Cons National Commercial Banking Corp of Aust Ltd v Batty 65 ALR 385

Appl Capricorn Financial Planners v ASIC (1999) 31 ACSR 46

[HIGH COURT OF AUSTRALIA.]

POLKINGHORNE . . . . . APPELLANT;
PLAINTIFF,

AND

HOLLAND AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1934.

MELBOURNE, *March* 20, 21.

SYDNEY, *Aug.* 7.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Solicitor and Client—Partnership—Principal and agent—Fraud by one member of firm—Acts done in course of authority as partner—Advice sought as to investments—Solicitor's knowledge of insecurity of investment—Duty to disclose—Liability of innocent partners.

The plaintiff entered into three transactions on the advice of H., a member of a firm of solicitors. The transactions were, first, the sale of £4,000 worth of Government stock and the investment of the proceeds in the shares of a company; secondly, the sale of £1,000 worth of Government stock and the loan of the proceeds to another company, S. Ltd.; thirdly, a guarantee by the plaintiff of the bank overdraft of S. Ltd. The third transaction was the result of an agreement whereby the plaintiff became a member of S. Ltd., and H., who was a director of that company, undertook to pay half of any loss the plaintiff might suffer under the guarantee. Each of the companies was, to H.'s knowledge, financially unsound when the advice was given, and the plaintiff lost the sums of £4,000 and £1,000 and was obliged to make payments under the guarantee.

Held:—

(1) As to the investments of £4,000 and £1,000, it was H.'s duty to inform the plaintiff what steps should be taken to investigate the financial stability of the companies and to disclose the facts within his knowledge: This duty was owed by H. in the ordinary course of the business of his firm, and its breach therefore involved his innocent partners in legal responsibility for the loss of the moneys.

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(2) As to the moneys lost under the guarantee, H. in this transaction had not acted within the scope of his authority as a partner or within the ordinary course of business as a solicitor, and therefore the innocent partners were not responsible for the loss incurred.

Lloyd v. *Grace, Smith & Co.*, (1912) A.C. 716, applied.

Decision of the Supreme Court of South Australia (*Murray* C.J.) reversed.

APPEAL from the Supreme Court of South Australia.

Florance Mary Eleanor Polkinghorne brought an action in the Supreme Court of South Australia against Thomas Corin Holland, Louis Arnold Whitington, George Harold Holland, Agnes Arabella Holland and Richard William Ernest Turner.

The following statement of facts is taken from the judgment of *Murray* C.J., who tried the action :—

In this action Mrs. Florance Mary Eleanor Polkinghorne, formerly Mrs. Wallace, claims damages on various allegations of negligence, misrepresentation, fraud, undue influence, conspiracy, and breach of contract. The defendants are Thomas Corin Holland, Louis Arnold Whitington and George Harold Holland, who, at the relevant times, were partners carrying on practice in Adelaide as solicitors under the firm name of Holland & Whitington, Agnes Arabella Holland, the wife of George Harold Holland, and Richard William Ernest Turner, an Adelaide sharebroker. George Harold Holland and his wife have not appeared to the writ. Turner entered an appearance and filed a defence denying liability, but was neither present or represented at the trial. No personal complicity in the wrongs alleged, and no reflection on the honour of Mr. T. C. Holland or Mr. Whitington are suggested, but they were joined as defendants and sought to be made liable for the conduct of their partner, George Harold Holland, under sec. 10 of the *Partnership Act* 1891 (S.A.), which provides that " where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm . . . the firm is liable therefor to the same extent as the partner so acting or omitting to act." The wrongs complained of are in respect of three transactions which, it is alleged, George Harold Holland, while acting as

solicitor for the plaintiff, advised her that it would be safe for her to enter into. The first transaction was the sale on or about 3rd April 1928 of £4,000 worth of South Australian Government inscribed stock held by the plaintiff, for the purpose of investing the proceeds in shares of a company called the S.A. Trust Investment Co. Ltd., but afterwards changed with her consent to actual investment in the shares of a company named the United Trust Investment and Deposit Co. Ltd.; the second was the sale on or about 19th February 1929 of £1,000 worth of South Australian Government inscribed stock, and the investment of the proceeds on loan to a company named Secretariat Ltd.; and the third was an agreement made on 10th June 1929 to guarantee the overdraft of Secretariat Ltd. at the Bank of New South Wales for the amount of £5,000. Each of the companies mentioned is alleged to have been financially unsound at the time the advice was given, with the result that the plaintiff has lost the £4,000 invested in shares of the United Trust Investment and Deposit Co. Ltd., the £1,000 lent to Secretariat Ltd., and the sum of £5,475 which she was called upon to pay under her guarantee of the overdraft of Secretariat Ltd. to the Bank of New South Wales. The claim against the partners in the firm of Holland & Whitington, including George Harold Holland, is based on negligence, fraud, and undue influence on the part of George Harold Holland as the plaintiff's solicitor. Agnes Arabella Holland is joined in the charge of undue influence. The case alleged against Turner is that he conspired with George Harold Holland to defraud the plaintiff of the £4,000 mentioned above, and that neither he nor George Harold Holland paid the £4,000 to S.A. Trust Investment Co. Ltd. or to United Trust Investment and Deposit Co. Ltd. for shares in either company, but converted the same to their own use. A claim is also made against George Harold Holland individually for breach of an agreement to pay to the plaintiff one half of any loss she might suffer as a result of giving the guarantee to the Bank of New South Wales for the overdraft of Secretariat Ltd.

Murray C.J. gave judgment for the plaintiff against the defendants, Turner and George Harold Holland, the latter not having appeared to the writ, for the sum of £4,000 and interest thereon at 5 per cent per annum from 3rd April 1928 to the date of judgment, and made a

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declaration that the plaintiff was entitled to be indemnified by Turner and George Harold Holland against such liability as might be upon her to pay in cash for 4,000 shares issued to her by United Trust Investment and Deposit Co. Ltd., and further gave judgment against George Harold Holland for £1,000 and interest thereon at 8 per cent per annum from 19th February 1929 to the date of judgment, less £40 already received by the plaintiff in respect of such interest, and for the sum of £5,000 (being £5,475 paid to the Bank of New South Wales, less the value of a security obtained on her account from Secretariat Ltd.) with interest thereon at 3½ per cent per annum from 27th August 1931 to the date of judgment. The Chief Justice dismissed the claim against Thomas Corin Holland and Louis Arnold Whitington, and also dismissed the claim against Agnes Arabella Holland.

The plaintiff appealed to the High Court against such part of this decision as dismissed the action against Thomas Corin Holland and Louis Arnold Whitington.

Further facts appear from the judgments hereunder.

