[HIGH COURT OF AUSTRALIA.]

BRUNKER . . . . . APPELLANT;
DEFENDANT,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 1, 2, 5, 6.

MELBOURNE, *June* 10.

Latham C.J., Rich, Dixon and McTiernan JJ.

Gift—Land—Memorandum of transfer—Executed by donor and delivered to third person—Death of donor—Authority of third person—Notification of encumbrance—Omission from document—Subsequent unauthorized insertion—Materiality of alteration—Right to register document—Imperfect gift—Donor—Capacity—Undue influence—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *sec.* 46.

A bachelor seventy-one years of age died from cardiac failure after an illness of seven days' duration. On the day before his death he executed a memorandum of transfer in respect of certain land under the *Real Property Act* 1900 (N.S.W.) in favour of the appellant, who for many years had been his housekeeper and had attended to him during his last and a previous illness. The transfer was prepared by a law stationer, a friend of both the deceased and the appellant, and was handed to him after execution without any precise instructions; it was expressed to be for a nominal consideration only and purported to transfer to the appellant an estate in fee simple in remainder expectant on the transferor's death: it contained no notification of a mortgage to which the land contained in the transfer was, together with other properties, subject at the time of the execution of the transfer, because it appeared that the transferor wished to procure a release of that land from the mortgage. After the transferor's death the law stationer handed the transfer to the appellant's solicitor, who then inserted particulars of the mortgage in the document and sought to register it. The relevant certificate of title was at all material times in the custody of the mortgagee. In a suit by the transferor's executor, which had entered a caveat against the registration of the transfer, the Supreme

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Court declared the transfer void and of no effect, but found in the appellant's favour on an issue of incapacity and, on an issue of undue influence, held that there was no relation of influence raising a presumption against the transaction and no proof of undue influence.

Held :—

(1) By the whole court, that the appellant had failed to establish a gift of any interest in the land.

(2) By *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the appellant had failed to establish the creation in her favour of any right to obtain an interest in the land by registration. So *held* :—

By *Rich*, *Dixon* and *McTiernan* JJ., on the ground that the memorandum of transfer had not been delivered to the appellant or to anyone on her behalf and she had no property in the instrument or right to possession thereof.

By *Rich* and *Dixon* JJ., on the further ground that without the indorsement of a notification of the mortgage as required by sec. 46 of the *Real Property Act* 1900 the memorandum of transfer was not a registrable instrument, and the insertion therein of that notification was unauthorized and could have no effect in favour of the party making it.

(3) By *Rich* and *Dixon* JJ. (*Latham* C.J. dissenting), that the insertion of the notification of the mortgage was a material alteration.

(4) By *Latham* C.J., that the findings in favour of the appellant on the issues of incapacity and undue influence should not be disturbed.

Semble, *per Rich* and *Dixon* JJ. : The burden of disproving undue influence was placed on the donee by the fact that the donor was on his death-bed and she was in charge of him as, in effect, his only nurse.

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 the Perpetual Trustee Co. (Ltd.), as sole executor and trustee of the will of Robert James Douglas Sellar deceased, against Bessie Brunker. The plaintiff sought to set aside a document signed by the deceased on 1st May 1934, whereby he transferred, or purported to transfer, certain land to the defendant. The plaintiff claimed that the document should be set aside because (*a*) of the incapacity of the deceased at the time he executed the document ; (*b*) it was executed under the undue influence of the defendant ; (*c*) the gift of the land was incomplete ; (*d*) of defects in the transfer ; and (*e*) of alterations of the memorandum of transfer in a material respect by or with the consent of the donee, the

defendant. The relevant facts are set forth in the judgment of *Nicholas* J., which was substantially as follows :—

The late Robert James Douglas Sellar on Tuesday, 1st May 1934, executed a memorandum of transfer under the provisions of the *Real Property Act* 1900 of all the land comprised in a certificate of title, registered vol. 3213, folio 61, in favour of Miss Bessie Brunker, the defendant in this suit. Mr. Sellar died on the following Wednesday, 2nd May. The gross value of his dutiable estate is stated in the stamp affidavit filed by his executor at £32,438, and his debts at £6,840 9s.

This dutiable estate includes gifts made within three years of the testator's death, which are valued at £18,000, and which include gifts intended to provide for the establishment and endowment of a bird sanctuary, of the total value of £16,486 and made on 30th September 1932, together with two parcels of land transferred voluntarily to a brother, Charles Craig Sellar, on 4th May 1931 and 26th February 1932 respectively and valued in the aggregate at £1,520. The land the subject of the memorandum of transfer is included in Mr. Sellar's assets and is valued at £4,750.

The Perpetual Trustee Co., as executor of Mr. Sellar's will, seeks to set aside this memorandum of transfer and has relied on the following grounds set out in the statement of claim as amended and re-amended :—

10. The plaintiff charges and it is the fact that at the time of the execution of the said purported memorandum of transfer the said Robert James Douglas Sellar was in a state of physical and mental health such that he was ignorant of the nature, effects or contents of the said memorandum.

11. The plaintiff further charges and it is the fact that at the time of the execution of the said purported memorandum of transfer the said Robert James Douglas Sellar was in a state of physical and mental health such that he was unable to appreciate the nature of his actions and did not know that he was purporting to deal with the said land.

12. The plaintiff further charges and it is the fact that the defendant procured the execution of the said purported memorandum of transfer by undue influence by dominating the mind of the said

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Robert James Douglas Sellar so as to prevent him from exercising a free discretion as to the disposition of his property.

13. The plaintiff further charges and it is the fact that the defendant during her association with the said Robert James Douglas Sellar and especially during his illness shortly before his death had acquired influence over his mind and will and by reason of such influence procured the execution of the said purported memorandum of transfer.

14. The plaintiff further charges and it is the fact that no consideration was ever given by the defendant or received by the said Robert James Douglas Sellar in respect of the said purported memorandum of transfer. The plaintiff further charges and it is the fact that on the said 1st day of May 1934 the defendant was acting as the nurse and sole attendant on the said Robert James Douglas Sellar who relied upon her for advice and was very seriously ill and was in a very weak physical and mental condition and had no independent advice in connection with the said alleged memorandum of transfer and the plaintiff submits that in the said circumstances the said alleged memorandum of transfer if signed by the said deceased which the plaintiff does not admit is not binding upon him or upon the plaintiff.

14 (*a*). The plaintiff further charges and it is the fact that at the time of its execution the said purported memorandum of transfer was not in registrable form as a memorandum of transfer under the *Real Property Act* 1900. The plaintiff further charges and it is the fact that after its execution the said purported memorandum of transfer was altered with the knowledge, consent and approval of the defendant and without the authority of the said Robert James Douglas Sellar in a material particular, namely, by adding thereto the words following, that is to say: "Subject to mortgage No. C193613 to Commonwealth Bank of Australia."

These grounds may be classified under the heads of (*a*) incapacity, (*b*) undue influence, (*c*) incomplete gift, (*d*) defects in the transfer, and (*e*) unauthorized alterations of the transfer in a material respect by the donee, or as (i) events dealing with the mental condition of Mr. Sellar and his relations with the donee, and (ii) conclusions of law to be drawn from events which are not connected with the issues of incapacity or undue influence.

Robert James Douglas Sellar, who has been and will be in this judgment referred to as Mr. Sellar, was at the date of his death at the age of 71 a bachelor and a retired grazier. He had come with two of his brothers to live at Manly near Sydney some time before 1918. Of these two brothers one, Charles Craig Sellar, survives and was a witness in this suit. The other brother, Walter Sellar, lived in the same house with Mr. Sellar for some years and died in the year 1923. The defendant had been in the employ of the two now deceased brothers for some two years prior to Walter Sellar's death, and she remained in the employ of Mr. Sellar until the day of his death. During the two years above-mentioned skilled nurses were employed in the interests of Walter Sellar, but from a date commencing shortly after Walter Sellar's death until a few years before the death of Mr. Sellar the only permanent residents in the house were Mr. Sellar and the defendant. During this period Mr. Sellar's health was fairly good and he did not require the services of a doctor until about a year before he underwent an operation, in 1933. Shortly before Mr. Sellar's death a nephew of the defendant, a youth named Robert Newie, came to live in his house. This nephew had been accustomed to visit the defendant at Mr. Sellar's house for some time before 1932. In 1932 he lost his position as a motor cycle mechanic and went to live at Mr. Sellar's house. There, for doing some outside work, he received at first 30s. per week and then 35s. per week besides numerous presents including a number of clocks. From 1918 onwards until the death of Mr. Sellar a frequent visitor to the house was Arthur Napier Fuller. He was a law stationer. He lived near Mr. Sellar's house at Manly and he first came to the house as the guest of Mr. Walter Sellar. He was an acquaintance of the defendant before she joined the Sellars' household but he says that he did not obtain her position for her. After Walter Sellar's death he continued to visit the house. His visits were paid frequently to the defendant and for some time he had a key of the house, but he usually saw Mr. Sellar and sometimes visited him. He appears to have discussed with him books and chess, to have played billiards with him and to have received from him a number of presents, of which the most important was a Willys Knight motor car valued at £600. For

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some time he endeavoured without success to conduct a garage in which he was placed by Mr. Sellar.

Mr. Sellar was a man of education and of literary tastes. He had a library which was valued for probate purposes at £107. After his brother's death he gradually became more and more of a recluse, he gave up golf and his exercise was limited to walking and billiards. He gradually received fewer visitors and seldom went to Sydney except to call at his club or do some shopping. His relatives, with the exception of the brothers mentioned, appear to have lived in South Australia and seldom visited him. For some years he was a heavy drinker but he seems to have abandoned this habit after an operation which he underwent in the month of July 1933. This operation was of a serious character and was preceded by bladder trouble which occasionally necessitated the attendance of Dr. Barron.

In the month of September 1932 he transferred to the Perpetual Trustee Co. certain real estate and certain investments for the purpose of establishing and endowing the bird sanctuary to which reference has already been made. In the deed of settlement it is provided that the settlor shall be employed as manager during his lifetime and shall have the right to nominate the first manager after his death.

In February 1934 Mr. Sellar became anxious about his financial position and desired that this gift for the purpose of establishing a bird sanctuary should be cancelled. In the same month he was warned by his solicitor against a tendency to make over-generous gifts, and was also advised to put his affairs under the control of the Perpetual Trustee Co. as his attorney, which he did. Late in April 1934 he began to suffer from bronchitis, a form of illness from which he had suffered in previous winters at Manly but not with such severity that he had found it necessary to call in a doctor. On the last Sunday in April 1934 his heart began to show signs of weakness; his physician Dr. Barron became alarmed, and seems to have suggested that he should enter a hospital. On the following Monday he was better and telephoned a chemist for medicines. As to his condition on Tuesday there are pronounced differences of opinion among the witnesses. He certainly became much worse on Wednesday about midday and he died on Wednesday evening.

The defendant, writing after Mr. Sellar's death, stated that she was his nurse and housekeeper and that he treated her as a daughter. Mr. C. Sellar says that his brother spoke of the defendant as an ordinary servant. It is clear that she did most of the household work but her position for some time prior to Mr. Sellar's death was not that of an ordinary servant. She was paid at first £2 a week, which was increased later to £2 10s., but she was allowed to appropriate, or at any rate was not prevented from appropriating, in addition, portion of a sum which was drawn by Mr. Sellar's cheque from the bank each week for payment of wages and household expenses. Occasionally as the result of this privilege her weekly wage was as high as £5; at times she was given presents, among which was in 1926 a cottage and later the furniture in Mr. Sellar's residence. Occasionally, but not invariably, she had her meals with Mr. Sellar. She looked after him in the illnesses, apparently not very serious, which preceded the bladder trouble already referred to.

Mr. Sellar informed her of a number of his proposed business transactions and of his intention of establishing a bird sanctuary. In September 1933, in exercise of his power under the settlement, he purported to appoint the defendant as manager of the sanctuary after his death at a salary of £5 per week. Whether he had power to do so is now the subject of a suit in which the defendant in this suit is plaintiff and which has been ordered to stand over generally on the application of her counsel in that suit. Mr. Sellar's solicitor was Mr. W. J. Baldock. Mr. Baldock had acted for Mr. Sellar in a number of matters extending over a period of fourteen years. These were mainly conveyancing transactions, the last of them relating to the power of attorney from Mr. Sellar to the Perpetual Trustee Co.

It was suggested by Mr. Fuller that the reason why Mr. Baldock was not employed in connection with the transfer to the defendant was that he had given Mr. Sellar offence by his conduct in relation to the deed of trust of the bird sanctuary. It does appear that in September 1933 Mr. Sellar objected to a clause in the deed of trust under which the trustee was given a power of sale, but it is also clear that in February 1934 Mr. Baldock was Mr. Sellar's trusted adviser, that he advised Mr. Sellar against persons who were inclined

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to take advantage of his generosity, and that it was at Mr. Baldock's suggestion that Mr. Sellar appointed the Perpetual Trustee Co. his attorney to manage his affairs. I do not believe that Mr. Sellar of his own initiative chose Mr. Fuller to advise him instead of Mr. Baldock. Mr. Fuller had acted for him previously, in relation to the purchase of a property which had been intended for the defendant, and Mr. Baldock acted subsequently in the preparation of Mr. Sellar's will, in relation to a sale at an undervalue of property to the trustees of the Far West Children's Health Scheme, in his gifts to his brother and in the establishment of the bird sanctuary, and in the appointment of the Perpetual Trustee Co. as his attorney in 1934.

