[HIGH COURT OF AUSTRALIA.]

YERKEY AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

JONES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Husband and Wife—Confidential relation—Guarantee—Equitable relief.

The relation of husband and wife is not one of influence, and the fact that a wife confers a voluntary benefit upon her husband by a gift or by becoming surety or otherwise raises no presumption in equity against the transaction: But, if a husband procures his wife to become surety for his debt and it appears that circumstances existed which, if they alone had been the parties to the transaction, would make it liable to be set aside as against the husband, then the guarantee or security may be invalidated also against the creditor if he relied upon the husband to obtain it from his wife and had no independent ground for reasonably believing that she fully comprehended the transaction and freely entered into it.

Bank of Victoria Ltd. v. *Mueller*, (1925) V.L.R. 642, distinguished.

Decision of the Supreme Court of South Australia (*Napier* J.): *Yerkey* v. *Jones*, (1938) S.A.S.R. 201, reversed.

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ADELAIDE, 1938, *Oct.* 4, 5.

MELBOURNE, 1939, *Mar.* 6.

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

APPEAL from the Supreme Court of South Australia.

John George Yerkey and Mary Penelope Yerkey (his wife) brought an action in the Supreme Court of South Australia against Florence May Blanche Jones and Estyn Jones (her husband). The claim was for principal and interest secured by a memorandum of mortgage registered under the *Real Property Act* 1886 (S.A.). The circumstances leading up to the execution and registration of the mortgage were as follows:—In 1936 Estyn Jones, who was then employed as a

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clerk at a small salary and had no other means, entered into negotiations for the purchase of a property belonging to the plaintiffs. This property consisted of a house and three acres of land at Payneham near Adelaide, which was fitted up as a poultry-farm.

Of the price of £3,500 asked for the Payneham property, only a nominal deposit was required. £200 was to be paid at the end of two years and £3,300 at the end of three years. The Yerkeys, however, made it a condition that £1,000 of the £3,300 final payment should be secured by a second mortgage over Mrs. Jones's Walkerville property, over which there was already a first mortgage for £700. Estyn Jones agreed to buy the property, and John George Yerkey instructed his solicitors to prepare the necessary documents. These instructions were given on 14th August 1936. The solicitors, in the first instance, prepared a memorandum in the form of a letter from Estyn Jones to the Yerkeys. This contained a brief statement of the terms of the purchase and included the following:— "The price is £3,500. I am to procure the execution by my wife Florence May Blanche Jones of a second mortgage to you over her property at 7 Smith Street, Walkerville (subject only to the present mortgage to the Savings Bank of South Australia for £700) for £1,000 repayable at the end of three years from the date hereof with interest at 5% payable quarterly such mortgage to contain such covenants and provisions as you or your solicitors may reasonably require." This document was signed by Estyn Jones at the solicitors' office on 17th August 1936, and, on the same day, the defendants took possession of the Payneham property. No more than a week had elapsed since Estyn Jones told Mrs. Jones that he had agreed to buy the property. At some time prior to 21st August 1936, when the documents effecting the sale were completed, Jones made the following statements to his wife:—That he had agreed to buy the Payneham property and that he would or might get into trouble if she did not give the mortgage over the Walkerville property; that if anything went wrong and she lost the Walkerville house he would still have the property at Payneham and that the mortgage for £1,000 would not fall due for three years. At some time prior to 21st August 1936, Mrs. Jones agreed with her husband to give a second mortgage for £1,000 as a guarantee

for the performance by him of his contract to pay £1,000 at the end of three years. In her evidence, however, she stated that she did not know that she might be called upon personally to pay the £1,000.

On 21st August 1936 the Yerkeys and the Joneses met at the solicitors' office. The following documents were then ready for signature and were signed :—

1. An agreement between the Yerkeys as vendors and Estyn Jones as purchaser which (*inter alia*) required Estyn Jones to procure the execution by Mrs. Jones of a second mortgage to secure the payment of £1,000, being part of the purchase money, on 17th August 1939 with interest at five per cent per annum containing such power of sale and other powers, covenants and provisions and rights and remedies to secure the payment of the said sum of £1,000 and interest thereon as the Yerkeys or their solicitors might reasonably require. The agreement made over certain personal chattels.

2. A bill of sale by Estyn Jones to the Yerkeys over the personal chattels to secure payment of the whole purchase price of £3,500.

3. A second mortgage over the Walkerville property to secure the £1,000, which was described as money lent to Estyn Jones, who joined in the mortgage under the description of "the borrower." This mortgage contained a provision making the principal immediately payable upon default in payment of interest for twenty-one days or upon breach of any of the covenants in the mortgage.

In the solicitors' office copies of the documents were handed to Estyn Jones before they were executed, and apparently he and Mrs. Jones sat next to each other so that they could read the documents together. The solicitor went through the clauses of the mortgage. He explained that there was a joint and several covenant by the Joneses to pay £1,000 and that this involved a personal liability on Mrs. Jones. He stated further that, if default was made in payment, the property might be sold but that if it did not realize the necessary amount, either or both parties would have to find the money from other sources. He gave the opinion that, having regard to what the Joneses regarded as the value of the property, it was unlikely that it would not realize sufficient to meet the mortgage. He also explained that upon default in payment of interest the mortgagees could sue for the whole amount of the mortgage money even although

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the three years had not expired and that this power was additional to the power of sale. He also explained a provision that though, as between the Joneses, Jones was primarily liable and Mrs. Jones was a surety only, yet as between mortgagor and mortgagee the mortgagor must be regarded as a principal debtor for all principal and other moneys secured. He explained that this was a clause which was necessary in the case of a "guaranteed mortgage" and that the effect of it was that the mortgagee could sue either or both of the Joneses.

Though the Yerkeys, in the course of their evidence, said that they did not regard the solicitors as their own solicitors any more than the purchasers' solicitors and that this was made clear to Jones, in fact the solicitors acted solely on behalf and in the interests of the Yerkeys. Mrs. Jones did not say that she relied upon the solicitors as protecting her interests or acting on behalf of her husband or herself, nor did Jones give any evidence that he considered the solicitors to be acting for himself or his wife.

In the Supreme Court of South Australia, *Napier* J. held that, on grounds of undue influence, misrepresentation and unilateral mistake, Mrs. Jones was entitled to equitable relief against the personal covenants in the mortgage. He therefore entered judgment for her: *Yerkey* v. *Jones* (1).

From this decision the plaintiffs appealed to the High Court.

Further facts appear in the judgments hereunder.

Mayo K.C. (with him *Astley*), for the appellant. The relationship of husband and wife gives rise to no presumption of undue influence (*McKenzie* v. *Royal Bank of Canada* (2), per Lord *Atkin*). There was no misrepresentation and no non-disclosure. The allegations of misrepresentation and non-disclosure concern the contents of the mortgage, and this was sufficiently explained. The solicitors were engaged and instructed by the appellants. There is no evidence that they were instructed to act for the respondent or her husband, and neither the respondent nor her husband gave evidence that they regarded the solicitors as acting for them or placed any reliance on them. No point that they were so acting could have been an inducing factor

(1) (1938) S.A.S.R. 201.

(2) (1934) A.C. 468, at p. 475.

(*Smith* v. *Chadwick* (1)). The mortgage was explained before execution, and the respondent advanced no reason to explain that her signature was either not in consequence of the explanation or indifferent to it (*Parker and Gabell* v. *South Eastern Railway Co.* (2)). As to the suggestion that the parties were never *ad idem*: The respondent meant to, and did, sign a mortgage, and she must show a right to release by virtue of misrepresentation, concealment or undue influence (*Howatson* v. *Webb* (3)). As to the suggestion that there was an incorrect recital: Recitals may be corrected by evidence (*Greenfield* v. *Edwards* (4); *Marler* v. *Tommas* (5); *Norton* on *Deeds*, 2nd ed. (1928), pp. 216, 217). The respondent gave a mortgage to the amount and of the type that she intended, and the mortgage that she intended must have other terms than those particularly referred to in the preliminary negotiations. The mortgage contained only such terms as are usual and proper in a mortgage given by a surety to secure his liability (*Tooth & Co. Ltd.* v. *Clifford Love & Co. Ltd.* (6); *Seaton* v. *Twyford* (7); *Burrowes* v. *Molloy* (8); *Evatt and Beckenham, Conveyancing Precedents*, p. 213). Any equity to set aside the mortgage would arise only if there were a duty to explain which was not satisfactorily discharged. The duty here (if any) was reasonably performed. The solicitors believed, and had grounds for believing, that the respondent understood the document (*Bank of Victoria Ltd.* v. *Mueller* (9)). [Counsel also referred to the *Real Property Act* 1886 (S.A.), secs. 69, 71, 72, 80 and 249.]

Alderman (with him *Brazel*), for the respondent. The respondent was not a business woman, and her husband exerted undue influence on her to procure her signature to the mortgage (*Turnbull & Co.* v. *Duval* (10)). There was no consideration for her executing the mortgage. The effect of undue influence appears from *Willis* v. *Barron* (11); *Chaplin & Co. Ltd.* v. *Brammall* (12), *Bischoff's Trustee*

(1) (1884) 9 App. Cas. 187.
(2) (1877) 2 C.P.D 416, *per Mellish* L.J., at p. 421: *per Bramwell* L.J., at p. 427.
(3) (1908) 1 Ch. 1.
(4) (1865) 2 DeG.J. & S. 582, at pp. 596, 597 [46 E.R. 501, at pp. 506, 507].
(5) (1873) L.R. 17 Eq. 8.
(6) (1920) 20 S.R. (N.S.W.) 432, at p. 436.
(7) (1870) L.R. 11 Eq. 591.
(8) (1845) 2 Jo. & Lat. 521.
(9) (1925) V.L.R. 642.
(10) (1902) A.C. 429.
(11) (1902) A.C. 271.
(12) (1908) 1 K.B. 233.

