[HIGH COURT OF AUSTRALIA.]

BANK OF NEW SOUTH WALES . . . APPELLANT;
DEFENDANT,

AND

ROGERS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *Mar.* 4, 5.

SYDNEY, *April* 21.

Starke, McTiernan and Williams JJ.

Undue influence—Guarantee—Charge given by surety—Debtor in loco parentis to surety—Improvident transaction—Surety having no independent advice—Presumption—Knowledge of creditor—Circumstances to put creditor on inquiry—Creditor's failure to make inquiry—Effect on creditor's charge on shares.

The plaintiff, who, since the death of her father, had resided with her uncle, whose advice she sought and followed without question in all matters of business, was induced by him to charge virtually the whole of her property in favour of his bank as security for his overdraft at a time when his affairs were hopelessly involved. The plaintiff was of mature age and of average intelligence and firmness, but had no business experience. The bank's manager knew that the plaintiff lived with her uncle, and while not actually aware of their relationship had reason to believe that some special relationship did exist between them and might by reasonable inquiries have ascertained what that relationship was. The manager knew that the uncle had no security to give to the plaintiff and that the plaintiff's property was not likely to be redeemed. He had strong grounds for suspecting that the plaintiff had not had independent advice. In fact the plaintiff had not had independent advice, nor was it ever suggested to her that she should obtain independent advice, and the full import of the transaction into which she entered was not explained to or understood by her.

Held that from the relationship of the parties a presumption arose that the plaintiff had been induced to give the charge by the undue influence of her uncle; that this presumption had not been rebutted; that the bank was so affected with notice of their relationship that the onus was cast upon it of

proving that the giving of the charge was the free, voluntary and well-understood act of the plaintiff; and that, the bank having failed to discharge that onus, the charge must be set aside.

Decision of the Supreme Court of South Australia (*Angas Parsons* J.): *Rogers* v. *Bank of New South Wales*, (1940) S.A.S.R. 317, affirmed.

APPEAL from the Supreme Court of South Australia.

May Elizabeth Rogers sued the Bank of New South Wales in the Supreme Court of South Australia, claiming that an equitable charge which she had purported to give over 987 shares, owned by her in the Adelaide Steamship Co. Ltd., should be set aside on the ground of undue influence. At the hearing of the action it appeared that Miss Rogers was a spinster, born in 1868. Her mother died when she was a child, and her father died in 1891, when she was 23 years old. She then went to reside with her uncle, Charles Lennox Gardiner, at his home at Semaphore, South Australia. In 1897 she received a legacy of £500 from the estate of her grandfather and, after consulting Gardiner, Miss Rogers invested it in a house property, receiving the rents personally. She held this property till about 1904, when she became dissatisfied with it as an investment, and, again consulting Gardiner, sold the house and invested the proceeds in sixty shares of £5 each in the Adelaide Steamship Co. Ltd. In November 1908 the Adelaide Steamship Co. Ltd. was reconstructed and seven £1 shares were given for each £5 share held, making Miss Rogers' holding 420 shares. In February 1920 the company was again reconstructed, three £1 shares being given for each share held, making Miss Rogers' holding 1,260 shares. In 1920 Miss Rogers, on Gardiner's advice, purchased forty shares, and in 1921 still another forty shares, making her final holding 1,340 shares. Her shares were in three certificates, one for 1,260 shares and two for forty shares each; the scrip was held on her behalf by her solicitors, Fisher, Powers & Jeffries, but she received the dividends from the shares herself, indorsing the cheques and paying them into her savings bank account. These dividends, together with an interest which she had in her father's estate, gave Miss Rogers an income of about £2 10s. a week.

Whilst living with her uncle Miss Rogers had been treated as a member of his family. He was her sole adviser in matters of business, and Miss Rogers relied on and followed his advice without question. Gardiner had apparently a strong personality—Miss Rogers described him at the trial as being "forceful" and "forcing his will upon her." She herself knew nothing about business and trusted him absolutely. Gardiner was a man of property and had

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been fairly well off, but from about 1930 he began to find himself in financial difficulties. His real estate was heavily encumbered, he had an overdraft of about £7,000 with the Bank of New South Wales, and he had guaranteed his nephew's account with the bank and the bank was calling upon him to sell his property in order to reduce his indebtedness. In May 1930 he went to Miss Rogers and stated that he wanted to borrow two hundred of her shares in the Adelaide Steamship Co. Ltd. Thereupon Miss Rogers signed an order addressed to Messrs. Fisher, Powers & Jeffries, the body of which was written in Gardiner's handwriting and read as follows: —"Please give to Mr. C. L. Gardiner scrip for 200 shares in the Adelaide Steamship Co. Ltd., from scrip now lodged in your office."

There was no scrip of that denomination in the solicitors' office, and on 22nd May 1930 a further order was given by Miss Rogers to her solicitors, the body of which was in Gardiner's handwriting and was as follows:—"Please hand to Mr. C. L. Gardiner all my scrip for shares in the Adelaide Steamship Co. Ltd. for the purpose of getting 200 of the said shares transferred, the balance of 1,140 shares to be returned to you for safe keeping."

The balance of the shares was never returned, but on 21st May 1930 Miss Rogers signed transfers of 200 shares in the company, and thereafter 1,140 shares therein were registered in Miss Rogers' name in two certificates, for 570 shares each. On 21st May 1930 the bank required Gardiner to reduce his overdraft by not less than £1,000, and on 24th May the two hundred shares which had been borrowed from Miss Rogers were sold by Gardiner, and he received the proceeds. On 28th May 1930 the Adelaide Steamship Co. Ltd., by registered post addressed to Miss Rogers, forwarded the two share certificates for 570 shares each, and she apparently received these, because she signed and returned receipts for them to the steamship company. Miss Rogers, in the course of her evidence, stated that she had no recollection of doing so. She also signed blank transfers on each certificate and apparently handed the certificates to Gardiner. Gardiner was still being pressed by the bank, and on 30th May 1930 he informed the manager of the bank that he proposed to sell his own 1,000 shares in the Adelaide Steamship Co. Ltd. held by the bank as collateral security for the overdraft on his nephew's account and to replace them by another 1,000 shares in the company which the manager of the bank (Sheridan) stated in his diary "are evidently being lent to him." On 19th June 1930 Gardiner, without any authority from Miss Rogers, lodged with the bank one of Miss Rogers' certificates for 570 shares in the steamship company, with the transfer signed by her in blank, and he requested

the bank to sell the shares and to place the proceeds to the credit of his account. He promised also to lodge further scrip to make a total of 1,000 shares, and these were to be "treated similarly." The manager of the bank gave Gardiner a typewritten letter to be signed by Miss Rogers. Gardiner procured her signature, and that letter contained a footnote in Gardiner's handwriting: "one thousand shares (1,000 shares)." The letter was lodged with the bank and was as follows:—"Adelaide, 19th June 1930. The Manager, Bank of New South Wales, Adelaide, S.A. Dear Sir, Mr. C. L. Gardiner will lodge with you certificate No. 13248 for 570 shares in the Adelaide Steamship Co. Ltd. of which I am the registered holder, and I have to request that you will realize on the said 570 shares at current market prices and place the proceeds of such sale to the credit of Mr. C. L. Gardiner's account with you. Mr. Gardiner will also lodge with you shortly a further 430 shares in the Adelaide Steamship Co. Ltd. on which I shall be glad if you will realize similarly, placing proceeds of these shares also to the credit of Mr. Gardiner's account with you." In her evidence Miss Rogers stated she had no recollection at all of this letter.