For some two years before the Perpetual Trustee Co. was appointed the rents of some of Mr. Sellar's property were collected by Mr. Cook, an estate agent of Manly, who saw him about four times personally.

Mr. Sellar also had business relations with Mr. Aiken, who besides carrying on business as a chemist was a councillor for the Far West Children's Scheme of which Dr. Barron acted as chairman. Mr. Aiken was informed by Mr. Sellar of the establishment of the bird sanctuary and of his intention to appoint the defendant as manager after his death. Mr. Aiken also discussed with Mr. Sellar a proposal to sell one of his properties for the use of the Far West Children's Health Scheme and the subsequent sale of that property at a price £900 less than the value placed on it for rating purposes.

The first question on which I have to give a decision is whether Mr. Sellar when he signed the memorandum of transfer of 1st May 1934 was in such a condition, mental or physical, that he was unable to understand what he was doing. On this issue the onus is on the plaintiff. Mr. *Abrahams* for the plaintiff, without abandoning the allegations contained in pars. 10 and 11 of the statement of claim, said that he would be surprised if he were to succeed on this issue.

The witnesses on whose evidence the allegations in pars. 10 and 11 were based were Dr. Barron and Mr. Charles Sellar. Dr. Barron, who was Mr. Sellar's sole medical attendant, said that on the Sunday preceding his death Mr. Sellar was in such a condition that he seemed unlikely to recover, that on the following Monday he

was better, that on Tuesday, 1st May, the day on which the transfer was executed, he was in a stuporous condition, that on the Wednesday morning he was weaker, "going down-hill." It further appears from the evidence of Mr. Aiken that on the Sunday Dr. Barron had suggested that Mr. Sellar enter a hospital. He was not, however, provided with a skilled nurse at any time.

Dr. Barron was asked :—

Q.—"I want to know whether in your opinion on Tuesday, 1st May, from what you saw he was in a fit condition to appreciate the nature or effect of a legal document?" A.—"I do not think so."

Q.—"Do you think if he executed a legal document he would know that he executed such a document?" A.—"No, my opinion was that he would not be able to appreciate anything like that."

In cross-examination, however, Dr. Barron would not deny the possibility of Mr. Sellar having carried out the transaction which the defendant and her witnesses claimed that he did carry out.

Mr. Charles Sellar said that his brother some three or four years before his death seemed to go to pieces, and that on the Tuesday before his death he was drowsy and did not appear to notice Mr. C. Sellar's greeting.

Even if the evidence of these two witnesses stood alone I should not hold that the allegations set out in pars. 10 and 11 of the statement of claim had been made out to my satisfaction.

Mr. Charles Sellar's recollection did not appear to me to be at all clear, nor was he a careful or accurate observer.

Dr. Barron was charged not merely with inaccuracy of recollection but with bias and lack of good faith. I think that Dr. Barron's view of his patient's capacity to conduct a business transaction was coloured by his opinion of the nature of the gifts which he had made, in particular of the large sums given for the bird sanctuary in 1932 and of the gift to the housekeeper which is the subject of this suit. This appears from remarks of his reported by the defendant's solicitor, Mr. Patterson, and by Mr. Fuller, whose evidence on this point I accept, and this view was not unnatural in view of Dr. Barron's interest in the Far West Scheme of which Dr. Barron was the chairman.

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Dr. Barron may also have been misled on Tuesday, 1st May, by Mr. Sellar's appearance during his visit, and may have concluded from his drowsiness that Mr. Sellar's mental condition was worse than in fact it was. That his evidence did represent his genuine opinion I have no doubt. He is a practitioner of long standing in Manly, a Fellow of the Royal College of Surgeons, he had no personal interest to serve in the matter, and the day after Mr. Sellar's death he made a statement on the subject to his solicitor.

Evidence that Mr. Sellar was capable of understanding the nature of the transaction, and did in fact understand it, was given by Mr. Jauncey, the manager of the Manly branch of the Commonwealth Bank, who had an interview with him on the afternoon of Tuesday, 1st May, and subsequently on that day witnessed his signature to the transfer.

The property comprised in the transfer was, with others, the subject of a mortgage to the Commonwealth Bank, of which Mr. Sellar was a customer. Mr. Jauncey called on Mr. Sellar on the afternoon of Tuesday, 1st May, at the instance of Mr. Fuller, for the purpose of discussing the release of this property from mortgage. His impression was corroborated to some extent by Miss Spence, a masseuse, who saw Mr. Sellar on the following morning. Mr. Jauncey formed a decided opinion that Mr. Sellar was quite capable of understanding what he was doing. He made a report to his bank on the transaction which was tendered in evidence and rejected on the objection of the plaintiff's counsel. Miss Spence had a conversation with Mr. Sellar the next day. It was not on business topics but it shows that Mr. Sellar was not then in a stuporous condition, and Dr. Barron's opinion was that the condition in which he found the patient on Tuesday would have become progressively worse.

I have arrived at the conclusion that the plaintiff fails on the issue of incapacity, without taking into account the evidence of the defendant or of Mr. Fuller, whose credibility I shall discuss in relation to the next issue.

The next issue is whether "the defendant during her association with the said Robert James Douglas Sellar and especially during his illness shortly before his death had acquired influence over his

mind and will and by reason of such influence procured the execution of the said purported memorandum of transfer."

On this issue again the onus is on the plaintiff. The charge is that at some period antecedent to the transfer the defendant had acquired an influence over Mr. Sellar which she so used in connection with the transfer that the transfer was not the act of an independent donor. Par. 13 must be read in conjunction with par. 14.

His Honour referred to *Johnson* v. *Buttress* (1) and quoted a passage from the judgment of *Lindley* L.J., in *Allcard* v. *Skinner* (2), and continued :—In this case I do not think that it has been shown that the defendant had acquired an influence over Mr. Sellar such that the onus of proving that the gift was the act of an independent donor falls upon her. There is evidence, no doubt, that Mr. Sellar was of an extremely generous disposition, which at times found expression in somewhat eccentric or capricious gifts, and that on some business matters he had taken both the defendant and Fuller into his confidence. Mr. Baldock in a letter dated 10th February 1934 expressed the opinion that he should be on his guard against unscrupulous persons, but this warning was not directed against either the defendant or Mr. Fuller. Mr. Charles Sellar, as has been already stated, looked upon the defendant as being in the position of a general servant to his brother. It is clear that Mr. Sellar had a high regard for the defendant and that on previous occasions he had wished to benefit her. Instances of this attitude may be found in his appointing her to be manager of the bird sanctuary after his death, in his taking her nephew to live with him at his house and in his gift of a cottage to her. But neither in the period before his last illness nor in his last illness can I find proof of such a degree of confidence reposed in, or such powers of management entrusted to the defendant or Fuller by Mr. Sellar as were found in *Huguenin* v. *Baseley* (3), *Dent* v. *Bennett* (4) and *Spong* v. *Spong* (5) ; see also *Pollock* on *Contracts*, 10th ed. (1936), p. 611 ; *Hanbury's Modern Equity*, 1st ed. (1935), p. 615.

(1) (1936) 56 C.L.R. 113.
(2) (1887) 36 Ch. D. 145, at pp. 182, 183.
(3) (1807) 14 Ves. 273 ; 33 E.R. 526.
(4) (1839) 4 My. & Cr. 269 ; 41 E.R. 105.
(5) (1914) 18 C.L.R. 544.

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The last illness of Mr. Sellar may be taken to have begun either seven days before his death, when, according to the death certificate, he was attacked by bronchitis, or on Sunday, 29th April when, as Dr. Barron states, there were the first signs of heart failure. Whichever date is taken I cannot hold that during the period of this illness the defendant as his nurse or in any other capacity acquired an influence over him such that he was not a free agent and such that the onus is on her of showing that he was a free agent in carrying out the voluntary disposition.

In discussing this transaction it is necessary to bear in mind: (*a*) that in view of the findings already set out the onus of proof is on the plaintiff; (*b*) that the court is not entitled to set aside a gift merely because of the extreme generosity or caprice of the donor; and (*c*) that there were no relatives of Mr. Sellar whom as far as the evidence shows he felt under any obligation to benefit.

By his will dated November 1931 he devised and bequeathed the residue of his estate to his nephews and nieces and that residue would be materially diminished by the gift to the defendant, but, as has been already pointed out, he had not for some time past been in close touch with these nephews and nieces. His brother, Mr. Charles Sellar, visited him regularly, but he had recently made him a substantial gift and the visits during the last year of Mr. Sellar's life do not appear to have given great satisfaction to either of the brothers.

The evidence of the events surrounding the transaction itself is extremely unsatisfactory. The direct evidence is that of the defendant, of Fuller and of Mr. Jauncey. I did not regard Fuller as a truthful witness. I think that he endeavoured to mislead the Court as to several incidents relating to the transfer, particularly as to the reasons for his presence at Mr. Sellar's house on Monday morning, when, as he said, the transfer was suggested by Mr. Sellar, as to the reasons for not calling in Mr. Baldock, Mr. Sellar's solicitor, as to the order of events on Tuesday when the transfer was signed by Mr. Sellar and witnessed by Mr. Jauncey and as to the origin of the suggestion that a life estate should be reserved to Mr. Sellar. I did not think the defendant scrupulously truthful and I think she was quite willing to mislead the Court on some points. I do, however,

accept her account of her conversations with Miss Spence and with Dr. Barron on the morning of Wednesday, 2nd May, and of the sudden change in Mr. Sellar's appearance before he passed into the state of coma which immediately preceded his death. I believe that she and Fuller acted in co-operation in relation to the gift, and if the onus of showing that the gift was that of an independent donor had rested on the evidence of the defendant and of Fuller I do not think that I should hold that it has been discharged. But as the onus is on the plaintiff, and as there is corroboration of the views expressed by the defendant and Fuller as to Mr. Sellar's condition, I do not think that I should hold that the gift was obtained under such circumstances that it should be set aside. Mr. Jauncey, his bank manager, saw him on the Tuesday afternoon and had two short interviews with him on which he formed the opinion that Mr. Sellar understood what he was doing when he executed the memorandum of transfer and intended thereby to make the gift now in question. Some question was raised as to the accuracy of Mr. Jauncey's evidence. His opportunities of observation were limited, but I have no doubt that he accurately reported what he saw. It is evident from Dr. Barron's conversation with Mr. Patterson that in his opinion Mr. Sellar during the last three days of his life was in such a condition that anyone could have obtained from him anything that he asked. But bearing in mind the extract from the judgment of *Lindley* L.J. quoted above (1), and also that I am not entitled to set aside a gift on the ground that I do not trust either of the two people who are fully aware of the circumstances under which it was made and of whom one is the donee, I hold that the plaintiff has not discharged the onus of showing that this transfer was obtained by the undue influence of the defendant or of anyone acting on her behalf.

The next question is whether the gift was voluntary and was of such an imperfect character that, being voluntary, it could not confer any interest on the defendant.

It was argued at the hearing that the memorandum of transfer could not be used to confer a title on the defendant because it was never delivered to the defendant or her agent by the donor or by

(1) (1887) 36 Ch. D., at pp. 182, 183.

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his agent in the lifetime of the donor. This contention does not appear to me to have been clearly raised by the pleadings, but it was argued by Mr. *Abrahams* and Mr. *Weston*, and I feel at liberty to treat it as an issue between the parties.

I think there can be no doubt that the transfer was voluntary. In her answers to interrogatories the defendant maintained that some consideration was given, but I did not understand this contention to be seriously pressed at the trial. Then does it confer any interest on the donee? In the present case the donor died before the memorandum of transfer was delivered to the donee or to anyone on her behalf, unless before the donor's death Fuller had become the donee's agent to hold the memorandum of transfer on her behalf. I do not think that he did become her agent. I think that up to the time of the donor's death Fuller was his agent, that Fuller's authority was terminated by Mr. Sellar's death and that therefore the memorandum of transfer was never delivered to the defendant by someone who had authority to deliver it to her. The contention that Fuller held the memorandum of transfer at any time during Mr. Sellar's life as agent for the defendant is, I think, inconsistent with Fuller's evidence and with her own evidence. I do not think she authorized anyone to hold it on her behalf during Mr. Sellar's lifetime or at any time until she directed her solicitor to obtain the transfer for her.

Mr. *Weston* argued that although Fuller's was not an agency coupled with an interest, and although he was agent for Mr. Sellar only until his death, Fuller's authority to deliver the memorandum of transfer continued after Mr. Sellar's death because (*a*) Mr. Sellar had informed the defendant of his intention to transfer the property to her and (*b*) because Mr. Sellar intended his authority to persist after his death. I cannot accept either of these contentions.

In this case I hold that the defendant received a memorandum of transfer from someone who had no subsisting authority to deliver it to her, and she may therefore be restrained by the plaintiff from taking any further steps to bring about its registration.

Mr. *Weston* argued that Fuller was not in the position of a mere agent, but that he should be more accurately described as a mandatory, and that he was therefore bound to deliver the memorandum

of transfer to the donee. If I understand this contention correctly, it must rest on one of two bases—either that consideration for the transfer was given or that at the death of Mr. Sellar Fuller was agent both for Mr. Sellar and for the defendant. As I have held that the transfer was voluntary and that Fuller was agent for Mr. Sellar only until the day of Mr. Sellar's death, I cannot give effect to this argument.