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v. *Frank* (1); *Bank of Montreal* v. *Stuart* (2); *Bank of Victoria Ltd.* v. *Mueller* (3). The duty of disclosure in the case of a guarantee transaction was not discharged (*Davies* v. *London and Provincial Marine Insurance Co.* (4); *Chambers* v. *Rankine* (5); *Re Parent Trust and Finance Co. Ltd.* (6)). The terms of this mortgage went beyond what are usual conditions (*Whitley* v. *Challis* (7); *Farmer* v. *Pill* (8); *Christison* v. *Warren* (9)).

Mayo K.C., in reply.

Cur. adv. vult.

1939, Mar. 6.

The following written judgments were delivered :—

LATHAM C.J. The plaintiffs in this action are husband and wife, and the defendants also are husband and wife. The plaintiffs (Yerkey and Mrs. Yerkey) sued upon a covenant to pay principal and interest contained in a mortgage of land owned by Mrs. Jones. The mortgage was executed and the covenant was made by both Jones and Mrs. Jones. The learned judge gave judgment against the male defendant but dismissed the action against the female defendant upon grounds which were stated in his judgment in the following passage :—" Upon this view of the evidence I think that there is some support for the defence of mutual mistake or misrepresentation. See *Wilding* v. *Sanderson* (10) : cf. *Davies* v. *London and Provincial Marine Insurance Co.* (11). But, however that may be, I think that Mrs. Jones is entitled to relief upon her defence of undue influence and unilateral mistake. I think that she executed the mortgage without understanding the effect of the personal covenant, and that she did so without due deliberation or advice, in circumstances of pressure and of confidence misplaced, which make it inequitable that the plaintiffs, who obtained the covenant by these means, should now be allowed to enforce it " (12).

The defendant Jones raised defences of fraud and mutual mistake and contended that the mortgage was not binding upon him. The learned judge, however, paid little attention to these defences so

(1) (1903) 89 L.T. 188.
(2) (1911) A.C. 120.
(3) (1925) V.L.R. 642.
(4) (1878) 8 Ch. D. 469.
(5) (1910) S.A.L.R. 73.
(6) (1937) 4 All E.R. 396.
(7) (1892) 1 Ch. 64.
(8) (1902) 1 Ch. 954.
(9) (1903) Q.S.R. 186.
(10) (1897) 2 Ch. 534, at p. 550.
(11) (1878) 8 Ch. D., at p. 475.
(12) (1938) S.A.S.R., at p. 213.

far as Jones relied upon them. Ordinary rules of law were applied. Jones signed documents which he had an opportunity of considering, no misrepresentation was made to him by anybody, and, in accordance with ordinary principles of law, he was bound by his bargain. Apparently, if Mrs. Jones had not been the wife of Jones, the decision would have been the same so far as her liability was concerned ; but the learned judge applied in her favour certain equitable principles which have survived the release of married women from incapacity by the *Married Women's Property Acts.*

The result of the judgment is that the mortgage remains on the register and that it can be dealt with in the ordinary way by being transferred to a bona-fide purchaser for value, who would not be prevented by the judgment in this action from suing the mortgagor, Mrs. Jones, upon the covenant contained in the mortgage : See *Real Property Act* 1886 (S.A.), sec. 151. The registrar was not made a party to the action, the mortgage was neither rectified nor cancelled, and accordingly it remains untouched upon the register though the plaintiffs cannot enforce the covenant against Mrs. Jones. Upon the appeal leave was given to the defendant Mrs. Jones to counterclaim for rectification and rescission, and she availed herself of this leave.

The action was brought upon a covenant to pay interest and principal contained in a mortgage over land at Walkerville of which Mrs. Jones was registered as proprietor under the *Real Property Act.* The land was already subject to a mortgage of £700 in favour of the State Savings Bank. The mortgage to the plaintiffs was a second mortgage for £1,000. Jones was a party to the mortgage and to the covenant, though the land belonged to his wife.

The defences of Mrs. Jones were based upon the fact that the plaintiffs had agreed with her husband that he should procure the execution by her of a second mortgage over her Walkerville property for the purpose of securing portion of his liability under a contract whereby he agreed to purchase a property at Payneham from the plaintiffs for the sum of £3,500. Substantially Jones had no money, but he was very anxious to buy the property at Payneham. His wife's property at Walkerville was said in conversation between

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the parties to be worth about £2,500. She also owned two mortgages. Jones was not in a position to pay any substantial deposit, and the arrangement between Jones and the plaintiffs was that he should get his wife to execute a second mortgage to secure £1,000 which was payable under the contract of sale on 17th August 1939 —three years after the date of the contract. Mrs. Jones alleged undue influence on the part of the plaintiffs and her husband acting together and also on the part of her husband separately. She alleged various fraudulent misrepresentations and certain non-disclosures. She contended that the mortgage which she actually signed was of a different nature from that which it was represented to her to be and from that which she understood it to be. She also alleged that the mortgage, by reason of a mutual mistake of the parties, failed to carry out a preliminary agreement which had been made, particularly in that it created a personal liability on her part instead of merely charging her property with a liability which would become enforceable after three years and only after three years.

Jones had practically no means, and his wife, as already stated, had some property. He was anxious to buy a property, mainly for the purpose of breeding dogs. He saw the plaintiffs' property at Payneham, which had a house on three acres of land and the equipment of a poultry-farm. The plaintiffs wanted £3,500 for it. Mrs. Jones was doubtful as to the wisdom of the enterprise, but her husband was enthusiastic. They had a number of talks about it, and the husband argued that he was so certain to make a success of poultry-farming (with apparently some breeding of dogs) that there was really no risk in his proposed venture. In the event Jones made a complete failure of the poultry-farm. He went into occupation and used the house, land and equipment for about a year. He paid no interest whatever except that a sum of £7 10s. was credited to him by way of set-off, representing rent payable by Yerkey for the Walkerville house, which Yerkey occupied for three weeks. Jones had the use of the property without any other payment. He left it in a dilapidated state, merely abandoning possession without even informing the plaintiffs of his intention. On 27th October 1937 —fourteen months after Mrs. Jones had signed the mortgage—the contention was raised for the first time that she did not understand

the transaction and the equitable defences mentioned were then relied upon.

These defences depend upon the circumstances in which Mrs. Jones entered into the transaction. She was not well disposed towards her husband's new venture, but he converted her. There is no evidence whatever that she expressed to the plaintiffs any reluctance on her part to proceed with the proposal. On the contrary, she visited and inspected the property, and had friendly conversations with the plaintiffs, and there was nothing to show them that she objected (as she now contends) to her husband entering into the transaction.

It was considered by Yerkey that some form of agreement should be drawn up. He went to his solicitors, Messrs. Finlayson, Mayo, Astley and Hayward, for the purpose. The solicitors prepared a memorandum in the form of a letter from Jones to the plaintiffs. This letter set out what were described as "the essential terms of the contract between us for the purchase by me of your property." It continued :—"The price is £3,500. I am to procure the execution by my wife Florence May Blanche Jones of a second mortgage to you over her property at 7 Smith Street, Walkerville (subject only to the present mortgage to the Savings Bank of South Australia for £700) for £1,000 repayable at the end of three years from the date hereof with interest at 5 per cent payable quarterly such mortgage to contain such covenants and provisions as you or your solicitors may reasonably require."

The letter also stated that £200 was to be paid at the expiration of two years and the balance, £3,300, including the amount of £1,000 secured by the second mortgage, at the end of three years. Payments of purchase money and interest were to be secured partly by a full form of agreement for sale and purchase, and partly by a bill of sale over personal chattels on the property at Payneham. This letter was signed on 17th August 1936.

Mrs. Jones went to Payneham, measured the rooms for carpets, &c., and moved into the house on about 17th August. She believed her husband's statements, even though she did not share his enthusiasm. The learned judge found that she was led to agree to give the mortgage which he asked her to give, because he made certain

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statements to her. These statements are some of the alleged misrepresentations of fact. They were, first, that he had agreed to purchase the property and that he would or might get into trouble if she did not give the mortgage. This statement was true. He did on 17th August make the agreement mentioned (recording a prior verbal agreement) under which he had contracted to procure the execution of a second mortgage by his wife. He further said to her that, if anything went wrong and she lost the Walkerville house, he would still have the property at Payneham. I should think that it was obvious that this was a statement as to the future and not a statement of a fact and that it merely represented his hopeful outlook upon the whole transaction. He was sure that he was going to make a success of the poultry-farm, and the effect of her "losing the Walkerville house" would be that £1,000 would be paid off the Payneham purchase. It can hardly be said that this statement of Jones was a representation of fact upon which his wife acted. Further, Mrs. Jones was told by her husband that the mortgage for £1,000 would not fall due for three years. This was an accurate statement, and it represented the intention of the parties. The mortgage, however, contained the ordinary provision that if default were made in payment of interest the principal should become due. As will subsequently appear, this fact was explained to Mr. Jones, and she understood it when she signed the mortgage.