On the same day, 19th June, Gardiner took one of the certificates for 570 shares to his sharebroker Turner, and on 3rd July and 30th September 1930 respectively Turner sold 153 of the shares and paid the net proceeds, namely £123 9s. 8d., to Gardiner. This left 417 shares belonging to Miss Rogers, but they had been transferred by the steamship company into Turner's name. On 24th June 1930, Sheridan, the manager of the bank, handed to Gardiner a further letter for Miss Rogers to sign, and he obtained her signature to it, the date, 25th August 1930, being in his handwriting, The letter was as follows:—"Adelaide, 25th August 1930. The Manager, Bank of New South Wales, Adelaide, S.A. Dear Sir, I hand you herewith the under-mentioned scrip certificates: Certificate No. 13248 for 570 £1 f.p. shares in Adelaide Steamship Co. Ltd. Certificates Nos. 13282, 13283, 13284, 13285, 13539, for 417 £1 f.p. shares in Adelaide Steamship Co. Ltd., which are to be held by your bank as security for advances already made and which your bank in its discretion may continue to make from time to time, but only during its pleasure, to Mr. Charles Lennox Gardiner of Semaphore, South Australia, retired civil engineer, and I, my executors, administrators and assigns hereby undertake to execute such forms of security over the above-described scrip certificates as your bank may require whenever called upon to do so, and at the expense of myself, my executors, administrators and assigns in all things. Yours faithfully, M. E. A. Rogers."

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On 12th August 1930 the Adelaide Steamship Co. Ltd., on Turner's order, had delivered to the bank the certificates for the 417 shares which were in his name. These 417 shares were retransferred to Miss Rogers, she signing the transfers as transferee. The transfers were registered on 25th August 1930, and the certificates returned to the bank. On the same day the above-mentioned letter signed by Miss Rogers was delivered to the bank, presumably by Gardiner. Miss Rogers in evidence stated she had no recollection of the document or of the signing of the scrip.

On 5th December 1930 Miss Rogers at Gardiner's request executed a general power of appointment over her interest in her father's will and out of the proceeds, in January 1931, made a gift to Gardiner of £225. The balance of the proceeds, £165 14s., she paid into her savings bank account.

The bank continued to press Gardiner to reduce his overdraft, and in January 1932 Gardiner promised the manager to bring in Miss Rogers to see him. On 3rd February 1932 Miss Rogers, accompanied by Gardiner, went to the bank and saw Sheridan. In her evidence Miss Rogers said that Gardiner had stated to her that "Mr. Sheridan wanted to see me at the bank about my Adelaide Steamship shares, that he wanted me to sign a paper, I thought he meant the 200 shares he had borrowed from me, I did not ask him why Mr. Sheridan wanted the paper signed and he did not tell me why." Sheridan read to her an equitable mortgage of the shares lodged with the bank. It was a long document, which, Miss Rogers said, Sheridan read deliberately and slowly but she did not understand its meaning. She signed the document and also signed a letter in the following terms:—"Adelaide, 3rd February 1932. The Manager, Bank of New South Wales, Adelaide, S.A. Dear Sir, I hand you herewith equitable mortgage executed by me this day to secure certain advances and accommodation afforded and to be afforded by you to Charles Lennox Gardiner of Semaphore, S.A., retired civil engineer, against the security, *inter alia*, of shares already lodged by me with your bank as particularly described at foot hereof. I am aware that the account of C. L. Gardiner with your bank is at this date overdrawn £6,772 17s. 6d. exclusive of interest. Yours faithfully, May E. A. Rogers. 987 £1 f.p. Adelaide Steamship Co. Ltd. as comprised in scrip certificates Nos. 13248, 13479, 13480, 13481, 13482, 13483. May E. A. Rogers."

In evidence Miss Rogers stated that she read the letter at the time of its signature but she did not remember the footnote above her second signature. She also deposed in cross-examination that she remembered that she had signed the equitable mortgage and

the letter, and that she knew that they were in connection with her shares, but not all of them. She stated that she thought the bulk of her shares must have been with the Adelaide Steamship Co. Ltd., as she went there and signed something. Sheridan, the manager of the bank, made a note of this interview in his diary, which was put in evidence, as follows :—" Mr. Gardiner brought in Miss Rogers to sign the equitable mortgage over the shares formerly deposited by her and to secure Mr. Gardiner's account. The whole situation was fully explained to Miss Rogers, who said that she was quite content to sign the equitable charge and appreciated that the shares covered by the same, which she had lodged as security, were to stand as a full security for any overdraft Mr. Gardiner might have with the bank."

After this transaction Gardiner's financial troubles continued, but the bank did not call up the overdraft, and Sheridan, its manager, died in 1936. On 11th October 1938, at the age of 94, Gardiner also died. His overdraft at that date stood at £6,537 3s. 2d. Miss Rogers stated that she continued to receive the dividends from the shares and it was only after his death that she discovered for the first time that all her shares were deposited with the bank as security for his overdraft, and on 15th October 1938 she instructed her solicitors to write to the bank claiming the return of her shares. The bank refused the demand of her solicitors, and on 7th November 1938 she issued a writ out of the Supreme Court of South Australia alleging undue influence by Gardiner, of which she averred the bank had notice actual or constructive, and she claimed—(*a*) that the equitable mortgage and the letter written on 3rd February 1932 were not binding on her and were null and void and of no effect; (*b*) that the bank should be ordered to deliver up the documents; (*c*) that the bank should be ordered to do all things necessary to return to her the share certificates for the 987 shares in the Adelaide Steamship Co. Ltd. and to pay any costs, charges and expenses of and incidental thereto; (*d*) that the bank might be restrained from parting with or disposing of the shares or any of them, otherwise than by returning them to her; (*e*) that the bank might be restrained from in any way enforcing or attempting to enforce anything contained in the documents against her or from assigning any of its rights under any of the documents; (*f*) that all necessary and proper orders might be made, directions given, inquiries had and accounts taken.

The action came on for hearing before *Angas Parsons* J., who gave judgment for the plaintiff. *Angas Parsons* J. accepted Miss Rogers as a witness of truth, and found that she had acted under the undue

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influence of Gardiner who, the learned judge said, had obtained the scrip by " fraud of a very heartless character." Further, he held that the bank could take no benefit from the securities which were obtained from Miss Rogers through the undue influence of Gardiner, because it had left it to Gardiner to obtain Miss Rogers' signature to the letter of 19th June 1930. The documents, his Honour said, obtained by the bank on 3rd February 1932 were designed to improve the infected security of 19th June 1930. His Honour did not think that the bank was a party, except through Gardiner, to any imposition, fraud or undue influence and of his conduct his Honour had no doubt the bank was ignorant, but it could not keep Miss Rogers' shares obtained by it in such improvident circumstances without proper independent advice, and he made an order for the return of the shares to Miss Rogers : *Rogers* v. *Bank of New South Wales* (1).

From that decision the bank appealed to the High Court.

Further facts are set out in the judgments hereunder.

Ligertwood K.C., with him *Hardy*, for the appellant. There was no confidential relationship either of trust or confidence from which there would be a presumption of undue influence. Furthermore, there was no undue influence proved in this case. Again, where there are third parties it is necessary to prove, firstly, undue influence, and, secondly, that the third parties taking the benefit of that undue influence knew or had constructive knowledge of it.

[WILLIAMS J. referred to *Bank of Montreal* v. *Stuart* (2).]

