[HIGH COURT OF AUSTRALIA.]

JOHNSON . . . . . APPELLANT;
DEFENDANT,

AND

BUTTRESS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Gift—Fiduciary relationship—Undue influence—Presumption—Rebuttal.

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SYDNEY, *April* 8, 16; *Aug.* 17.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised. To rebut the presumption it must be affirmatively shown by the donee that the gift was the pure, voluntary, well-understood act of the mind of the donor.

A man sixty-seven years of age, who was wholly illiterate, of low intelligence and quite devoid of any capacity for, or experience in, business affairs, was habitually dependent on others for advice and assistance. After the death of his wife he transferred to a relative of his wife a piece of land on which his home was erected and which was substantially his only asset. The transfer was executed in the office of the donee's solicitor, and was expressed to be for natural love and affection. The donor did not have any independent advice concerning the transfer, but it was shown that he was appreciative of kindnesses shown from time to time by the donee to his wife and to himself. At the suit of the donor's son the transfer was set aside as having been made under the undue influence of the donee.

Held that an appeal from this decision must be dismissed:—

By *Latham* C.J., *Dixon*, *Evatt* and *McTiernan* JJ., because a special relationship of influence was shown by the circumstances to have arisen between the donee and the donor and the presumption of undue influence which arose from the relationship had not been rebutted.

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By *Starke* J., because the evidence justified the finding of the primary judge that the transfer was the result, not of the full and deliberate judgment of the donor, but of unfair and undue pressure on the part of the donee.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by John Spencer Raymond Buttress, as administrator *cum testamento annexo* of the will of his deceased father, John Spencer Buttress, and as the assignee of one Agnes Emily Hart, the sole executrix and sole beneficiary under the will, against Mary Eliza Johnson. The plaintiff sought to set aside a document signed by the deceased on 24th April 1931, whereby he transferred or purported to transfer to the defendant a piece of land at Maroubra near Sydney, on which was erected a cottage in which the deceased had lived for many years. The plaintiff claimed that the document should be set aside because it was executed under the undue influence of the defendant, and he based this claim on the circumstances surrounding and immediately preceding the transfer, on the mental condition of the transferor, the deceased, and, to some extent, on the events which followed the execution of the transfer as throwing light on the execution itself.

The suit was heard by *Nicholas* J.

A great number of witnesses was called and there was a conflict of evidence on some critical points in the case. Certain facts, as follows, were, however, undisputed:—At the date of the transfer the deceased was a man of about sixty-seven years of age and was wholly illiterate; the defendant was not a blood relation of the deceased, but was a relative of his wife whom the defendant and her family addressed as "aunt"; the deceased had one child only, a son (the plaintiff), and living near him at Maroubra were a sister and a niece (the sole beneficiary referred to above), both in poor circumstances, and another sister lived in Melbourne; the wife of the deceased died in December 1930; shortly after her death the deceased paid a visit to his sister in Melbourne and on his return he made a will in favour of that sister; within a few weeks after making that will, namely, on 18th March 1931, the deceased made a will in favour of the defendant; on

24th April 1931 the deceased transferred his cottage at Maroubra to the defendant; this cottage, with the exception of a life policy for about £50 and some furniture, was the only property the deceased possessed; the transfer and the will were executed at the office of the defendant's solicitor; the deceased's previous legal work, consisting mainly of the drafting of wills, had been carried out at the office of another solicitor, and the deceased had no independent advice at the time of the making of the transfer; the deceased had stepsons, one of whom had lived with him for some time, and he at one time made a will in favour of the son of this stepson; some time before the death of his wife the deceased made a will in favour of his son; the defendant had a husband, a son and two daughters, who knew the deceased and his wife for some twenty years before the death of the wife; in September 1931 the deceased left Sydney and thereafter, with occasional visits to Sydney, lived on some land owned by the defendant at Mount Victoria.

There was a conflict of evidence as to the mental condition of the deceased at or about the time of the execution of the transfer, and also as to whether he lived at the defendant's house at any time between the dates of his return from Melbourne and of the execution of the transfer. The witnesses for the plaintiff, whom his Honour accepted as witnesses of truth, gave evidence to the effect that the mental equipment of the deceased had been for some time past less than normal and had deteriorated after the death of his wife. They said generally that he was slow of understanding, that he could not keep his mind on one topic for any length of time, and that he was liable to break out into fits of excitement and rage in which he was excessively noisy. The members of the defendant's family agreed in saying that the deceased was a man of average understanding and of quick decision, and they were corroborated by other witnesses, most of whom had met the deceased on a few occasions only.

Nicholas J. found that the deceased was a man of less than average intelligence; that he had little or no experience of or capacity for business; that when he executed the transfer he did not understand that he had parted with the land and cottage

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irrevocably. His Honour held that, upon the evidence, the transfer could not stand and must be set aside. In stating his reasons for that decision his Honour stated he thought that at the date of the transfer the defendant was in a fiduciary relation to the deceased, who placed trust and confidence in her, and that in and about the making of the transfer the deceased was not placed in such a position that the gift was his spontaneous act under circumstances which enabled him to exercise an independent will and which would justify his Honour in holding that the gift was the free exercise of his will. The transaction must be set aside because it was made under the influence of the defendant and because that influence was undue. His Honour inferred that the influence of the defendant was undue from the improvident nature of the transfer itself, from the circumstances that the defendant took the deceased to her own solicitor, that independent advice was not suggested or obtained, and that the deceased parted with the whole of his property; and his Honour regarded the facts that after the execution of the transfer the defendant accounted for the rents and the deceased was accustomed to speak of the property as his own as affirmative evidence that the deceased did not exercise a free and unfettered judgment in the making of the transfer.

From that decision the defendant appealed to the High Court.

Further facts appear in the judgments hereunder.

Barwick, for the appellant. Some of the findings of fact made by the judge of first instance are not supported by the evidence, e.g., that the appellant suggested the transfer of the land, that the deceased did not understand that he was parting with the property irrevocably and that he relied exclusively on the advice of the appellant in business affairs. Much of the evidence was inadmissible. Some of the findings are based entirely upon the appellant's evidence. There was not any fiduciary relationship between the deceased and the appellant, and therefore the onus should not have been upon her of establishing that the transaction was purely voluntary. His Honour was wrong in finding that the deceased " was a man of less than average intelligence." In any event that finding does not carry the matter any further, because it does not amount to a finding

of imbecility or weakness, or subservience of mind, or that he was incapable of managing all or some of his affairs. His Honour apparently overlooked the fact that there was an unquestionable cause for gratitude from the deceased towards the appellant. In all the circumstances the transaction was not of an improvident nature. A reasonable person would not draw the inference that the deceased had been unduly influenced by the appellant to enter into the transaction. His Honour has not found undue influence; the finding was that there had been a fiduciary relationship out of which the presumption flowed. Nor is there any evidence from which an inference of undue influence can be drawn. The transaction was a firm bargain between the deceased and the appellant (*Harrison* v. *Guest* (1)). Prima facie a voluntary gift is good. Here there is neither any evidence nor any finding of misrepresentation or actual fraud inducing the transfer, nor is there any recognized fiduciary relationship. In those circumstances the respondent must prove either undue influence in fact, or that there was such a relationship in fact at the date of the execution of the transfer as placed the mind of the deceased under the dominion of that of the appellant to such an extent that in dealing with his property the deceased would be likely to act at her behest and under her influence (*Allcard* v. *Skinner* (2)).