There are no other parts of the evidence, so far as I have been able to discover, which have any relevance to the allegation of an actual exercise of undue influence by Jones over his wife. There is no evidence whatever that the plaintiffs, in concert with the husband or otherwise, did anything which can be described as amounting to the exercise of undue influence. The only evidence as to the exercise of influence by the husband is that which I have summarized. The learned judge accepted the authority of *Howes* v. *Bishop* (1) to the effect that there is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband and wife so as to throw on the husband or on the person who is suing the wife the onus of disproving an allegation of undue influence. For a definite statement of this proposition

(1) (1909) 2 K.B. 390.

by the highest judicial authority, see *Bank of Montreal* v. *Stuart* (1). It is true that undue influence may be more easily proved in the case of husband and wife than in cases where no special relationship exists between the parties, but there is no presumption of such influence from the marital relationship. In the present case it appears to me that, in spite of what I have already quoted from the reasons for judgment of the learned trial judge, his Honour definitely found that there was no undue influence. He said : " I am satisfied that there was pressure as well as persuasion ; but I think that Mrs. Jones knew that she was charging her property as security for the debt of her husband, and I cannot find that her will was overborne by the stronger will of her husband. See *MacKenzie* v. *Royal Bank of Canada* (2) " (3). If the will of Mrs. Jones was not overborne by her husband's will, then her act must be taken to have been her free and voluntary act and she can base no defence on the ground of undue influence, whatever other defences may be open to her.

After Mrs. Jones had agreed with her husband that she would give the mortgage, the parties on 21st August 1936 went to the office of the solicitors who had prepared the letter already mentioned. There is no evidence that Mrs. Jones had seen the letter or that she at any stage knew anything about its terms, but it is found that she did believe that what she was about to do was to be done in pursuance of an agreement which her husband had already made and by which he was bound. All the parties went to the solicitors' office, and the agreement for sale, the bill of sale, and the mortgage were signed. Mr. von Bertouch, a solicitor, explained the documents. The learned trial judge did not think that Mr. von Bertouch, though an honest witness, was able to recollect the precise words which he used in explaining the documents, but his Honour said in his reasons for judgment :—" I accept Mr. von Bertouch's evidence that he gave an explanation of the principal terms of the mortgage ; but, on the other hand, I accept Mrs. Jones' evidence that she signed it, believing that it was such a mortgage as she was bound to give in order to comply with the contract between her husband and the plaintiffs. I think that she understood or believed that

(1) (1911) A.C., at p. 137.
(2) (1934) A.C. 468, at p. 475.
(3) (1938) S.A.S.R., at p. 211.

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the £1,000 would not become payable by her husband until August 1939, and that it was charged upon her property; but I do not think that she realized that she was incurring any personal liability" (1).

Mrs. Jones in effect remembered nothing of the transaction. She remembered that documents were before the parties and that Mr. von Bertouch explained them, but she has no particular recollection of what took place. She said simply :—"I cannot remember anything at all that was said. Mr. von Bertouch did not explain anything to me." But, although she says this, her own evidence shows quite clearly that she had agreed with her husband to give a second mortgage for £1,000 as a guarantee for the performance by him of his contract to pay £1,000 at the end of three years. She admits that she understood that if her husband did not pay up at the end of three years her property might be sold and that she was pledging her Walkerville house as security for his payment in three-years' time. She stated in evidence that she did not know that she might be called upon personally to pay the £1,000. Mr. von Bertouch, however, gave evidence as to what was actually said and done on the occasion of the execution of the documents. He explained the obvious things. He went through the clauses of the mortgage. Mrs. Jones was sitting alongside her husband, who had a copy of the mortgage in his hands. Mr. von Bertouch explained that there was a joint and several covenant by Mr. and Mrs. Jones to pay £1,000 and explained that that involved a personal liability of Mrs. Jones. He stated that, if default was made in payment, the property might be sold, but that, if it did not realize the necessary amount, either or both parties would have to find the money from other sources. He expressed an opinion that, having regard to what Mr. and Mrs. Jones regarded as the value of the property, it was unlikely that the property would not realize a sufficient sum to meet the mortgage. He then explained that upon default in payment of interest the mortgagees could sue for the whole of the mortgage money even though the three years had not expired and that this was a power additional to the power of sale. The mortgage contained a provision that, though, as between Jones and his wife, Jones was

(1) (1938) S.A.S.R., at p. 209.

primarily liable and Mrs. Jones was only a surety for her husband, yet as between mortgagor and mortgagee the mortgagor would be considered as a principal debtor for all principal and interest and other moneys secured. He explained that this was a clause which was necessary in the case of " a guarantee mortgage " and that the effect of it was that the mortgagees could sue either Jones or Mrs. Jones or both.

When Mr. von Bertouch said that this was a necessary provision in a guarantee mortgage he was referring to the fact that such a clause is a common form in such mortgages. See *Encyclopædia of The Laws of England*, 2nd ed., vol. 9, pp. 355 and 413, referring to what is described as the common surety clause, and at p. 361 : " Whenever a wife joins with her husband in mortgaging the wife's estate, it is advisable to add the common surety clause." See also *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 242 :—" Although a surety only undertakes for the default of another, the practice in mortgage deeds is to make him contract and become bound as a principal so far as concerns the mortgagee, but to let him remain a surety so far as concerns the mortgagor. Accordingly the borrower and surety usually enter into joint and several covenants for payment of principal and interest, with a proviso that although, as between the borrower and the surety, the latter is only a surety, yet, as between the lender and the surety, the latter is to be deemed a principal debtor and not to be released by any indulgence given to the borrower."

Mrs. Jones did not go so far as to say that she thought that the mortgage was to be free of interest. A provision that, upon default in payment of interest, the principal should become payable in full is a normal and well-known clause in any mortgage. See *Tooth & Co. Ltd.* v. *Clifford Love & Co. Ltd.* (1) ; *Seaton* v. *Twyford* (2) : " It is difficult to conceive a mortgage that could be framed in any other way." Mrs. Jones did not give any evidence that this provision was unknown or surprising to her. It is a provision which everybody would expect to be included in any document described as a mortgage, and Mr. von Bertouch says that he stated it to her. Thus the clauses included in the mortgage were quite ordinary and

(1) (1920) 20 S.R. (N.S.W.), at p. 463. (2) (1870) L.R. 11 Eq., at p. 598.

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they only carried out the agreement contained in the letter of 17th August.

In the case of an ordinary adult person there would be little room for defence to an action brought upon a document signed in circumstances such as these. But it is contended that in the case of a wife whose execution of a document has been procured by the influence of her husband the law is different. In particular the contention is that, where a husband procures his wife to become a surety for him, the creditor must show that the wife understood exactly what she was doing. There must be some limit to the suggested principle. The law of guarantee is particularly complex, and it is doubtful whether any surety ever understands in its full significance the nature of the transaction into which he enters. The general rule is that if an adult person of ordinary understanding executes a document he (or, in modern law, she) is bound by it notwithstanding any misunderstanding by him (or by her) of its terms, unless that misunderstanding has been brought about by mutual mistake or by undue influence, fraud, or, in some cases, innocent misrepresentation or non-disclosure of material facts. There was no mutual mistake in the present case. The plaintiffs were under no misapprehension as to anything. I exclude unilateral mistake not brought about by any of the causes mentioned, because such unilateral mistake is not a ground upon which a party can escape the effect of a transaction (*Freeman* v. *Cooke* (1)), though in certain very special cases which contain an element of sharp practice a court of equity may give to a party an option between abiding by a corrected contract or having the contract annulled (*Garrard* v. *Frankel* (2)). But in this case there is no element of fraud or sharp practice. There is no evidence whatever of misrepresentation on the part of the plaintiffs themselves. They had no direct dealings with Mrs. Jones at all. Her husband told her nothing that was untrue. He was an optimist as to his prospects of success as a poultry-farmer, but he told her no lies and did not mislead her in any way.

The allegations of non-disclosure are irrelevant unless there was a duty resting upon the plaintiffs to make disclosure. The contract

(1) (1848) 2 Ex. 654 [154 E.R. 352].
(2) (1862) 30 Beav. 445 [54 E.R. 961.]

of suretyship, as distinguished from a contract of insurance, is not a contract *uberrimae fidei*, though such a contract is readily set aside on the ground of misrepresentation (innocent or fraudulent), or non-disclosure amounting to misrepresentation (*Davies* v. *London and Provincial Marine Insurance Co.* (1); *London General Omnibus Co. Ltd.* v. *Holloway* (2)).

It is, however, contended that Mrs. Jones relied upon Mr. von Bertouch acting in the interests of all parties, that she trusted him, and that her confidence in him was misplaced, though the learned judge does not suggest that he was guilty of any impropriety in regarding himself as acting only for the plaintiffs, who alone employed him. There is no evidence that any person told or even suggested to Mrs. Jones that Mr. von Bertouch was acting for her or protecting her interests. There is no reason why she should have had such a belief. She said in the box that she understood that he was protecting her, but even if this statement be accepted as true, such a unilateral mistake affords no ground of defence if the transaction is otherwise unimpeachable.

Upon the appeal it was argued that this was a case of *non est factum*. No such defence was raised by the pleadings. The contention is not supported by the facts. Mrs. Jones knew perfectly well that she was engaged in a legal transaction as to which she had had several discussions with her husband and whereby she would become a surety for him in relation to the purchase of the Payneham property to the extent of £1,000.

Thus, in my opinion, the defence of *non est factum* fails, and the other defences fail so far as they are based upon the general law as to undue influence, fraud, innocent misrepresentation, mutual or unilateral mistake. Accordingly the case for Mrs. Jones must depend upon some special rules applying to a wife who becomes a surety for her husband. The rule relied upon is a rather vague and indefinite survival from the days when a married woman was almost incapable in law and when the courts of equity gave her special protection in relation to transactions affecting her separate property. Perhaps the principle relied upon is stated in the form most favourable to the defendant in *Halsbury's Laws of England*,

(1) (1878) 8 Ch. D., at p. 475. (2) (1912) 2 K.B. 72, at pp. 82, 87.