In that case, there was a much closer relationship than there was here, and in any event the bank did not leave everything to Gardiner. There is not a single fact proved in the evidence from which it should have had notice of any undue influence being exercised by Gardiner. Unless there is notice actual or constructive there is no equity against the bank. There is evidence that Miss Rogers did authorize the pledging of these shares and authorized it on three occasions. She also endorsed the same. She must show that there was some relationship between her and Gardiner which dominated her and forced her will to do something which she did not desire. There is nothing like that shown here, save the improvidence of the transaction and the fact of her living in the same house. The improvidence of the transaction is consistent with her desire to help Gardiner in return for the kindnesses by him over many years. That is just as consistent an inference as that of undue influence by him. Anyhow, there is no undue influence here because of any relationship between them. The presumption of undue

(1) (1940) S.A.S.R. 317.

(2) (1911) A.C. 120, at p. 138.

influence dies at the age of emancipation, which need not necessarily be the age of twenty-one. In *Lancashire Loans Ltd.* v. *Black* (1) *Greer* L.J. sets out the well-established rules applicable to this kind of transaction and the relationship that is necessary to be proved. Undue influence is based upon a relationship of trust and confidence, and, having established that, it is necessary to show that the transaction is improvident. Miss Rogers was a free agent knowing she was making a sacrifice and prepared to make it; she did this with her eyes open (*Bainbrigge* v. *Browne* (2); *Turnbull & Co.* v. *Duval* (3); *Chaplin & Co. Ltd.* v. *Brammall* (4); *Yerkey* v. *Jones* (5)). Those cases illustrate what the position of third parties is when undue influence has been exercised. In *Lancashire Loans Ltd.* v. *Black* (6) there was knowledge by the creditor of all the relevant facts. In this case there was no knowledge. In essence, the cases turn around the fact that there is a relationship in the nature of an agency created between the creditor and his debtor, so that when the debtor exercises undue influence he is exercising it on behalf of the creditor. Alternatively, there is some relation between the debtor and the third party which is known to the creditor, and that relationship should lead the creditor to know that an influence may be exerted, and if he does not go to the extent of finding out what the true relationship is, and that no undue influence has been exercised, he takes the risk of having the transaction set aside. But in this case the bank did not leave everything to Gardiner, and that distinguishes this case from *Duval's Case* (3). It got into touch with Miss Rogers and obtained her signature to the equitable mortgage and the letter signed on the same day. There was nothing here to show there was any relationship between Gardiner and Miss Rogers, and the bank dealt directly with Miss Rogers. There was nothing to raise an equity against the bank. If Miss Rogers only pledged 200 shares she is guilty of estoppel, laches and acquiescence. She is now estopped from alleging that the equitable mortgage is not what it purports to be (*Yerkey* v. *Jones* (7)). This case is covered by *Bainbrigge* v. *Browne* (2), rather than *Duval's Case* (3) or *Chaplin's Case* (4). Where the relationship of husband and wife exists, there may be notice to the creditor, but in a case like this Miss Rogers must show that Gardiner was the agent for the creditor. There was no direction by the bank for Gardiner to go to Miss Rogers to get her signature to the equitable

(1) (1934) 1 K.B. 380, at p. 419.
(2) (1881) 18 Ch. D. 188.
(3) (1902) A.C. 429.
(4) (1908) 1 K.B. 233.
(5) (1939) 63 C.L.R. 649.
(6) (1934) 1 K.B. 380.
(7) (1939) 63 C.L.R., at p. 684.

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mortgage, but on the other hand Miss Rogers was brought to the office (*Ware* v. *Lord Egmont* (1)).

Brebner, for the respondent. The findings of the court below should not be disturbed by this court as there was evidence to support the findings. (*a*) Sheridan had knowledge of sufficient facts to cause him to be suspicious of the propriety of the transaction between Miss Rogers and Gardiner and to put him on inquiry, and having failed to make the inquiry the bank was affected with knowledge. (*b*) The decision can be supported on the basis of *Turnbull & Co.* v. *Duval* (2). (*c*) In cases of undue influence, third parties may be affected by the transaction, even though they have no notice of the fraud. On the balance of probabilities, Sheridan should have known that Miss Rogers was Gardiner's niece and living with him. He knew that Miss Rogers moved in the same social circles and he knew Gardiner was up against it. The fact that someone was going to lend Gardiner 1,000 shares should have put Sheridan on his inquiry. The bank asked Gardiner to obtain the shares from Miss Rogers and he witnessed her signature. The principle enunciated by Lord *Lindley* in *Duval's Case* (2) is not limited only to husband and wife. That relation does not give rise to a presumption of undue influence. Sheridan must have known that the transaction was an improvident one for Miss Rogers and in principle there is no difference between the relationship of Miss Rogers and Gardiner and that of husband and wife. Miss Rogers should have had independent advice (*Bank of Montreal* v. *Stuart* (3); *The Bank of Victoria Ltd.* v. *Mueller* (4); *Bunbury* v. *Hibernian Bank* (5); *Aldritt* v. *Maconchy* (6); *Sercombe* v. *Sanders* (7)). In cases of undue influence notice is unnecessary (*Morley* v. *Loughnan* (8); *Huguenin* v. *Baseley* (9); *Halsbury's Laws of England*, 2nd ed., vol. 15, p. 275, and vol. 13, p. 31).

Ligertwood K.C., in reply.

Cur. adv. vult.

April 21. The following written judgments were delivered :—

STARKE J. Appeal from a judgment of the Supreme Court of South Australia, in an action brought by the respondent against the bank, declaring that a banker's lien or charge given by the respondent

(1) (1854) 4 DeG. M. & G. 460, at p. 473 [43 E.R. 586, at p. 592].
(2) (1902) A.C. 429.
(3) (1911) A.C., at p. 138.
(4) (1925) V.L.R. 642, at pp. 648, 649, 656.
(5) (1908) 1 I.R. 261.
(6) (1906) 1 I.R. 416, at p. 427.
(7) (1865) 34 Beav. 382 [55 E.R. 682].
(8) (1893) 1 Ch. 736, at p. 757.
(9) (1807) 14 Ves. 273 [33 E.R. 526].

to the bank over securities therein mentioned to secure the debt of her uncle, C. L. Gardiner, to the bank, and also certain other documents, are not binding upon the respondent, and also ordering that 987 shares in the Adelaide Steamship Co. Ltd. in the name of the respondent subject to the lien or charge be returned to the respondent. *Angas Parsons* J., who tried the action, found that the documents were obtained by an undue and unconscientious abuse of influence and fraud on the part of C. L. Gardiner, the uncle of the respondent, in whom she placed trust and confidence, and that the bank in substance left it to Gardiner to obtain the respondent's execution of the securities or documents, and should, therefore, abide the consequences of his acts.

The judgment cannot be disturbed if there be evidence to support these findings. "The jurisdiction of a court of equity," said the Chief Justice of this court in *Johnson* v. *Buttress* (1), "to set aside gifts *inter vivos* which have been procured by undue influence is exercised where undue influence is proved as a fact, or where, undue influence being presumed from the relations existing between the parties, the presumption has not been rebutted. Where certain special relations exist undue influence is presumed in the case of such gifts. These relations include those of parent and child, guardian and ward, trustee and *cestui que trust*, solicitor and client, physician and patient, and cases of religious influence. The relations mentioned, however, do not constitute an exhaustive list of the cases in which undue influence will be presumed from personal relations. Whenever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised." Further, creditors cannot improve their security, taken from persons to whom they have given credit, by instigating or inducing them to obtain further security for their debts from near relations or persons under their influence and not in a situation to resist their importunity (*Sercombe* v. *Sanders* (2); *Turnbull & Co.* v. *Duval* (3)). The inference of undue influence operates not only "against the person who is able to exercise the influence", but "against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity. But . . . it would operate against no others; it would not operate against a person

(1) (1936) 56 C.L.R. 113, at p. 119.
(2) (1865) 34 Beav. 382, at p. 385 [55 E.R. 682, at p. 683].
(3) (1902) A.C., at p. 435.