[DIXON J. referred to *Haskew* v. *Equity Trustees, Executors and Agency Co. Ltd.* (3).]

In *Watkins* v. *Combes* (4) there was a specific finding on the facts that the donee had in fact acquired a dominance over the deceased.

[DIXON J. The last statement in the quotations from *Morley* v. *Loughnan* (5) made by *Isaacs* J. in *Spong* v. *Spong* (6) has been disputed by this court.]

The whole transaction can be quite readily and naturally accounted for; it is capable of a simple and natural explanation (*Hunter* v. *Atkins* (7)). The proper inference is not one of fraud.

(1) (1855) 6 DeG.M. & G. 424; 43 E.R. 1298; (1860) 8 H.L.C. 481; 11 E.R. 517.
(2) (1887) 36 Ch. D. 145.
(3) (1919) 27 C.L.R. 231; (1918) V.L.R. 571.
(4) (1922) 30 C.L.R. 180.
(5) (1893) 1 Ch. 736.
(6) (1914) 18 C.L.R. 544, at p. 551.
(7) (1834) 3 My. & K. 113, at p. 142; 40 E.R. 43, at pp. 54, 55.

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Wallace (with him *Woodhill*), for the respondent. The finding that at the date of the transfer the appellant was in a fiduciary relation to the deceased who placed trust and confidence in her, and that the transfer was not, in the circumstances, his free and independent act, is in accord with the evidence. There is no conclusive definition of what constitutes fiduciary relationship (*Spong* v. *Spong* (1); *White and Tudor's Leading Cases in Equity*, 9th ed. (1928), vol. I., p. 226; *Smith* v. *Kay* (2)). Where in respect to a transaction a person places confidence and trust in another, a fiduciary relationship is established from which the presumption flows (*Spong* v. *Spong* (3)). The appellant and the deceased were not on equal terms: the latter, an illiterate man, looked to the former for assistance (*Kerr* on *Fraud and Mistake*, 6th ed. (1929), p. 197). The transaction was not a free and independent exercise by the deceased of his will (*Inche Noriah* v. *Shaik Allie Bin Omar* (4)). Here there was not at any time an agreement between the appellant and the deceased similar to the agreement in *Harrison* v. *Guest* (5). From the appellant's own evidence the inference can be drawn that there was an influence, and an undue influence. The presumption which arose has not been rebutted by the appellant (*Inche Noriah* v. *Shaik Allie Bin Omar* (6)). It is not necessary for the respondent to establish complete dominion and management on the part of the appellant. The transaction, from the point of view of the deceased, was a most improvident one (*Dent* v. *Bennett* (7); *Clark* v. *Malpas* (8); *Baker* v. *Monk* (9); *Fry* v. *Lane* (10); *Watkins* v. *Combes* (11)). The inability of the deceased to manage his own affairs, and his almost complete reliance upon other people is clearly shown by the evidence. In the circumstances, he could not have understood that the transfer was irrevocable.

(1) (1914) 18 C.L.R., at p. 552.
(2) (1859) 7 H.L.C. 750, at p. 779; 11 E.R. 299, at pp. 310, 311.
(3) (1914) 18 C.L.R., at pp. 549, 551.
(4) (1929) A.C. 127.
(5) (1855) 6 DeG.M. & G. 424; 43 E.R. 1298; (1860) 8 H.L.C. 481; 11 E.R. 517.
(6) (1929) A.C., at p. 135.
(7) (1839) 4 My. & Cr. 269; 41 E.R. 105.
(8) (1862) 4 DeG.F. & J. 401; 45 E.R. 1238.
(9) (1864) 4 DeG.J. & S. 388; 46 E.R. 968.
(10) (1888) 40 Ch. D. 312.
(11) (1922) 30 C.L.R. 180.

Barwick, in reply. The absence of independent advice as a factor in assisting the Court upon a question of undue influence was discussed in *MacKenzie* v. *Royal Bank of Canada* (1).

Cur. adv. vult.

Aug. 17.

The following written judgments were delivered :—

LATHAM C.J. The jurisdiction of a court of equity to set aside gifts *inter vivos* which have been procured by undue influence is exercised where undue influence is proved as a fact, or where, undue influence being presumed from the relations existing between the parties, the presumption has not been rebutted. Where certain special relations exist undue influence is presumed in the case of such gifts. These relations include those of parent and child, guardian and ward, trustee and *cestui que trust*, solicitor and client, physician and patient and cases of religious influence. The relations mentioned, however, do not constitute an exhaustive list of the cases in which undue influence will be presumed from personal relations. Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised (*Dent* v. *Bennett* (2) ; see also *Smith* v. *Kay* (3)).

Where such a relation of what may be called, from one point of view, dominion, and from another point of view, dependence, exists, the age and condition of the donor are irrelevant so far as raising the presumption of undue influence is concerned. It must be affirmatively shown by the donee that the gift was (to use the words of *Eldon* L.C. in the leading case of *Huguenin* v. *Baseley* (4)) " the pure, voluntary, well-understood act of the mind " of the donor.

It may not be necessary in all cases to show that the donor received competent independent advice (*Inche Noriah* v. *Shaik Allie Bin Omar* (5) and *Haskew* v. *Equity Trustees, Executors and*

(1) (1934) A.C. 468, at pp. 474, 475.
(2) (1839) 4 My. & Cr. 269 ; 41 E.R. 105.
(3) (1859) 7 H.L.C. 750 ; 11 E.R. 299.
(4) (1807) 14 Ves. 273 ; 33 E.R. 526 ; White and Tudor's Leading Cases in Equity, 7th ed. (1897), vol. I., at p. 247.
(5) (1929) A.C., at p. 135.

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Agency Co. Ltd. (1)); the law as to this matter is still a subject of discussion (*Lancashire Loans, Ltd.* v. *Black* (2)). But evidence that such advice has been given is one means, and the most obvious means, of helping to establish that the gift was the result of the free exercise of independent will; and the absence of such advice, even if not sufficient in itself to invalidate the transaction, would plainly be a most important factor in determining whether the gift was in fact the result of a free and genuine exercise of the will of the donor.

In the case of an illiterate or weak-minded person it will be more difficult for the donee to discharge the prescribed onus of proof than in other cases. The burden will be still heavier upon the donee where the donor has given him all or practically all of his property (*Price* v. *Price* (3); *Inche Noriah* v. *Shaik Allie Bin Omar* (4)).