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2nd ed., vol. 15, p. 282. It appears at the end of a discussion of fraud and undue influence and is in the following words : " Further, where creditors of the husband procure the wife's signature to a security for his debt through the agency of the husband, they must, in order to succeed in an action on the security, be in a position to prove that a proper explanation of the effect of the document was given to the wife." This rule cannot be made to fit into any systematic statement of the principles relating to fraud, misrepresentation or undue influence, but there is authority to support it. In *Turnbull* v. *Duval* (1) a transaction was set aside on the ground that under it a benefit was obtained by a trustee from a *cestui que trust* who was a married woman by pressure exercised through her husband, she not understanding the true nature of the transaction. It was therefore a clear case of abuse of confidential relationship. It was further said that the plaintiff " left everything to Duval " (the husband) " and must abide the consequences " (2). Duval deceived his wife, and she did not know what she was doing. There are no corresponding features in the present case.

In *Chaplin & Co. Ltd.* v. *Brammall* (3) creditors obtained from a wife a guarantee of her husband's liabilities. No explanation whatever of the document was given to her. She was simply told that her husband wanted her to sign something. She signed it without knowing what it was. It was held by the Court of Appeal that in these circumstances the plaintiffs could not succeed. But in the present case the matter was not merely left to the husband. The provisions of the actual document which the wife signed were explained to her in considerable detail. The plaintiffs had every reason to believe, by reason of her conduct in their presence at the solicitor's office, that she knew quite well what she was doing when she signed the mortgage.

Reference was also made to the case of *Bank of Victoria Ltd.* v. *Mueller* (4), where *Cussen* J. examines most elaborately the law with respect to this matter. In that case his Honour found that the husband, in procuring his wife's assent to a guarantee, had misrepresented in a material respect what was proposed to be the nature of her

(1) (1902) A.C. 429.
(2) (1902) A.C., at p. 435.
(3) (1908) 1 K.B. 233.
(4) (1925) V.L.R. 642.

liability as guarantor and that, by reason of this misrepresentation, the wife did not understand the true nature of her liability. It further appeared that the creditor who was receiving the benefits of the guarantee gave either no explanation or only a partial explanation not covering the material matter in respect of which the wife was misled. Further, there were no circumstances, beyond such partial explanation (if any) and the mere signing of the document, which could justify the creditor in thinking that the wife understood the document in all material respects. In such a case it was held that the wife was entitled as against the creditor to equitable relief. In the present case no misrepresentation by any person is proved. The wife did in all material respects know the nature of her liability and the plaintiffs were quite entitled to suppose that she followed and understood the explanations which were given to her at the solicitor's office.

In my opinion all these cases are distinguishable from the present case.

In my opinion, therefore, the plaintiffs were entitled to succeed against both defendants and the appeal should therefore be allowed and judgment should be entered for the plaintiffs against Mrs. Jones as well as against her husband. The amount, including interest to date of judgment in the Supreme Court for which judgment should be entered is £1,068 17s. 4d.

If I had been of a different opinion I should have been compelled to consider whether, in the action as at present framed (the Registrar-General not being a party) it would be proper to give the equitable relief which the defendant seeks or other equitable relief by way of injunction, or whether it would be proper merely to give judgment for Mrs. Jones in the action without giving any equitable relief. In the view which I have taken, however, these questions do not arise.

The appeal should be allowed.

RICH J. In this case I am not prepared to dissent from the conclusion of the court that the appeal should be allowed.

I do not wish to derogate in the least degree from the judgment of *Cussen* J. in the case of *Bank of Victoria Ltd.* v. *Mueller* (1), which contains a valuable exposition of equitable doctrine and a discussion

(1) (1925) V.L.R. 642.

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and explanation of authorities which have caused much confusion. But I agree that the facts fall short of establishing the necessary foundation of fact.

There are three cardinal matters of fact which cause me to concur in allowing the appeal. The first is that I do not think the respondent acted under the undue influence of her husband or was positively deceived by him or that her will was improperly overborne by him. The transaction does not seem to have been to the advantage of the Jones couple, and it may well be that the husband's enthusiasm was produced by something besides his own foolishness. It is true that in obtaining his wife's concurrence in the transaction to which he had committed himself he acted with less consideration for her interests than chivalry, not to say propriety, demanded, and it is probable that in committing himself to the purchase he wished to create a situation which would cause her some feeling of reluctance or even of embarrassment in refusing her subsequent concurrence. But I do not think that facts were established which would as between him and her create an equity sufficient to avoid the dealing if it had been confined to themselves. In the second place, I do not think that the appellants and their solicitors are shown to have so acted as to be bound by equities arising out of his conduct going only to her comprehension of the transaction. Having regard to what had occurred before the meeting at which the documents were executed, I am unable to say that the steps taken to explain the documents were insufficient. In the third place, I do not think that a case was made and proved on the part of the respondent wife that in executing the document she acted in the belief that the solicitors were advising her or her husband as well as the appellants and were protecting her interests. The case is a hard one, but I do not think that at law or in equity the respondent is able to say *non haec in foedera veni.*

I therefore concur in allowing the appeal.

DIXON J. About 10th August 1936 the respondent's husband, Estyn Jones, a clerk earning a slender salary, resolved to purchase at a price of £3,500 a bungalow standing on over three acres of land near Payneham, Adelaide. The place was fitted up as a poultry-farm, and from poultry keeping and from the breeding of dogs, a

pursuit in which he took a great interest, he expected to make a certain profit. The respondent was less optimistic. When he had married her three or four years before, she was a widow with two young children. Her late husband had left her some money, but it was scarcely enough to justify launching out on the scale proposed, and the claims of the two young children made it worse than foolish to take risks with the money. She inspected the place but, although she liked it, she opposed the purchase, on the ground that it was far too big for them and that it was not only the buying of it but the running of it that needed money. However her husband made out an attractive computation of the profits he could make and assured her that there was no risk. At that time they lived in a house in Walkerville, which she owned. Under the terms negotiated for the purchase of the bungalow and poultry-farm payment of nearly the whole of the purchase money was to be deferred until the end of three years. Only a nominal deposit was required. Of the purchase money £200 was to be paid at the end of two years and £3,300 at the end of three years. But the vendors, who are the appellants, made it a condition that, of the £3,300, payment of £1,000 should be secured by a second mortgage over the respondent's property at Walkerville, over which a first mortgage already subsisted for £700.

The order of events is not quite clear, but it appears that the respondent's husband, Estyn Jones, agreed to buy the place before he had succeeded in obtaining his wife's assent to his doing so and before he had explained to her the proposal that she should give the mortgage. The appellants, the vendors, instructed their solicitors, who on 14th August 1936 drew up a preliminary agreement, which was signed by Estyn Jones at their office on Monday, 17th August 1936, the day when the respondent and her husband took possession of the bungalow. No more than a week had elapsed since he told her that he had agreed to buy the property.

The preliminary agreement briefly stated the terms of the purchase. The terms included an undertaking on the part of Estyn Jones to procure his wife to give the second mortgage for £1,000, repayable at the end of three years with interest at five per cent per annum payable quarterly, the mortgage to contain such covenants and provisions as the vendors or their solicitors might reasonably require.

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On 21st August 1936 all parties, that is, the two appellants, the respondent and her husband, attended at the office of the vendors' solicitors and executed the documents by which the sale was secured. The documents consisted in the following :—

(1) An agreement between the appellants as vendors and Estyn Jones as purchaser which included a provision that the purchase money should be £3,500, payable, or the payment of which was to be secured, in manner thereinafter mentioned, and went on to express an obligation on the part of the purchaser to obtain a second mortgage by his wife. In terms it required him to procure the execution by his wife of a second mortgage to secure the payment of £1,000, being part of such purchase money, on 17th August 1939 with interest at five per cent per annum payable quarterly, containing such power of sale and other powers, covenants and provisions and rights and remedies to secure the payment of the said sum of £1,000 and interest thereon in manner aforesaid as the vendors or their solicitors might reasonably require. The agreement then provided that £200 should be paid on 17th August 1938 and £2,300 in addition to the sum of £1,000 on 17th August 1939. The agreement made over the chattels personal forming the poultry-keeper's plant which was included in the sale.

(2) A bill of sale granted by Estyn Jones over the chattels personal to the vendors to secure payment of the whole £3,500, therein described as money lent.

(3) The second mortgage to secure the £1,000, which was described as money lent to Estyn Jones, who joined in the mortgage under the description of "the borrower." Although the first document contained an executory promise on the part of the purchaser to procure his wife to execute a second mortgage, the two instruments were in fact executed on the same occasion. The second mortgage contained a clause providing that upon default in payment of interest for twenty-one days or upon breach of any of the covenants the principal should become immediately due, payable and recoverable.

The respondent's husband, Estyn Jones, did not prosper in the new enterprise. Interest soon fell into arrear, and after little more than twelve months he and she left the bungalow and the poultry-farm

in charge of a caretaker and went elsewhere. Some proposals were discussed between the parties for the cancellation of the sale, but the appellants' terms were unacceptable, and on 9th December 1937 the writ in the present action was issued by the appellants against both the respondent and her husband for the recovery of principal and interest under the second mortgage. Both of them defended the action, which was heard by *Napier* J. His Honour gave judgment against the defendant Estyn Jones, who seems to have had no real defence, and he has not appealed. But the defence of his wife, the respondent, succeeded. It succeeded upon equitable grounds, room for which was afforded by the fact that the appellants had relied upon the respondent's husband to procure her to give the mortgage as surety for him.