Alderman (with him *Waterhouse*), for the appellant. The Chief Justice was wrong in leaving out of account the general scope of the firm's business. In October 1927 the defendant Whitington joined the firm, of which T. C. Holland and George Harold Holland were members. T. C. Holland had been acting as the solicitor of the plaintiff and her mother since the death of the plaintiff's father in 1911. In October 1927 George Harold Holland was introduced to the plaintiff by T. C. Holland. Prior to 1927 T. C. Holland had been in partnership with other solicitors and had not made any specific charges for work done for the appellant, but had then been paid by fees from mortgagors and a charge of 5 per cent made for collecting income from investments. These commissions all went into the profits of the firm. Soon after October 1927 the plaintiff saw only George Harold Holland about her affairs. The partners did not exercise any control over him, although the plaintiff believed that they did. The plaintiff did not intend to speculate in shares, but to re-invest her money. The partners left the entire management of this part of their business to George Harold Holland, and

are liable for his defaults. As soon as the money was paid over to George Harold Holland it was stolen. The plaintiff intended these to be specific investments, but they were fraudulent devices. If George Harold Holland had believed that these were not sound investments he should have so stated to the plaintiff, and advised her not to invest in them. The evidence showed that this was a proper matter for George Harold Holland's advice. It is the business of a solicitor, if he believes that a proposed investment is unsound, to advise his client against investing. It is the duty of a solicitor to collect the relevant material, and at least submit that to the client. What was done in this case was within the apparent scope of each of the partners (*Cox* v. *Snowball and Kaufmann* (1)). This firm was really in the position of general agents. It was George Harold Holland's duty to advise against the investments, or at least to advise, before proceeding, what elements should be considered as to the companies' capital and liabilities, and there was a duty to see that the client's money went to the companies, and that she got the scrip ; the special circumstances of the companies raised a particular duty in those respects. The fact that the firm was accustomed to do work outside the ordinary solicitor's work indicates that these matters were within the apparent scope of the partner's functions. The costs entries show that the firm was acting as the plaintiff's business advisers and agents. The attendances were taken into account in deciding what charges should be made. The plaintiff is entitled to succeed against the respondents on the principle of *Lloyd* v. *Grace, Smith & Co.* (2), *Earl of Dundonald* v. *Masterman* (3) and *Bugge* v. *Brown* (4).

[EVATT J. referred to *British Homes Assurance Corporation Ltd.* v. *Paterson* (5).]

Ligertwood K.C. (with him *Reed*), for the respondents. Four questions arose on this appeal:—(1) Whether it is within the ordinary duty of a solicitor to advise his clients in their financial transactions. This point was abandoned by the plaintiff. (2) Whether this firm so extended its ordinary business of solicitors as to make it part of

(1) (1929) Unreported. [Supreme Court of Victoria (Full Court).]
(2) (1912) A.C. 716.
(3) (1869) L.R. 7 Eq. 504.
(4) (1919) 26 C.L.R. 110.
(5) (1902) 2 Ch. 404.

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their business to advise their clients in business transactions. This should be answered in the negative. (3) Whether George Harold Holland was, in the transactions complained of, guilty of any act or omission in relation to his duty as a member of the firm in the business undertaken by the firm. (4) Whether in all the transactions complained of the plaintiff elected to deal with George Harold Holland to the exclusion of the partnership. As to the second question, the plaintiff was not a witness of truth, and her evidence was not accepted by the Chief Justice. In fact the plaintiff took a personal interest in her investments, and exercised her own judgment as to values. The plaintiff gave specific instructions to make certain payments, which shows that it was not a general agency which the firm acted upon, but that it acted under the power of attorney only. As soon as the plaintiff returned from her visits abroad she would come in and obtain the interest which had been collected. The contention that the plaintiff regarded the respondents as her general business agents broke down at the trial, and has not been re-established. As to the third question, this refers mainly to the investment in S.A. Trust Investment Co. Ltd. The proper inference to be drawn from the evidence as to this transaction is that Turner went to the plaintiff and asked her to put money into that company. She went to George Harold Holland and asked him whether it was safe. He answered in the affirmative, and the plaintiff then went back to Turner and handed over £4,000 worth of stock. George Harold Holland was probably not conscious of any actual fraud when investing the money in these companies and, therefore, the inference of fraud should not be drawn against the two respondents. If any money reached George Harold Holland, which is doubtful, he did not receive it as a member of the firm. Turner was a man of repute in the city, and was alleged to have a big business. The respondents, being innocent persons, are entitled to the benefit of all the inferences which can be drawn. It was not in the ordinary course of a solicitor's business to give financial advice to clients, and the respondents had not extended their business to include the giving of such advice. There is no evidence that the plaintiff requested George Harold Holland to have the matter seen through. She realized that she was trusting Turner. The scrip

never got into the possession of George Harold Holland. The plaintiff endeavoured to convey the impression that she was a helpless widow relying entirely upon Holland, whereas she managed her own business herself, at least to a very large extent. *Lloyd* v. *Grace, Smith & Co.* (1) is distinguishable. The loan of £1,000 to Secretariat Ltd. was a financial transaction only, not involving any legal work, and as a solicitor George Harold Holland had nothing to do with it. He only said it was a good investment. The guarantee of the overdraft of Secretariat Ltd. with the Bank of New South Wales for £5,000 was a mere partnership agreement between the plaintiff, Cox and George Harold Holland, and the respondents were in no way implicated in that. As to the fourth matter, it is possible that a client may so deal with one partner as to preclude himself from recourse against the others (*Earl of Dundonald* v. *Masterman* (2)). That was the case here, and the plaintiff knew that T. C. Holland was opposed to such investments. Solicitors' business does not include advising on financial transactions (*Dick* v. *Alston* (3); *Learoyd* v. *Alston* (4)). No entries were made in the firm's books relating to the transactions complained of. The respondents are not liable for the default of George Harold Holland (*Harman* v. *Johnson* (5); *Plumer* v. *Gregory* (6); *Bourdillon* v. *Roche* (7); *Cleather* v. *Twisden* (8); *Dick* v. *Alston* (9); *Learoyd* v. *Alston*; *Scholes* v. *Brook* (10)).

[STARKE J. referred to *Rae* v. *Meek* (11).]

In that case the solicitor had actually undertaken to do the act complained of. The scope of the business of the firm is the important thing. There is no evidence which shows that this firm extended its business in the manner suggested. T. C. Holland informed the plaintiff that he would not advise her in financial matters.

Alderman, in reply. There is evidence that the respondents treated other clients in the same way as the appellant.

Cur. adv. vult.

(1) (1912) A.C. 716.
(2) (1869) L.R. 7 Eq., at p. 516.
(3) (1911) S.C. 1248, at p. 1270.
(4) (1913) A.C. 529.
(5) (1853) 2 E. & B. 61; 118 E.R. 691.
(6) (1874) L.R. 18 Eq. 621.
(7) (1858) 27 L.J. Ch. 681.
(8) (1884) 28 Ch. D. 340.
(9) (1911) S.C. 1248.
(10) (1891) 63 L.T. 837.
(11) (1888) 15 R. (Ct. of Sess.) 1033, at p. 1051.