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who is not shown to have taken with such notice of the circumstances under which the deed was executed" (*Bainbrigge* v. *Browne* (1)).

The facts are fully stated and discussed in the judgment of the learned judge, and I shall therefore refer only to the more outstanding features of the case. The respondent, who is a spinster, was born in 1868, and was therefore of mature age in the years 1930-1932 when the transactions took place which were challenged in the action. Her mother died when she was a child and her father in 1891, when she was twenty-three years of age. She then went to live with her uncle, C. L. Gardiner, and resided with him until he died in the year 1938, at the great age of ninety-four years. She lived as a member of her uncle's family, and was attached and grateful to him. The home appears to have been a comfortable one; the ordinary domestic help was available to its inmates. In 1923, when Mrs. Gardiner died, the respondent took charge of the house. She was an intelligent woman with a will of her own, not an aggressive woman, or one who yielded too easily, but in matters of business she relied upon and followed her uncle's advice without question. In short, there can be no doubt that Gardiner stood in *loco parentis* towards the respondent, and therefore in the special class of relationship from which undue influence is presumed unless rebutted. In 1930, the respondent was possessed of some property, which consisted of a small interest in her father's estate and some 1,340 shares of £1 each in the Adelaide Steamship Co. Ltd. It was all the property she had. It returned to her an income of about £2 10s. per week. About 1930, Gardiner found himself in a hopeless position financially: he owed the bank some £7,000 on overdraft and his property was heavily encumbered. His creditors, including the bank, began to press for payment. In this plight he, about the middle of 1930, approached his niece the respondent, told her that he was in financial difficulties, and requested that she should make 200 of her steamship shares available to him. She complied with this request and authorized the solicitors who held the shares to hand to Gardiner "all my scrip for shares in the Adelaide Steamship Co. Ltd. for the purpose of getting 200 of the said shares transferred: the balance certificate for 1,140 shares to be returned to you for safe keeping." The 200 shares were transferred, sold, and the proceeds paid to Gardiner or his account. The steamship company issued new certificates for 1,140 shares, each for 570 shares, and posted them to the respondent, who acknowledged receipt. The respondent next signed blank transfer forms for these 1,140 shares and handed them with the share certificates to Gardiner. Gardiner at once saw the bank and

(1) (1881) 18 Ch. D., at pp. 196, 197.

said that he had 1,100 shares made available to him. Ultimately, 987 shares in the name of the respondent, with blank transfers attached, were deposited with the bank; the balance being sold and the proceeds paid to Gardiner or for his account. But the respondent was allowed to receive the dividends from these shares, which probably explains her inaction in respect of the shares.

She says that she did not intend to make available to her uncle more than 200 of her steamship shares already mentioned, and that she cannot remember signing many transfers and other documents relating to the remainder of her shares. Thus she could not remember an authority given to the bank in June of 1930 stating that Gardiner would lodge with the bank 570 of her shares in the steamship company, and shortly after a further 430 shares, all of which she desired to be realized and placed to the credit of his account. Nor could she remember another authority in writing given to the bank in August of 1930 setting forth that scrip certificates for 570 and 417 shares respectively were handed to it to be held by the bank as security for advances already made or which the bank might from time to time make to Gardiner and undertaking to execute such form of security over the scrip certificates as the bank might require.

"It seems to me," said Lord *Macnaghten* in *Edwards* v. *Carter* (1), "that every one who is of sufficient age and intelligence to execute a deed, whether he be an infant or a man of full age, and who does execute a deed, must be treated as knowing the contents of the instrument which he executes."

The respondent does, however, remember that in February of 1932 she went to the bank with Gardiner, who said that the manager wished to see her about her steamship shares, and that she signed the banker's lien or charge, which was read over to her, and also a short note addressed to the bank stating that she handed to it the lien or charge to secure certain advances and accommodation made or given to Gardiner against the security of 987 shares of £1 fully paid in the Adelaide Steamship Co. Ltd. lodged with the bank and that she was aware that his overdrawn account amounted to £6,672, exclusive of interest. But she asserts that she did not understand the effect of the lien or charge or that she had charged all her shares in favour of the bank.

One other transaction should be mentioned, because it illustrates the insistent calls upon the respondent. About the end of 1930 the interest which the respondent had in her father's estate was realized. To relieve Gardiner in his difficulties, she authorized the placing of £200 from this source to the credit of his account with the bank and

(1) (1893) A.C. 360, at p. 367.

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to another of his creditors was paid £25. The balance, about £165. was paid into her savings bank account.

The law does not prohibit persons making gifts to or conferring benefits upon other persons standing in positions of trust and confidence towards them, whether from motives of affection, gratitude or otherwise, so long as the gifts or benefits are the voluntary and well-understood acts of such persons. The question, however, is not whether the respondent "knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf" (*Huguenin* v. *Baseley* (1)).

In the present case, the respondent was a person of mature age, quite intelligent, but possessed of little business experience. But to make available to Gardiner, her uncle, who was hopelessly insolvent, practically the whole of her little fortune and the sole means of support in her declining years, was an act of great and foolish improvidence. She made it available, however, to her uncle, because of his importunity and his financial embarrassment. She was given no security and was without advice. Yet her uncle stood in *loco parentis* towards her and did not even warn her that his position was so hopeless that her fortune could never be replaced and would certainly be lost in discharging his indebtedness. Had the shares been transferred or given directly to the respondent's uncle instead of to the bank, relief must, in accordance with the principles above stated, have been given to her and the transfers set aside. *Angas Parsons* J. regarded the action of Gardiner as a heartless fraud, but perhaps his age and his needs at the time led to importunities that in other and happier circumstances would have been repugnant to his feelings; certainly his actions stand in contrast to the generous kindness and protection which for so many years he had accorded to his niece.

The position of the bank remains for consideration. The bank gave what is called "valuable consideration" in the law, for the deposit with it of the respondent's shares and the lien and charge over them. But from a practical point of view the respondent got nothing. It is clear from the diary of its manager that the bank knew that the respondent's shares were "evidently being lent" to Gardiner. It does not appear, however, that the bank ever knew that the respondent was Gardiner's niece. But it knew that the respondent lived at the same address as Gardiner, that every transfer

(1) (1807) 14 Ves., at p. 300 [33 E.R., at p. 536].

of shares that she signed was attested by Gardiner. The bank did not suggest that Gardiner should procure the respondent's shares as further security for his indebtedness : that was the act of Gardiner himself. But the bank prepared and armed Gardiner with the authorities of June and August 1930 already mentioned which it desired he should have executed for the protection of the bank. Again, the lien and charge and the authority of February 1932 were also prepared by the bank, and it was the bank that arranged with Gardiner " to get from Miss Rogers a proper charge over her 1,000 shares in the Adelaide Steamship Co. Ltd. as a security for Mr. Gardiner's overdraft." Only a few days later, Gardiner " brought in Miss Rogers, who signed the equitable mortgage over the shares formerly deposited by her and to secure Mr. Gardiner's account." The bank manager, who is dead, sets out in his diary that " the whole situation was fully explained to Miss Rogers, who stated she was quite content to sign the equitable charge and appreciated that the shares covered by same, which she had lodged as security, were to stand as a full security for any overdraft Mr. Gardiner may have with the bank." In my opinion, these facts afford a reasonable basis for and justify the inference, which I understand was also the view of the learned judge, that the bank knew that some special relationship existed between Gardiner and the respondent, some relationship that was not merely one of business but of confidence and trust, which enabled Gardiner to exercise influence over her. And if this is so, then it was for the bank to establish that the security given to it by the respondent was free from any undue influence and was the voluntary and well-understood act of her mind.