It is not easy to give adequately the effect in a summary form of the grounds upon which the judgment proceeds. Equities invalidating contractual obligations effectual at law often depend upon a combination of a large number of circumstances affecting the transaction and cannot be reduced to a series of syllogistic propositions. But the following statement represents the mode of reasoning by which the conclusion was reached. His Honour began with the position that the appellants knew, as he believed, that the respondent would not join as purchaser and knew further that, her husband having no means of his own, the only way to effect a sale was to leave it to him to procure his wife to finance his purchase. It was for this reason that the agreement was put in the form of an undertaking by him to procure her to execute a mortgage. This fact, the transaction being one in which a wife became her husband's surety, produced a legal consequence. It operated to affect the appellants with any conduct on the part of the husband in relation to his wife which might raise equities in her favour against the instrument of mortgage. His Honour thought that such equities had in fact arisen from circumstances preceding and leading up to the execution of the document, circumstances which it will be necessary further to discuss. He held in effect that an explanation received by the respondent in the office of the vendors' solicitors had not resulted in her obtaining an understanding of material aspects of the obligations she was undertaking and that, as

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she erroneously supposed that the solicitors were acting in her interests as well as in the interests of the vendors and was led to do so by the vendors, the fact of an explanation having been given was not fatal to her equity to relief.

Before dealing with the considerations of fact upon which the conclusion depends, some account should be given of the equitable principles upon which it is founded.

Up to the *Married Women's Property Acts* the capacity of a wife to undertake the obligations of a surety for her husband depended entirely upon the equitable doctrines which enabled her to bind her separate estate by contract. As her separate estate was her equitable property and as her power to deal with it rested on equitable principles, the question whether a contract or dealing was efficacious stood in quite a different position from the question whether a contract or disposition, valid at law, should be set aside by a court of equity on the ground of undue influence or unconscientious dealing.

The question whether a married woman might bind her separate property by a contract made with her husband or for his benefit or dispose of it in his favour did not present itself as a matter depending upon the application to the relationship of husband and wife of the presumption of influence. It was regarded as turning upon the degree to which the Court of Chancery was to carry its doctrine that with respect to her separate estate a married woman was to be considered a *feme sole* of full legal capacity. Was the doctrine so unqualified that her husband, the very man against whom the recognition of trusts for his wife's separate use operated, might himself be an object of her power of alienation, and benefit under her capacity to bind her separate estate by contract? That he might be the object of her bounty seems to have been settled early; possibly at the beginning of the seventeenth century: See *Baskervile* v. *Sinthome* (1), which Sir *W. S. Holdsworth* so understands (*History of English Law*, vol. v., p. 314). By the middle of the eighteenth century it had become settled law that, in virtue of her capacity in equity to act as if she were a *feme sole* in relation to her separate property, a married woman could deal with her husband as freely as

(1) (1614) Tothill 95 [21 E.R. 134].

with others. Though the court was more ready to believe that a disposition in favour of the husband had been improperly procured, yet the burden of showing it by evidence rested upon her as in other cases. In *Grigby* v. *Cox* (1) Lord *Hardwicke* said :—" The rule of the court is, that where anything is settled to the wife's separate use, she is considered as a *feme sole* ; may appoint in what manner she pleases ; and unless the joining of her trustees with her is made necessary, there is no occasion for that. . . . And this will hold, though the act done by the wife is in some degree a transaction alone with the husband : although in that case a court of equity will have more jealousy over it : and therefore if there is any proof that the husband had any improper influence over the wife in it by ill, or even extraordinary good usage, to induce her to it, the court might set it aside : but not without that. The wife might have made an immediate appointment for benefit of her husband ; which would have stood, unless some such proof as before mentioned."

Forty years later Lord *Thurlow* found that he could not refuse a decree for the carrying into effect of an appointment in favour of her husband's creditors made by a married woman in the exercise of a power in her marriage settlement, notwithstanding that the settlement had been made under the direction of the court itself for the protection of the wife against her husband (*Pybus* v. *Smith* (2)). The wife was a ward of the court with whom the husband had eloped, and to purge his contempt he had been obliged to make a settlement to the separate use of his wife of the property the gaining of which had apparently been his chief object. But the settlement approved by the Master contained a trust to pay the income to such persons as the wife should by writing appoint and to hold the corpus upon trust for such persons as she should by deed appoint. Within a short time the husband, a trader heavily indebted to his bankers, procured his wife to execute appointments of principal and income in their favour as security for his liability. The bankers filed a bill to enforce the security. Although the defendant's answer did not set up that the deeds had been improperly obtained, Lord *Thurlow* at first directed an inquiry " how they were executed : for

(1) (1750) 1 Ves. Sen. 517 [27 E.R. 1178].
(2) (1790) 1 Ves. Jun. 189 [30 E.R. 294]; (1791) 3 Bro. C.C. 341 [29 E.R. 570].

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it is very fit in case of a married woman, that the court should know how she has disposed of her property" (1). The Master reported, in effect, that the wife had executed the deeds freely and readily without arguments or persuasion and that she appeared to know their effect (2). Lord *Thurlow* then said that, "if the point was open, he should have thought that a *feme covert* who had a separate estate, should not part with it without an examination; but a *feme covert* has been considered by the court, with respect to her separate property, as a *feme sole*; therefore, though he had been desirous of going as far as he could, he found he had gone too far upon a former occasion. If a *feme covert* sees what she is about, the court allows of her alienation of her separate property" (3). Lord *Thurlow* reached this conclusion most unwillingly, and he appears to have shared the opinion expressed by his successor, Lord *Loughborough*, who said that, if the rule laid down "is to be pushed to its full extent, a married woman, having trustees and her property under the administration of this court, is infinitely worse off, and much more unprotected than she would be, if left to her legal rights; as far as they consist of rights, which the husband cannot *proprio marte* affect. Such rights cannot be taken from her without a formal deed: not by implication and inference from conversation or conduct. Upon *Pybus* v. *Smith* (4) it would be the vainest act to make a settlement upon a woman marrying under the direction of the court. The settlement was made here after a reference to the Master, and was submitted to the court, and approved; and it was stated by Mr. Lloyd, that within two days afterwards, and at the very time the settlement was submitted to this court, the transaction was going on, by which the effect of it was taken away from her; and she gave up the benefit of all that care, the court was taking for her protection" (*Whistler* v. *Newman* (5)). Lord *Loughborough* plainly leaned to the view that to a married woman's dealings with her husband the presumption of influence should be applied. In *Milnes* v. *Busk* (6) he had already said as much. Speaking of

(1) (1790) 1 Ves. Jun., at p. 194 [30 E.R., at p. 297].
(2) (1791) 3 Bro. C.C., at p. 343 [29 E.R., at p. 572].
(3) (1791) 3 Bro. C.C., at p. 346 [29 E.R., at p. 573].
(4) (1791) 3 Bro. C.C. 341 [29 E.R. 570].
(5) (1798) 4 Ves. 129, at p. 144 [31 E.R. 67, at p. 74].
(6) (1794) 2 Ves. Jun. 488, at p. 498 [30 E.R. 738, at p. 744].

her capacity to deal as a *feme sole* with her separate estate, he said that it would require great consideration before holding that " without the common precaution that would attend the transactions of persons under a degree of influence (and it is well compared by the Solicitor-General " Mitford " to the case of parent and child), that she should be considered as a *feme sole quoad* her husband and in transactions between them." But Lord *Thurlow's* mind went in a different direction. He regarded the whole question as depending upon the meaning and effect of the trust instrument creating the separate use. He was thus led to frame, extra-judicially, an instrument limiting the power of the married woman to deal in advance with the future income of the trust and so to devise the restraint on anticipation: See *The Origin of the Restraint upon Anticipation*, by Dr. *W. G. Hart*, *Law Quarterly Review*, vol. 40, p. 231.

" In *Pybus* v. *Smith* (1) . . . the court, settling the property, in order to protect it, with all the anxious terms then known to conveyancers, in a day or two afterwards, while the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument; and the same judge, who had made such efforts to protect her, was upon authority obliged to withdraw that protection. In a subsequent case, in which Lord *Thurlow* became a trustee, he inserted words, that he hoped would take the case out of Lord *Hardwicke's* doctrine; and Lord *Alvanley*, in some late instances, introduced similar words, as to not charging by anticipation, &c." (per Lord *Eldon*, *Jones* v. *Harris* (2)). " He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law: but, as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord *Thurlow* endeavoured to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus: that equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it: but the case of a disposition to a man, who, if he has the property, has

(1) (1791) 3 Bro. C.C. 341 [29 E.R. 570].

(2) (1804) 9 Ves. 486, at p. 493 [32 E.R. 691, at pp. 693, 694].

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the power of aliening, is quite different" (per Lord *Eldon*, *Brandon* v. *Robinson* (1)).

Lord *Loughborough's* views did not find acceptance (See *Hovenden's* note (2)), and Lord *Eldon* adopted a very different position. In *Parkes* v. *White* (3), speaking of *Pybus* v. *Smith* (4) and an earlier decision of Lord *Thurlow*, he said:—"About that time this court had no difficulty in supposing, a woman, having such an interest, might give it to her husband, as well as to anyone else. These cases never intended to forbid that; and, if he conducts himself well, I do not know, that she can make a more worthy disposition; though certainly the particular act ought to be looked at with jealousy." Again: "If no other observation can be added, but, that it is to satisfy the debt of the husband, unless the doctrine is that she may give to everyone but the person in whose favour upon the most proper and meritorious obligations she may be influenced to act, that is not an objection."