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Aug. 7.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The question raised by this appeal is whether two innocent partners in a firm of three solicitors are liable for any part of the loss suffered by a client in consequence of the culpability of the third. The two innocent partners are the respondents, T. C. Holland, a solicitor of forty-five years standing, and L. A. Whitington, a solicitor of sixteen years standing. The culpable partner is Harold Holland, a son of the respondent T. C. Holland. The firm, which practised in Adelaide, was founded in October 1927. T. C. Holland had been a member of other firms, and his last partnership, of which his son was also a member, was dissolved in the same month. He had long been solicitor to the lady, the appellant, who seeks in this appeal to impose upon the respondents liability for her loss. Her father, one J. M. Dent, who died in 1911, had been a client of T. C. Holland. His wife and his daughter, the appellant, survived him, and they succeeded to a substantial estate. The appellant was then a widow about thirty-six years of age. She and her mother remained clients of T. C. Holland in the various firms of which he became a member. The legal business of these ladies arose mainly out of the investments which they made. The remuneration obtained by their solicitor consisted for the most part in fees paid by mortgagors and in commission charged upon the interest and other income collected for them. About the time that the firm of Holland & Whitington was formed, the appellant's mother died. In consequence of her mother's death, the appellant consulted Holland & Whitington. Harold Holland attended to her business. Hitherto she and her mother had almost confined their investments to bank shares, to first mortgages of real estate, and to Government bonds and stock. Apparently T. C. Holland had at some time or other warned them against speculating. But the appellant was not content with the income obtainable from Government securities. She was minded to sell her bonds and stock and invest in mortgages. About this time a valuer and stockbroker, named Turner, was sent by Harold Holland to make a valuation which was required as a result of her mother's death. She appears to have discussed investments with him. The upshot was that, after inspecting in his company two properties

submitted through him to Holland & Whitington as securities, and after that firm had obtained his valuation, the appellant instructed them to sell through Turner some bank shares and to invest about £2,000 on those securities. The transaction was regularly carried through before the end of January 1928. Harold Holland was the partner under whom it was conducted, and, before the appellant decided upon the investment, she appears to have sought and obtained his approval. In the meantime the appellant resolved to visit Europe, and set about preparing for her departure, which was fixed for 14th April 1928. Her preparations included arranging for the transmission of money to England, the appointment of the Hollands as her attorneys under power, the making of her will, the deposit of her securities with her bank for safe custody, and the complete investment of her funds. These matters were all attended to by, or under the direction of, Harold Holland. He suggested that she might invest £1,250 upon a mortgage given by a borrower who was in fact his friend. Relying upon his statement as to the sufficiency of the security, she agreed to the loan without an inspection or a valuation of the security, which she said she had no time to make or obtain. Someone else recommended her to invest in debentures of a trading or financial company. She consulted Harold Holland upon the wisdom of doing so, and, after discussion with him, instructed him to take up £800 of debentures for her. Her will and the power of attorney were executed on 19th March 1928, when her securities were handed over to her for deposit with her bank. Between 24th March and 3rd April 1928, Turner, on the firm's instructions, sold £2,000 of Commonwealth stock for her, and the firm applied the proceeds to the loan upon the mortgage suggested by Harold Holland, and to the loan upon the debentures. None of the transactions thus far appears to have been improvident, but, two or three weeks before her departure, a proposal was made to the appellant, her acceptance of which resulted in the loss of £4,000. Turner came to her and suggested that she should sell South Australian inscribed stock of which she held about £5,000, and invest in shares of a company called "S.A. Trust Investment Company Limited," which, he said, would return ten per cent and would be a better investment than mortgages. The company was in fact one

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of a number in the formation of which Harold Holland had been active. It had been registered by the firm. One of Turner's clerks was secretary, and its books, so far as it needed any, were kept in his office. It had issued no share capital. It had no banking account. It did no business, except that a sum of £100 was lent in its name to one man and another sum of uncertain amount to another man. For the steps which the appellant took before she assented to the proposal that she should invest in this company's shares, we have little but her own evidence. The respondents have been absolved of all knowledge of the transaction. Neither Harold Holland nor Turner was called as a witness. Turner was sent to gaol for other misdeeds, and at the trial the whereabouts of Harold Holland, with whom the respondents dissolved partnership on 1st July 1931, were not made clear. Upon some subjects the appellant's testimony was not considered reliable by *Murray* C.J., who tried the action. But he does not appear to have doubted the substantial correctness of her account of this matter, and indeed no sufficient reason exists for doubting it. She says that she told Turner that she would not act without her solicitor's advice. She consulted Harold Holland, who said that he knew about the company: that they did the solicitors' work for it. She said that she had told Turner she would see him, and she asked him what he thought of it; what he would do in her place. Harold Holland told her he would himself invest in the shares if he had the money. Turner came over to the office and they talked over the matter together. She also had a discussion with Turner in his office. Eventually it was decided that she should dispose of £4,000 of her inscribed stock, retaining £1,000 as security for her letter of credit which her bank would issue for the purpose of her tour. Harold Holland drew out a document consisting of two parts. The first was a receipt, which Turner signed, for warrants and signed transfers in respect of £4,000 stock, stating that it was to be accepted by him "at the market rates for all above par and for any under par to be accepted at par for fully paid shares in S.A. Trust Investment Company Limited." The second part was an application to that company for fully paid ordinary shares, a request to register her as a shareholder, and an

agreement to be bound by the memorandum and articles of association. The number and value of the shares were left blank. This application was signed by the appellant, who also signed forms of transfer. The latter was witnessed by a clerk of Turner, and may have been signed in his office. All the instruments bear the date 3rd April 1928. Turner sold the stock, but how he applied the money has not been satisfactorily explained. Turner's clerk, who was secretary of the company, threw no light upon it, except to say that the company did not receive any part of it, and that, although Turner's books recorded the receipt of the £4,000 worth of inscribed stock from the appellant on 3rd April 1928, there was no record of the proceeds or where they went. It appeared that on 3rd April 1928 a cheque for £1,354 19s. 8d. was placed to the credit of Harold Holland's bank account, which had been overdrawn to that amount. It further appeared that two cheques of Turner for £500 each were paid to another bank account of Harold Holland on 16th April and 1st May 1928 respectively. *Murray* C.J. was of opinion that these three sums represented part of the value of the appellant's inscribed stock. If so, the first sum must have been paid in by Turner in advance of the actual receipt of the proceeds of the stock. But whether Harold Holland did, or did not, receive any moneys representing the appellant's stock, he could not fail to know that the appellant was exposing her money to great hazard. Indeed, it may safely be inferred that he did know that she was actually defrauded, whatever hope he may have entertained of her ultimate rehabilitation.