In my opinion, the bank failed to do so. It prepared and left it to Gardiner to procure the critical authorities of June and August, and must therefore abide the consequences of his undue influence. Further, the explanation of the lien and charge and the authority of 1932 may have been full and satisfactory from the point of view of the bank. But it gave to the respondent no information or advice that the circumstances required or that an independent adviser ought to have given in the circumstances. The respondent was not told that Gardiner's position was hopeless and that her securities would be engulfed in his ruin, or warned against the folly of parting with her whole fortune to discharge Gardiner's overdraft.

Consequently, the bank fails in this appeal as well for the reason given by the learned judge as for the reason that the bank did not give the respondent, nor obtain for her, the information and advice that her situation and relationship to Gardiner, and known to the bank, required.

The appeal should be dismissed.

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McTIERNAN J. The appellant and the respondent are, respectively, creditor and surety. The suretyship is upon the overdrawn account of C. L. Gardiner at the appellant's Adelaide bank. He died on 11th October 1938. His overdraft was £6,537, and his estate is insolvent. The suretyship is constituted by an equitable mortgage dated 3rd February 1932 given by the respondent to the appellant of 987 shares belonging to her in the Adelaide Steamship Co. Ltd., a letter of the same date implementing the mortgage and blank transfers of the shares. It will be seen that the share certificates and the blank transfers were deposited with the bank many months before 3rd February either by Gardiner personally or under his instructions. The respondent did not visit the bank on any occasion before 3rd February.

The mortgage is contained in a long and complicated printed form having a wider scope than a security merely over the respondent's 987 shares and for Gardiner's overdraft. It provides that, in consideration of the bank's forbearance to press him for immediate payment of his liability to it and in further consideration of the bank's discounting in its discretion bills, notes and other securities presented by the respondent or Gardiner and granting further advances to him solely or in conjunction with any other person, the respondent agrees to give the bank a lien over many kinds of securities, including share certificates already or afterwards deposited with it. The mortgage charged them with the repayment of the moneys advanced by the bank. It gave the bank power to sell the securities if the moneys were not repaid on demand, to apply the proceeds in payment and to fill up blanks in transferring scrip or other security. The mortgage is cast in general terms, not mentioning the respondent's 987 shares; but the letter declares that the mortgage is to secure past and future advances to Gardiner and that they are secured against, *inter alia*, the shares already lodged by the respondent with the bank as described in the footnote. There the 987 shares, which were of £1 each, are described by reference to the certificates. The letter states that the respondent is aware that Gardiner's overdraft is £6,772 17s. 6d., exclusive of interest. No other securities of the respondent were lodged at the bank, and she received no benefit from the suretyship.

The respondent began an action on 7th November 1938, that is, after Gardiner's death, to have these securities set aside on the ground that they were given under influence resulting from a quasi-parental relationship between Gardiner and herself, that the bank had notice of these circumstances, and that she gave the securities to the bank without receiving any independent or proper advice or explanation

about the nature and effect of the transaction. *Angas Parsons* J., who tried the action, found that the respondent has established her claim to the relief sought and ordered accordingly. The appellant contended that there was no relation of influence between Gardiner and the respondent, that, if there were, it had no notice that he procured the securities by undue influence, that the respondent was a lady of intelligence and full legal capacity, that she was mistress of her own affairs and freely gave the securities.

The execution of these documents was the last of a series of dealings, exhausting the respondent's entire fortune, which she made for Gardiner's benefit. The 987 shares were the balance of a total holding of 1,340 shares which the respondent had in the Adelaide Steamship Co. Ltd. for many years. She had been receiving dividends amounting to £107 a year. Her only other income was £6 a quarter derived from a life interest under her father's will in a sum of £385. The respondent's 1,340 shares were reduced to 987 by a sale on 24th May 1930 of 200, which she says that she consented to " lend " to Gardiner, and by sales on 3rd July and 30th September in the same year of 153 shares in two lots. These sales were made on Gardiner's initiative and under his instructions and he got the entire benefit of the proceeds. Besides, in January 1931 the respondent gave him £225 out of a sum which she realized by executing on 5th December 1930 a general power of appointment over her interest in her father's will; she paid the balance, £165, into her savings bank account.

When the respondent gave the bank security against her 987 shares, Gardiner's financial position had so far deteriorated that it was highly improbable that the shares would ever be redeemed. Gardiner had been a man of considerable fortune and he had sufficient property to enable him to get a large overdraft on the account for which the respondent was induced to give the additional security of her 987 shares. In May 1930 the overdraft was about £7,000. It was secured by part of his Woodside pastoral property. The other part was mortgaged to another creditor. Gardiner's home at Semaphore was also mortgaged, and 1,000 shares which he held in the Adelaide Steamship Co. Ltd. were deposited with the bank as collateral security for the account of a nephew. The economic depression found Gardiner heavily mortgaged and the decline in values extinguished his credit. Mr. Sheridan, the manager of the appellant's Adelaide bank, kept a diary containing notes of interviews with Gardiner. It shows that, before Gardiner encroached on the respondent's resources, he was already reduced to the extremity of seeking Sheridan's indulgence of a few days for small

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amounts which he needed to draw to pay household accounts. After the bank obtained possession of the respondent's shares Gardiner was in substantially the same predicament. Entries in the diary, for example those on 26th February 1932 and 31st December 1932, show that the deposit of the shares improved Gardiner's position but little, if at all. If the question had been considered, Gardiner and Sheridan would have realized that assets of the value of the respondent's shares could not save Gardiner from eventual collapse. They could be a boon only to the bank. When the respondent signed the mortgage and the letter on 3rd February, Sheridan did not disclose more about Gardiner's position than the amount of his overdraft. Where a banker has no notice of any fiduciary or other special or peculiar relations between a customer and a person coming forward to guarantee the customer's account, there is no duty on the banker to disclose to the intending surety everything within his knowledge which is material to the formation of a judgment, whether it would be prudent to enter into the guarantee or not. In *Hamilton* v. *Watson* (1), Lord *Campbell* said: "If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept: whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires." In *London General Omnibus Co. Ltd.* v. *Holloway* (2), *Farwell* L.J. said: "No surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing; the proper presumption in most instances is that he

(1) (1845) 12 Cl. & Fin. 109, at p. 119 [8 E.R. 1339, at pp. 1343, 1344].
(2) (1912) 2 K.B. 72, at pp. 83, 84.

has been doing so, and wishes to do so again. That is a legitimate carrying on of business, and that is what the surety is asked to guarantee." *Kennedy* L.J. said: "On the other hand, in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure constitute only extrinsic circumstances. They may be material circumstances, such as might affect the judgment of the person who is asked to be surety. But, in the language of Sir *Frederick Pollock* (*Principles of Contract*, 8th ed. (1911), p. 568), 'the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates; and on this point there is no difference between law and equity.' The bank or other creditor cannot reasonably be taken as affirming, by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee. I say 'cannot reasonably be taken,' because, as Mr. *Rowlatt* in his work on *Principal and Surety*, (1898), p. 155 (citing *Hamilton* v. *Watson* (1) and other cases), points out, the probable reason for requiring a guarantee is dissatisfaction with the customer's credit. The law will rightly refuse to find in mere silence an implied representation to the surety in circumstances where the surety cannot reasonably contend that he inferred, in the absence of any statement to the contrary, that a particular state of facts existed different from that which did in truth exist" (2). There are, however, other rules which come into play. In *Davies* v. *London and Provincial Marine Insurance Co.* (3) *Fry* J., after affirming that there is no universal obligation on the creditor to make disclosure, said: "But I do think that the contract of suretyship is, as expressed by Lord *Westbury* in *Williams* v. *Bayley* (4), one which 'should be based upon the free and voluntary agency of the individual who enters into it.' I think that principle especially applicable here, because there is no consideration in this case, as in many cases of suretyship, for the contract so entered into; and therefore I think, to use the language of Lord *Eldon* in *Turner* v. *Harvey* (5), it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid. It is one, furthermore, in which I think that everything like pressure used by the intending creditor will have a very serious effect on the validity of the contract; and the case is

(1) (1845) 12 Cl. & Fin. 109 [4 E.R. 1339].
(2) (1912) 2 K.B., at pp. 87, 88.
(3) (1878) 8 Ch. D. 469, at pp. 475, 476.
(4) (1866) L.R. 1 H.L. 200, at p. 219.
(5) (1821) Jac. 169, at p. 178 [37 E.R. 814, at p. 818.].