As I have held that the attempted transfer was ineffective it is not necessary for me to give a decision on the remaining grounds taken by the plaintiff. It was said (*a*) that when the transfer was signed by Mr. Sellar it was not in a registrable form, and (*b*) that it was rendered invalid by the action of the defendant in causing it to be altered in a material respect without the authority of the donor. It was further argued that by reason of these facts I should not only grant relief on the basis of an imperfect gift, but I should also direct that the caveat entered by the plaintiff should be extended.

The memorandum of transfer bears the words: "Subject to mortgage No. C193613 to Commonwealth Bank." I find that these words were not on the memorandum of transfer when Mr. Sellar signed it, that they were put on later after Mr. Sellar's death by the authority of the defendant, she having been advised that she must take the property subject to the mortgage.

The memorandum of transfer was declared to be void and of no effect, and it was ordered that it be cancelled and delivered up to the plaintiff. An injunction was granted restraining the defendant from attempting further to register the memorandum of transfer, or in any way acting thereunder, and the operation of a caveat forbidding the registration of the memorandum of transfer was extended.

From that decision the defendant appealed and the plaintiff cross-appealed to the High Court.

Weston K.C. (with him *Leslie* and *McClelland*), for the appellant. The judge of first instance was in error in determining that the transfer of the land was an imperfect gift and therefore failed. The

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authority conferred by the deceased upon Fuller extended until the registration of the memorandum of transfer in favour of the appellant who had "accepted" it. This is not the ordinary case of a mere custodian of a document. The existence of a memorandum which is voluntary with a right to have it registered confers an estate (*Macedo* v. *Stroud* (1)), but, on the finding of the Judicial Committee, that case is distinguishable from this case because here there was no instruction by the donor that the transfer should not be registered, and he had fully informed the appellant of its existence and his intentions in this regard. An authority by the donor to the person to whom he had delivered the memorandum of transfer, expressed to enure notwithstanding the donor's death and until registration, is adequate to overcome the difficulty felt by the court in *Wadsworth* v. *Wadsworth* (2). The donor had taken active steps to secure registration, and it was competent for the appellant to do all that remained to be done to that end.

[RICH J. referred to *Smith* v. *Davy* (3).]

It is established by many cases, of which *Barry* v. *Heider* (4), *O'Regan* v. *Commissioner of Stamp Duties* (5) and *Great West Permanent Loan Co.* v. *Friesen* (6) are typical, that equitable estates may be created without registration. In *In re Skinner* (7) the transferor had not, as here, parted with the instrument of transfer. Although a common law deed which is voluntary is ineffectual to pass an interest under the *Real Property Act* (*Finucane* v. *Registrar of Titles* (8)), an unregistered voluntary transfer can be effectively registered after the death of the transferor (*Tierney* v. *Halfpenny* (9)). The donor intended that title to the land should be vested in the appellant and to that end he delivered the memorandum of transfer to Fuller, as his agent, to do all things necessary for registration thereof. In those circumstances that authority was not revoked or determined by the donor's death (*Bowstead* on *Agency*, 6th ed. (1919), pp. 454 et seq.). The true position in *Kiddill* v. *Farnell* (10) was that the power of attorney as such did not give

(1) (1922) 2 A.C. 330.
(2) (1933) N.Z.L.R. 1336.
(3) (1884) 2 N.Z.L.R. 398.
(4) (1914) 19 C.L.R. 197.
(5) (1921) Q.S.R. 283.
(6) (1925) A.C. 208.
(7) (1894) 6 Q.L.J. 68.
(8) (1902) Q.S.R. 75.
(9) (1883) 9 V.L.R. (Eq.) 152.
(10) (1857) 3 Sm. & Giff. 428; 26 L.J. Ch. 818; 65 E.R. 723.

any legal interest to the donee, and the circumstance which enabled the legal interest to be obtained was the efficacy of a power as an authority after the death of the donor because he had expressed a desire that it should be so efficacious. The donee under a voluntary transfer of land under the *Real Property Act* has a right to obtain registration notwithstanding any repentance on the part of the donor. The scheme of the Act is that secs. 36 (2) and 41 (2) recognize the transferee as perhaps the most suitable person to make application for registration, and while sec. 121 is restricted to registered proprietors, sec. 97 gives a competent remedy to transferees. The remedy shown in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1) was available until 1928 when sec. 97 was amended. The Act does not interfere generally with transactions *inter partes*. There is no evidence that the deceased was aware that registration of the transfer was necessary in order to effectuate the gift. An alteration made in a document affords no relief to a person unless the alteration prejudicially affects that person; if an alteration does prejudicially affect a person, then the other person is debarred from bringing a suit against the person so prejudiced, but the document is not void (*Halsbury's Laws of England*, 2nd ed., vol. 10, pp. 227, 228, par. 287; pp. 231, 232, par. 292; pp. 249, 250, par. 313). If the memorandum of transfer were registered in the form in which the deceased gave it, then under the section of the Act, the appellant would still take the land subject to the mortgage. The provisions of sec. 46 of the Act as to notation of encumbrances are merely directory. The object of those provisions is to ensure that a transferee shall have warning of the existence of encumbrances. The rules with relation to the alteration of documents apparently relate to documents altered *inter partes*. The memorandum of transfer was not a document *inter partes*. Upon execution and acceptance there was no further obligation on either of the parties. The alteration was not such as to render the document capable of being registered.

Abrahams K.C. and *Gain* (with them *B. Maughan*), for the respondent.

(1) (1912) 14 C.L.R. 286.

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Abrahams K.C. There never was a complete gift. Even if there were a complete gift it was procured by the undue influence of the appellant and, also, it was vitiated by the alteration of the document.

[RICH J. referred to *Nanney* v. *Morgan* (1), *Moore* v. *North Western Bank* (2) and *Ireland* v. *Hart* (3).]

The decision in *Société Générale de Paris* v. *Walker* (4) was in respect of two competing equities which had been created for value, and thus does not assist the court in this case. The deceased, a man of advanced years, was a recluse and was *in extremis* when he signed the document. The gift could have been made by will instead of *inter vivos*. The inference is that the disadvantages of a will from the appellant's point of view, e.g., as to revocability, necessity for witnesses, presence of a solicitor, influenced her to arrange for the execution by the deceased of a memorandum of transfer rather than a will. There was a domination of the deceased. As regards the deceased the appellant had placed herself in the position of a nurse and daughter, and Fuller had placed himself in the position of a legal adviser, and the two of them acting in concert had placed themselves in a position where the onus rested on them of satisfying the court that the execution of the memorandum of transfer was the free and voluntary act of the deceased. There was a special relationship of influence between the appellant and the deceased (*Johnson* v. *Buttress* (5)).

[DIXON J. referred to *Jesse* v. *Bennett* (6).

[RICH J. referred to *Hoghton* v. *Hoghton* (7), *Blackie* v. *Clark* (8) and *Phillips* v. *Mullings* (9).]

The decisions in *Scoones* v. *Galvin* (10) and *O'Regan* v. *Commissioner of Stamp Duties* (11) proceed on a dictum of *Griffith* C.J. in *Anning* v. *Anning* (12), which should not be preferred to the dictum of *Isaacs* J. in the same case (13). Even where there is delivery of a memorandum of transfer to the donee of a voluntary gift, title does

(1) (1887) 37 Ch. D. 346.
(2) (1891) 2 Ch. 599.
(3) (1902) 1 Ch. 522.
(4) (1885) 11 App. Cas. 20.
(5) (1936) 56 C.L.R. 113.
(6) (1856) 6 DeG. M. & G. 609; 43 E.R. 1370.
(7) (1852) 15 Beav. 278, at p. 299; 51 E.R. 545, at p. 553.
(8) (1852) 15 Beav. 595, at p. 600; 51 E.R 669, at p. 671.
(9) (1871) 7 Ch. App. 244.
(10) (1934) N.Z.L.R. 1004.
(11) (1921) Q.S.R. 283.
(12) (1907) 4 C.L.R. 1049, at p. 1057.
(13) (1907) 4 C.L.R., at p. 1069.

not pass in the absence of registration. The onus is upon a party in the Equity Court who claims the benefit of a voluntary gift to show that the gift is perfect (*O'Regan* v. *Commissioner of Stamp Duties* (1)).

[McTIERNAN J. referred to *Abigail* v. *Lapin* (2).]

The fact that the deceased signed a document does not complete the gift unless that document be a contract or the creation of a trust (*Richards* v. *Delbridge* (3); *Anning* v. *Anning* (4)). If a donor intends to make a legal transfer the legal title must vest in the donee, otherwise the gift or transfer is ineffective. In *In re Richardson*; *Shillito* v. *Hobson* (5) the donee was the defendant. No estate or interest passes under the memorandum of transfer until the document is registered (sec. 41, *Real Property Act* 1900 (N.S.W.)). Even if registration is unnecessary there must be delivery of a registrable instrument to the donee or his agent and nothing must remain to be done by the donor to enable registration to be effected. In *Macedo* v. *Stroud* (6) the case proceeded on the basis that the donor was the registered proprietor of the land because the legal representatives were entitled to be registered as proprietors, apparently by transmission. The memorandum of transfer executed by the deceased did not comply with the provisions of sec. 46 of the *Real Property Act*, which, in conjunction with sec. 39, are mandatory, that a statement of encumbrances be noted on memoranda of transfer (See *Crowley* v. *Templeton* (7)). In that condition and in default of the discharge of the bank's mortgage, the memorandum of transfer was not registrable. Not having procured that discharge nor inserted a statement of particulars of encumbrances the deceased had not done all in his power to enable the memorandum of transfer to be registered. The deceased did not put the appellant in possession of the relevant certificate of title (*Scoones* v. *Galvin* (8); sec. 48, *Real Property Act* 1900). The memorandum of transfer was not delivered to the appellant and she has not shown that Fuller was authorized by the deceased to deliver the document to her, or that he was her agent for any purpose. He was not authorized to deliver

(1) (1921) Q.S.R. 283.
(2) (1934) A.C. 491.
(3) (1874) L.R. 18 Eq. 11.
(4) (1907) 4 C.L.R., at p. 1069.
(5) (1885) 30 Ch. D. 396.
(6) (1922) 2 A.C. 330.
(7) (1914) 17 C.L.R. 457, at p. 463.
(8) (1934) N.Z.L.R. 1004.

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the document to the appellant, and any authority he had from the deceased was revoked by the death of the latter. *Kiddill* v. *Farnell* (1) is merely an authority for the proposition that an imperfect gift may be perfected by the getting in of the legal estate. (See also *In re James*; *James* v. *James* (2).)

[LATHAM C.J. referred to *Strong* v. *Bird* (3).]

Gain. Any unauthorized material alteration in an instrument voids the document. Here the alteration was both unauthorized and material. The document is void against the party causing the alteration and voidable at the option of the person not authorizing the alteration. Without the statement of encumbrances as required by sec. 46 of the *Real Property Act* 1900, the memorandum of transfer was not registrable (*Canaway* on *The Real Property Act* 1900 (N.S.W.) (1902), p. 89; *Kerr's Australian Lands Titles* (*Torrens*) *System* (1927), p. 124; *Beckenham and Harris* on *The Real Property Act* (*N.S.W.*) (1929), p. 113). The alteration operated to make registrable an instrument which would not otherwise have been registrable (*McGlone* v. *Registrar of Titles* (4); *Perkins* v. *Registrar of Titles* (5); *Merry* v. *Australian Mutual Provident Society* [*No.* 3] (6); *Paraone* v. *Matthews* (7)). *Barker* v. *Weld* (8) was wrongly decided. The alteration changed the legal effect of the document and therefore was material (*Norton* on *Deeds*, 2nd ed. (1928), p. 38). The rule there set forth applies to all instruments whether under seal or not (*Suffell* v. *Bank of England* (9)) and applies equally to defendants and plaintiffs. A document altered or caused to be altered by a party in a material particular is void as against that party (*Gardner* v. *Walsh* (10); *Suffell* v. *Bank of England* (11); *Koch* v. *Dicks* (12)).

[RICH J. referred to *Aldous* v. *Cornwell* (13) and *Master* v. *Miller* (14).]

(1) (1857) 3 Sm. & Giff. 428; 26 L.J. Ch. 818; 65 E.R. 723.
(2) (1935) Ch. 449.
(3) (1874) L.R. 18 Eq. 315.
(4) (1886) 2 Q.L.J. 182.
(5) (1887) 3 Q.L.J. 47.
(6) (1872) 3 Q.S.C.R. 40.
(7) (1888) 6 N.Z.L.R. 744.
(8) (1884) 3 N.Z.L.R. 104.
(9) (1882) 9 Q.B.D. 555, at pp. 559, 561, 569, 572.
(10) (1855) 5 E. & B. 83; 119 E.R. 412.
(11) (1882) 9 Q.B.D. 555.
(12) (1933) 1 K.B. 307.
(13) (1868) L.R. 3 Q.B. 573, at pp. 578, 579.
(14) (1791) 4 T.R. 320, at pp. 330, 345; 100 E.R. 1042, at pp. 1047, 1055, 1056.

The rule is a rigid rule, and must be applied even if it results in great hardship (*Koch* v. *Dicks* (1)). An unauthorized alteration of an instrument avoids it.

LATHAM C.J. Mr. *Weston*, the court does not desire to hear you on the question of capacity as distinct from other questions.