She sailed for England on 14th April and arrived back in Adelaide on 10th November 1928. A fortnight later she left for Sydney, whence she returned on 18th January 1929. During her absence abroad, Turner and Harold Holland had registered another company. It was called "United Trust Investment & Deposit Company Limited." It was formed with the object of acquiring the financial business of Turner, who was to be its managing director, the assets of S.A. Trust Investment Co. Ltd., which were to be paid for partly in cash and partly in shares, and some other interests. After the appellant's return to Adelaide, Harold Holland told her that this company would take over that in which she had agreed to invest,

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and persuaded her that it would be a much better concern. She signed a transfer to her by S.A. Trust Investment Co. Ltd. of 4,000 shares in the new company, which issued to her scrip for 4,000 shares fully paid. These shares are valueless, and the appellant's loss in respect of £4,000 of her inscribed stock is complete.

The remaining £1,000 of inscribed stock, which had served to support her letter of credit, again became available upon her return. It was not long before she was induced to part with it. Among the companies which Harold Holland had been active in forming was one called "Secretariat Limited." He was chairman of a company with which an organization of farmers was associated, and he registered Secretariat Ltd. in order to do the taxation and other secretarial work, which this organization or its members might be thought to require. He had enlisted the aid of an accountant named Cox, who was to do the clerical work of this and some other of his companies. At his instance, Cox laid a proposal before the appellant that she should lend £1,000 to Secretariat Ltd. for twelve months at eight per cent, with an option to take 1,000 fully paid £1 shares in the company in lieu of repayment. She did not agree until she had seen Harold Holland. She asked him whether he thought the investment proposed by Cox a good one and the interest a good rate: whether it was a good safe investment. He said it was and recommended it. He explained that Secretariat Ltd. would acquire an eighth interest in a company called "Australian Wattle Plantations Limited," and expatiated upon that enterprise. She agreed to the proposal, and a document embodying the terms was drawn out and signed by Cox. It was dated 19th February 1929. The stock was sold, and with the proceeds the company opened a bank account, a thing which so far it had had no occasion to do. Out of the account £700 was paid to Harold Holland, for payment, it was said, to Australian Wattle Plantations Ltd. The money went through his private account and was not paid to that company, although possibly he may have paid it to another of his companies. Of the balance, £120 appears to have been lent through Harold Holland to the last-mentioned company, £63 7s. was used to pay for its prospectus, and £100 was lent to another company, independent and reputable, which repaid the loan. But the appellant's £1,000

has not been returned to her and cannot be recovered. *Murray* C.J. inferred that Harold Holland appropriated the sums of £700 and £120 to his own use. But even if this were not so, he knew perfectly well that Secretariat Ltd. was quite unable to repay the loan from any existing resources, and that the investment was utterly unsound.

Three or four months after this transaction, Harold Holland made a direct and open request to her to embark upon a speculation. He and his wife had rendered themselves liable for mortgage moneys secured over land which they had contracted to exchange for other land also subject to a mortgage. The mortgagees of each piece of land were pressing for payment; in the case of the latter piece foreclosure proceedings had been commenced, but, in the case of the former, the mortgagees had issued a writ against him and his wife for £3,148. The plan which he formed for relieving himself of this embarrassment was that Secretariat Ltd. should raise the money to pay off the mortgage and acquire the land, that which he was to transfer under the exchange if the exchange should go off, as seemed likely, but if not, then that to be transferred to him under the exchange. The difficulty was for Secretariat Ltd. to find the money. To overcome this difficulty he laid before the appellant a proposal that she, Cox and himself should become sole proprietors in equal shares of that company and should be its directors; that she should guarantee its overdraft up to £7,000; and that he should guarantee her against half any loss she might suffer. The overdraft was to be used in acquiring assets for Australian Wattle Plantations Ltd., whose bonds Secretariat Ltd. would sell. He pressed this proposal upon her and she agreed to it. An overdraft supported by her securities and guarantee was granted up to £5,000. This sum was drawn and applied in discharging the mortgage moneys for which Harold Holland and his wife were sued. Nearly all the balance was paid to him. The exchange transaction went off, but Secretariat Ltd. did not obtain the land for which in substance it had paid the moneys raised by overdraft. Instead it obtained other land for which that again was exchanged. The land it so obtained was subject to encumbrance, and the net value of the equity of redemption is so small as to be unimportant. The appellant under her

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guarantee has been compelled to pay £5,475 19s. 5d. for which she has nothing to show, at any rate, nothing of greater value than £475.

Murray C.J. decided on two grounds that neither of the respondents was liable for the loss suffered by the appellant as a result of her reliance upon their partner, Harold Holland, in these three transactions. The first ground was that no wrongful act which he committed was within the scope of his actual or apparent authority as a partner. The second ground was that, in any case, the appellant had dealt with Harold Holland to the exclusion of other members of the partnership and as an individual, not as a partner acting on behalf of the firm.

At the trial the appellant sought to show that she and her mother had been accustomed to depend upon T. C. Holland and his various firms to a peculiar or unusual extent and degree for the conduct of her own and her mother's affairs, and particularly for directing and advising them in the investment and disposition of their moneys. She attempted to establish that the firm undertook special or enlarged duties, in her case, at any rate, and that the execution of them had been committed to Harold Holland. The nature was not defined exactly of the extension said thus to have occurred of the ordinary scope of the business of a firm of solicitors. But no sufficient foundation was made for imputing to the respondents' firm the assumption of any special or peculiar functions not belonging to the business of a solicitor. The difficulty of the case really lies in determining what is within the course of a solicitor's business. By associating themselves in a partnership with Harold Holland, the respondents made themselves responsible, as principals are for an agent, for all his acts done in the course of his authority as a partner. That authority was to do on behalf of the firm all things that it is part of the business of a solicitor to do. If, in assuming to do what is within the course of that business, he is guilty of a wrongful act or default, his partners are responsible, notwithstanding that it is done fraudulently and for his own benefit (*Lloyd* v. *Grace, Smith & Co.* (1)). But, to make his co-partners answerable, it is not enough that a partner utilises information obtained in the course of his duties, or relies upon the personal confidence won or influence obtained in doing the firm's

(1) (1912) A.C. 716.

business. Something actually done in the course of his duties must be the occasion of the wrongful act. The claim for the loss from the transaction in which the appellant guaranteed the overdraft of Secretariat Ltd. is disposed of by this consideration. Harold Holland, doubtless, used the influence which, as a member of the firm, he had gained over the appellant and abused the confidence which she reposed in him in that capacity, in order to obtain her suretyship. But he did nothing which was part of his business to do. She applied to him for no advice, she did not instruct him to act on her behalf. She and he entered into a business engagement as contracting parties, not as solicitor and client. He was a volunteer acting on his own behalf. He did not act upon request or on her behalf. The wrongful act or default was committed outside the course of his actual and apparent authority as a partner. But in the first transaction, when Turner proposed the investment in the shares of S.A. Trust Investment Co. Ltd., she repaired to Harold Holland for advice upon the proposal. She requested his services. Again, when Cox proposed the loan to Secretariat Ltd., she consulted him and sought his advice and opinion. She went to him, because he was her solicitor; he was her solicitor because he was a member of the firm. In judging whether he acted in the course of his authority, the part taken by him in the transactions must be regarded as upon the surface it appeared to her. She did not know that Cox had been sent to her by Harold Holland and that the proposal was his. She did not know that Turner and he were associates, if not confederates, in the transaction which appeared to originate with Turner. All that she knew was that Turner had been entrusted by Holland & Whitington with the valuation of part of the estate to which she succeeded on her mother's death, that he had thus become acquainted with her, that he had submitted two mortgage securities which, after obtaining his valuation, Harold Holland had approved, and that now he wished her to invest in shares in a company of which she had no knowledge. She had made an investment upon mortgage upon the faith of his assertion as to the sufficiency of the security, and she had obtained his advice and approval in taking up the commercial debentures. In these circumstances it cannot be denied that the natural thing for her to