Hovenden (5) regarded the authorities as "showing that a *feme coverte* may make a valid disposition of her own separate property in favour of her husband, which disposition (if made without such fraud as would vitiate it supposing the parties to be unconnected) a court of equity has no power to set aside, but it is bound to effectuate." But it seems that the assimilation of dispositions by a wife in favour of her husband to transactions between strangers was not so complete. It was not supposed that they dealt at arm's length. *Story* (*Equity Jurisprudence* (1835), sec. 1395) said:—"The doctrine is now firmly established in equity that she may bestow her separate property, by appointment or otherwise, upon her husband as well as upon a stranger. But at the same time, courts of equity examine every such transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence."

In substance this position has been maintained until the present day.

(1) (1811) 18 Ves. 429, at pp. 434, 435 [34 E.R. 379, at p. 381].
(2) 1 Ves. Jun., Supp., at pp. 293, 435 [34 E.R., at p. 862].
(3) (1805) 11 Ves. 209, at p. 222 [32 E.R. 1068, at p. 1073].
(4) (1790) 1 Ves. Jun. 189 [30 E.R. 294]; (1791) 3 Bro. C.C. 341 [29 E.R. 570].
(5) 1 Ves. Jun., Supp., at p. 293 [34 E.R., at p. 795.]

In *In re Lloyds Bank. Ltd.*; *Bomze and Lederman* v. *Bomze* (1) the present Lord Chancellor (Lord *Maugham*), speaking of gifts by a wife to her husband, said that it is well settled that the relation is not one of those in which the doctrine of *Huguenin* v. *Baseley* (2) applies, "but where there is evidence that a husband has taken unfair advantage of his influence over his wife or her confidence in him, it is not difficult for the wife to establish her title to relief." The reason for excluding the relation of husband and wife from the category to which the presumption applies is to be found in the consideration that there is nothing unusual or strange in a wife from motives of affection or even of prudence conferring a large proprietary or pecuniary benefit upon her husband. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over his wife which a husband often possesses. But in the relations comprised within the category to which the presumption of undue influence applies, there is another element besides the mere existence of an opportunity of obtaining ascendancy or confidence and of abusing it. It will be found that in none of those relations is it natural to expect the one party to give property to the other. That is to say, the character of the relation itself is never enough to explain the transaction and to account for it without suspicion of confidence abused.

The distinction drawn between large gifts taken by a man from the woman to whom he is affianced, a case to which the presumption applies, and similar gifts by a wife to her husband, a case to which it does not apply, a distinction sometimes condemned, is explained by this consideration and also, perhaps, by the consideration that the rule is one of policy and, upon a balance, policy is against applying it to husband and wife. But while the relation of a husband to his wife is not one of influence, and no presumption exists of undue influence, it has never been divested completely of what may be called equitable presumptions of an invalidating tendency.

In the first place, there is the doctrine, which may now perhaps be regarded as a rule of evidence, that, if a voluntary disposition in favour of the husband is impeached, the burden of establishing that it was not improperly or unfairly procured may be placed upon him by proof of circumstances raising any doubt or suspicion. In the

(1) (1931) 1 Ch. 289, at p. 302. (2) (1807) 14 Ves. 273 [33 E.R. 526].

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second place, the position of strangers who deal through the husband with the wife in a transaction operating to the husband's advantage may, by that fact alone, be affected by any equity which as between the wife and the husband might arise from his conduct. In the third place, it still is or may be a condition of the validity of a voluntary dealing by the wife for the advantage of her husband that she really obtained an adequate understanding of the actual nature and consequences of the transaction.

It will be seen that all three of these matters must have a special importance when the transaction in question is one of suretyship and the wife without any recompense, except the advantage of her husband, saddles herself or her separate property with a liability for his debt or debts.

It will be necessary to say more as to the nature and validity of each of these suggested propositions. But before doing so it may be as well to refer to the effect of the *Married Women's Property Act*. During the argument of *Howes* v. *Bishop* (1) *Farwell* L.J. is reported to have qualified by the phrase "at any rate since the *Married Women's Property Act* 1882" an observation to the effect that the relation of husband to wife was not within the category of relations of influence. In *Colonial Bank of Australasia* v. *Kerr* (2) *a'Beckett* J. attributed a similar effect to the legislation. He said: "The law which allows married women to acquire and dispose of property as if they were single, makes them competent to deal, and responsible for their dealings, notwithstanding the influence which a husband may exert" (3). There can be no doubt that the changes made by the legislation have profoundly affected our general conceptions of the position of married women, but two comments may be made upon the suggested operation. The first is that before the legislation it was well established that the relation of a husband to his wife was not one of influence calling into play the presumption. The second is that the equitable conception of separate estate is the foundation upon which the *Married Women's Property Act* was constructed. The legislation could hardly be considered inconsistent with any consequential rules of equity. Indeed, the *Married Women's Property Acts*, by

(1) (1909) 2 K.B., at p. 394.
(2) (1889) 15 V.L.R. 74, 314.
(3) (1889) 15 V.L.R., at p. 78.

making all the property to which a woman is entitled at the time of her marriage or which she afterwards acquires her separate estate, should operate to give a general application to presumptions and rules of equity governing dealings by a married woman for the benefit of her husband.

Of the three suggested rules or presumptions to which I have already referred, the existence of the first appears to be beyond question, but it is somewhat vague and indefinite. It may amount to no more than saying that the opportunities which a wife's confidence in her husband gives him of unfairly or improperly procuring her to become surety for his debts or to confer some other benefit upon him is recognized as a matter of fact and taken into account with other facts as a reason for calling upon him to explain or justify a given transaction.

The second of the three matters is connected with the rule established in the case of relations of influence. That rule is that where there is a relation of influence and the dominant party is the person by or through whom an instrument operating to his advantage is obtained from the other the instrument is voidable even as against strangers who have become parties to the instrument for value if they had notice of the existence of the relation of influence or of the circumstances giving rise to it. Thus, a guarantee procured by a principal debtor in favour of his creditor from a niece residing with him who had not long come of age and whose guardian he had been was set aside on the ground that a relation of influence existed. The creditors, who gave no consideration to the guarantor, except the forbearance from calling up her uncle's debt, knew her defenceless position (*Maitland* v. *Irving* (1))—Cf. *Archer* v. *Hudson* (2); *Kempson* v. *Ashbee* (3); *Bainbrigge* v. *Browne* (4); *De Witte* v. *Addison* (5); *London and Westminster Loan and Discount Co. Ltd.* v. *Bilton* (6). In the last-named case *Joyce* J. said that where a parent borrowed on the security of an instrument given by an unmarried daughter living under the same roof it behoved the lender to ascertain and assure himself that she understood what

(1) (1846) 15 Sim. 437 [60 E.R. 688].
(2) (1844) 7 Beav. 551 [49 E.R. 1180].
(3) (1874) 10 Ch. App. 15.
(4) (1881) 18 Ch. D. 188.
(5) (1899) 80 L.T. 207.
(6) (1911) 27 T.L.R. 184.

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she was doing and also that she was not acting under parental influence.

Although the relation of husband to wife is not one of influence, yet the opportunities it gives are such that if the husband procures his wife to become surety for his debt a creditor who accepts her suretyship obtained through her husband has been treated as taking it subject to any invalidating conduct on the part of her husband even if the creditor be not actually privy to such conduct. It is evident, however, that in many cases, though it is the husband who obtains his wife's consent to act as guarantor or surety, yet the creditor or his agents will deal directly with the wife personally. It must then be a question how far an apparent or real comprehension on the part of the wife or advice or explanation received by her will prevent any earlier improper conduct on the part of the husband from operating to make the transaction voidable. But, before dealing with the more modern authorities upon this and cognate matters, it is desirable to speak of the third of the propositions to which I have referred ; for it is necessarily connected with the same question.

In the older authorities many references occur to the necessity of showing, in cases where an important benefit has been voluntarily conferred by a wife, that she fully understood the transaction. There are early traces of a wider doctrine applying to all persons, that is, persons of full capacity, a doctrine to the effect that, when anyone has made a large voluntary gift or the like and it is impeached, the burden is thrown upon the donee or party benefiting of justifying it as fairly and honestly obtained from a party understanding the nature and consequences of the transaction. Lord *Romilly* found this doctrine particularly attractive, and while he was Master of the Rolls it almost became established as a permanent part of the law. When, in 1876, Sir *Frederick Pollock* first published his work on *The Principles of Contract*, he wrote :—" But another general proposition of much importance is established by modern decisions which considerably modifies (it would be hardly too much to say overrides) the doctrine of *Hunter* v. *Atkins*. This is set forth by Lord *Romilly's* judgment in *Hoghton* v. *Hoghton* (1), which may

(1) (1852) 15 Beav. 275, at p. 298 [51 E.R. 545, at p. 553].

perhaps now be regarded as the leading authority on the subject, and its effect is as follows : In every case where ' one person obtains, by voluntary donation, a large pecuniary benefit from another,' the person taking the benefit is bound to show that the donor knew and understood what he was doing. For this purpose any transaction is treated as a voluntary donation in which one person confers a large pecuniary benefit on another, though it may be in form a contract. And this rule obtains whether there is any confidential relation or not " (1st ed., p. 507).

