to observe their dead father's expressed wishes, and not by any abuse on the part of the defendant of his position or by the exercise of any undue influence. It is probable, I think, that the mother recalled those wishes to the minds of the daughters and pointed out what her own position would be if the business were discontinued. The defendant was, no doubt, in a position of power; if he did not carry on the business there was no one else who could do so. But I do not think he used

(1) 1 Wh. & Tud. L. C., (8th ed.), at p. 278. (2) (1900) A.C., at p. 508.

that power for the purpose of extorting the agreements. He had a family of his own, and, were his father's intentions not observed, then his duty towards his own family would compel him to employ his talents in other directions for their establishment in life. Some of the evidence on which these conclusions were based has already been referred to, but the plaintiff's own statement goes to the heart of the case. "I always understood from my mother," it reads, "that it was my father's intention that the girls should be paid £300 cash, and that after my mother's death my brother George should get everything. As far as I understood, we all knew what it" (the agreement of 1895) "meant, and expected nothing out of the estate after we got the £300, and that when we were paid the £300 we had no further interest in father's estate . . . we all understood that and were satisfied with it." Now we are asked to say that the agreement was so unconscionable that the use and abuse of influence are apparent.

Let me examine the facts. The net value of the estate was sworn for probate purposes at £2,265. Under the will each daughter was given £200 after the death of the testator's widow and one-fifth share in the residue. Under the agreements the sum of £300 was to be paid to each daughter on or before 31st December 1899; the mother's interest was unaffected, and the defendant took what was left and also shouldered the risks of carrying on the business. This does not shock the conscience, especially in view of the evidence that it is the very disposition of his estate which the testator himself wished. I am not satisfied on these facts that the brother used his position to obtain an unfair advantage over his sisters. Indeed, the plaintiff would never, I venture to think, have accused her brother of improper conduct but for the fact that her sisters obtained from him a considerable sum of money in settlement of their claims. But the attempt to repeat her sisters' success has failed, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Povey, Blackburn & Waterhouse.*

Solicitors for the respondent, *Varley, Evan & Thomson.*

B. L.