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do was to seek explanation and advice from Harold Holland. But the question remains whether it was within the province of a solicitor to respond to her request for that advice or assistance. Solicitors possess, in virtue of their profession, no special skill in the valuation of real property, of shares, or of marketable securities. It is not in the course of their professional duty to advise upon such matters (*Scholes* v. *Brook* (1)). In the unreported case of *Cox* v. *Snowball and Kaufmann* (1929), *Irvine* C.J., speaking for the Full Court of Victoria (*Irvine* C.J., *Mann* and *Macfarlan* JJ.), said that although it is, of course, well known that clients are in fact often guided by the advice of their solicitors as experienced men of affairs, the conclusion that such advice is part of a solicitor's business as such, or that it is the business of a given firm, can only be based on evidence. An appeal to this Court from the relevant part of the judgment was dismissed by *Knox* C.J., *Isaacs* and *Rich* JJ., simply upon the ground that there was no evidence on which the jury could find a verdict for the plaintiff. The judgment of this Court did not deal with the statement of *Irvine* C.J. But it is one thing to say that a valuation or expression of his own judgment upon a commercial or financial question is not within the scope of a solicitor's duties, and another to say that when he is consulted upon the wisdom of investing in the shares of a company of which his client knows nothing, it is outside his province as a solicitor to inquire into the matter and to furnish his client with the information and assistance which the facts upon the register will give, to point out what inquiries may be made, and, if required, to undertake them or invoke the aid of those who will. *Kekewich* J. considered that it was part of a solicitor's ordinary duty to assume the responsibility of ascertaining whether mortgages were such that money might be safely invested upon them, that is, of taking all reasonable precautions to see that the money was safely invested (*Dooby* v. *Watson* (2)). *Cresswell* J. directed a jury that an attorney retained to lay out money on good security must exercise a reasonable degree of skill and proper diligence and attention in order to discover the solvency of the party to whom the money was lent (*Aldis* v. *Gardner* (3)). In reference to the

(1) (1891) 63 L.T. 837 ; 64 L.T. 674 ; 7 T.L.R. 214.
(2) (1888) 39 Ch. D. 178, at p. 183.
(3) (1844) 1 Car. & K. 564 ; 174 E.R. 939.

duty of a solicitor in respect of the investment of trust moneys, *Stirling* J. said :—"It is, therefore, the duty of a solicitor not so much himself to form, or express an opinion on the value of the property offered to a trustee as security for an advance (though the law does not prohibit him from so doing, if he thinks fit), as to see that the trustee has before him the proper materials for forming a judgment of his own. He ought, therefore, to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor, and not appearing by the valuations, which may affect the value of the property, and that his attention is directed to any rules laid down by the Courts for the guidance of trustees with reference to such matters" (*Blyth* v. *Fladgate* (1)). (See, too, per *Stirling* J. in *Stokes* v. *Prance* (2).) In a case where a young woman, who had borrowed money to re-lend to a brother-in-law, who in fact was in pecuniary difficulties, claimed damages from her solicitor, *Cockburn* C.J. directed a jury that "if" he "was indeed retained to advise her on the lending of her money, then it was his duty to warn her as to the position of the borrower, which he was aware of, and as to the expediency of security. He knew all the circumstances, and ought certainly in that case, to have advised her on the matter" (*Langdon* v. *Godfrey* (3)).

On the whole circumstances of this case, the advice and guidance which the appellant sought from Harold Holland in relation to the proposal of Turner, and the proposal of Cox, involved work which it was in the course of a solicitor's business to perform. The request imposed upon him the duty of explaining to her (if he had been unacquainted with the facts) what might be done if she wished to ascertain whether the company was not unsubstantial, whether its business was not speculative or chimerical, whether its promoters were not men without standing, and of informing her what further inquiries might be made into the business and profit-earning capacity of the concern, and of warning her of the danger of blind investment. The fact that, from motives antagonistic to her interests, he took the course of concealing his actual knowledge of the menace to

(1) (1891) 1 Ch. 337, at p. 360.
(2) (1898) 1 Ch. 212, at p. 223.
(3) (1865) 4 F. & F. 445, at p. 450; 176 E.R. 639, at p. 641.

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which her money was exposed, is not enough to take the duty he assumed to perform outside the scope of his authority, although it amounted to a malfeasance in its pretended performance. Unless, therefore, the second ground relied upon by the learned Chief Justice is sound, the respondents should be held liable for the loss suffered by the appellant as a result of the first two transactions. To sustain this ground, it is not enough that the appellant dealt with Harold Holland as the particular member of the firm by whom she desired her business to be transacted, or from whom she sought advice. It must appear that she dealt with him as an individual to the exclusion of the firm, as a distinct and separate agent. (See per *James* V.C. in *Earl of Dundonald* v. *Masterman* (1).) To make this out the respondents rely upon the suggestion that she knew or ought to have known that T. C. Holland would have disapproved of her investing in such concerns, upon statements which she admitted Harold Holland made that his father was old-fashioned and these were more modern ways of money-making, and upon her reticence about the transactions in her communications with the members of the staff of the firm. These considerations do not appear, however, to be enough to support the extreme inference that she did not consult him as the member of the firm upon whom she relied, but to the exclusion of the firm. Her previous investments, her will, her power of attorney, the collection of her income and all the detailed arrangements involved in her departure, were all transacted by " the firm " under his superintendence. Her desire for new or more profitable investments expressed to him as her solicitor was the occasion of the disputed transactions. Turner came to her first under the direction of the firm. The proceeds of the bonds and stock were to be accounted for by him not to her direct, and therefore to the firm's " office." There is no reason for separating the character in which she spoke to him about these.

Unfortunate as is the result for his innocent partners, the loss ensuing from their co-partner's culpability in respect of those two transactions ought to be borne by them, and not by the equally innocent client of the firm.

The appeal should be allowed with costs.

(1) (1869) L.R. 7 Eq., at pp. 515, 516.

Judgment in the action for the amount of the proceeds of the £5,000 of South Australian inscribed stock with interest should be entered for the appellant with costs, excepting the costs occasioned by the claim in respect of loss arising from the appellant's guarantee, and the costs occasioned by the appellant's attempt to prove a special relationship with the respondents and the firms of which T. C. Holland was a member, or to prove the conduct by such firms of a special course of business. The respondents' costs of such matters should be taxed and set off against the costs payable by them.