But thirty years later, in his preface to the volume of the *Revised Reports* containing the same case (1), Sir *Frederick Pollock* wrote :—" Lord *Romilly* (to anticipate his later description) had one or two singular equitable doctrines. In *Cockell* v. *Taylor* (p. 328) he is sound enough on the effect of inadequate value when a sale is impeached. But in *Cooke* v. *Lamotte* and *Hoghton* v. *Hoghton* (pp. 397, 421) it is said without qualification that whoever takes a benefit by way of voluntary gift is bound to prove, if challenged, that the gift was made freely and with full knowledge. It is needless to tell anyone moderately familiar with equity practice that these dicta have never been accepted by the profession. I have heard Sir *George Jessel* brush them aside as not worth serious argument. But they have never been formally overruled by higher authority, though the whole current of authority is inconsistent with them ; and students must therefore still be warned against taking them for anything but the expression of an individual and on this point eccentric opinion." To this condemnation the learned author adhered in the later editions of his work (e.g., 8th ed., p. 645 ; 10th ed., p. 604).

In *Henry* v. *Armstrong* (2) *Kay* J. said that the law was that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property is bound by his own act and if he himself comes to have the deed set aside he must prove some substantial reason for so setting aside. Sir *Frederick Pollock* (*loc. cit.*) comments that, though of only a co-ordinate authority with Lord *Romilly's*, the statement of *Kay* J. expresses

(1) 92 R.R., p. 397, Pref. v. (2) (1881) 18 Ch. D. 668.

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the clear sense of the Equity Bar ever since the writer could remember it.

The earlier leaning towards, and the later temporary acceptance of, the wider doctrine have contributed to the adoption or expression of the view that unless it appears that a wife clearly understood the effect of an instrument conferring a voluntary benefit on her husband it may be invalidated. The abandonment of the general doctrine makes it necessary to use care in relying upon dicta even when expressed as having a narrower application.

In 1914, in *Bank of Victoria Ltd.* v. *Mueller*, which was reported eleven years later (1), all the more modern authorities on the position of a wife as surety for her husband underwent a full and very acute examination by *Cussen* J., the value of which to anyone dealing with the subject can hardly be overstated. Much of what follows in this judgment is no more than an echo and discussion of his views. His Honour began with a very important deduction from the cases. It was that the " doctrine as to the necessity for fully understanding the transaction is extended to transactions of a commercial nature, such as guarantees given to a creditor by a wife for the benefit of her husband, particularly if there is a heavy past indebtedness to be secured. In such cases the relation of husband and wife and the past indebtedness may put the creditor in such a position that, if he does not take care to fully explain the transaction, he may find himself defeated by proof that the wife did not fully understand it " (2). This statement is, I think, shown by the judgment to be correct. But it is preceded by a citation from Lord *Romilly's* judgment in *Hoghton* v. *Hoghton* (3) in which he places upon the donee absolutely the burden of supporting as righteous a transaction in which he obtains by voluntary donation a large pecuniary benefit. This passage cannot now be regarded as sound. But *Cussen* J. prefaces his proposition with the words, " Disregarding any question as to the onus of proof which may be a doubtful matter—See *Henry* v. *Armstrong* (4) " (2).

In the present case the burden of proof is more important. In my opinion the burden of proving that a wife fully understood a

(1) (1925) V.L.R. 642.
(2) (1925) V.L.R., at p. 651.
(3) (1852) 15 Beav. 278 [51 E.R. 545].
(4) (1881) 18 Ch. D. 668.

guarantee given by her for her husband's debt is not placed upon the creditor by the mere fact that her consent to give the guarantee or become surety was secured by her husband. But this opinion is quite consistent with the formulation by *Cussen* J. of his proposition.

The three principal modern cases in which a wife's instrument of suretyship for her husband's obligations has been set aside are *Turnbull & Co.* v. *Duval* (1), *Chaplin & Co. Ltd.* v. *Brammall* (2) and *Shears & Sons Ltd.* v. *Jones* (3).

Turnbull & Co. v. *Duval* (1) decides, I think, that a charge given by a wife as surety for her husband's debt, on his importunity, is void against the creditors, when she signed it under pressure, misunderstanding its effect and erroneously supposing that she was lending the money to her husband to enable him to settle a particular account. It happened that the creditors acted through a man who was a trustee and executor of an estate in which the wife was interested and the charge was given over her interest. Lord *Lindley*, speaking for the Privy Council, said: "It is open to the double objection of having been obtained by a trustee from his *cestui que trust* by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts" (4). But he clearly distinguished between the two objections, and, in deciding that the creditors were affected by the pressure exerted upon the wife by the husband and by her ignorance, he put it upon the ground that they left everything to the husband and must abide the consequences.

Chaplin & Co. Ltd. v. *Brammall* (2) is a decision of the Court of Appeal. The reasons, which were given by *Vaughan-Williams* L.J., put the decision on two grounds, upon the second of which the greater reliance was apparently placed. A husband about to set up as a trader was asked by his chief prospective suppliers of goods for his wife's guarantee of his account with them. He obtained her signature to an instrument of guarantee without an adequate explanation of its effect and she was not sufficiently informed of its contents

(1) (1902) A.C. 429.
(2) (1908) 1 K.B. 233; 97 L.T. 860.
(3) (1922) 128 L.T. 218.
(4) (1902) A.C., at p. 434.

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and did not understand it. After citing *Turnbull & Co.* v. *Duval* (1) *Vaughan-Williams* L.J. says: "So here the plaintiffs left everything to the defendant's husband; they furnished him with the document that he might get his wife's signature to it, and they must take the consequences of his having obtained it without explaining to her or her understanding what she was signing." The correctness of the first ground given, however, is less clear. It is based on the judgment of *Wright* J. in *Bischoff's Trustee* v. *Frank* (2), which had, in fact, been reversed on the facts by the Court of Appeal in an unreported decision of which *Vaughan-Williams* L.J. does not seem to have been aware: See *Howes* v. *Bishop* (3); *Bank of Victoria Ltd.* v. *Mueller* (4). *Wright* J. appears to have treated the relation of a husband to his wife as falling in the category to which the presumption of undue influence applies and, although *Cussen* J. (5) remarks that the Court of Appeal nowhere use the expression "undue influence," the report reads as if their Lordships were misled as to the application of the presumption.

Shears & Sons Ltd. v. *Jones* (6) is a decision of Lord *Russell*, as he now is, given by him as a judge of the Chancery Division. A creditor for a large debt owing by the husband began bankruptcy proceedings, but at a meeting with the husband agreed to discontinue them if his wife executed a document, which was at once prepared, agreeing to give a bill of sale over some valuable furniture. The husband took it away and brought it back bearing his wife's signature. Proceedings to enforce this agreement failed on two grounds, viz., (1) that the document itself amounted to an unregistered bill of sale, (2) that the circumstances cast on the creditors the duty of seeing that the wife had separate and independent advice before they took such a benefit from her. His Lordship found that the wife did not sufficiently understand the general nature of the document to know that she was placing her furniture at risk for the purpose of giving security to the creditors for a debt due by her husband under a judgment, but he thought the case fell short of *Chaplin & Co. Ltd.* v. *Brammall* (7) and therefore did not put his

(1) (1902) A.C., at p. 434.
(2) (1903) 89 L.T. 188.
(3) (1909) 2 K.B., at pp. 397, 401.
(4) (1925) V.L.R., at pp. 652, 653.
(5) (1925) V.L.R., at p. 653.
(6) (1922) 128 L.T. 218.
(7) (1908) 1 K.B. 233; 97 L.T. 860.

decision on that ground alone. The passage from the judgment in which the principle is stated is as follows :—" The question I have to decide is, first, did Mrs. Jones substantially understand the document? Secondly, is the fact that there was no separate independent advice fatal to the plaintiffs' claim ? Taking the latter first, there are various authorities which have been cited to me—*Howes* v. *Bishop*, *Chaplin* v. *Brammall*, *Turnbull* v. *Duval* and *Bischoff's Trustee* v. *Frank*. . . . I cannot extract from them any simple principle, but I understand that the mere relationship of husband and wife does not render necessary separate independent advice in order to validate a gift by the wife to the husband. More shortly, it does not raise an equity, as in *Huguenin* v. *Baseley* (1). But the circumstances may be such that in the absence of independent advice such a gift cannot stand " (2).

For myself I fully accept the exposition by *Cussen* J. (3) of *Howes* v. *Bishop* (4) and *Talbot* v. *Von Boris* (5). That exposition, I think, shows that these cases are consistent with and recognize the proposition that, if a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside. This is contained within the proposition stated by *Cussen* J. as the minimum necessary for the decision of *Bank of Victoria Ltd.* v. *Mueller* (6), subject to the qualification he expresses in the introductory condition which speaks of the husband's plight as a debtor.

It will be apparent from what has been said that the course of development which the rules of equity governing the voidability of instruments of suretyship entered into by married women for debts of their husbands have followed has left the state of the law somewhat indefinite, if not uncertain. To such transactions the same general principles are considered applicable as affect the validity of voluntary alienations of valuable property in favour of the husband,

(1) (1807) 14 Ves. 273 [33 E.R. 526].
(2) (1922) 128 L.T., at p. 221.
(3) (1925) V.L.R., at pp. 654, 655.
(4) (1909) 2 K.B. 390 ; 100 L.T. 826.
(5) (1910) 27 T.L.R. 95 (*Phillimore* J.); (1911) 1 K.B. 854 ; 104 L.T. 524 (C.A.).
(6) (1925) V.L.R., at p. 648.

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but the application of these principles is necessarily qualified by considerations arising out of the position of the creditor as a third party giving value to the husband and possibly bona fide. It is almost needless to say that the equitable grounds for setting aside a voluntary disposition, while well understood, recognize the indefinite variation of form which unconscientious conduct may assume.