Weston K.C., in reply. There is no evidence that, during the few days preceding the death of the deceased, the appellant was informed by the doctor, or had knowledge otherwise, as to the serious nature of the deceased's illness. The doctor's evidence should not be regarded as evidence of any great weight in determining the issues. Undue influence by Fuller was not raised in issue by the respondent; therefore undue influence on the part of Fuller in concert with the appellant is not open on the pleadings. It has neither been shown nor suggested that the appellant was a party to or guilty of any impropriety or wrongdoing in connection with the transaction. She neither had nor exercised influence. The evidence which would justify the court in presuming undue influence and throwing upon the defendant the onus should be of such a character and degree that in ordinary proceedings it must make out the plaintiff's case (*In re Coomber*; *Coomber* v. *Coomber* (2)).

[RICH J. referred to *Inche Noriah* v. *Shaik Allie Bin Omar* (3).]

There is nothing in the antecedent relations between the appellant and the deceased nor in the circumstances which puts the onus upon the appellant. Neither the appellant nor Fuller occupied any dominant position over the deceased, nor was he dependent upon them in any way. There is nothing that shows evidence of trust or dependence between them. Influence is not necessarily undue influence. Equity recognizes a voluntary assignment of a chose in action.

[DIXON J. referred to *Crichton* v. *Crichton* (4) and *Comptroller of Stamps* (*Vict.*) v. *Howard-Smith* (5).]

The principles enunciated by *Griffith* C.J. in *Anning* v. *Anning* (6) are correct. Those principles are supported by the decisions

(1) (1933) 1 K.B., at pp. 322, 324.
(2) (1911) 1 Ch. 723, at p. 730.
(3) (1929) A.C. 127, at pp. 133, 135.
(4) (1930) 43 C.L.R. 536.
(5) (1936) 54 C.L.R. 614.
(6) (1907) 4 C.L.R., at p. 1057.

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in *Macedo* v. *Stroud* (1), *Wadsworth* v. *Wadsworth* (2) and *Tierney* v. *Halfpenny* (3), and, having regard to differences in the local statute, also by the decision in *Scoones* v. *Galvin* (4). The deceased executed the memorandum of transfer with the intention that the appellant should utilize it and gain for herself the advantage which registration would bring to her. Whether it contained a reference to the first mortgage or not, the document could only be, in the circumstances, a second mortgage (*Barker* v. *Weld* (5)); thus the insertion of a statement of the prior encumbrance was not a material alteration. No concluded opinions were expressed in *McGlone* v. *Registrar of Titles* (6), or in *Perkins* v. *Registrar of Titles* (7), that provisions similar to sec. 46 of the *Real Property Act* 1900 were mandatory. Under sec. 51 of that Act only such estate and interest as the transferor, the deceased, had would pass to the transferee upon registration of the memorandum of transfer (*Phillips* v. *McLachlan* (8)). The onus of proving the revocation of a voluntary deed was dealt with in *Henry* v. *Armstrong* (9). As shown by sec. 41 (2) of the Act, it is not essential that, in order that a transfer may be registered, a transferee must present the relevant certificate of title.

Cur. adv. vult.

June 10.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff company is the executor of the late Robert James Douglas Sellar, who died on Wednesday, 2nd May 1934. The defendant is a lady who was Mr. Sellar's housekeeper for fourteen years immediately preceding his death. The plaintiff seeks a declaration that a certain memorandum of transfer of land under the *Real Property Act* 1900 of New South Wales executed by the testator on 1st May is void and of no effect, an order for the cancellation and delivery up of the transfer, and an injunction restraining the defendant from attempting to register the transfer under the Act. The transfer related to land owned by Sellar upon

(1) (1922) 2 A.C. 330.
(2) (1933) N.Z.L.R. 1336.
(3) (1883) 9 V.L.R. (Eq.) 152.
(4) (1934) N.Z.L.R. 1004.
(5) (1884) 3 N.Z.L.R. 104.
(6) (1886) 2 Q.L.J. 182.
(7) (1887) 3 Q.L.J. 47.
(8) (1884) 5 L.R. (N.S.W.) 168.
(9) (1881) 18 Ch. D. 668.

which there was a garage and service station. The transfer transferred to the defendant an estate in fee simple expectant upon the death of Sellar. The plaintiff alleges that Sellar was ignorant of the contents of the transfer when he signed it and was incapable of appreciating the nature of his act at the time. It is also alleged that the defendant exercised undue influence over Sellar. It is further contended that the transfer was not registrable under the Act because it did not include a memorandum of an existing mortgage (*Real Property Act* 1900, sec. 46) and that it is void because, after execution, it was altered in a material part with the authority of the defendant, the alteration consisting in adding a memorandum of the mortgage. Although the pleadings made no reference to the matter, the parties fought the issue as to whether there had been a delivery of the transfer to the defendant. The learned trial judge (*Nicholas* J.) found against the plaintiff on the issues of incapacity and undue influence, but decided that the memorandum of transfer was never delivered to the defendant by any person who had authority to deliver it to her. On this ground he made the declaration and order sought, granted the injunction, and extended the period of operation of a caveat lodged under the *Real Property Act* by the plaintiff forbidding the registration of the transfer. Upon the hearing of the appeal, the plaintiff (respondent) contended not only that the judgment was right upon the ground stated by the learned judge, but further contended that the learned judge should have decided in favour of the plaintiff upon the issues of incapacity and undue influence, and that the judgment was right by reason of the objections mentioned in the pleadings, namely, the alleged non-registrable character of the transfer and the alleged material alteration authorized by the defendant.

The transfer was executed on Tuesday, 1st May 1934 when Sellar was in bed in what proved to be his last illness. He died on the next day, Wednesday, 2nd May. He had an attack of bronchitis during the preceding week-end and was in bed on Monday, 30th April when he discussed his proposed gift to the defendant with one Fuller, an old friend of his own and also a close friend of the defendant. There is no evidence whatever of any failure of the testator to understand what he was doing. The evidence of the manager of

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the Manly branch of the Commonwealth Bank of Australia (Mr. S. J. Jauncey), which the learned judge accepted, showed that the testator was quite intelligent and understood precisely what he was doing when on Tuesday, 1st May, he signed the transfer to the defendant. The decision of the learned judge upon the issue of incapacity was not seriously challenged. The only undue influence alleged in the statement of claim is undue influence exercised by the defendant. In argument before this court it was alleged that Fuller, the defendant's friend, exercised undue influence upon Sellar, but this is not the allegation in the pleadings. I cannot see any evidence at all of any influence, undue or other, exercised by the defendant. Nor is there evidence of the exercise of undue influence by Fuller, although, as I have said, this was not an issue. It was argued that the relation between Sellar and the defendant was such as to raise a presumption of undue influence. This question was considered recently by this court in *Johnson* v. *Buttress* (1). In this case there is no special relationship between the parties such as raises a presumption of undue influence, nor is there any evidence which would justify a finding that in fact the defendant was in a position to exercise dominion over Sellar by reason of trust and confidence reposed in her by him. Suspicion cannot be substituted for evidence, and, according to the evidence in this case, the transaction was the natural act of a generous man who wished to recognize by a substantial gift personal services which had been rendered to him during a long period by a lady for whom he had both respect and affection. The existence of such a relationship as this between a donor and a donee does not raise any presumption of undue influence. I can see no ground for disturbing the findings of the learned trial judge upon these issues.

Before dealing with the other questions which arise, it is necessary to summarize certain relevant facts. On Monday, 30th April, the question of making a gift to the defendant was raised by Sellar and discussed between him and Fuller. He asked Fuller to fix up the transfer of the land to the defendant for him and to do it that day. Fuller went to the Registrar-General's office and found that the land was subject to a mortgage to the Commonwealth Bank of Australia.

(1) (1936) 56 C.L.R. 113.

Returning to Sellar he spoke about the mortgage and Sellar said that he wished the land to be given to the defendant free from the mortgage and asked Fuller to see Jauncey, the manager of the Commonwealth Bank of Australia at Manly, in order to ascertain whether the bank would discharge this particular piece of land from the mortgage which the bank held over this and two other pieces of Sellar's land. Fuller saw the manager on Tuesday, 1st May. The manager said that he thought that the bank would comply with Mr. Sellar's request but he wanted to see Mr. Sellar. He did so and Sellar personally told Jauncey that he wished to give the land to the defendant and asked that the land be released from the mortgage. Jauncey said that he would recommend the release, that he thought that the bank would raise no objection, but that it was a matter for the head office.

As Jauncey was leaving Sellar's house he saw Fuller who, after ascertaining that Jauncey was a justice of the peace, asked him if he would witness the transfer which Fuller, who was a law stationer, had already prepared. Jauncey agreed, and the transfer was executed. The evidence is that Sellar executed it in his bedroom and that Miss Brunker and Jauncey affixed their signatures in another room. The transfer was in the form prescribed by the Act and included therefore the word "accepted" followed by the defendant's signature. Fuller took possession of the document. No directions were given by Sellar concerning either the custody or the registration or the non-registration of the document. It merely remained in Fuller's possession. The document did not contain any memorandum stating that the land was subject to a mortgage. After Sellar's death the defendant took legal advice, and, acting on that advice, authorized the insertion of a reference to the mortgage in the transfer and presented the transfer for registration. The certificate of title is in the possession of the Commonwealth Bank. The plaintiff entered a caveat and instituted these proceedings.

The questions which arise for consideration may be arranged in the following order:—

In the first place, it was contended on behalf of the plaintiff that the transaction between Sellar and the defendant amounted to an imperfect gift which the court would not assist and that the plaintiff should succeed upon that ground.

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Secondly, the question arises whether the defendant is entitled to the possession of the transfer which she seeks to register. If Sellar, being alive, had changed his mind, could he have recovered the document from her? Did his death determine any authority to hold or use the document which may have existed? Was Fuller entitled to give this document to the defendant or her solicitors?

Thirdly, it may be that, even if the defendant is entitled to the possession of the piece of paper constituting the transfer, there is some obstacle to the registration of it. The plaintiff alleges that there are three obstacles:—(*a*) The transfer, when executed, was not a registrable document because it contained no memorandum of the mortgage to which the land was subject. (*b*) The transfer was avoided by the insertion with the authority of the defendant of the reference to the mortgage. (*c*) The defendant cannot obtain registration of the transfer because she has not lodged the certificate of title with it in the office of the Registrar-General, and she cannot compel the Commonwealth Bank of Australia to produce the certificate if the bank should refuse to do so.

The main contention of the plaintiff before this court was that the gift to the defendant was imperfect and that the court will, in accordance with long established principles, do nothing to assist the donee by perfecting the gift. The law on this subject—"the whole law"—as *Griffith* C.J. said in *Anning* v. *Anning* (1), is to be found in *Milroy* v. *Lord* (2). It is not necessary to repeat the well-known passage from *Milroy* v. *Lord* (3). A gift may be made by way of declaration of trust where the donor constitutes himself a trustee for the donee. This transaction, however, cannot be supported upon that basis, because there is no evidence to support the view that Sellar ever intended to make himself a trustee. What he intended to do was to give to the defendant an estate in remainder after a life estate to himself. Further, in my opinion, the transaction cannot be supported as a transfer of any interest in the land. It is established by authority that equitable interests in land can be created under the *Real Property Act* (*Barry* v. *Heider* (4); *Great*

(1) (1907) 4 C.L.R., at p. 1056.
(2) (1862) 4 DeG. F. & J. 264, at p. 274; 45 E.R. 1185, at p. 1189.
(3) (1862) 4 DeG. F. & J. 264; 45 E.R. 1185.
(4) (1914) 19 C.L.R. 197.

West Permanent Loan Co. v. *Friesen* (1)). Thus a contract for the sale of land may create an equitable interest in accordance with the rules of the general law of property. But no instrument of transfer until registered can itself be effectual to pass any estate or any interest in any land under the provisions of the *Real Property Act* (sec. 41 (1)). Thus the instrument of transfer in itself cannot be effectual to vest in the defendant either a legal or an equitable interest in the land (See *Williams* v. *Papworth* (2)). But where there is a transaction for value which is recorded in a contract followed by an instrument of transfer, or where there is a transaction for value which itself is recorded in a transfer (*Mathieson* v. *Mercantile Finance and Agency Co. Ltd.* (3)), then "the transaction behind the instrument" and upon which it rests may create an equitable interest in the land which will be recognized in the courts, such interest being subject to the risk of being defeated by a transfer to a bona fide purchaser for value which obtains prior registration. As *Isaacs* J. says in *Barry* v. *Heider* (4), sec. 41 of the *Real Property Act* 1900 "in denying effect to an instrument until registration, does not touch whatever rights are behind it."

It is true that the transfer states a consideration of ten shillings. This is a nominal consideration, the land being worth about £4,000, and the mortgage upon it and two other pieces of land amounting to £2,000. The apparent purchase was not a real purchase—the evidence shows that it was intended to be a gift—and, in spite of the presence of the small consideration mentioned in the transfer, it should be treated as a gift (*Howard* v. *Shrewsbury (Earl)* (5); *Plumpton* v. *Plumpton* (6)).

If the defendant had been a transferee for value she would, by reason of the transaction being for value, have had an equitable interest in the land. She is not, however, a transferee for value. The result is that the execution and delivery (if there was delivery) of the transfer did not give her any estate in the land, legal or equitable.