STARKE J. This is an appeal brought by Mrs. Polkinghorne against a judgment of the Supreme Court of South Australia, delivered by the learned Chief Justice of that Court in August of 1933, in so far as it dismissed her action or claim against Thomas Corin Holland and Louis Arnold Whitington. The facts have been exhaustively stated in that judgment, and I shall do no more than recapitulate those I consider relevant for the determination of this appeal.

Mrs. Polkinghorne was the only child of J. M. Dent, who died in 1911. She first married one Wallace, who died in 1910, and in 1932 she married Arthur John Polkinghorne. Thomas Corin Holland was a solicitor. About the time of Dent's death, he was practising in Adelaide, in partnership with another solicitor. Upon that solicitor's death in 1921, Holland and his son George Harold, also a solicitor, entered into partnership with other solicitors. This partnership was dissolved in 1927, and in the same year Holland and his son entered into partnership with the respondent Louis Arnold Whitington, also a solicitor. They practised as solicitors in Adelaide under the style or firm of " Holland and Whitington " until 1931, when the partnership was dissolved. The agreement of partnership was oral; no deed of partnership was ever executed. The Chief Justice said :—" No mention was made of what the business of the firm should be, but the parties were and had been for many years practising as solicitors, and they agreed simply to enter into partnership. The only reasonable conclusion to be drawn from such meagre data is that the business of the firm was to be the proper business of solicitors." T. C. Holland had been a friend of

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Dent, the father of Mrs. Polkinghorne, and had acted as his solicitor for many years. Shortly before his death, Dent asked Holland to look after his wife and daughter in the same way as he had looked after him, and Holland promised to do so. After Dent's death, the firm of which T. C. Holland was for the time being a member acted as solicitors for the widow and Mrs. Polkinghorne, collected the interest on some of their investments, and prepared a few mortgages for them, but otherwise the widow and Mrs. Polkinghorne managed their own affairs without consulting or relying upon the advice of T. C. Holland or his firm as to their investments. On cross-examination Mrs. Polkinghorne admitted that T. C. Holland had always advised her to keep her moneys in Government loans and on mortgages, and not to put it into companies. Mrs. Polkinghorne's mother, who for some nine years had been an invalid, died in October 1927. She left a will, leaving all her property to her husband, who had predeceased her. Some question arose as to proving this will, and as to succession duties. Mrs. Polkinghorne saw T. C. Holland about the matter, but it was ultimately taken over by George Harold Holland and dealt with by him. From that time forth, George Harold Holland attended to the business transacted by Mrs. Polkinghorne with the firm of Holland and Whitington. The evidence suggests that G. H. Holland embarked upon the promotion and registration of companies which had singularly little capital. Among those with which he was closely connected were the S.A. Trust Investment Co. Ltd., United Trust Investment and Deposit Co. Ltd., Secretariat Ltd., and Australian Wattle Plantations Ltd. Richard W. E. Turner was in close association with G. H. Holland, and he was interested in the investment companies already mentioned. He had also been employed as a valuer by G. H. Holland in connection with Dent's estate and the assessment of succession duty thereon; his valuation disclosed liquid assets of a value of about £12,800. Both G. H. Holland and Turner were thus thoroughly acquainted with Mrs. Polkinghorne's position and the assets at her disposal. Early in 1928 Turner saw Mrs. Polkinghorne, and said he had a good investment in shares of a company which would bring her in ten per cent, but she declined to do anything without consulting her solicitor. She saw G. H. Holland, who said

that he knew the company which Turner had mentioned to her, and that if he had any spare money he would go in for it; he added: "We do the solicitor's work for that firm." The company was the S.A. Trust Investment Co. Ltd. The result was that Mrs. Polkinghorne handed to Turner inscribed stock warrants, and signed transfers of the stock, to the value of £4,000, and the following document, in the handwriting of G. H. Holland, was signed by Turner and herself and was retained by Holland:—"Received from Mrs. F. W. E. Wallace S.A. Inscribed Stock and signed Transfers Warrant No. 6581—£300—1928—15/12/1928—5½%; Warrant No. 1960—£700—1/11/1929—5½%; Warrant No. 1378—£3,000—1/8/1929—5½%; to be accepted by me at the market rates for all above par and for any under par to be accepted at par for fully paid shares in S.A. Trust Investment Company Limited. 3rd April 1928. [Sgd.] R. W. E. Turner. S.A. Trust Investment Company Limited.—I hereby apply for fully paid ordinary shares in the company and hand you herewith S.A. inscribed stock to that value of £ and I request you to register me as a shareholder in the company and agree to be bound by the memorandum and articles of association thereof. 3rd April 1928. [Sgd.] F. M. E. Wallace."

The stock was sold or collected by Turner, but no part thereof was paid to the company, nor were any shares issued to Mrs. Polkinghorne. In cross-examination Mrs. Polkinghorne said that she knew that T. C. Holland would not have approved of this investment, but that G. H. Holland told her that his father was old-fashioned, and that the investment was a more modern way of making money. Soon after this transaction, Mrs. Polkinghorne left for England. But before doing so, she made her will, which G. H. Holland prepared, and executed a document, also prepared by G. H. Holland, authorizing T. C. Holland and G. H. Holland jointly and severally to act as her attorneys in the State during her absence. On her return from England she saw G. H. Holland, and asked him how the company was getting on, and he told her that things had not gone quite as well as they had expected, but she need not worry, as they would improve. Later, she saw both G. H. Holland and Turner, who told her that the depression had come and things were not too good, but would come alright. Early in 1929, G. H. Holland told

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her that a company called the United Trust Investment and Deposit Co. Ltd. was to take over the S.A. Trust Investment Co. Ltd., and that it would be a much better proposition. The objects of this company were to acquire the business of Turner, the lease of his office, and an interest in a syndicate called the Standard Banking Syndicate, also the assets of the S.A. Trust Investment Co. Ltd. Turner was its managing director. The consideration to the S.A. Trust Investment Co. Ltd. for the sale of its business was £7,321, to be paid in cash, but the company was to subscribe for at least 4,500 shares, to be paid in full on allotment. In March 1929 G. H. Holland produced to Mrs. Polkinghorne for signature the following document, which she executed :—

"Transfer.

"I, S.A. Trust Investment Company Limited of Adelaide (hereinafter called the transferor) for valuable consideration paid to me by Florance Mary Eleanor Wallace care of Holland & Whitington, Pirie Street, Adelaide (hereinafter called the transferee) do hereby transfer to the transferee four thousand (4,000) shares numbered 5281 to 9280 inc. standing in my name in the books of the United Trust Investment & Deposit Company Limited, to hold unto the transferee her executors, administrators and assigns, subject to the several conditions upon which I the transferor holds the same at the time of the execution hereof. And I the transferee hereby agrees to take the said shares subject to the same conditions. As witness our hands this 1st day of March 1929.

Approved at directors' meeting held 20/3/29.