The difficulty, if not danger, thus created of attempting to state the conditions which must be fulfilled before a given kind of conduct or of unfairness amounts to an invalidating cause is greatly increased by the introduction of the consideration that the equity must be such as ought to prevail against the claims of the creditor as a possibly innocent third party. But it is clearly necessary to distinguish between, on the one hand, cases in which a wife, alive to the nature and effect of the obligation she is undertaking, is procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established, and on the other hand, cases where she does not understand the effect of the document or the nature of the transaction of suretyship. In the former case the fact that the creditor, on the occasion, for example, of the actual execution of the instrument, deals directly with the wife and explains the effect of the document to her will not protect him. Nothing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice. If the creditor has left it to the husband to obtain his wife's consent to become surety and no more is done independently of the husband than to ascertain that she understands what she is doing, then, if it turns out that she is in fact acting under the undue influence of her husband, it seems that the transaction will be voidable at her instance as against the creditor. It is not clear how far the same principle is to be applied to a case where the wife is induced to become surety by the husband making some fraudulent or even innocent misrepresentation of fact which, though material, does not go to the nature and effect of the instrument or transaction. It may be said that the making of such a representation is no more to be anticipated by a creditor when a husband procures his wife's guarantee than when any other principal debtor procures a surety. On the other hand, the basal reason for binding the creditor with equities arising

from the conduct of the husband is that in substance, if not technically, the wife is a volunteer conferring an important advantage upon her husband who in virtue of his position has an opportunity of abusing the confidence she may be expected to place in him and the creditor relies upon the person in that position to obtain her agreement to become his surety. Misrepresentation as well as undue influence is a means of abusing the confidence that may be expected to arise out of the relation.

In the second case, that where the wife agrees to become surety at the instance of her husband though she does not understand the effect of the document or the nature of the transaction, her failure to do so may be the result of the husband's actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent. But, where the substantial or only ground for impeaching the instrument is misunderstanding or want of understanding of its contents or effect, the amount of reliance placed by the creditor upon the husband for the purpose of informing his wife of what she was about must be of great importance.

If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety. The creditor may have done enough by superintending himself the execution of the document and by attempting to assure himself by means of questions or explanation that she knows to what she is committing herself. The sufficiency of this must depend on circumstances, as, for example, the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife and the intelligence and business understanding of the woman. But, if the wife has been in receipt of the advice of a

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stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction: Cf. per *Cussen* J. (1). If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife.

Apart from the unwisdom or improvidence of the transaction into which he persuaded her, the facts of the present case do not show that Estyn Jones exercised any influence over his wife which could be considered undue or a ground for interference by a court of equity. His enthusiasm for a project or enterprise that it was foolish to embark upon was not shared by his wife, but it is impossible to believe that she did not understand as well as he that, if the purchase was to be made, whatever money was needed must be found by her. The discussion and difference of opinion between them related to the prudence of the venture and the probabilities of its success. When he committed himself or themselves to buy the bungalow and poultry-farm before she had yielded her consent, he may have done so with a view of presenting her with a *fait accompli* which she would not take the responsibility of rejecting. His statement that he had bound himself to get her to finance the purchase and that he would get into trouble if she refused contained no element of falsity. The nature and extent of the trouble into which she thought he would get if she rejected the transaction is not stated by her, and apparently she was faced with the fact that her husband had agreed to buy the property, all parties knowing that she must find the funds which the transaction might call for.

(1) (1925) V.L.R., at p. 649.

In placing his wife in this position, Estyn Jones no doubt did what he ought not to have done. But he created a situation with which his wife had to deal as she thought best in the interests of all concerned. She was not deluded, coerced or overborne. She was placed in a dilemma, a dilemma unfair to a woman, but not in a situation rendering the course she chose to take one from which afterwards she was entitled to be relieved. That which, according to the findings contained in the reasons given by *Napier* J., induced her to agree to the purchase and to take her part by giving a mortgage was her husband's persuasion in which, to his optimism as to the success of the venture and its consequent "safety," he added the arguments, first, that he had agreed to purchase and was bound, secondly, that he would get into trouble if she refused to give the mortgage, thirdly, that the mortgage was a guarantee not falling due for three years and, fourthly, that if anything went wrong and she lost her house at Walkerville they would have the bungalow and poultry-farm at Payneham.

The appellants are not shown to have known that the respondent was definitely opposed to the transaction; they knew that it was not she but Estyn Jones who had the resources enabling them to become purchasers, and in that sense they relied upon him, as the person with whom they negotiated and contracted, to obtain his wife's security. But it was not a case where a husband having incurred a heavy indebtedness is relied upon by a creditor to obtain from his wife a guarantee which will improve the position of the creditor to the detriment of the wife, who will obtain no benefit except the satisfaction of relieving her husband for a time from one of his embarrassments.

It was a transaction in which on the one hand the appellants were stating the terms on which they would sell their property and on the other Estyn Jones was negotiating for the acquisition of a home for himself and his wife and a new means of livelihood.

The difference might not be enough if Estyn Jones had obtained his wife's consent by undue influence or fraud. But, for the reasons I have given, the case appears to me to come down to the effect of a combination of matters, consisting in the inducements stated, the respondent's understanding of the transaction when she attended

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for the purpose of executing the instrument of mortgage, the actual provisions it contained, the explanation she received and her final comprehension of the matter.

She went to the solicitors' office, as I understand the finding, believing that she was to give a mortgage over her house at Walkerville for £1,000, forming part of the purchase money falling due in three years, and that the mortgage would operate as a guarantee, so that the burden would fall on her house if her husband then failed to find the £1,000.

The solicitors were instructed by the appellants and acted solely on their behalf and in their interests. The appellants in the course of their evidence said that they did not regard them as their solicitors any more than the purchasers', and that this was made clear to Estyn Jones. The respondent, however, did not say that she relied upon the solicitors as protecting her interests or acting on her behalf or that of her husband, and Estyn Jones gave no evidence to the effect that he considered the solicitors as in any way acting for him or his wife. I do not think that the defendant can be regarded as having signed the mortgage in reliance upon the advice or approval of the solicitors and as having mistakenly supposed that they were acting on behalf of herself or her husband. I do not think that such a case was made by her, and the suggestion arose only out of answers given in the cross-examination of the appellants. The substantial or more important matters in which the provisions of the mortgage produced an effect going beyond the ideas of her own position entertained, on the findings, by the respondent when she went to the solicitors' office are as follows :—

(1) It contained a personal covenant.

(2) It covered interest as well as the £1,000 principal.

(3) It made principal fall due forthwith on default in payment of interest or non-observance of covenants.

(4) It provided for the exercise of the power of sale in such an event.

(5) It was drawn so as to make the respondent liable as between the vendors and herself as a principal debtor who would not be discharged by the release of her husband, who however joined in the mortgage as " the borrower."

In the solicitors' office, before the documents were executed, copies were handed to Estyn Jones, and it would appear that his wife sat next to him so that they could read them together. The solicitor went through the documents, explaining the effect of various provisions.

His explanation of the mortgage appears to me to have been simple enough and complete enough to ensure that any woman of average intelligence would understand that she was making herself liable for interest on the £1,000 and that, if it was not paid, the principal might be called up and that she bound herself to pay it so that she might be sued and her property sold. As to the effect of the clauses directed to the exclusion of the principles of law by which a surety may be discharged from his obligations though the debt is not paid, probably the explanation was incomplete, and, if complete, it doubtless would have failed to produce any impression except a confused idea that some possibility of the mortgagee escaping was excluded. But, if the general nature and effect of an instrument such as a mortgage executed by a married woman is understood or on reasonable grounds the creditor or other party or his agents believes it to have been understood, it is no ground for setting it aside that some of its details or its possible consequences or applications are not comprehended, notwithstanding that the husband is the person who has obtained her consent to the transaction. This observation applies to the suggestion that, even though the £1,000 was paid under the mortgage, the contract might be cancelled for default in the rest of the purchase money and the payment applied to answer damages.

If the respondent grasped the points I have mentioned, I do not think that the provisions of the instrument involved a departure from the nature of the transaction, as she would understand it, sufficient to warrant a court of equity setting it aside. How far she did in fact understand her personal responsibility and the effect of default in interest in causing principal to become immediately payable is a question of fact upon which *Napier* J. took a view in her favour. But in my opinion the solicitor had no reason to suppose that she did not grasp the essentials of the transaction and on reasonable grounds the appellants and their solicitor believed

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that she had understood the substantial effect in all material respects of the obligations she was undertaking. In my opinion the respondent failed to make out a case which under the principles I have discussed entitled her to equitable relief.

I think that the appeal should be allowed.

McTIERNAN J. I agree with some doubt that the facts do not raise an equity entitling the respondent, Mrs. Jones, to be relieved of her covenant.

I concur in the order that the appeal be allowed.

Appeal allowed with costs. Set aside so much of the judgment of the Supreme Court as adjudges that the plaintiffs recover nothing from the defendant Florence May Blanche Jones and that the defendant Florence May Blanche Jones recover against the plaintiffs her costs of action to be taxed. Enter judgment for the plaintiffs against such defendant as well as against the defendant Estyn Jones for the sum of £1,068 17*s.* 4*d. entered in the judgment of the Supreme Court being an amount determined after giving credit to the said defendants for the sum of* £25 *and no more on account of rent payable by the plaintiffs or one of them to the defendant Florence May Blanche Jones and for the plaintiffs' costs of the claim and counterclaim.*

Solicitor for the appellant, *Ronald Nickels Finlayson.*

Solicitors for the respondent, *Alderman, Reid & Brazel.*

C. C. B.

[Leave to appeal from the above decision was refused by the Privy Council on 7th December 1939.—*Ed., C.L.R.*]