In this case the plaintiff is the administrator *c.t.a.* of John Spencer Buttress, who died at Sydney on 1st May 1934 at the age of 69 years. He seeks to set aside a transfer made on 24th April 1931 whereby the deceased transferred to the defendant land owned by him upon which a cottage was erected. The transfer was made by way of gift. The deceased was unable to read or write. He was dependent for his living upon the rent which he received from the cottage. The deceased had practically no other assets save some small quantity of furniture and personal effects and a life policy for about £50.

The wife of the deceased died in December 1930 and the plaintiff was his only child. He had a sister, Mrs. Wise, and a niece, Mrs. Hart, living near him at Maroubra—both of them in poor circumstances—and another sister, Mrs. Job, was living in Melbourne. Deceased had quarrelled with his son and was unstable in his relations with other persons. He had very little business to transact and the only evidence of what may be called business activities is to be found in the evidence relating to the transfer in question, to several wills, and to the eviction of a tenant who was occupying the cottage and the finding of a new tenant therefor. As the deceased was completely illiterate, he was necessarily dependent upon other persons to some extent in relation to almost any business matter.

(1) (1919) 27 C.L.R. 231.
(2) (1934) 1 K.B. 380, at pp. 404, 420.
(3) (1852) 1 DeG.M. & G. 308; 42 E.R. 571.
(4) (1929) A.C. 127.

He made a will in favour of a stepson named Amsen in January 1931 and almost immediately afterwards, in February 1931, following upon a visit to his sister in Melbourne, he made a will in her favour. In March 1931 he made a will in favour of the defendant, with whom he had been on terms of friendship for a long time. The transfer which it is sought to set aside was made on 24th April 1931. On 24th November 1932 he made a will in favour of his niece Mrs. Hart. No adequate reason (indeed, no reason at all other than recent proximity) is suggested for these variations of testamentary intention, and the testamentary enterprises of the testator certainly support the view that he was definitely unstable in intention and that he was at least liable to change his views without obvious reason when he was contemplating the disposition of his property.

It cannot be denied that the absolute transfer to the defendant of the property which was his sole source of income was highly improvident. It is true that the defendant and her daughter gave evidence that it was understood that the defendant would support him for the rest of his life, but the learned judge has found that there was no contract to that effect, and, if the defendant had died the day after the transfer, the deceased would have been left practically without any property and without any enforceable rights to ensure his support.

The transfer was prepared by the managing clerk of defendant's solicitor. The defendant accompanied the deceased to the solicitor's office, and was present at the interview with the managing clerk. The learned judge accepted the evidence of the managing clerk, which showed that the deceased understood at the time that he was dealing with his property and that he was parting with his property. But nothing was said to direct his attention to the fact that he was in effect denuding himself of the whole of his property without obtaining any equivalent, and of course it was not suggested that the advice which he received in the office of the defendant's solicitor was independent advice.

The learned judge heard a great deal of evidence with respect to the mental capacity of the deceased and found that he was a man of less than average intelligence and that he had little or no experience of or capacity for business. His Honour refers to the evidence of

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four specified witnesses as "witnesses of truth." Each of these witnesses gave evidence which went beyond the proposition in which the learned judge expressed his finding. Their evidence, if accepted in full, would show that the deceased was highly excitable, very stupid and mentally unstable. There is, beyond doubt, ample evidence to support the finding which the learned judge actually made. It is true, as urged on behalf of the appellant, that the finding is not one of imbecility, but the finding is sufficient to increase to some extent the weight of the burden of proof which rests upon the defendant if a relevant relation of dependence between the deceased and the defendant is proved to have existed at the relevant time.

The learned judge also found that the deceased for some time prior to the execution of the transfer had been accustomed to lean on someone for advice in business matters, first on his step-son Amsen and thereafter on the defendant. The defendant had been kind to his wife and kind also to the deceased, and there was ample reason for gratitude to her. It was urged that the feelings of friendship and gratitude which the deceased in fact and very properly entertained for the defendant were enough to explain and to support the transfer of the property to her. But the learned judge found upon a view of the whole of the evidence that the deceased did not understand that he had parted with his property irrevocably. This finding was based in part upon subsequent behaviour and statements of the deceased. As to the evidence of subsequent behaviour, see *Dent* v. *Bennett* (1). Evidence of subsequent statements was not, in my opinion, admissible as evidence of the alleged fact that he did not understand the full effect of what he had done. But the evidence was admissible, subject to obvious comments as to the weight to be attached to it, for the purpose of showing the degree of mental capacity which he possessed.

The learned judge found that a relation of trust and confidence obtained between the deceased and the defendant of such a character that he relied upon her for advice on any matter of business. His Honour did not believe that the original suggestion of a transfer came from the defendant but that it was suggested (obviously by

(1) (1839) 4 My. & Cr., at pp. 275, 276; 41 E.R., at pp. 107, 108.

the defendant) in order to make "the gift previously made by the will irrevocable." This inference was, in my opinion, fairly open on the evidence. This being so, I agree with the learned judge that, in order to maintain the transaction, it was necessary for the defendant to show affirmatively that the deceased knew what he was doing when he made the transfer, in the sense that he understood its effect and significance in relation to himself, and further to show that the transfer was the result of his own will. I apply to this case the words of Sir *John Leach* V.C. in *Griffiths* v. *Robins* (1), quoted by the Chief Justice Sir *Samuel Griffith* in *Spong* v. *Spong* (2), altering only the pronouns to make the words more plainly applicable to the present case and omitting the words referring to independent advice which later authorities (already mentioned) have shown to be unnecessary as part of the rule of law:—"He (the donor) had entire trust and confidence in her (the person who induced him to execute the deed of gift); and it may be stated that she was the person upon whose kindness and assistance he depended. She stood, therefore, in a relation to him which so much exposed him to her influence that she can maintain no deed of gift from him unless she can establish that it was the result of his own free will."

Thus, in my opinion, the findings of the learned judge, supported as they are by admissible evidence, show that though it has not been affirmatively proved against the defendant that she exercised undue influence, yet she has not displaced the presumption of undue influence which arises in the circumstances of this case. Thus the transaction cannot stand by reason of the general policy of the law directed to preventing the possible abuse of relations of trust and confidence.

In my opinion, the appeal should be dismissed.

STARKE J. The respondent is the administrator *c.t.a.* of his father John Spencer Buttress deceased. And as such administrator, and as an assignee of an interest under his father's will, he instituted a suit in the Supreme Court of New South Wales, praying, in substance, that a voluntary transfer of certain lands at Maroubra from his father to the appellant should be set aside on the ground

(1) (1818) 3 Madd. 191, at p. 192; 56 E.R. 480.
(2) (1914) 18 C.L.R., at p. 549.