This conclusion, however, is not the end of the matter. The defendant is in possession of a transfer executed by the registered

(1) (1925) A.C. 208.
(2) (1900) A.C. 563, at p. 568.
(3) (1891) 17 V.L.R. 271; 12 A.L.T. 220.
(4) (1914) 19 C.L.R., at p. 216.
(5) (1867) 2 Ch. App. 760.
(6) (1886) 11 V.L.R. 733, at p. 738.

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proprietor of the land in question. I propose to assume for the moment that there is nothing unlawful in her possession of the transfer and to consider the position of a person who is given an executed transfer, the intention of the registered proprietor who executes the transfer being to give to that person the land which is the subject matter of the transfer. Prima facie such a transferee is entitled to do with the transfer what he wishes. If by presenting it at the Registrar-General's office he is able to obtain registration, there is nothing to prevent him from doing so. He has been given a piece of paper with the intention that he should use that piece of paper for his own purposes, including the most obvious and natural purpose of using it so as to become the registered proprietor of the land. The piece of paper has certainly been given to him, whether or not any interest in the land has been given to him. I have not been able to discover any principle which would prevent him either tearing the transfer up or burning it or presenting it at a public office for registration.

A person who makes a gift cannot recall the gift simply because it is a gift (*Standing* v. *Bowring* (1)). If he repents of the gift, that fact is immaterial, if the gift of what he has given is complete. The simple position is that he cannot get back property which he has transferred in an effectual manner so as to vest the title to the property in another person. If, on the other hand, the gift is incomplete, so that the transaction, so far as it has gone, does not vest any property in another person, then the position is that the alleged donee has nothing, and, because he is a volunteer, a court will not help him to get anything from the donor. But, where the donee does not ask the court to do anything, as in the present case, the principle that equity will not assist a volunteer has no application. Though a volunteer, the defendant is not asking for assistance from any court. Accordingly, in this case, if the defendant lawfully obtained possession of the transfer, there is no reason why she should not present it for registration. She may meet difficulties by reason of the fact that the transfer is deficient in form, or by reason of the fact that it has been altered in a material particular, or by reason of the fact that she is unable to produce the certificate

(1) (1885) 31 Ch. D. 282.

of title. But these difficulties do not prevent her from presenting the transfer for registration. If Sellar were still alive he would have had no right to prevent the presentation of the transfer for registration and his executors are, in my opinion, in no better position. The defendant has the transfer—as in *Rummens* v. *Hare* (1)—and she can make what advantage of it she can. The case is different from that of *In re Richardson*; *Shillito* v. *Hobson* (2) where an equitable mortgagee by deposit of a deed handed over the deed by way of gift, intending to transfer the moneys secured by it. It was held that the interest in the deed was only incidental to his interest in the mortgage and that therefore he could not transfer any right to the deed unless he also transferred the charge. There is no analogy between that case and the present case. A transfer under the Torrens system does not constitute any title to land: it is created only for the purpose of divesting a person of his title and of vesting that title in another person.

It has been argued that by signing the transfer Sellar at most only gave authority to the transferee to apply for registration and that this authority was revoked by his death. (This contention is distinct from the contention that Fuller has no authority to deliver the document to the defendant.) But a transfer is not properly described as an authority to do anything. A transfer is a document which, upon registration, transfers an interest in land. An executed transfer is a representation that the transferee is entitled to the interest defined in the transfer (*Great West Permanent Loan Co.* v. *Friesen* (3)). A transferee is able to present a transfer for registration simply because he has it. The *Real Property Act* 1900 recognizes, in several provisions, that a transferee may himself properly present a transfer for registration. See sec. 36 (2) which provides that "a transferee of land shall not be required in any case to present in duplicate a memorandum of transfer for the purpose of registration." This provision assumes that transferees may present documents for registration. Sec. 41 (2) provides that "should two or more instruments executed by the same proprietor and purporting to transfer or encumber the same estate or interest

(1) (1876) 1 Ex. D. 169.
(2) (1885) 30 Ch. D. 396.
(3) (1925) A.C., at p. 225.

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in any land be at the same time presented to the Registrar-General for registration and endorsement, he shall register and endorse that instrument under which the person claims property, who shall present to him the grant or certificate of title of such land for that purpose." This provision plainly assumes that a transferee, as a person claiming property under a transfer, can present a transfer for registration. In *In re the Transfer of Land Statute*; *Ex parte Davies and Inman* (1) it was held that, under the *Transfer of Land Statute* (Vict.) 1866, the registered proprietor alone had the right to require the registrar to register a dealing. But in 1885, sec. 74 of Act No. 872 was passed apparently in consequence of this decision, and words were inserted to make it clear that a transferee could apply for registration. These words appear in the corresponding provision in the New South Wales Act. See sec. 97 (1), referring to applications "to be registered as proprietor" and the phrase inserted by the *Real Property (Amendment) Act* 1928, sec. 4 (*f*), "or any person claiming under any memorandum of transfer."

Under some contracts the vendor is bound to procure the registration of a purchaser (*Vale* v. *Blair* (2); *Taylor* v. *Land Mortgage Bank of Victoria Ltd.* (3)). But even where this is the case there is nothing to prevent a transferee from asking the Registrar-General to register an instrument (*National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Boyd* (4); and see *The Commonwealth* v. *New South Wales* (5), where *Higgins* J. evidently considered that in a normal case the transferee applied for registration: and see per *Barton* J. (6)). When a transferee makes such an application he does not act in any way as the agent of or on behalf of the transferor—he acts on his own account. The production of an instrument transferring the land to him is all the evidence which the Registrar-General's office is entitled to require of his right to become registered as the proprietor. These considerations answer the contention on behalf of the plaintiff that the "authority" to procure registration was revoked by Sellar's death. In my opinion, no real question of authority arises at all. The idea of authority is irrelevant to the position of the transferee when the transferee asks the Registrar-

(1) (1885) 11 V.L.R. 780; 7 A.L.T. 99.
(2) (1887) 9 A.L.T. 90.
(3) (1886) 12 V.L.R. 748; 8 A.L.T. 39.
(4) (1926) 39 C.L.R. 72, at p. 84.
(5) (1918) 25 C.L.R. 325, at p. 351.
(6) (1918) 25 C.L.R., at p. 334.

General for registration. It may be observed that in *Anning* v. *Anning* (1) where a person executed a deed of gift relating to chattels in possession and died soon afterwards, it was clear that the assignment of the chattels in possession fell under the *Bills of Sale Act* 1891 of Queensland so that it was ineffectual unless registered. But *Isaacs* J. definitely held (2), and *semble* per *Griffith* C.J. (3), that the deed could be made effectual by registration after the death of the assignee as to such of the chattels as remained in specie. The deed of gift also covered a mortgage debt secured on land in New South Wales which could only be transferred by the method prescribed by the *Real Property Act* 1900 (N.S.W.). It was held that the deed, not being in the prescribed form, was not effectual to convey the property in the mortgage debt, but it was not suggested in any of the judgments of the court that the death of the transferor determined some authority which had to continue to exist before a transfer could be registered. The practice of the profession, I understand, has never been based upon the view that, whenever a man signs a transfer and dies before the transfer is registered, it is necessary to secure re-execution of the transfer by his personal representatives. In *Tierney* v. *Halfpenny* (4), *Molesworth* J. held that an unregistered voluntary transfer could be effectively registered after the death of the transferor. (See also *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Boyd* (5).) The principle enunciated by *Knox* C.J., *Rich* and *Dixon* JJ. in *Currey* v. *Federal Building Society* (6) is applicable to this case: the defendant's "right to be registered as proprietor arises from the fact that she is the transferee of the registered proprietor under a proper instrument, and it depends upon nothing else. This right might be intercepted by extrinsic facts if they showed that the transfer was an impropriety, but it is nothing but a confusion to treat facts which negative impropriety as part of the transferee's title to registration." Thus if the allegations of incapacity or undue influence had been established or if some other circumstance were shown to exist, the defendant could be prevented from registering the instrument which she has presented for registration, but apart from such considerations

(1) (1907) 4 C.L.R. 1049.
(2) (1907) 4 C.L.R., at p. 1076.
(3) (1907) 4 C.L.R., at p. 1062.
(4) (1883) 9 V.L.R. (Eq.) 152.
(5) (1926) 39 C.L.R. 72, at p. 84.
(6) (1929) 42 C.L.R. 421, at p. 431.

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her possession of the transfer is sufficient to entitle her to registration. This conclusion is, I think, supported by *O'Regan* v. *Commissioner of Stamp Duties* (1). In that case a transfer of land under the *Real Property Act of* 1861 was made by way of gift. The relevant certificates of title were delivered to the donee's solicitors at some later date (See *O'Regan's Case* (2)). It was held that the transferee obtained on the date of the execution of the transfer a statutory right to registration of the estate. In the Queensland statute there is an express provision that the execution of an instrument under the Act confers on a transferee a claim or right to registration of the estate transferred. This provision, which appears also in the South Australian statute, has been held in South Australia to be a declaratory one by which no new rights are conferred. The judgment in *O'Regan's Case* (1) adopts and applies the dictum of *Griffith* C.J. in *Anning* v. *Anning* (3) : " So, in the case of a gift of land held under the Acts regulating the transfer of land by registration, I think that a gift would be complete on execution of the instrument of transfer and delivery of it to the donee." It is true that *Isaacs* J. says :—" If the legal title is assignable at law it must be so assigned or equity will not enforce the gift. If for any reason, whether want of a deed by the assignor, or a specifically prescribed method of transfer, or registration, or statutory notice, the transfer of the legal title is incomplete when the law permits it to be complete, equity regards the gift as still imperfect and will not enforce it. In such a case, the fact that the assignor has done all that he can be required to do is not applicable " (4). It is argued that this dictum is not consistent with that of *Griffith* C.J. But the whole of this passage must be read in close relation to its first sentence, which relates to equity " enforcing the gift." In the first place, the whole statement has no relevance to a case, such as the present, where no appeal is made by the donee to a court of equity to " enforce " anything. In the second place, as already stated, the rule that a court of equity will not assist a donee by completing an imperfect gift means that, in the absence of consideration, the court will not compel *the donor* to do anything to complete a gift. Where a donor has placed a

(1) (1921) Q.S.R. 283.
(2) (1921) Q.S.R., at p. 284.
(3) (1907) 4 C.L.R., at p. 1057.
(4) (1907) 4 C.L.R., at p. 1069.

donee in a position to obtain a legal title by the donee's own action without further action by the donor, no question arises as to the application of the rule. Thirdly, what *Isaacs* J. says at p. 1069 should not be read as being inconsistent with his statement on p. 1076 that a donee could give validity to an ineffectual bill of sale in his favour by registering it.

The case of *Scoones* v. *Galvin* (1) has been strongly relied upon by the plaintiff for the proposition that there cannot be a gift of land under a Torrens system unless not only a transfer but also the certificate of title has been delivered to the donee. The case certainly decides that there is a complete gift when this is done. But the negative proposition for which the case has been argued to be authority does not go so far as has been suggested. The decision that a delivery of a transfer with a certificate of title is a complete gift is based on the fact that there is nothing more which it is necessary for the donor to do to complete the gift. In other words, the donor has put the donee in a position to obtain the legal title without further recourse to the donor. The negative proposition for which the case is authority is that there is no complete gift if the donor gives the donee a transfer but himself retains the certificate of title. It was held by the court that the donee could not obtain registration under the New Zealand Act without production of the certificate of title. Therefore, if the donor refused to produce the certificate of title, it would be necessary for the donee to take proceedings against him to compel him to do so. That is just precisely what the law will not permit. The donee has not any legal title—if he had such a title no question would arise. If he comes to a court of equity he is met by the rule that such a court will not do anything to compel a donor to complete an imperfect gift. But the case is quite different where the donor is not himself in possession of the certificate of title and where it is not necessary for the donee, in order to obtain the benefit of the gift, to ask a court to compel the donor to do anything. In the present case, the donor did not retain the certificate in his possession, because it was not in his possession but was held by the Commonwealth Bank as mortgagee. Thus *Scoones* v. *Galvin* (1) does not assist the plaintiff in the circumstances of the present case.

(1) (1934) N.Z.L.R. 1004.

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Some of the dicta in this case are, in my opinion, not consistent with the dictum of *Griffith* C.J. in *Anning* v. *Anning* (1) or with the decision in *O'Regan* v. *Commissioner of Stamp Duties* (2), though the Full Court of New Zealand did not take this view. The Full Court said that *Griffith* C.J. "no doubt . . . had in mind the case of a simple transfer by way of gift, and the delivery of that transfer together with the appropriate certificates of title (3)." But *Griffith* C.J. conspicuously did not say so. In *O'Regan's Case* (2) the point of the decision is that the date of the execution of the transfer was declared to be the date upon which the donee obtained a statutory right to registration. The date of the delivery of the certificate of title was not mentioned in the judgment of the court. The present case, however, as I have already said, is not one in which the donor retained the certificate of title and it is therefore distinguishable from *Scoones' Case* (4).

It is now necessary to consider other features of the case which are said to present obstacles to the application of the defendant to become registered proprietor.