Signed by the transferor in the presence of :— A. F. Allchin.

S.A. Trust Investment Company Limited.
R. W. E. Turner, Transferor,
L.S. Governing Director.

Signed by the transferee in the presence of :— A. F. Allchin. Widow

Florance Wallace,
Transferee.

Care Holland & Whitington, Pirie St., Adelaide

Occupation of Transferee.

Address

"

A scrip certificate was issued to Mrs. Polkinghorne for 4,000 £1 shares in the United Trust Investment & Deposit Co. Ltd. paid up to 4s. per share, but the certificate was marked "Fully Paid," and this marking is authenticated by the signature of the secretary of the company. No payment in cash or in kind seems to have been made to the United Trust Investment and Deposit Co. Ltd. by Mrs. Polkinghorne or the S.A. Trust Investment Co. or by anyone. In 1931, the United Trust Investment and Deposit Co. Ltd. was wound up compulsorily. "It is clear," said the learned Chief Justice, "that the plaintiff's £4,000 has been totally lost." Turner and G. H. Holland co-operated to defraud her; substantially they appropriated the money to their own use. This is the first of the transactions the subject matter of this action.

The second is in connection with a loan of £1,000 to Secretariat Ltd. The objects of this company were to carry on the business of capitalists, financiers, concessionaries and merchants, and to undertake, carry on and execute all kinds of financial, commercial, trading and other operations. One Cox was secretary and also a director, G. H. Holland was another director, and his firm were solicitors to the company. No more than five £1 shares were ever issued by the company. Early in 1929 Cox, at the suggestion of G. H. Holland, saw Mrs. Polkinghorne, and applied to her for a loan of £1,000 at 8 per cent interest. Mrs. Polkinghorne consulted G. H. Holland, who said he thought the investment a good and safe one and the interest a good rate. By means of the loan Secretariat Ltd. would acquire, he said, an eighth interest in the Australian Wattle Plantations Ltd. Mrs. Polkinghorne handed over stock warrants and transfers thereof signed by her to the value of £1,000, and a document in the following terms was given in acknowledgment thereof:— "A. Bertram Cox, A.F.I.A., A.A.T.S.—19th February 1929.— Received from Mrs. F. M. E. Wallace £1,000 S.A. inscribed stock, taken at the market price at this date, the company agreeing to repay the amount of such market price on the 1st day of March 1930 and until such repayment to pay interest quarterly thereon at the rate of eight pounds per centum per annum. And Mrs. Wallace is to have the right whilst any of the said amount shall remain unpaid to purchase at par from the company shares in the company

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to the amount of the market price of the above inscribed stock or any lesser amount. Dated 19th February 1929. Secretariat Limited. [Sgd.] A. Bertram Cox, Director." The stock was sold, and the proceeds placed to the credit of the company, but the bulk of the money found its way back to G. H. Holland, who, the learned Judge concludes, misappropriated it. The assets of Secretariat Ltd. are of little or no value, and the £1,000 lent to it by Mrs. Polkinghorne is lost.

The third transaction the subject of this action is also connected with Secretariat Ltd. About the middle of 1929, G. H. Holland suggested to Mrs. Polkinghorne that she put some money into the Secretariat business. A wattle plantation was particularly mentioned. She said she had no spare money to invest, but G. H. Holland said he did not want her to put up cash, but security, in the form of a guarantee to the bank. Ultimately, a memorandum of agreement was prepared by Holland, and executed by Holland, Cox, and Mrs. Polkinghorne. It was as follows :—" Memorandum of agreement made this 6th day of June 1929 between Florance Mary Eleanor Wallace, Alfred Bertram Cox, and George Harold Holland whereby it is agreed as follows : 1. Mrs. Wallace shall put up security necessary to enable Secretariat Limited to borrow seven thousand pounds from its bank. 2. A. B. Cox shall be actively engaged in furthering the business of Secretariat Limited. 3. G. H. Holland shall pay to Mrs. Wallace one half of any loss she may suffer on account of the said sum of seven thousand pounds. 4. One hundred and fifty fully paid shares in Secretariat Limited shall be issued to each of the parties hereto. 5. No other shareholders shall be permitted in Secretariat Limited than the present without the consent of parties hereto. 6th June 1929. G. H. Holland, A. Bertram Cox, F. M. E. Wallace." Mrs. Polkinghorne became a director of the company. She guaranteed the Secretariat account up to £5,000, and interest thereon, with the Bank of New South Wales, and backed her guarantee with securities. The company drew on its account, and became indebted to the bank in a sum of £5,475 in round figures. A substantial part of the sum so drawn was applied in discharging obligations of G. H. Holland and his wife, or in payment to G. H. Holland himself. In 1930, the bank called upon Mrs. Polkinghorne

under her guarantee to pay this sum of £5,475, which she did. She has nothing to show for her money, but a mortgage over an allotment of land in Port Adelaide valued at £475. The assets of Secretariat Ltd. are, as already mentioned, of little or no value. Mrs. Polkinghorne will thus lose at least £5,000, which she paid to the bank under her guarantee of Secretariat Ltd.

T. C. Holland and L. A. Whitington knew nothing of these transactions, and were not personally connected with any of them. Indeed, they all sprang from the cupidity of Mrs. Polkinghorne, which led her to enter upon them despite the warning of T. C. Holland. But she seeks to make the respondents liable for the acts of G. H. Holland, on the principle that if an act is done by one partner on behalf of the firm, and done in carrying on the partnership business in the ordinary way, the firm is liable, although in point of fact the act was not authorized by the other partners (*Lindley* on *Partnership*, 7th ed. (1905), p. 146; *Partnership Act* 1891 (S.A.), sec. 10). But what is the ordinary course of a solicitor's business?

It is no part of the duty of solicitors, in ordinary cases, to act as valuers, or as advisers upon investments. If an investment has been resolved upon, the solicitor's ordinary professional duty is to satisfy himself of the validity or legal sufficiency of the security. Solicitors may undertake further duties, such as that of advising upon investments, and if they do, then they must perform those duties with due care and skill. But one partner cannot undertake such further duties except within the limits set by his authority as a partner, " and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits save on his own responsibility." " The liability of his co-partners can only be established on the ground of agency " (*Hagart and Burn-Murdoch* v. *Inland Revenue Commissioners* (1); *Minter* v. *Priest* (2); *Rae* v. *Meek* (3); *Cleland* v. *Brownlie, Watson & Beckett* (4); *Lindley* on *Partnership*, 7th ed. (1905), p. 147). Solicitors, however, who act for clients, are morally and in my opinion legally, bound to inform a client of any facts within their knowledge affecting the sufficiency and character of an

(1) (1929) A.C. 386.
(2) (1930) A.C. 558, at p. 568.
(3) (1888) 15 R. (Ct. of Sess.), Lord *Shand* at pp. 1051, 1052, and in the House of Lords (1889) 14 App. Cas. 558.
(4) (1892) 20 R. (Ct. of Sess.) 152, at p. 164.