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that it was procured by the exercise of undue influence on the part of the appellant. *Nicholas* J., who heard the suit, declared that the transfer was obtained by the undue influence of the appellant, and should be set aside, and decreed accordingly. The learned judge found that " at the date of the transfer the " appellant " was in a fiduciary relation to Buttress, who placed trust and confidence in her, and that in and about the making of the transfer, Buttress was not placed in such a position that the gift was his spontaneous act under circumstances which enabled him to exercise an independent will and which would justify " the learned judge " in holding that the gift was the result of a free exercise of his will." But the learned judge also said that he inferred " that the influence of the " appellant " was undue, from the improvident nature of the transfer itself, from the circumstances that the " appellant " took Buttress to her own solicitor, that independent advice was not suggested or obtained, and that Buttress parted with the whole of his property, and " that he regarded " the facts that after the execution of the transfer the " appellant " used to account for the rents and Buttress to speak of the property as his own, as affirmative evidence that Buttress did not exercise a free and unfettered judgment in making the transfer." Buttress fell, according to the learned judge, within the class of " protected " persons in respect of whom there is a presumption of undue influence (*Allcard* v. *Skinner* (1), per *Cotton* L.J.; *Inche Noriah* v. *Shaik Allie Bin Omar* (2); *MacKenzie* v. *Royal Bank of Canada* (3)). But he was also satisfied, as I follow his judgment, that the transfer was the result of influence expressly used by the appellant for the purpose (See *Allcard* v. *Skinner* (1); *Inche Noriah* v. *Shaik Allie Bin Omar* (4)). The decree of the learned judge cannot be disturbed if the evidence supports either of these findings.

The facts are fully discussed by the learned judge, but the following outline is sufficient for my purpose. The deceased, at the time of the transfer to the appellant, was a man of about sixty-seven years of age. He was wholly illiterate, not very intelligent, and of little or no experience or capacity in business. He had but one

(1) (1887) 36 Ch. D., at p. 171.
(2) (1929) A.C. 127.
(3) (1934) A.C., at p. 475.
(4) (1887) 36 Ch. D. 145.

child, the respondent, and I think two of his sisters and a niece were also alive, with whom he was apparently on good terms. His wife had died some few months before the transfer, and he was much affected by her death. The appellant, who was a daughter of a step-sister of the deceased's wife, had treated the wife with some kindness during the illness which preceded her death, and the deceased was grateful. The deceased had a little property at Maroubra, which was worth about £700 or £800, and returned him about £1 a week in rent. Substantially this was all the property the deceased had, and his only means of livelihood. About March 1931 he either went to live with the appellant, or else went almost daily to her home. Almost immediately, the appellant took the deceased to her solicitor, and a will was made in her favour. It was only in February 1931 that he had made a will in favour of his sister, Mrs. Job. In New South Wales there is a *Testator's Family Maintenance and Guardianship of Infants Act* 1916, which enables the Supreme Court to order provision for children out of the estate of a testator who disposes of his property in such a manner that his children are left without adequate provision; one may suspect, but cannot be sure, that this Act influenced the next step. At all events, we know that when the will was executed, the deceased, according to the appellant, asked whether his son could upset it, and was told he could not; however, in April 1931, the deceased, according to the appellant, suddenly resolved that he would "deed" his place over to her and that he did not wish to leave anything to his son or any of the others. He was again taken to her solicitor, and the property was absolutely transferred to the appellant, without any consideration, and without any enforceable provision being made for his declining years. The improvidence of the transaction is upon its face. But the solicitor, or rather his clerk, gave the deceased no advice upon the subject. The transfer was not disclosed to the son or any of the members of the deceased's family. About the end of September 1931 the deceased was relegated to the mountains to "a bit of property" the appellant had there. He lived there alone, in a tent, dug out the rocks and cleared the property, and never before did he so "appreciate the beauties of nature." But he did all this for nothing, and for the

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benefit of the appellant. Strangely enough, he always insisted upon the rents of the Maroubra property, which he had transferred to the appellant, being transmitted to him; and ultimately, in November 1932, without communicating the fact to the appellant, he left all his real and personal estate to his niece Agnes Emily Hart absolutely.

Now I feel some difficulty in assenting to the learned judge's view that the facts disclose a peculiar relationship of trust and confidence between the deceased and the appellant which brings him within the "protected class" in respect of which there is a presumption of undue influence. But the age and capacity of the deceased, the improvident and unfair nature of the transaction, the want of proper advice, the retention of the rents of the property transferred, the various testamentary dispositions, and the other circumstances mentioned, afford evidence from which the learned judge might justly infer that the transfer was not the result of the free and deliberate judgment of the deceased, but the result of unfair and undue pressure on the part of the appellant. The learned judge, it must be remembered, saw and heard the appellant and her family, and did not accept their version of either the facts and circumstances surrounding the making of the will of the deceased in favour of the appellant, or of those surrounding the transfer to her. His judgment in the case must necessarily have been influenced by the credibility and demeanour of these witnesses, and this court is wholly deprived of that advantage.

In my judgment, the appeal fails and ought to be dismissed.

DIXON J. We are called upon in this appeal to decide whether *Nicholas* J. rightly made a decree setting aside a memorandum of transfer as obtained by undue influence. The land transferred is an allotment in Maroubra on which a cottage stands. The transfer was made on 24th April 1931 by a man called John Spencer Buttress, who died three years later without having impeached its validity. The suit is maintained by his only child, a son named John Spencer Raymond Buttress, who has obtained letters of administration with the will annexed of his father's estate.

The transferee, who is the defendant in the suit and appeals from the decree, is a married woman named Mary Elizabeth Johnson.

Her husband conducted a photographer's studio in Sydney and she occupied herself with the responsibilities of a family of three grown-up children, a son and two daughters, and of a home at Rose Bay, where they all dwelt together. She had known the deceased Buttress for more than twenty years. Their acquaintance arose from his marriage. His wife, a widow with three sons, had a half or stepsister who was Mrs. Johnson's aunt. This connection does not seem close but it proved sufficient to put the parties on the footing of relations. Buttress worked as a labourer at quarrying or the like, and the modes of life of the two families were not the same.

After an interval in which Buttress seems to have lived in Melbourne, he and his wife established themselves on a small block of land at Maroubra, the purchase of which was completed in 1912. A cottage was built upon it and there they resided until Mrs. Buttress died on 9th December 1930. It is the land now in dispute.

Notwithstanding the possibility of social distinctions, Mrs. Johnson appears to have kept up a familiarity with Mrs. Buttress, whom she called aunt. In the illness from which the latter died, Mrs. Johnson paid her frequent visits and interested herself in her condition sufficiently to obtain for her skilled medical advice. At her death Buttress found himself in possession of the house and furniture but with no other property, except a life policy for a very small amount. He was sixty-six years of age and had ceased to work some months before, when the neighbouring quarries where he was employed had suspended operations. His son had recently married. One stepson lived in another suburb ; the others resided out of New South Wales. He had two sisters, both elderly. One, named Mrs. Job, lived in Melbourne. The other, named Mrs. Wise, lived close by in Maroubra with her daughter, Mrs. Hart.