The first of these obstacles is, it is argued, to be found in the alleged fact that Fuller had no authority to hand over the transfer to the defendant or her solicitors after Sellar's death. The learned judge in his judgment says:—"The donor died before the memorandum of transfer was delivered to the donee or to anyone on her behalf, unless before the donor's death Fuller had become the donee's agent to hold the memorandum of transfer on her behalf. I do not think that he did become her agent. I think that up to the time of the donor's death Fuller was his agent, that Fuller's authority was terminated by Mr. Sellar's death and that therefore the memorandum of transfer was never delivered to the defendant by someone who had authority to deliver it to her." This finding is a conclusion from the evidence accepted by his Honour and it depends entirely upon the proper inference to be drawn from evidence showing that Sellar, in stating his intention to give a present to the defendant, used words to show that he wanted Fuller to do something "for him"; e.g., he said:—"Can you fix up that transfer for me? . . .

(1) (1907) 4 C.L.R., at p. 1057.
(2) (1921) Q.S.R. 283.
(3) (1934) N.Z.L.R., at p. 1017.
(4) (1934) N.Z.L.R. 1004.

I want you to do it for me to-day . . . All right, Mr. Fuller, you go ahead and fix it up for me and I want you to do it to-day." In my opinion this evidence does not justify the inference which his Honour drew. The natural meaning of this evidence is that Fuller should see to the preparation and execution of the transfer which was to be done " to-day ". It does not appear to me to be reasonable to suppose that the " authority " to Fuller to do something " to-day " was intended or understood or should be understood to include an authority to procure registration of the defendant as owner of the estate in remainder. Nothing whatever was said about registration. There are no facts such as those which were proved in *Wadsworth* v. *Wadsworth* (1) where the solicitors of the donor were told to hold a transfer and that it was " not to be gone on with " and where, in defiance of this instruction, the solicitors gave the transfer to the donee. See also *Macedo* v. *Stroud* (2) where the donor gave transfers of land under a Torrens system to his solicitor telling him to keep and not to register them. In the present case Sellar executed the transfer himself and left the witnessing of his signature and the execution by the defendant and the witnessing of her signature to be carried out in the presence of Fuller and Jauncey in another room. When this was done Fuller retained the document, and, after Sellar's death, handed it over to the defendant's solicitors, who lodged it for registration. Thus the position, so far as Sellar was concerned, was that he executed the transfer and then had no more to do with it except that he knew it was to be executed by the defendant and that he gave no directions which prevented Fuller from carrying out his definitely expressed wish by allowing the defendant to have possession of the document so that she could become registered proprietor of an interest in the land. I can find no evidence to show that Sellar " authorized " Fuller to procure registration—that Fuller was given authority to do something on his behalf, an authority which would be determined by Sellar's death. The " authority," if authority there was, was an authority to do what was necessary to bring about the execution of the transfer. That was all that Sellar (so far as the evidence shows) intended to do himself, and all that he needed to do. I

(1) (1933) N.Z.L.R. 1336. (2) (1922) A.C. 330.

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find it difficult, however, to regard the evidence as showing that Sellar made Fuller his agent or gave him any authority for any purpose. The facts are more properly described, in my opinion, by saying that there was simply a request by Sellar to Fuller for gratuitous services, assented to by Fuller, and that the requested services were performed by Fuller. It is a mistake to regard every contract of employment, including the anomalous contract of gratuitous employment, as constituting a relation of principal and agent.

The next question depends upon a provision contained in sec. 46 of the *Real Property Act* 1900. This section provides that the memorandum of transfer "shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created, and a memorandum of all leases, mortgages, and other encumbrances to which the same may be subject." When Sellar signed the document it had not been arranged that the land was to be discharged from the mortgage to which it was subject, though he desired that this should be done. In the expectation that it would be done, no memorandum of the mortgage was made upon the transfer before it was signed. It is said, therefore, that it was an unregistrable document when it came into the possession of the defendant.

I agree that the Registrar-General ought not to register the document if it does not contain the appropriate memorandum of the mortgage. The memorandum is now in fact on the transfer, which is in registrable form, but it was not in such form when the defendant (or her solicitors) received it. She took legal advice upon the matter after Sellar's death and in accordance with that advice authorized the addition to the transfer of a memorandum of the mortgage. It is contended that this was a material alteration converting an unregistrable into a registrable document and that it avoided the transfer. In my opinion this objection is not well founded. It is quite plain that the testator intended that the defendant should become the owner of the land. When he executed the transfer he intended to put her in the position of being able to become the owner of the land. He also hoped that the Commonwealth Bank of Australia would agree to discharge the land from the mortgage. There is nothing to show that the discharge

of the mortgage was to be a condition precedent to the defendant receiving any benefit at all. In conversation with Jauncey and Fuller, Sellar had expressed his wish that the land should be transferred free from the mortgage, but he knew that whether this was done or not depended upon the decision of the Commonwealth Bank of Australia. With this knowledge, he executed the transfer, thus leaving it to the bank to determine whether the mortgage should be discharged or not. The substance of the transaction was the transfer of the land. The disappointment of Sellar's hope or wish does not affect the gift of the land or the intention of Sellar that the defendant should receive the land. Accordingly the position is that he allowed the transfer to go out of his possession without imposing any conditions at all and therefore without there being any evidence to rebut the natural inference that he delivered the document with the intention that the defendant should be able to use it. The document being a document which could only be brought into existence for one purpose, namely, the purpose of registration, Sellar must be regarded as intending to place the defendant in such a position that she could do what was necessary to obtain registration of that which he intended to transfer to her.

The case is similar to that of *Barker* v. *Weld* (1), where it was held (under a provision corresponding to sec. 46 of the New South Wales Act) that the indorsement after execution upon a memorandum of mortgage of land under the *Land Transfer Act* of a note stating that the document was subject to a prior mortgage, had no material effect upon the instrument or the registration and did not vitiate either. In that case, when a memorandum of mortgage was presented for registration, an objection was made to its registration in its existing form because a prior mortgage of the same premises had been registered, and the words "subject to mortgage" were inserted to get over this objection. *Johnston* J. said:—"I am of opinion that the words inserted had no material effect upon the document or the registration. Whether they were inserted or not the mortgage was a second mortgage, although the mortgagee believed it to be a first mortgage. The words inserted were only such as the law would supply. The mortgagee had the right to have the instrument registered, and both

(1) (1884) 3 N.Z.L.R. 104.

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parties must have contemplated that it was to be registered, and the insertion of the words in question was necessary to procure the registration" (1). See also *McGlone* v. *Registrar of Titles* (2) and *Perkins* v. *Registrar of Titles* (3). In these cases the registrar refused to register a dealing unless the documents submitted for registration were altered by inserting references to certain prior encumbrances. It is very plainly apparent in *McGlone's Case* (2) that the registrar required McGlone, the transferee who presented the transfer for registration, and not the transferor, to indorse the prior encumbrances upon it. In *Perkins' Case* (3) the registrar refused to register the transfer without himself indorsing a reference to a judgment upon it. The court held that the registrar was right in both cases. It was therefore assumed in those cases that either the transferee or the registrar was entitled to alter the document, not so as to alter its legal effect, but in order to make apparent on its face the true legal effect. It was not suggested in either case that it was necessary for the transferor to make or agree in the making of such an alteration. These authorities strongly support, in my opinion, the proposition that the alteration made in this case was not a material alteration which avoided the document. If, however, contrary to the view that I have expressed and to *Barker* v. *Weld* (4), the insertion of the reference to the mortgage did alter the legal effect of the document, the alteration was for the benefit of the transferor (or his estate). Such an alteration was held not to be a material alteration in *Darcy and Sharpes' Case* (5) decided in 1584, at a time when rules with respect to the effect of altering a document were very strict indeed. In *Aldous* v. *Cornwell* (6) a promissory note which expressed no time for payment was altered by the addition, without the assent of the maker, of the words "on demand." The alteration only expressed the effect of the note as it originally stood. The court said: "We are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice anyone, destroys the validity of the note" (7).

(1) (1884) 3 N.Z.L.R., at p. 108.
(2) (1886) 2 Q.L.J. 182.
(3) (1887) 3 Q.L.J. 47.
(4) (1884) 3 N.Z.L.R. 104.
(5) (1584) 1 Leon 282; 74 E.R. 257.
(6) (1868) L.R. 3 Q.B. 573.
(7) (1868) L.R. 3 Q.B., at p. 579.

But the alteration even in a material particular of a document does not avoid it in all cases and for all purposes. For example, where a deed is avoided by a material alteration without the consent of another party to the deed, the avoidance of the deed is not retrospective and it does not have the effect of revesting any estate or interest in property which has already passed by the deed (See *Ward* v. *Lumley* (1)). Further, the effect of the avoidance of a deed (or other document—*Master* v. *Miller* (2)) by a material alteration is only " to prevent the person, who has made or authorized the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made." (*Halsbury's Laws of England*, 2nd ed., vol. 10, p. 227). The same rule is stated in *Norton* on *Deeds*, 2nd ed. (1928), p. 38, in the following terms : " If a material alteration by erasure, interlineation or otherwise, be made, after execution, in a deed by, or with the consent of, any party thereto, he cannot as plaintiff enforce any obligation contained in it against any party who did not consent to such alteration." In this case the defendant is not seeking to enforce against anybody any obligation, covenant or promise. The law with respect to avoidance of documents by material alterations is not applicable.

The only remaining question is whether it should be held that the defendant cannot become registered proprietor by reason of the fact that she does not produce the certificate of title to the Registrar-General. In the normal case the transferee of land produces both the certificate of title and the transfer in order to obtain registration. I have not been able to find any provision in the *Real Property Act* 1900 which expressly makes it necessary for a transferee to produce the certificate of title in order to be entitled to register a transfer under the Act. On the contrary there are several provisions in the Act which assume that the production of the certificate is not always essential. Sec. 41, sub-sec. 2 is in the following terms : " Should two or more instruments executed by the same proprietor and purporting to transfer or encumber the same estate or interest in any land be at

(1) (1680) 5 H. & N. 87 : 157 E.R. 1112.

(2) (1791) 4 T.R. 320 ; 100 E.R. 1042.

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the same time presented to the Registrar-General for registration and indorsement, he shall register and indorse that instrument under which the person claims property, who shall present to him the grant or certificate of title of such land for that purpose."

This provision plainly assumes that a transfer may be presented for registration and may be registered although the applicant for registration does not produce the relevant certificate of title. Sec. 48 contains a special provision for dealing with the case of the transfer of an estate of freehold in possession in part of the land mentioned in any grant or certificate of title. It is provided that the transferor shall deliver up the grant or certificate of title of the said land, and that the Registrar-General shall after registering the transfer enter on the grant or certificate of title a memorandum cancelling the same partially and setting forth the particulars of the transfer. In such a case the section requires the transferor to deliver up the certificate of title. This provision would seem to be unnecessary if it were always essential to produce the certificate of title before a transfer could be registered. But sec. 38 (1), on the other hand, requires the Registrar-General to enter dealings on the duplicate certificate of title. The same section, however, also provides that he may dispense with the production of the duplicate certificate if the party dealing makes a statutory declaration that the certificate has not been deposited as security for any loan. If the Commonwealth Bank of Australia, which has possession of the certificate of title, is entitled to retain it as part of its security, this provision would appear not to be applicable. But sec. 12 (*a*) provides machinery whereby a transferee who is not in possession of a certificate of title may take steps to secure its production so that he may obtain registration. The section provides that the Registrar-General may require, *inter alia*, the mortgagee of land in respect of which a transfer or other dealing is about to be transacted to produce the certificate of title if it is in his possession. The Registrar-General may issue a summons to such a mortgagee to appear and give any explanation respecting the land or the instruments affecting the title to the land. In this case if the Commonwealth Bank of Australia should refuse to produce the certificate of title so that the transfer may be registered, the Registrar-General can proceed under sec. 12 (*a*) and may hear under

sec. 12 (*b*) any explanation that the bank has to give for declining to facilitate the registration of the transaction, i.e., the registration of the defendant as proprietor of the land (now, after Sellar's death) in fee simple subject to the mortgage to the bank. The registration of such a transaction cannot in any manner affect the interest of the bank and it is to be presumed that, if all allegations of incapacity, undue influence, and other invalidating circumstances were set on one side by the judgment of this court, the Registrar-General would exercise his powers to procure the registration of the transfer so as to give effect to an honest and valid transaction.

In requiring the Registrar-General to exercise his powers for this purpose the defendant would not be acting inconsistently with the rule that the court will not give any assistance for the purpose of completing an imperfect gift—as was suggested by *Herdman* J. in *Scoones* v. *Galvin* (1). The rule is that, if the gift is imperfect, in the absence of consideration the court will not aid the donee *as against the donor* (*Anning* v. *Anning* (2)). " The court will not compel *the intending donor*, or those claiming under him, to complete " an imperfect gift (*Halsbury's Laws of England*, 2nd ed., vol. 15, p. 738, and cases there cited). In the present case the defendant does not seek to compel the donor's executor to do anything. The rule mentioned does not apply to prevent a donee from compelling third persons to recognize his rights. Otherwise a company could on this ground refuse to register any voluntary transfer of shares, and a depositary of chattels which had been made the subject of a gift by deed or by proper transfer of a document of title could retain the chattels as against the donee. If, in this case, the Registrar-General were to refuse to register the transfer and were to force the defendant into legal proceedings against him or against the bank, the rule mentioned would not constitute any obstacle to her success in those proceedings.

For these reasons I am of opinion that the appeal should be allowed and that judgment should be entered for the defendant with costs.

(1) (1934) N.Z.L.R., at p. 1022.

(2) (1907) 4 C.L.R., at pp. 1057, 1064, 1065, 1079.