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stronger where that pressure is the result of maintaining a false conclusion in the mind of the person pressed." If the pressure or undue influence were exerted by the debtor on the surety and the creditor has notice actual or constructive of the circumstances, the creditor would be no less liable to the surety's equity to set aside the suretyship than if the pressure or undue influence came from him. In *Owen and Gutch* v. *Homan* (1), Lord Chancellor *Cranworth* said: "Without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse. Now, here, not only were the circumstances such (I take them of course solely from the answer) as made the inquiry natural, but they were such as made abstaining from the inquiry unnatural." This principle applies whatever be the kind of fraud used by the creditor. "This court has an undoubted jurisdiction to relieve against every species of fraud." After making this observation, Lord Chancellor *Hardwicke* described a species of fraud in these words: "A third kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting: and this goes further than the rule of law; which is, that it must be proved, not presumed: but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other" (*Chesterfield (Earl of)* v. *Janssen* (2)).

The relative situation between the bank and the respondent was, of course, not one from which equity would presume that it obtained the securities by undue influence or any form of imposition. But if it had notice of any such fraud on Gardiner's part, it is liable to the same equity and stands in the same place as Gardiner would if he, instead of inducing the respondent to give the securities directly to the bank, had procured them to be transferred to himself in order

(1) (1853) 4 H.L.C. 997, at pp. 1034, 1035 [10 E.R. 752, at p. 767].

(2) (1751) 2 Ves. Sen. 125, at pp. 155, 156 [28 E.R. 82, at p. 100].

to deposit them with the bank. The proof of the respondent's claim to relief is twofold. It is necessary for her to prove that Gardiner procured the securities to be given to the bank by undue influence or other fraudulent means, and that the appellant through Sheridan, its manager, had notice either actual or constructive that the securities were obtained by such means. If this state of circumstances is established, the bank has the onus of justifying the retention of the securities. It must show that the giving of them was the free and well-understood act of the respondent (*Bainbrigge* v. *Browne* (1); *Yerkey* v. *Jones* (2)).

The jurisdiction invoked by the respondent is that which courts of equity exercise in watching and controlling transactions between persons standing in a confidential relationship or in a situation exposing the giver of a benefit to the pressure or domination of the recipient. The courts do not intervene in such cases to discourage generosity or folly, but for reasons of public policy and utility, to protect persons from being deprived of their property by force or fraud of any kind (*Allcard* v. *Skinner* (3)). A surety is within the protection of this principle. In *Sercombe* v. *Sanders* (4) the Master of the Rolls (Sir *John Romilly*) said: "It is important that creditors should understand that they cannot improve their security, taken from persons to whom they have given credit, by inducing them, at the last moment, to compel near relations or persons under their influence, and not in a situation to resist their importunity, to pay their debts." Nor can a creditor take advantage of security if he has notice that it has been obtained by such means. In *Berdoe* v. *Dawson* (5) the principle is well illustrated. A father, who was pressed for payment of a debt, with the knowledge of the creditor induced his two sons, then of the respective ages of twenty-five and twenty-three, to join in securing his debt. The father and sons executed an indenture whereby they assigned all their interests under a will to secure the debt and interest. The sons were resident with and maintained by their father until his death. He died insolvent. The creditor was well acquainted with the family. The Master of the Rolls said: "When a person executes a deed by which his father or any other person nearly related and connected with him, or who, from any other cause, has necessarily a considerable influence over him is benefited, then the person who claims the benefit of that deed is bound to establish two things:—he is bound to establish, in the first place, that the person who executed the

(1) (1881) 18 Ch. D., at pp. 196, 197.
(2) (1939) 63 C.L.R., at p. 677.
(3) (1887) 36 Ch. D. 145, at p. 183.
(4) (1865) 34 Beav., at p. 385 [55 E.R., at p. 683].
(5) (1865) 34 Beav. 603 [55 E.R. 768].

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deed knew what he was about when he executed it; and in the next place, he is bound to show that it was made of his own free will, and unbiassed by and without being subject to that influence which he could not easily resist" (1).

It should be observed that much that is material in the present case came to the knowledge only of the respondent, Gardiner and Sheridan. Sheridan died in 1936. The respondent alone lived to tell what she remembered of the dealings. Sheridan's diary recording his dealings with Gardiner was put in evidence on the respondent's behalf without objection. The question of what credence is to be given to her evidence is of the highest importance. *Angas Parsons* J. considered it with great care and expressed his conclusion in these words:—"It seems to me that the first approach should be to determine what credence I am entitled to give to the plaintiff's evidence. After serious consideration and a close observation of her in the box, I am of opinion that she is a truthful witness. I should estimate her as being a person with a will of her own; not an aggressive woman or one who yields too easily. I detected nothing to cause me to suspect that she was avaricious. I do not think that she tried to hide anything. On the contrary, she impressed me that she was making a genuine effort to tell the court all she knew. She uttered no word of complaint or reproach against her uncle. She said nothing against Mr. Sheridan. She made no claim to what she had given and intended to give to her uncle—the 200 shares, the £225 out of her father's estate, and various small sums which from time to time she had given him out of her slender resources in the Savings Bank. Generally speaking she showed a restraint which was impressive, and not to be expected in one who was telling a false story" (2). That opinion, formed with the aid of personal observation of the witness, is more likely to be correct than a different opinion arrived at without such assistance but by forming theories upon the materials in the transcript. I think we should act upon his Honour's opinion. The respondent's evidence is proof of any fact as to which it speaks. But there may be a more probable inference from other evidence to which the law gives equal credence. As regards such a fact her proof would fail.

The respondent's evidence proves her relationship with Gardiner before and at the time she gave the bank security over her shares, and how she came to give it. In 1891 a close and special association began between Gardiner and the respondent. In that year her father died. He had survived her mother by many years. Gardiner

(1) (1865) 34 Beav., at p. 605 [55 E.R. at p. 769].
(2) (1940) S.A.S.R., at p. 326.

appears to have filled the gap created by the father's death. He took her into his home, which is at Semaphore, and she lived there as a member of his family until his death. Gardiner's wife died in 1923, and since then he and the respondent, who remained a spinster, were, apart from domestics, the only occupants of the home. She received no wages and had no employment outside the home. She was twenty-three years of age when she was received into Gardiner's household. She received a legacy of £500 under her grandfather's will about seven years afterwards. Until then her only income was that derived from the small life interest under her father's will. Gardiner advised her to invest the legacy of £500 in a house property. She kept this property for about seven years. When she became dissatisfied with it, it was sold, and Gardiner advised her to invest the proceeds in Adelaide Steamship Co. Ltd. shares. Subsequently she purchased more of this company's shares, again acting on Gardiner's advice. By 1921 she had acquired by purchases, all made on his advice, and as a result of capital distributions 1,340 of the company's £1 shares. It was Gardiner who assumed the responsibility of lodging the share certificates for safe custody at the office of a firm of solicitors. She said in evidence that he had told her that he had done so. The dividend cheques were posted to her at Gardiner's home, and she indorsed them and paid them into her savings bank account. Gardiner was kind to her and she was fond of him. His manner was forceful, hers deferential. She had attained her 64th year when she gave the appellant security over her shares. I should think that she was becoming more dependent on her uncle for her home. Her wealth and business experience were small in comparison with his. She counted on him as her adviser. In evidence she said:—"I knew nothing about business. I trusted Mr. Gardiner absolutely. He was the only person who could help me in my affairs. He was the only person I did consult in business matters."