He was a man peculiarly dependent upon others. He was quite illiterate ; he could not even write his own name. Whether because his hands were stiffened with labour, or through disuse of other faculties, he was quite unable to do anything but the roughest work. He was excitable and would give rein to his emotions, whether of anger, grief, or dejection. He was easily moved to

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gesticulation and shouting. He had a tendency to loud and disconnected talk. Many people found him trying and he seems to have been regarded as an oddity. He was called by a nickname, "Rocker," which he carried with him when, at a later time, he left Maroubra. He seems to have depended a great deal upon the help and support of his wife, particularly in reference to the disabilities arising from his illiteracy. For a short time after his wife's death, his son and daughter-in-law lived with him in his cottage. But this arrangement broke down before Christmas. He fell into a passion with his daughter-in-law and she and his son departed. He had at one stage depended to some extent upon his stepson and he now turned to him. But he had a wife who refused to comply with the old man's request that they should move to his cottage before the Christmas holidays. The proposal lapsed, but a reason for not pursuing it was given by Buttress in a remark that Mrs. Johnson, whom he called "Ide," thought that he would not get on with his stepson.

At this stage, Buttress made a will; perhaps it was before he gave up the idea that his stepson should establish his family at his cottage. His stepson accompanied him to a solicitor and a will was executed in favour of the stepson's child. It was not the first will Buttress had made. By that which it superseded he appears to have constituted his own son his sole beneficiary. But his son had long since ceased to please him, and many expressions that he should get nothing are ascribed to Buttress. He lived on for a little at the cottage, obtaining his meals at his sister's home, close at hand. Mrs. Wise advised him to visit his other sister, Mrs. Job, in Melbourne. This he agreed to do. He found some tenants for his cottage, a mother with a grown-up son. He told them he might return in twelve months, or in two years, but he arranged with them that, when he did so, he should have a room to himself in his cottage. They went into possession about 10th January, and he left for Melbourne. But he was back again at the end of the month. He occupied the room he had reserved and resumed the practice of going to his sister for his meals, for which he made a weekly payment. Although his residence with his sister in Melbourne had been short, it had affected his testamentary

views. With the help of his niece, Mrs. Hart, on 5th February 1931 he went again to his solicitor, who had prepared his will a month or so before, and made another will. This time he left his property to Mrs. Job for life and after her death to Mrs. Hart.

For some weeks Buttress continued to sleep in his cottage and dine with his sister and niece, but, before the end of March, serious differences arose between him and his tenants. How much he saw of the Johnsons between his return from Melbourne and his troubles with his tenants appears uncertain. Before he left for Melbourne, Mrs. Johnson had paid him two or three visits and he had called at her husband's studio. She says that she did not see him again until about the middle of March. He went then to the studio and on to her house. He remained a couple of hours, she says, during which he told her how he was living. Her evidence is that, shortly afterwards, he paid her another visit. This time he announced that he wished to make a will in her favour, leaving all his property to her. He spoke of his desire that his son should get none of it. A few days later, on 18th March 1931, he came again. He reiterated his desire to make a will in her favour and they went off together to her solicitor. His managing clerk took instructions from them together and prepared a will in favour of Mrs. Johnson appointing her executrix. According to the evidence, Buttress stated to the clerk that he wished to leave his property to Mrs. Johnson and said that he supposed he must leave his son a shilling, otherwise he could break the will. The clerk told him that he need not, and said that his son could only apply under the *Testator's Family Maintenance and Guardianship of Infants Act.* After asking one or two questions, the clerk added that there was not much chance of that. Buttress betrayed ignorance of what an executor was, but it was not until the will was made out that Mrs. Johnson explained that he could not read or write. He then executed the will as a marksman. The will was left at the solicitor's office, and a copy which was supplied was handed over to Mrs. Johnson at the instance of Buttress.

It is not disputed that from this time the frequency of his visits to the Johnsons' home increased. Towards the end of March Mrs. Johnson came over to Maroubra to see the cottage, which,

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after inspection, she seems to have pronounced dirty and ill-kept. Shortly afterwards, he asked his tenants to leave. He sent some of the furniture over to Mrs. Johnson's house. Some violent altercations with his tenants ensued, in the course of which the police were invoked on both sides. Mr. Johnson with his son and perhaps his wife enlisted their aid on behalf of Buttress, but there is a dispute as to the stage in the course of events when this took place. In consequence of the hostilities, he went, about 10th April, to sleep at Mrs. Wise's house. He appears also, at or about the same time, to have sought the help of his stepson in evicting his tenants. To him he made a confused statement about seeing a magistrate whose directions he could not grasp and about Mr. Johnson's wanting a power of attorney to proceed on his behalf.

His behaviour at his sister's house grew so excited and emotional that she and her daughter were much distressed. After three days he left them, as they understood, to live with Mrs. Johnson. For some time he paid them only irregular visits.

Mrs. Wise and Mrs. Hart are definite that he did not resume taking his meals with them until his tenants went, which took place on 12th June 1931. They are positive that he was living with the Johnsons. This belief is supported by other evidence. But the Johnsons are all equally definite that he did not come to live with them before the end of August 1931. He did often go to their house at Rose Bay early in the morning and stay to lunch, and *Nicholas* J. found in this an explanation of the apparent inconsistency of the evidence. He said :—" Buttress was an early riser and was not in employment at the time, and it may be that although he slept at Maroubra in the one room which he had retained for himself, he would spend the greater part of his time, at all events after 13th April, at Mrs. Johnson's house, and that his relatives did telephone to that address in the belief that he was living there."

On 24th April 1931 Buttress made the transfer now in question. On that day he and Mrs. Johnson presented themselves at her solicitors a second time. According to the account given by the managing clerk, whom they again saw, she said that Buttress wished to transfer the property to her. In answer to a question, Buttress confirmed the statement. He produced the certificate of

title and said that that was the property. To a question whether he was selling it, he replied, no, that he was giving it, that he wanted the witness to deed it over to her. The witness asked if he understood that Mrs. Johnson was not paying anything for it and could he tell him if there was any reason for it. Buttress answered that he wanted her to have it; she was very good to his wife and he was very fond of her. The transfer was then prepared. In it Mrs. Johnson was described as Buttress' niece and the consideration was given as natural love and affection. The nature of the consideration was stated to Buttress. A question as to the value of the property produced the reply from Mrs. Johnson that it was worth £700 to £800, a value which seems to have been overestimated. He was taken away to a justice of the peace, before whom he made his mark. After the transfer was executed, Mrs. Johnson went off to the municipal offices to give a notice of change of ownership. The transfer was not lodged for registration until 18th December 1931, but the delay does not seem to have been deliberate. Stamp duty and fees were found by the Johnsons.

The reason for this transaction can be given now by no one except the Johnsons. It is not stated by any of them in a satisfactory manner. Mrs. Johnson says that Buttress paid three or four visits only between the date of making his will and the date of the transfer. At one of them he said he wished to give her the property and leave everything to her, nothing to anybody else. She remonstrated, but, at a subsequent visit, he returned to the subject and she took him in to her solicitor. She said that after the transfer she gave the rents to Buttress, because she knew he could not live on nothing and she had to give him something; she provided him also with necessaries.