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investment or security upon which the client is entering. This is part of the ordinary course of a solicitor's business. Thus Lord *Shand* observed in *Rae* v. *Meek* (1) that in the case of trustees he would be prepared to hold that if a law agent were consulted about an investment which trustees proposed to make and which—being in the knowledge of the terms of the trust deed—he had reason to think would be beyond the powers committed to them, he would be bound to warn them of this. *Stirling* J. in *Blyth* v. *Fladgate* (2), put the matter more explicitly :—" It is, therefore, the duty of a solicitor not so much himself to form, or express an opinion on the value of the property offered to a trustee as security for an advance (though the law does not prohibit him from so doing, if he thinks fit), as to see that the trustee has before him the proper materials for forming a judgment of his own. He ought, therefore, to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor, and not appearing by the valuations, which may affect the value of the property, and that his attention is directed to any rules laid down by the Courts for the guidance of trustees with reference to such matters."

Evidence was led in the present case suggesting that it was in the ordinary course of a solicitor's business in South Australia to act as an adviser upon investments. It shows that some firms of solicitors acted as advisers upon investments when requested to do so, but there is nothing in the evidence displacing the finding of the learned Chief Justice that the business of Holland and Whitington was confined to the proper business of solicitors, and had never extended to that of advisers upon investments. But, though that firm were not advisers upon investments and had never undertaken that responsibility, it was within the ordinary course of their business as solicitors, and part of the duty which they owed to a client, to inform him of any facts within the knowledge of the member of the firm consulted, affecting the value or sufficiency of any property or security in which the client was investing. Every professional witness called in the case recognized the moral obligation of so doing,

(1) (1888) 15 R. (Ct. of Sess.), at p. 1051.
(2) (1891) 1 Ch., at p. 360.

and the observations of Lord *Shand* and *Stirling* J. establish it as a legal obligation in cases where the client is a trustee. The duty may be more onerous in the case of trustees, owing to the character of their position, but it is founded upon the confidence reposed by a client in his solicitor, and upon the relationship of solicitor and client. G. H. Holland neglected, in the most flagrant manner, this duty to Mrs. Polkinghorne, who was a client of the firm; at least, the firm was employed by her to investigate and complete title to her investments in the S.A. Trust Investment Co. Ltd., the United Trust Investment and Deposit Co. Ltd., and Secretariat Ltd. G. H. Holland was deeply interested, if not involved, in these companies, and knew well the hazardous and unsound position of each of them; but he said nothing, and actively misrepresented the position to Mrs. Polkinghorne, and encouraged her to go on with her dangerous speculation in these concerns. It was his duty to inform and warn Mrs. Polkinghorne of the facts within his knowledge and of the danger of the situation, and it was a duty which he owed to her in the ordinary course of the business of the firm of solicitors of which he was a member. In the breach of this duty, G. H. Holland has involved his firm and all the members of his firm—the innocent partners as well as himself—in legal responsibility. It may be that G. H. Holland set out to and did defraud Mrs. Polkinghorne, but all the partners are liable for the fraud of one of their number, acting in the ordinary course of the business of the firm, though the fraud was committed for his own benefit and not for the benefit of the firm (*Lloyd* v. *Grace, Smith and Co.* (1)).

The result, in my opinion, is that T. C. Holland and L. A. Whitington must be held responsible for the loss of £4,000 sustained by Mrs. Polkinghorne in respect of her investments in the S.A. Trust Investment Co. Ltd. and the United Investment and Deposit Co. Ltd., and for the loss of £1,000 in respect of the moneys advanced by her to Secretariat Ltd.

There remains for consideration the responsibility of T. C. Holland and L. A. Whitington for the loss sustained by Mrs. Polkinghorne in connection with her guarantee of Secretariat Ltd. to the Bank of New South Wales. In this case G. H. Holland approached Mrs.

(1) (1912) A.C. 716.

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Polkinghorne and said that he wanted her to put some money into the company. But she had no spare money, and G. H. Holland then persuaded her to guarantee the company's account to the bank. Such a transaction is, I think, outside the ordinary course of a solicitor's business, and the facts do not justify the conclusion that G. H. Holland had any authority as a partner to engage in such transactions, or to approach clients of the firm for that purpose. Moreover, Mrs. Polkinghorne entered into the agreement of 6th June 1929 between Holland, Cox, and herself, which is clearly beyond the limits of any authority given to or residing in G. H. Holland as a member of the firm of Holland and Whitington. In my opinion T. C. Holland and L. A. Whitington are not responsible to Mrs. Polkinghorne for the loss she has sustained in connection with her guarantee to the Bank of New South Wales.

The appeal should be allowed as to the sums of £4,000 and £1,000 already mentioned, and interest thereon, but otherwise dismissed.

Appeal allowed with costs. Discharge so much of the judgment of the Supreme Court as ordered that the plaintiff's claim against the defendants, Thomas Corin Holland and Louis Arnold Whitington, be dismissed out of that Court, and adjudged and ordered that the plaintiff recover nothing against the said defendants and that the said defendants recover against the plaintiff their costs of action. Order that in lieu thereof as of the day of such judgment, viz., 8th August 1933, *judgment be entered in the Supreme Court for the plaintiff against the said defendants for the sum of* £4,000 *and interest thereon at* 5 *per cent per annum from 3rd April* 1928 *being parcel of the sum of* £5,069 11*s.* 9*d. by such judgment awarded to the plaintiff against the defendants R. W. E. Turner and G. H. Holland, and* £1,000 *and interest thereon unpaid except* £40 *at* 5 *per cent per annum from 19th February* 1929 *being parcel of the sum of* £6,658 3*s. by such judgment awarded to the plaintiff against the defendant G. H. Holland, which sums of* £4,000 *and* £1,000 *together with such interest amount in all to* £6,252

17*s.* 6*d.* *Order that the judgment entered in accordance with this order be without prejudice to the plaintiff's right to recover any further sum as damages in respect of any payment she might be required to pay as shareholder or contributory of United Trust Investment & Deposit Co. Ltd. in respect of the shares mentioned in Exhibit P*11. *Reserve liberty to apply to the Supreme Court.*

Plaintiff-appellant to recover from the defendants-respondents the costs of the action other than the costs incurred by the plaintiff by reason of her claim in respect of loss arising from the transaction in the course of which she guaranteed the overdraft at the Bank of New South Wales of Secretariat Ltd., which transaction is mentioned in pars. 19 *and* 20 *(inter alia) of the statement of claim, and other than the costs incurred by the plaintiff-appellant by reason of her attempt to establish at the trial that a special relationship existed between the plaintiff and the firm of Holland & Whitington and firms of which the defendant T. C. Holland was previously a member and that such firms conducted a special course of business. Order that the costs occasioned by the defendants-respondents in respect of the plaintiff-appellant's said claim and of her said attempt to establish such matters be taxed and set off against the costs payable to her by them.*

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

Solicitors for the respondents, *Baker, McEwin, Ligertwood & Millhouse.*

H. D. W.