I am satisfied from the evidence that for many years down to 1930 Gardiner stood in a quasi-parental relationship to his niece, the respondent; that the relationship involved trust and confidence and much of the general dependence proper to the parental relationship; that in 1930 down to his death he had an ascendancy and influence resulting from that relationship; and that his will would dominate hers if she hesitated to consider whether she should adopt any course which he asked her to take in business matters. The relationship between Gardiner and the respondent had not the external appearance of any in the familiar list of relations which import confidence. Equity presumes that a party standing in one

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of those relations has abused the confidence of the person reposing confidence in him if he is the recipient of a substantial benefit, and it casts upon the recipient the onus of justifying the retention of the benefit. But equity does not confine this principle to relations within the category of those which import confidence. "It is not the relation of solicitor and client, or of trustee and *cestui que trust*, which constitutes the sole title to relief in these cases, and which imposes upon those who obtain such securities as these, the duty before they obtain their confirmation, of making a free disclosure of every circumstance which it is important that the individual who is called upon for the confirmation, should be apprised of. The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of equity most ordinarily deals, are those of trustee and *cestui que trust*, and such like. It applies specially to those cases, for this reason and this reason only, that from those relations the court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a court of equity, are just as applicable in the one case as in the other" (per Lord *Kingsdown* in *Smith* v. *Kay* (1))—See also *Johnson* v. *Buttress* (2), per *Dixon* J.

Gardiner first asked the respondent to make her Adelaide Steamship Co. shares available to serve his ends on 19th May 1930. The bank and the other mortgagee of his Woodside property were pressing him. The low ebb to which his credit had fallen is indicated by the entry in Sheridan's diary for 6th May 1930: "Agreed to pay his" (Gardiner's) "cheque for £11 on the distinct understanding that he will not later than tomorrow pay in to meet same." The diary shows that on 16th May the bank required him to sell Woodside without delay, and threatened that if he did not make satisfactory arrangements to sell within a week his overdraft would be called up and the land sold by the bank. Under this pressure Gardiner asked the respondent to sign a letter dated 19th May 1930 which he drafted, addressed to the solicitors having custody of her Adelaide Steamship Co. Ltd. shares requesting them to give him 200 of them. The respondent complied. In her evidence she said that in May 1930 Gardiner spoke to her about borrowing Adelaide Steamship shares from her; that he said when he brought the letter to her that he wanted to borrow some of them temporarily. She said that upon

(1) (1859) 7 H.L.C. 750, at pp. 778, 779 [11 E.R. 299, at pp. 310, 311].
(2) (1936) 56 C.L.R., at pp. 134, 135.

that representation she signed the letter; that there was no discussion about his reason for borrowing the shares or the use he would make of them. The respondent said she believed, presumably because the letter mentioned 200 shares, that he wanted to borrow that number. There was not, however, separate scrip for 200 shares. The respondent said that Gardiner asked her to sign another letter drafted by him asking the solicitors to hand him all her scrip for the purpose of getting 200 of them transferred and that again she complied. This letter, which was dated 22nd May 1930, contained a promise that the balance certificate for 1,140 shares would be returned to the solicitors for safe keeping. The promise was not fulfilled. There is a letter dated 1st July 1930 bearing the respondent's signature and addressed to the solicitors, authorizing them to hand all scrip in her name to Gardiner. This letter released Gardiner from any obligation arising under the terms of the letter of 22nd May 1930 to return the balance of the scrip for 1,140 shares. The respondent said she did not remember signing this letter. The transfers of share certificates which the respondent signed and two letters dated respectively 19th June 1930 and 25th August 1930, which are signed by the respondent and addressed to the bank, show how the shares were disposed of after Gardiner took them out of safe custody. All transfers signed by her are witnessed by Gardiner. She signed transfers enabling the sale of 200 to be completed. Gardiner got the benefit of the entire proceeds of sale. On 19th June Gardiner deposited with the bank a certificate for 570 of her shares with a blank transfer signed by her. The letter dated 19th June 1930 says that Gardiner would lodge that certificate; that she was the registered holder of the shares; and it purported to convey a request by her to the manager to realize the shares at current prices and credit the proceeds to Gardiner's account. The letter also states that Gardiner would lodge shortly a further 430 shares. Referring to these shares the letter concludes: "On which I shall be glad if you will realize similarly placing proceeds of the shares also to Mr. Gardiner's credit with you." The letter has as a footnote: "One thousand shares (1,000 shares)." The letter strikes a note of gladness which would come strangely from the respondent; but the letter was drawn and typed by the bank. The respondent said in evidence that she did not recollect the letter at all. On the same date Gardiner gave the certificate for the balance of the respondent's shares, 570, to a broker, and 153 of these shares were sold, as already mentioned, on 3rd July and 30th September, Gardiner getting the benefit of the proceeds of sale. There remained only 417 of the respondent's original holding of 1,340 shares. These 417 shares

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became registered in the broker's name and he, no doubt on Gardiner's instructions, gave an order to the bank to get the scrip for these shares from the Adelaide Steamship Co.'s office. The bank collected the scrip. It was accompanied by a blank transfer signed by the broker, the shares having become registered in his name. The result was that the bank then held certificates with signed blank transfers for the respondent's 987 shares. The promise in her letter of 19th June was to lodge certificates for 1,000 shares. The letter dated 25th August 1930 is signed by the respondent and addressed to the manager of the Adelaide branch. It was prepared at the bank, but the date was filled in by Gardiner. The letter purports to say that the respondent hands to the manager scrip certificates for 570 and 417 shares respectively, although the first lot of shares had been in the bank's possession since 19th June, the second lot since 12th August. The letter goes on to say that the shares are to be held by the bank as security for advances already made and which the bank in its discretion may continue to make to Gardiner during its pleasure, and that the respondent and her representatives and assigns undertake to execute at his or their expense such form of security over these share certificates as the bank may require. Subsequently, on 3rd February, the respondent executed the equitable mortgage and signed the accompanying letter.

At the time these dealings were taking place the respondent lived under Gardiner's roof as a member of his household. She was all the time exposed to his influence and importunity. The transactions strongly suggest subservience to his demands. The shares constituted almost her whole substance. It was imperative for Gardiner to get the benefit of the shares, as he was in urgent need of fresh resources to get credit to carry on his home, and to induce the bank to stay its hand. Although at first he limited his request to a loan of 200 of the respondent's shares, it is not difficult to believe that, if he could survive at all with the aid of her shares at least the whole of them needed to be thrown into the scale. Naturally, there would have been reluctance on his part, founded on sympathy or expediency, to tell her that he needed all her shares. The respondent said in evidence: "I imagined after that" (May 1930) "he must have used more than 200 shares, as the dividends were not so large as they had been. I formed no opinion as to how many of my shares he had used. I never asked him and he never told me. I never before his death believed he had used all my shares. As I received the dividends every year I thought my shares were in safe custody and that they were mine. I have continued to receive a reduced dividend up to the present time. I discovered soon after his death

that he had used all my shares. I did not know till after he died." Although *Angas Parsons* J. said that the respondent was a truthful witness, we are asked to reject this evidence for the following reasons. First, if it was the respondent's belief that Gardiner used only 200 shares, she would not have been driven to execute the power of appointment to raise money to help him. I do not appreciate how this consideration can be conclusive against her. It is probable that she would prefer to raise money in that way rather than encroach further upon her shares, as they were her main source of income. The second reason is that the letters of 19th June 1930 and 3rd February 1932, which the respondent signed, contained in their footnotes respectively "One thousand shares (1,000 shares)" and "987." The respondent's sworn evidence that she had no recollection of the contents of the letter of 19th June and that she did not see the number of shares in the letter of 3rd July 1932 nor remember the footnote weakens any presumption which these letters might found that she knew that Gardiner had used more than 200 of her shares.