Her husband's evidence was that one morning, at about 9 o'clock, Buttress came to their house and said that he had been unable to sleep and had been thinking over the thing and thought that Mrs. Johnson was the rightful person to have the property. The witness at first said that this was some days before the transfer was actually made, and, later, that it was the same day. Her son said that he remembered his father and mother talking about the transfer of the property for a day or two beforehand.

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Miss Johnson, who gave evidence, contributed a more intelligible account of the transaction. She said that, on his first visit after his return from Melbourne, Buttress complained that he was tired of everything and wanted to get away from everyone, that he had not had a fair spin and that he would pitch his tent in the bush. She suggested that he should go up to Mount Victoria and occupy a piece of land there which she held in her name. Some few days before the visit to the solicitor, Buttress talked to her mother and herself of transferring the land at Maroubra, and it was discussed in the family in a general way. In the first instance, her mother refused to have it; then, as she knew from Buttress, he and her mother decided that the latter would look after him for the rest of his life and give him a home and give him everything he wanted, and give him the rent of the cottage.

A week after the date of the transfer, Mr. Johnson took Buttress to the same solicitor for the purpose of obtaining the eviction of the tenants of the cottage. Notice to quit was given on 4th May and proceedings in the police court were begun on 12th May and heard on 20th May. In all this the Johnsons took the leading part. When the place was vacated on 12th June Mr. Johnson and his son, with the assistance of Buttress, repaired and renovated the premises, work upon which Mrs. Johnson expended a substantial sum. Then after a time a fresh tenant was found. Buttress, it is agreed, did after this come to reside with the Johnsons. He lived with them, they say, for about three weeks, and, about 24th September 1931, he went to live on the land at Mount Victoria. Arrangements were made that the proprietor of a neighbouring guest house should receive and read his letters and send such answers or messages as might be required. He was to get supplies of milk and the like from the same source. At first he lived in a tent, but afterwards a shack was built. He worked hard in clearing and improving the land. Clothes and some necessaries were sent up to him and also the net amount of the rent from the cottage. The Johnsons went up regularly and Buttress came down to the city occasionally. He lived thus for some three years. He died in hospital on 21st May 1934. During his residence at Mount Victoria some antagonism to the Johnsons appears to have developed in him. He spoke to

various people about them and said he knew they wanted his property at Maroubra, but they would not get it. To the Johnsons themselves apparently and to some others, he continued to profess that he was under obligations to Mrs. Johnson. On his way to hospital, he called on his niece, Mrs. Hart, and put into her hands a document. This was a will which he had made at Mount Victoria on 24th November 1932. Under it Mrs. Hart was the sole beneficiary and executrix. She afterwards visited him at the hospital, and remonstrated with him for disinheriting his son. He replied that he trusted her to do what was best for his son and to look after him. The genuineness of this will was contested by Mrs. Johnson. Mrs. Hart made over all her interest under it to John Spencer Raymond Buttress, the now plaintiff, who successfully propounded it. The transfer to Mrs. Johnson and the will in her favour were not made known to any of Buttress' relatives until after his death. But the Johnsons say that he himself forbade any disclosure.

This narrative of facts includes no circumstances or combination of circumstances positively inconsistent with the existence in Buttress when he transferred the land of a full understanding of the consequences of his act and a judgment freely exercised in favour of the object of his bounty, whether based on gratitude, esteem, or confidence in her future help, protection and solicitude, or on a mixture of these motives. *Nicholas* J. did not believe that the transaction originated in the old man's mind, or that he understood its final character. His Honour thought that the purpose with which the transaction had been suggested to him was to render the gift already made by will irrevocable and to prevent an application under the *Testator's Family Maintenance and Guardianship of Infants Act*. No doubt these are reasonable explanations of the conduct of the parties and arise upon the facts themselves. But it is difficult to find enough in the evidence to establish them as affirmative conclusions. If the circumstances of the transaction are such as to throw upon the donee the burden of justifying it as an independent act resolved upon by a free and understanding mind, the burden could not be discharged unless such a view of the origin and purpose of the transfer were negatived by satisfactory evidence. But, on the other hand, if positive proof is required that

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the transfer was procured by the improper exercise of an actual ascendancy or domination gained over the donee, and the case cannot rest on presumption, then, in my opinion, that requirement is not satisfied.

The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee. This burden is imposed upon one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other. A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry. The facts which must be proved in order to satisfy the court that the donor was freed from influence are, perhaps, not always the same in these different relationships, for the influence which grows out of them varies in kind and degree. But while in these and perhaps one or two other relationships their very nature imports influence, the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes

towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position. He may be taken to possess a peculiar knowledge not only of the disposition itself but of the circumstances which should affect its validity; he has chosen to accept a benefit which may well proceed from an abuse of the authority conceded to him, or the confidence reposed in him; and the relations between him and the donor are so close as to make it difficult to disentangle the inducements which led to the transaction. These considerations combine with reasons of policy to supply a firm foundation for the presumption against a voluntary disposition in his favour. But, except in the well-recognized relations of influence, the circumstances relied upon to establish an antecedent relation between the parties of such a nature as to necessitate a justification of the transaction will be almost certain to cast upon it at least some measure of suspicion that active circumvention has been practised. This often will be so even when the case falls within the list of established relations of influence. Because of the presence of circumstances which might be regarded as presumptive proof of express influence, cases outside the list but nevertheless importing a special relationship of influence sometimes are treated as if they were not governed by the presumption but depended on an inference of fact. *Scrutton* L.J. has remarked on the inclination of common law judges "to rely more on individual proof than on general presumption, while considering the nature of the relationship and the presence of independent advice as important, though not essential, matters to be considered on the question whether the transaction in question can be supported" (*Lancashire Loans, Ltd.* v. *Black* (1)). Further, when the transaction is not one of gift but of purchase or other

(1) (1934) 1 K.B., at p. 404.

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contract, the matters affecting its validity are necessarily somewhat different. Adequacy of consideration becomes a material question. Instead of inquiring how the subordinate party came to confer a benefit, the court examines the propriety of what wears the appearance of a business dealing. These differences form an additional cause why cases which really illustrate the effect of a special relation of influence in raising a presumption of invalidity are often taken to decide that express influence which is undue should be inferred from the circumstances.

The decision of the present appeal depends, I think, altogether on the question whether, before the transfer, Mrs. Johnson, or possibly the Johnson family collectively, stood in a special relation of influence to Buttress. The suggested relation has not its exact counterpart in any decided case. But this is of little weight. The rule must not be narrowed; the risk must not be run of fettering the exercise of the jurisdiction by an enumeration of persons against whom it should be exercised; the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another (per Lord *Cottenham* L.C. in *Dent* v. *Bennett* (1), including a citation from the argument of Sir *Samuel Romilly* in *Huguenin* v. *Baseley* (2)). " It is sufficient for the application of the principle, if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker " (per Lord *Selborne* L.C., *Earl of Aylesford* v. *Morris* (3)). Moreover, not very distant analogies to the relationship suggested in the present case are to be found in *Griffiths* v. *Robins* (4), *Harvey* v. *Mount* (5), *Longmate* v. *Ledger* (6), *Clark* v. *Malpas* (7) and *Baker* v. *Monk* (8).