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RICH J. I have had the advantage of reading the judgment of *Dixon* J. and agree with his Honour's reasons and conclusion.

DIXON J. Robert James Douglas Sellar, a bachelor, died on Wednesday, 2nd May 1934, at the age of seventy-one, from cardiac failure after an attack of bronchitis of some seven days' duration. His medical attendant had thought that he might die on the previous Sunday, but some improvement took place in his condition and the collapse ending in death did not in fact occur until the afternoon of Wednesday. He died between six and seven o'clock. On the same evening, some hours after his death, his medical attendant learned that, on the previous afternoon, the deceased had executed a transfer in favour of the appellant.

The appellant had for many years been in the deceased's service and acted, she says, as housekeeper and as his nurse, that is, presumably, after an operation he underwent in the previous winter.

The land the subject of the transfer is set down at a value of £4,750. The transfer, which is expressed to be in consideration of ten shillings, purported to transfer to the appellant an estate in fee simple in remainder expectant on the transferor's death.

The medical attendant at once objected to the transaction. Indeed, the strength of his objection was or became so great that, on the part of the appellant, it is said to have impaired the value and accuracy of his evidence.

The transfer was prepared by a law stationer who was on terms of great friendship with the appellant. He frequented the house and appears to have been accepted as a friend or acquaintance by the deceased, whom probably he knew independently of the appellant. Neither his evidence nor that of the appellant proved trustworthy, according to the opinion of *Nicholas* J., who heard the suit. But an account of the actual execution of the transfer was given by the manager of the local branch of the deceased's bank, and his evidence was fully accepted. From that it appeared that the deceased understood what he was doing. The banker said that on the Tuesday morning the law stationer came to him and said that he was representing the deceased; that he had found at the office of the Registrar General that the land in question was mortgaged to the bank, and

that the deceased wished to know whether the bank would release the security so far as it affected the land, because he wished to transfer it to his housekeeper, the appellant. On learning that the deceased was too ill to come to the bank, the manager agreed to go to see him. He went about five o'clock on that afternoon. He told the deceased, whom he saw alone, that he considered that he could not afford to part with the income of the land, on which the deceased said that he intended to transfer the property and to retain a life interest in it, and asked the witness whether the bank would be prepared to release the land from its security to enable the transfer to go through. The witness replied that he thought the bank would, but that he would submit the question and let the deceased know. As he was leaving the house, the law stationer asked him if he would witness the transfer. The transfer was produced, some additions were made to it and the deceased signed it, sitting up in bed and resting the paper on a suit case. The signature is a bad one and it is evident that it was preceded by one or two abortive attempts to make it. The appellant appears to have been present. The bank manager then witnessed the deceased's signature. The document remained in the custody of the law stationer. At that time it contained in the memorandum of encumbrances no reference to the bank's mortgage.

After the deceased's death, the respondent, the executor, lodged a caveat against dealings with the land. The transfer was handed over to the appellant's solicitors who, for the purpose of obtaining registration, added to the body of the instrument a notification of the bank's mortgage as an encumbrance, informing the respondent of what they were doing. It was lodged for registration, and the respondent, in order to maintain the caveat, brought the suit out of which the present appeal arises, seeking to restrain registration. A decree was made declaring the transfer void and of no effect, restraining its registration, ordering its delivery up and extending the caveat.

The consideration of ten shillings stated in the transfer was, of course, nominal only and the appellant supports the transaction as a gift. *Nicholas* J. found that the gift was inchoate and incomplete, but he found in the appellant's favour on the issues raised by the

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respondent of incapacity and undue influence. He held that the burden of proof on both these questions lay upon the respondent. He said that, neither in the period before the deceased's last illness, nor in his last illness, could he find proof of such a degree of confidence reposed in, or such powers of management entrusted to, the defendant, or the law stationer, as were found in the authorities which he mentioned dealing with the relations of influence. His Honour quoted from the judgment of *Lindley* L.J. in *Allcard* v. *Skinner* (1) the statement that courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors, and that the doctrine of undue influence is founded on the principle that it is right to save people from being victimized. He said that it was evident that the opinion of the deceased's medical attendant was that, during the last three days of his life, the deceased was in such a condition that anyone could have obtained from him anything he asked. His Honour continued: "But bearing in mind the extract from the judgment of *Lindley* L.J., quoted above, and also that I am not entitled to set aside a gift on the ground that I do not trust either of the two people who are fully aware of the circumstances under which it was made and of whom one is the donee, I hold that the plaintiff has not discharged the onus of showing that this transfer was obtained by the undue influence of the defendant or of anyone acting on her behalf." But the learned judge said that he believed that the appellant and the law stationer acted in co-operation in relation to the gift and that, if the onus of showing that the gift was that of an independent donor had rested on their evidence, he did not think that he would hold that it was discharged. Notwithstanding the evidence of the bank manager, the circumstances of the transaction appear to me to make its propriety very doubtful. Although it is, no doubt, quite true that, up to his last illness, the appellant stood in no relation of influence to the deceased, I see nothing inconsistent with principle in treating the dependence of a dying man on the woman in charge of him as sufficient to place upon her the burden of establishing the righteousness of a large gift made to her within twenty-six hours of death. We have recently discussed

(1) (1887) 36 Ch. D., at pp. 182, 183.

the whole question of special relations of influence (*Johnson* v. *Buttress* (1)) and I do not wish to enter again upon the subject. In the view I take of the appeal it is unnecessary to decide whether there is enough in the circumstances to put the burden of disproving undue influence upon the appellant. For, in my opinion, the deceased did not make any effective gift to her.

If he did authorize the law stationer to register the transfer on his behalf, his death would, I think, revoke the authority, notwithstanding the contention made to the contrary (see, per *Fair* J., *Scoones* v. *Galvin* (2)). In any case, his executor's action means a countermand of any subsisting authority to act on its behalf, or exercise any right or power belonging to the deceased. The consideration of ten shillings stated in the transfer was nominal and the appellant cannot, except by registration, obtain a legal estate in the land. A transfer for value may before registration confer upon the transferee an equitable estate or interest. But it does so, not because it is a transfer, but because the transferee has given value for the land, and because, notwithstanding that the instrument is a memorandum of transfer, it may, as a writing, suffice to satisfy the requirements of the Statute of Frauds and so place the transferee in the position of a purchaser who is entitled to specific performance of his contract and has paid his purchase money.

An intended donee cannot stand in such a position. Being a volunteer, an intended donee cannot obtain equitable remedies against the donor compelling him to give legal effect to his intention to give. The deceased manifested no intention to constitute himself a trustee of the land for the appellant, and the memorandum of transfer is not, and cannot produce the effect of, a declaration of trust. The appellant is, therefore, the owner of neither a legal nor an equitable estate in the land. But, under the system of the *Real Property Act*, a transferee may be in a position by registering an instrument to obtain a legal estate, although prior to registration neither the legal nor any equitable estate was vested in him. If that system allows a volunteer to acquire an indefeasible right to the registration of an instrument in his favour, then, although it would remain true that before registration he had neither a legal nor an

(1) (1936) 56 C.L.R. 113.

(2) (1934) N.Z.L.R., at p. 1023.

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equitable estate in the land, yet he would be entitled to a right of a new description arising under the statute, and by its exercise he could vest the legal estate in himself.

The true question in the present case appears to me to be whether the appellant acquired a right of this nature which the deceased or his executor could not intercept or defeat. There is no *a priori* reason why statutory provisions making title depend upon registration should not confer upon a person in whose favour a registrable instrument has been made, a right to procure its registration, notwithstanding that it is voluntary, and no reason why it should not leave the transferor powerless to countermand his instrument. Such a right would not depend upon the doctrines or remedies of a court of equity, and, pending actual registration, the transferee could not be considered entitled to an equitable interest any more than to a legal interest in the land. It might appear anomalous, but the anomaly would be no obstacle to the existence of the right. Under other Torrens statutes this question has arisen and the weight of judicial opinion appears to concede that under the system a transferee in possession of a voluntary transfer may become entitled to register the transfer, notwithstanding that the transferor seeks to prevent it. Sir *John Salmond* seems to have been unready to make this concession (*Public Trustee* v. *Commissioner of Stamp Duties* (1)) and *Herdman* J. has refused to do so (*Scoones* v. *Galvin* (2)). But, if such a right can be conferred at all, it seems to be agreed that to impart it more is required than the mere execution of the transfer by the donor.

On the other hand, until the decision of the New Zealand Court of Appeal in *Scoones* v. *Galvin* (3), to which the court was referred by *Rich* J. upon the hearing of the present appeal, there does not appear to have been any judicial decision defining the conditions which must be satisfied before the right could arise. Sir *John Salmond* had assumed that the question was whether the delivery of the certificate of title together with an executed transfer into the hands of the donee would amount to a complete gift (4).

(1) (1925) N.Z.L.R. 237, at pp. 239, 240.
(2) (1934) N.Z.L.R., at p. 1022.
(3) (1934) N.Z.L.R. 1004.
(4) (1925) N.Z.L.R., at p. 240.

Griffith C.J. in *Anning* v. *Anning* (1) had expressed an opinion that it would be enough to execute the transfer and deliver it to the donee. The Supreme Court of Alberta had decided that a donor who first handed to the donee's father for registration a transfer completed and accompanied by the certificate of title, and then, before the transfer could be registered, repossessed himself of the documents and destroyed the transfer, had made no more than an imperfect gift which he had effectually revoked before completion (*Smith* v. *Smith* (2)). The Privy Council in *Macedo* v. *Stroud* (3) had held that a voluntary transfer which the donor executing it did not present or hand to the donee for registration conferred no estate or interest either at law or in equity and amounted to no more than an imperfect gift which the donee could not enforce against the donor's executors. In *Wadsworth* v. *Wadsworth* (4) *Myers* C.J. had decided that an intending donor, who had executed a transfer in favour of the intended donee but had not delivered it to her, was entitled against the donee into whose hands it had come without his authority to an order for delivery up of the transfer and for the removal of a caveat lodged by her. In *O'Regan* v. *Commissioner of Stamp Duties* (5) the Supreme Court of Queensland had been called upon to decide for the purposes of succession duty the question as at what precise time a completed transaction by way of gift first amounted to a "disposition of property . . . purporting to operate as an immediate gift." The court decided that the transfers of the land before registration amounted to such a "disposition," inasmuch as they had been completed and handed to the solicitors for the donees to whom the certificates of title had already been delivered.

But in *Scoones* v. *Galvin* (6), after making a valuable examination of these and other authorities, *Myers* C.J., *Blair* and *Kennedy* JJ. did define the conditions which must be fulfilled in order to put it beyond the donor's power to revoke an intended gift of land under the Torrens system. Their Honours reached the conclusion that it is necessary for the donor to execute the transfer and deliver

(1) (1907) 4 C.L.R. 1049.
(2) (1915) 21 D.L.R. 861.
(3) (1922) 2 A.C., at p. 338.
(4) (1933) N.Z.L.R. 1336.
(5) (1921) Q.S.R. 283.
(6) (1934) N.Z.L.R. 1004.

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to the donee or his agent not only the transfer but also the certificate of title. They said :—" This, we think, must be so, because, if the donor retains possession of the certificate of title, he has not done all that is necessary for him to do. He still has to produce the certificate of title, and until he has done that he may, as we think, revoke the gift and refuse to do anything more " (1). The New Zealand *Land Transfer Act* 1915 contained no express provision requiring production to the registrar of the original certificate, but in practice it had always been insisted on, and, in 1895, in *Ex parte Bettle* (2) it had been held that the registrar was entitled to refuse registration unless the certificate was produced (per *Fair* J. (3)). The language quoted from the judgment of *Myers* C.J., *Blair* and *Kennedy* JJ. evidently alludes to the test laid down in the well-known statement by *Turner* L.J. in *Milroy* v. *Lord* (4) of what was necessary to make a voluntary settlement valid and effectual: " The settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him." But, in applying that test to the present question, care must be taken to keep in mind what that question exactly is. It is not whether the intending donor has divested himself of his estate or interest in the land, or has done all that lies in his legal power to do so. For obviously it was within his legal power himself to cause the immediate registration of the transfer. The question is whether by his acts he has placed the intended donee in such a position that under the statute the latter has a right to have the transfer registered, a right which the donor, or his executors, cannot defeat or impair. That delivery of the transfer to the donee or the donee's agents is a condition which must be fulfilled before such a right will arise appears to me to be clear. It is only by the control or possession of the instrument that the transferee could effect registration without any liability to interference or restraint on the part of the transferor. Further, I think that the donee must obtain property in the piece of paper itself and

(1) (1934) N.Z.L.R., at p. 1017.
(2) (1895) 14 N.Z.L.R. 129.
(3) (1934) N.Z.L.R., at p. 1026.
(4) (1862) 4 DeG. F. & J. 264, at p. 274 ; 45 E.R. 1185, at p. 1189.

property in the paper could pass only by delivery (*Cochrane* v. *Moore* (1)). If property in the transfer remained in the transferor, his power of recalling it must also remain. For he would be entitled to possession of the paper, he could refuse to present it for registration and he could destroy it. But, if by delivery to the donee or someone as bailee for her, the transferor has given her property in the instrument itself, then unless some further condition is expressly or impliedly prescribed by the statute, it would appear that the instrument, assuming it to be registrable, may be registered by the transferee independently altogether of the donor and in spite of any objection on his part. Under the New Zealand legislation such a further condition appeared to be prescribed; delivery of the certificate of title was considered a necessary condition of the transferee's right to register. It does not, of course, follow that delivery of the certificate of title will also be a condition under the New South Wales *Real Property Act*. But in fact the provisions of that Act create a position which is not so very different from that which appears to obtain under the New Zealand Act. The effect of secs. 35, 37 and 38 (1) of the *Real Property Act* 1900 (N.S.W.) is to define registration as the entry of a memorial of a transfer or other dealing on the folium of the register book constituted by the certificate of title and to make it necessary forthwith to enter a like memorial on the duplicate certificate "unless the Registrar-General, as hereinafter provided, dispenses with the production of the same." What is thereinafter provided is that the Registrar-General may dispense with the production of an instrument for the purpose of recording the memorial thereon, but, in that case, he must notify in the register book the fact that no entry has been made in the duplicate certificate. Before exercising this power, he must obtain a statutory declaration that the certificate of title has not been deposited as security for a loan (See sec. 38 (2) and (3)). Under sec. 12 (*a*) he may require a proprietor, mortgagee or other person interested in land in respect of which a transfer or other dealing "is about to be transacted" to produce a certificate of title or other instrument in the latter's possession or control affecting the land or the title thereto. It is not clear that, in requiring a statutory declaration that the certificate

(1) (1890) 25 Q.B.D. 57.