The first and most important consideration affecting the question is the standard of intelligence, the equipment and character of Buttress. No doubt, once it is established that a relation of influence exists, the presumption arises independently of these matters. It

(1) (1839) 4 My. & Cr., at pp. 276, 277 : 41 E.R., at p. 108.
(2) (1807) 14 Ves., at pp. 285, 286; 33 E.R., at p. 531.
(3) (1873) L.R. 8 Ch. 484, at p. 491.
(4) (1818) 3 Madd. 191 ; 56 E.R. 480.
(5) (1845) 8 Beav. 439, at p. 452 ; 50 E.R. 172, at p. 177.
(6) (1860) 2 Giff. 157, at pp. 164, 165 ; 66 E.R. 67, at p. 70.
(7) (1862) 4 DeG.F. & J. 401 ; 45 E.R. 1238.
(8) (1864) 4 DeG.J. & S. 388 ; 46 E.R. 968.

has been said that it is an error to treat the subjects of capacity and of influence as if they were separate elements (Cf., per *Christian* L.J., *Armstrong* v. *Armstrong* (1)). But, in any case, in this peculiar case it is the man's illiteracy, his ignorance of affairs, and his strangeness in disposition and manner that provide the foundation for the suggested relation. For many years he had leant upon his wife, and it is evident that, after her death, he was at a loss for guidance and support. He turned first to one and then to another for a prop. His affairs of business were in reality few and simple. But to him they seem to have loomed large. A claim that his deceased wife owed money for some cash orders threw him into a state of great excitement. The question whether he could obtain an old-age pension troubled him. The failure of the arrangement that his son and daughter-in-law should share his home was succeeded by negotiations with his stepson. In some of these matters he quoted the advice of Mrs. Johnson. In making a will in favour of his stepson's child, and then a second will in favour of Mrs. Job, he showed how unstable his attachments were. It is possible that he regarded will-making as a means of securing that help and support which he so much needed. After his return from Melbourne, he began to place increasing reliance upon Mrs. Johnson and the members of her family. Then the difficulties with his tenants developed. Whether Mrs. Johnson's advice on her visit to the premises or his own temperament was the cause of the trouble, it is clear that the attempt to get his tenants out became the source of great concern and difficulty to him. It was a matter with which he could not cope. He relied on the Johnsons to manage it for him. From the beginning of March his connection with them must have steadily grown. His will in favour of Mrs. Johnson marks its progress. From 13th April 1931, although he did not live at Rose Bay, he must have spent the greater part of his time there. Little doubt can be felt that ultimately he came so to depend upon Mrs. Johnson that a full relation of influence over him subsisted. It would be a mistake to lay much stress on the statements made in cross-examination by Mrs. Johnson, her husband and her daughter as to the degree and kind of confidence the old man placed in Mrs.

(1) (1873) 8 I.R. (Eq.) 1, at p. 30.

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Johnson. They are general statements expressed in terms dangerous in their ambiguity. But they do draw a picture of an ignorant labouring man depending in many essential matters upon one whom he regarded as having all the advantages of education and position and in whom he confided. This picture is borne out by the description of his manner of life and the accounts of what he said from time to time. But the question remains whether, at the time of the transfer, she stood in that or any less relation of influence. It is not, I think, illogical to consider as an additional piece of evidence bearing upon this question the significance of the transfer itself. Whether its purpose was to prevent an application under the *Testator's Family Maintenance and Guardianship of Infants Act*, or simply to confer an immediate benefit upon Mrs. Johnson in the confident expectation that she would look after him for the rest of his life, the fact that Buttress was prepared to make over to her his sole property shows how far his trust in her had advanced. Faith in her future beneficence towards him must not be confused with present dependence and subjection. But the condition in which his ignorance and illiteracy placed Buttress must be kept in view. That condition coupled with his temperament, his odd behaviour and his inferior mental faculties made the habitual guidance and support of some one almost essential to him. That person would be called upon either to tolerate or to manage him. At a later date, Mrs. Johnson occupied this position. At an earlier date, Buttress was instinctively seeking someone who would undertake it. The evidence of the course of events in the short intervening period which includes the will and the transfer is meagre. But it shows beyond doubt that such matters of business as he had occasion to transact were managed by, or under the supervision of, Mrs. Johnson. It shows that he was constantly in her company and that he relied upon her advice and depended on her kindness.

I think that when the circumstances of the case are considered with the character and capacity of Buttress they lead to the conclusion that an antecedent relation of influence existed which throws upon Mrs. Johnson the burden of justifying the transfer by showing that it was the result of the free exercise of the donor's independent will. This, in my opinion, she has quite failed to do.

Her appeal should, therefore, be dismissed.

EVATT J. I agree with the judgment of my brother *Dixon*.

McTIERNAN J. The decree of the Supreme Court of New South Wales against which this appeal is lodged sets aside a memorandum of transfer under the *Real Property Act* on the ground that it was obtained by the undue influence of the appellant. The question for decision is whether the charge of undue influence was made out.

The person who executed the transfer was one Buttress, an illiterate man of advanced years and peculiar disposition who had earned his livelihood by rough heavy work. The property transferred was an allotment of land and the cottage thereon which had been his home for many years and was substantially his only asset. His wife died four months before the transfer, and he died three years afterwards. The respondent is the only son of Buttress, and he did not know of the gift until after his father's death. The transfer was executed on 24th April 1931. The appellant, Mrs. Johnson, to whom the property was transferred in consideration of natural love and affection was a relative of Buttress' wife and had been on friendly terms with him and his wife for many years. She was kind to Mrs. Buttress in her last illness and Buttress was deeply moved by her attentions. He made gifts of jewellery of sentimental value to Mrs. Johnson's daughters on the day his wife died. Mrs. Johnson was the wife of a successful business man and the Johnsons were in comfortable circumstances. None of Buttress' relatives had attained to their degree of material prosperity. Besides being illiterate Buttress was of low intelligence and quite devoid of any capacity for or experience in the management of such humble affairs as he had to transact. He was habitually dependent on others for advice and assistance. Any savings are to be attributed to the advice of his wife and his stepson. In addition to his other disabilities Buttress was highly excitable, noisy, easily enraged and fickle in his relationships. The death of his wife caused him great distress. He found himself alone in the cottage. His son and daughter-in-law refused to stay there and his stepson and his wife could not be induced to go there. After letting the cottage to tenants he went to stay with an elderly sister in Melbourne, but returned in a month although he said that he would be absent for

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one or two years. He lived in a room in the cottage and took meals at his sister's house. After his return from Melbourne he visited the Johnsons. Miss Johnson said: "He used to pop over quite frequently in the mornings and have lunch with us and then go away." The intimacy and closeness of the association between him and them is shown by the fact that on 18th March 1931 he went with Mrs. Johnson to her solicitor's office and made a will leaving her all his property. The month before, he made a will under which the sister whom he visited in Melbourne took a life interest in his property and the niece who provided him with meals the remainder. A month before that, again, he disposed of his property by will to his stepson's child. Before that he had made a will in favour of his own son. Mrs. Johnson's solicitor had not acted for Buttress before. It was she who gave the clerk his full name and spelt it. Despite all these wills Buttress had to inquire of the clerk what he meant by an executor. He readily agreed to the appointment of Mrs. Johnson. According to the evidence he was most concerned about preventing his son from getting anything because he was "a rotter and a waster." There is nothing in the evidence which at all supports this description. The clerk was unaware of Buttress' inability to read or write until Mrs. Johnson told him as he was about to hand the testator a copy of the will. Buttress gave the will to Mrs. Johnson to mind. Mrs. Johnson agreed to the suggestion made in cross-examination that he did so because he thought she was the person to have it as she was looking after him, and he looked to her for protection and help. That Mrs. Johnson was engaged in minding his affairs is also shown by her visit to the cottage with him. Although Buttress appeared to be satisfied with the tenants, Mrs. Johnson on this inspection pronounced the place to be dirty and this was the prelude to a demand that the tenants should leave. The ensuing dispute concluded with the ejectment of the tenants by legal process which was served by Mr. Johnson, and during the dispute he and his son joined forces against the tenants. In the meantime the transfer was executed. It should be observed that after Mrs. Johnson's visit to the cottage she arranged for the removal of Buttress' furniture to her house. Owing to the dispute with the tenants Buttress stayed for a few days with

his sister who lived in the neighbourhood. This event approaches the date of the transfer. How he managed to live in a small cottage while quarrelling violently with the tenants is a question which the evidence does not elucidate. His relatives always rang up the Johnsons when they wanted to communicate with him. The members of the Johnson family, however, denied that at the time he lived with them and the learned judge accepted their denial. On 24th April Mrs. Johnson again conducted Buttress to her solicitor's office. He had with him the certificate of title of the cottage. She said to the clerk :—" I have brought Mr. Buttress in again, Mr. Lackey. He wished to transfer the property to me." Buttress assented and gave him an envelope containing the certificate. He said he wanted Mrs. Johnson to have it because she was very good to his wife and he was very fond of her. According to the clerk's evidence, when he asked Buttress what was the value of the property the latter looked at her and she answered between £700 and £800. Buttress signed the memorandum as a marksman. He took no further part in the matter than to bring in the certificate of title, state the reasons for the gift which have been mentioned and to execute the transfer. It is probable, in view of her assumption of responsibility for Buttress' affairs, that Mrs. Johnson had previously seen the rate notices for the property, because she said they were her source of information that a change of ownership should be notified to the municipal council and she did this immediately after the transfer was executed. Buttress did not inform anyone outside the Johnson family of his intention of making this gift. Mrs. Johnson and her daughter say that he warned them against disclosing it to his relatives. The members of the family gave various if not inconsistent explanations of Buttress' reasons for making the gift. The learned trial judge inferred that the gift was prompted by Mrs. Johnson. A conveyance of property *inter vivos* as a method of defeating any attack by the son on the will already made in her favour was quite outside Buttress' experience, yet Mrs. Johnson said that he insisted that she should take the property there and then so that his son would not be able to get it. Mr. Johnson said that he was not aware of Buttress' intention until the day it was made. Miss Johnson's account is that her mother at first refused to accept the gift but later she and

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McTiernan J.

Buttress decided that she would accept it and look after him for the rest of his life and supply his needs and give him the rent of the cottage. Soon after the transfer was made the Johnsons had the tenants dispossessed and had the place renovated. They utilized the service of Buttress for this purpose. Later he lived with the Johnsons for a few weeks. His last place of abode was at Mount Victoria, where he lived in a tent afterwards replaced by a hut on land owned by the Johnsons. They first drove him there so that he could see whether he would like to live there. According to the evidence of Mrs. Johnson he had expressed a desire to live under these conditions. He worked at clearing and improving the land. The Johnsons provided him with clothing and necessaries and sent him the rent from the cottage and visited him. Arrangements were made for his letters to be read to him and answered. He talked freely to strangers in the locality about the disposition of the property. Evidence was given of statements expressing his opposition to Mrs. Johnson having the cottage and of statements acknowledging her kindness. However in November he made another will leaving all his property to his niece. Excepting the land and the cottage all that he had was a small insurance policy. In the end he went to hospital and on his way gave this will to his niece. Mrs. Johnson challenged the genuineness of this will.

It is clear that at the time of the gift there was great inequality between donor and donee, due principally to the illiteracy and incompetence of the donor and his incapability of depending on himself or acting for himself in any transaction. They could not stand at arm's length in any dealing. Mrs. Johnson stood in a relation to him the essence of which was his trust and confidence in and his dependence on her to look after his affairs, such as they were, in his interests. There can be no doubt that when the transfer was made the relationship in which she stood to Buttress would enable her to acquire great influence over him. It is unreasonable to suppose that very considerable influence was not in fact acquired by her over Buttress. The relationship which was in fact established between the donor and the donee and the immoderate nature of the gift brings the case within the range of the principle upon which equity sets aside a voluntary gift upon the presumption that the

gift was obtained by abuse of the relationship, unless the donee can prove that the gift is a free exercise of the donor's will. In *Billage* v. *Southee* (1) the Vice-Chancellor (Sir *George Turner*) described the limits of this jurisdiction in these words :—" No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling transactions between persons standing in a relation of confidence to each other ; and in my opinion this part of the jurisdiction of the court cannot be too freely applied, either as to the persons between whom, or the circumstances in which, it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustees and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient—to be merely instances of the application of the principle." (See also *Smith* v. *Kay* (2), per Lord *Kingsdown* ; *Morley* v. *Loughnan* (3) ; *Tate* v. *Williamson* (4). Compare *Baker* v. *Monk* (5) ; *Clark* v. *Malpas* (6).)

It is not possible to infer that notwithstanding the presumption of undue influence arising from the relationship of the parties the gift was the result of the free exercise of the donor's will. It may be that the evidence does not prove the actual exercise of undue influence. However, as it fails to satisfy the burden which equity casts upon the appellant of showing that the gift was obtained without any abuse of the relationship in which she stood to Buttress, the decree setting aside the gift was rightly made.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *L. S. Smith.*

Solicitors for the respondent, *Mervyn Finlay & Jennings.*

J. B.

(1) (1852) 9 Hare 534, at p. 540 ; 68 E.R. 623, at p. 626.
(2) (1859) 7 H.L.C., at p. 779 ; 11 E.R., at pp. 310, 311.
(3) (1893) 1 Ch., at p. 756.
(4) (1866) L.R. 2 Ch. 55.
(5) (1864) 4 DeG.J. & S. 388 ; 46 E.R. 968.
(6) (1862) 4 DeG.F. & J. 401 ; 45 E.R. 1238.