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of title has not been deposited as a security, the provision includes the case of a mortgagee under a registered first mortgage to whom the certificate of title has been handed, in accordance with the common practice. Sec. 96 of the *Conveyancing Act* 1919 recognizes the existence of the practice and provides that the mortgagor shall be entitled to have the certificate of title lodged by the mortgagee with the Registrar-General to allow of the registration of any authorized dealing by the mortgagor with the land. But the transferee or other person taking under such a dealing has no statutory right directly to compel a mortgagee in possession of the certificate to produce it at the Land Titles Office. It follows that, when a mortgagee holds the certificate of title, a transferee from the mortgagor cannot obtain registration unless one or other of the following events occurs: either (i.) the mortgagee must voluntarily produce the certificate; or (ii.) the mortgagor transferor must under sec. 96 of the *Conveyancing Act* compel him to lodge it; or (iii.) the Registrar-General must under sec. 12 (*a*) of the *Real Property Act* require him to produce it; or (iv.) the Registrar-General must dispense with its production. Obviously in such a case the Registrar-General would not dispense with production. Under a voluntary transfer, the transferee could not insist that the transferor should compel the mortgagee to lodge the certificate. Whether the Registrar-General would require its production would depend upon the mode in which he exercised a very wide discretion. In these circumstances it cannot be said that without the certificate the appellant acquired a right to obtain registration as against the Registrar-General. But, as against the donor, it may be said that, if she obtained a chance of securing the favourable exercise of the discretion of the Registrar-General, neither the donor nor his executor is entitled to any relief against the possibility of her so securing registration. Perhaps the most logical view is that, if an intending donor confers upon the intended donee property in a piece of paper containing a memorandum of transfer in the donee's favour, completed and executed by the donor, he has no legal title to recall it or prevent its use by the donee for any purpose allowed by law including registration and no equity upon which an injunction or any other relief administered by the Court of Chancery would be

granted. On this view, the question whether the donee could divest the donor's legal title would depend on her practical success in procuring production of the certificate of title, or obtaining dispensation from its production. But this is not the view adopted by the New Zealand Court of Appeal in *Scoones* v. *Galvin* (1). The question was not discussed in that case whether the registrar might, if in his discretion he saw fit, register the transfer without production of the duplicate certificate of title, but, inasmuch as he could not be required to do so, it was decided that the donee had no right not defeasible at the instance of the donor.

In the present case, it is, I think, unnecessary to pursue the distinction. For, in my opinion, there are two fatal objections to the appellant's claim that, as against the respondent, she is entitled to register the transfer if she can procure registration. The first objection is that the memorandum of transfer was not a registrable instrument either at the time of the deceased's death, or, if it be material, at the time when by caveating the respondent as executor sought to revoke or recall the inchoate gift. The second objection is that upon the facts the instrument was not given to the appellant or to Fuller, the law stationer, as bailee for her and, therefore, never became her property and was not placed by the deceased in her possession or control. The memorandum was not registrable as the title stood when it was executed, because it contained no notification of the mortgage by which the estate transferred was encumbered. Sec. 46 of the *Real Property Act* 1900 provides that a memorandum of transfer shall contain an accurate statement of the estate intended to be transferred, and a memorandum of all leases, mortgages, and other encumbrances to which the same may be subject. The transfer did not contain such a memorandum, because the transferor is said to have intended that the land should be discharged from the mortgage. But, as this was not done, the instrument could not be registered. To overcome the difficulty, after the transferor's death the transferee's advisers altered the instrument by inserting a note of the encumbrance in the place for the memorandum of encumbrances. This, in my opinion, was an unauthorized alteration. In *Barker* v. *Weld* (2) *Johnston* J. held that an analogous

(1) (1934) N.Z.L.R. 1004.

(2) (1884) 3 N.Z.L.R. 104.

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alteration made in a memorandum of mortgage was, in the circumstances of the case, within the implied authority of the mortgagee. The circumstances were peculiar, but the decision, which appears to me to go a long way, cannot, I think, apply to a voluntary transfer definitely intended by the transferor to be subject to no encumbrance. The reason for the decision appears in the following passage from the judgment of *Johnston* J. :—"I am of opinion that the words inserted had no material effect upon the document or the registration. Whether they were inserted or not the mortgage was a second mortgage, although the mortgagee believed it to be a first mortgage. The words inserted were only such as the law would supply. The mortgagee had the right to have the instrument registered, and both parties must have contemplated that it was to be registered, and the insertion of the words in question was necessary to procure the registration" (1). Here, although both parties no doubt contemplated registration of the instrument, that registration was intended to follow the discharge of the mortgage.

If the alteration had been authorized, it would have made the instrument registrable. Both on this ground and because its operation would be to transfer an encumbered and not an unencumbered estate, the respondent contends that the alteration was material and that it avoided the instrument. I agree that the alteration was material and I do not say that the contention is not right that the instrument is avoided as against the respondent as executor of the transferor. Difficulties exist in applying the principle upon which the contention depends to instruments the purpose of which is, so to speak, to put the Registrar-General in motion, and it may be that, after registration, the transferor could not avail himself of such an alteration to overcome the effect of registration. But, in any case, I think that it is unnecessary for the respondent to rely upon the alteration as vitiating the instrument. It is enough that without it the instrument is not entitled to registration and that the alteration is unauthorized. At least it must be treated as having no effect in favour of the party making it.

The second objection, no doubt, depends upon the facts disclosed by the evidence. But, in considering whether the transfer was

(1) (1884) 3 N.Z.L.R., at p. 108.

delivered to the law stationer as agent or bailee for the appellant, it must be remembered that his evidence was disbelieved by *Nicholas* J. and cannot be relied upon. I can see no reason for imputing to the deceased an intention that the law stationer should hold the instrument for and on behalf of the appellant to the exclusion of the deceased himself. He had reserved a life estate to himself. He must be taken to have intended that the transfer should not be registered until the bank discharged the land from their security. Some one, presumably he himself, had to provide stamp duty as on a gift and pay the registration fees. Probably he never thought of the law stationer otherwise than as acting as his solicitor would do. In any case, he did nothing to manifest or communicate an intention to hand over the transfer to him as agent or bailee for the transferee. The fact that the law stationer intended to act throughout in the interests of the appellant and thus probably for his own advantage is beside the point. The question is whether the deceased as donor delivered the paper to the appellant as donee. *Nicholas* J. found expressly that before the donor's death the memorandum of transfer was not delivered to the appellant or to any one on her behalf; that the law stationer did not become her agent but up to the donor's death remained his agent and that his authority was revoked by the donor's death. I agree in that conclusion.

In my opinion the appellant has failed to establish a gift of any interest in the land or the creation in her favour of any right to obtain one by registration.

A further complaint made on her behalf is against the order for costs contained in the decree. I think that we should not disturb that order. To make it was well within the discretion of the learned judge.

The respondent gave a notice of cross-appeal complaining of the findings against it on the issue of undue influence. The finding was not embodied in the decree and as no variation of the decree itself was required and the respondent meant to do no more than impugn some of the reasons of the learned judge, the notice was in strictness unnecessary. Rule 16 of sec. III. relates to variations sought by respondents in judgments, decrees, orders, or sentences.

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In my opinion the appeal should be dismissed with costs, other than the costs of the cross-appeal, which should be paid by the respondent.

McTIERNAN J. In my opinion the appeal should be dismissed. The decree of the Supreme Court of New South Wales against which this appeal is brought declared that a memorandum of transfer of land under the *Real Property Act* 1900 (*N.S.W.*), lodged by the appellant for registration, was of no effect, and granted certain consequential relief including an injunction restraining the appellant from further attempting to register it. The suit was instituted by the respondent which is the executor of the registered proprietor of the land described in the memorandum of transfer. He died on the day after he had executed the transfer in favour of the appellant. It was made for a nominal consideration only. A material question in the suit was whether the deceased had made an effectual gift of the land. If the gift had not been perfected by the deceased he could have repented of his bounty, and nothing appears that would make it unconscientious in the view of a court of equity for the respondent as his executor to oppose his bounty being perfected by the registration of the transfer. The Supreme Court (*Nicholas* J.) decided that question against the appellant. In my opinion that decision was right and it is sufficient to dispose of the case.

The memorandum of transfer bore a notification that it was made subject to a lease, but there was no notification of an existing mortgage to the Commonwealth Bank of Australia. It was expressed to transfer to the appellant an estate in fee simple in remainder expectant on the death of the transferor. The instrument was prepared by a law stationer, Fuller, a friend of both the deceased and the appellant, and was witnessed by the manager of the local branch of the Commonwealth Bank of Australia. It was not handed by the deceased to the appellant, but remained in the possession of Fuller who, after the death of its maker, handed it to the appellant's solicitors. As the mortgage to the bank was undischarged a notification of that encumbrance was added to the transfer and it was lodged for registration, on behalf of the appellant.

The legal estate in the land could not pass to the appellant except by registration of the transfer, and, as she was a volunteer only, no equitable rights passed to her by the transfer, which did not purport to be a declaration of trust. It is plain that if the registered proprietor of land, intending to make a gift, executes a memorandum of transfer in favour of a volunteer and retains possession of the instrument, the volunteer has no equity to compel the registered proprietor to have it registered or to obtain possession of the instrument in order to have it lodged for registration. If he gives a duly executed transfer to the donee or to someone on his behalf, then the question arises which was much debated, whether the gift is effectively made, or whether it is necessary that the donor should also give the donee the duplicate certificate of title, or enable him to obtain it, or, indeed, whether registration itself is necessary. But none of these questions arises unless the donor has taken the necessary preliminary step of giving the executed transfer to the donee or to someone on his behalf. In the present case the deceased did not give the transfer to the appellant. But the appellant contends that this preliminary step was accomplished when the transfer was given to Fuller. If he were merely the agent of the donor it is clear that his authority as agent, whether it was to hand the instrument to the appellant or to have it registered, came to an end at the death of the donor. As against this it was urged that Fuller's position was that of a mandatory and that his authority as such to have the transfer registered did not terminate with his principal's death. Although the deceased had communicated to the appellant his intention to make her the gift no equity or right arose in her to prevent the deceased from repenting of his intended bounty. The deceased took no irrevocable step by handing the transfer to Fuller for registration. He was free to revoke his instructions before they were carried out. There is no basis in principle for the conclusion that, whether Fuller was an agent or might more properly be described as being vested with a mandate to perfect the gift by having the transfer registered, his authority was not determined at the death of the intending donor. Nor can the appellant's position be improved by treating Fuller as her agent for that conclusion is quite impossible on the evidence.

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It is unnecessary in this view to decide whether the transfer was invalidated by the addition of the notification of the mortgage or to discuss the issues of incapacity or undue influence.

I should add that I see no reason for disturbing the order of *Nicholas* J. as to costs.

Appeal dismissed with costs. Cross appeal dismissed with costs. Costs to be set off.

Solicitors for the appellant, *William Patterson & Co.*

Solicitors for the respondent, *Iceton, Faithfull & Baldock.*

J. B.

Appl *Esso Aust Resources Ltd* v *Commissioner of Taxation* (1997) 144 ALR 458

[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXES (SOUTH AUSTRALIA). APPELLANT;
RESPONDENT,

AND

ELDER'S TRUSTEE AND EXECUTOR COMPANY LIMITED RESPONDENT.
APPELLANT,

H. C. OF A. 1936. ADELAIDE, *Oct.* 7. SYDNEY, *Dec.* 10. Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Land Tax (Cth.)—Assessment—Validity—Pastoral leases of Crown lands—Notice of objection—Appeal—Grounds available—Amendment—Land Tax Assessment Act 1910-1912 (*No.* 22 *of* 1910—*No.* 37 *of* 1912), *secs.* 29, 44, 74—*Land Tax Assessment Act* 1914 (*No.* 29 *of* 1914)—*Land Tax Assessment Act* 1930 (*No.* 1 *of* 1930).

Statute—Construction—Erroneous assumption by Parliament as to effect of statute.

The *Land Tax Assessment Act* 1910-1912 provided that land tax should be charged on land as owned at noon on the thirtieth day of June immediately