In my opinion, the relations of confidence and dependence which existed between the respondent and Gardiner, the nature and extent of the benefits which she bestowed upon him by the documents charging her 987 shares with his past and future liabilities to the bank, and the fact that these documents stripped her of her fortune, are sufficient to raise a strong presumption that Gardiner procured the securities for his account at the bank by undue influence. If the respondent had transferred the shares to him in order that he could give the securities in his own name, equity would cast the onus on him to justify the transaction. If the bank had notice of the relations of confidence and influence between the respondent and Gardiner, the bank's title to the securities is subject to the same equity. In *Kempson* v. *Ashbee* (1) a young lady living with her mother and step-father executed at his solicitation after she came of age a bond to secure the repayment of moneys advanced to him by the defendant. Sir *W. M. James* L.J. said: "This court has endeavoured to prevent persons subject to influence from being induced to enter into transactions without independent advice. The first question, therefore, is, whether the bond of 1859 was obtained by the undue exercise of influence of the step-father; and was it obtained under such exercise as that knowledge of it can be imputed to the defendant" (2).

The first intimation that Sheridan received from Gardiner that he could put his hands on fresh securities was on 30th May 1930.

(1) (1874) 10 Ch. App. 15.

(2) (1874) 10 Ch. App., at p. 21.

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Gardiner apparently stated vaguely what his rights in the shares would be, as Sheridan wrote in his diary that the shares "are evidently being lent to him." It is there silent about the ownership of the shares. An entry in the diary records an interview between Sheridan and Gardiner on 19th June 1930. It refers to a memorandum of an interview on 16th June 1930, when Gardiner "faithfully promised to come in on Thursday 19th instant and deposit scrip for 1,000 shares in the Adelaide Steamship Co. Ltd." Sheridan was obviously pressing Gardiner to find additional security. He must have known that Gardiner had no tangible security to offer the lender of the shares. The diary shows that Gardiner brought in 570 shares on 19th June, that the letter of deposit, though bearing that date, was signed afterwards, and that Gardiner was then commissioned by Sheridan to obtain the respondent's signature and bring the letter to him. The note of the interview of 19th June is: "Mr. Gardiner today lodged the share certificates for 570 shares in the name of Miss M. E. A. Rogers and requested us to sell the same through R. W. E. Turner" (a broker) "and place proceeds to the credit of his account with us. He" (Gardiner) "stated that in a day or two he will lodge further scrip certificate making the total number of shares 1,000. These shares to be treated similarly. Handed him an authority for Miss Rogers to sign and return to us, which he promised to bring in tomorrow." It appears that the respondent had not in fact given Gardiner any written authority to lodge the scrip for 570 shares and the blank transfer with the bank. Sheridan was content to take both without the respondent's authority, and he apparently relied upon Gardiner to be able to obtain her confirmation. Although she does not recollect signing the letter dated 19th June, she does not repudiate the signature. It is clear that Sheridan recognized that the respondent had not parted with her property in the shares to Gardiner. On 24th June the diary shows that Sheridan gave Gardiner "an authority to be signed by Miss Rogers depositing as security 1,000 shares in the Adelaide Steamship Co. Ltd. as additional security for his own overdraft and 560 of these shares have been deposited already." Gardiner got the respondent's signature. The authority was the letter dated 25th August 1930. The date is in Gardiner's own handwriting. On 31st July the diary shows that Sheridan "arranged with him to get from Miss Rogers a proper charge over her 1,000 shares in the Adelaide Steamship Co. Ltd. as a security for Mr. Gardiner's overdraft." But the matter rested until 26th January 1932 when, as it appears from the diary, the bank paid Gardiner's cheque for £8 on

his undertaking to pay in £20 to the credit of his account in a fortnight. The diary adds: "He also promised to bring in Miss Rogers to enable us to take full security over the shares which she has already lodged as part security for his overdraft." Action followed on 3rd February 1932, when the equitable mortgage was signed. The diary and, of course, the respondent's evidence give accounts of what happened on this occasion. The note in the diary says that Gardiner "brought in Miss Rogers", and that she signed the mortgage over the shares formerly deposited by her "and to secure Gardiner's account." The diary records that "the whole situation was fully explained to Miss Rogers, who stated that she was quite content to sign the equitable charge and appreciated that the shares covered by same which she had lodged as security were to stand as a full security for any overdraft Mr. Gardiner may have with the bank." It is impossible to gather from this entry what was included in the explanation of the "whole situation"; and the distinction which Sheridan drew between a security and a full security might well have been obscure even to a more experienced person than the respondent. The respondent's account is that a few days before Gardiner told her that "Mr. Sheridan wanted to see me at the bank about my Adelaide Steamship shares—that he wanted me to sign a paper . . . I thought he meant the 200 shares he had borrowed from me. I did not ask him why Mr. Sheridan wanted the paper signed and he did not tell me why." Upon arrival at the bank, as the respondent said, Sheridan had a paper brought to him. This was the first time the respondent ever saw the printed form of mortgage. She said: "He read it deliberately—slowly: I did not understand it. I can't remember what was said at the interview—nothing important: the business was conducted and then there was a little social chat." If in the reading of this long and complicated form, which does not mention her Adelaide Steamship shares at all, the respondent failed to appreciate that she was giving a charge over 987 of them, her failure is not surprising. The mortgage, however, bears her signature. She said in her evidence that she read the letter of 3rd February 1932. This bears her signature also. The note in the diary makes no reference to the letter. Referring to the letter she said:—"I did not read it at the time. I never saw the number of shares. I do not remember the footnote above my second signature." She denies the statement in Sheridan's diary that she was content to sign the printed form. She said:—"I had no belief as to what the printed document was about. I did not understand it. . . . I see there is a reference in the letter to Mr. Gardiner's overdraft. I read that at the time. No

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explanation was given to me by Mr. Sheridan as to the meaning of the document." She said that she told Gardiner when they left the bank that she did not understand what she signed, and he said it was not necessary for her to understand the documents. Until the respondent read the letter relating to the mortgage, she believed that Gardiner's overdraft was £1,000, but she was always aware that he was in financial trouble. The respondent was willing to help him, but not, as she said, "to the extent of all her means." I am satisfied that Gardiner did not make any explanation of the purpose of her visit to Sheridan beyond saying that it was necessary for her to sign a paper about her shares.

At no time when the respondent signed any document charging her shares in favour of the bank was she severed from Gardiner's influence. The respondent does not say of the mortgage or the letter *non factum est.* That allegation could not succeed on her own evidence that the mortgage was read to her and that she read the letter: See *Carlisle and Cumberland Banking Co.* v. *Bragg* (1). Where there is legal capacity to execute an instrument, there is no such thing as equitable incapacity (*Osmond* v. *Fitzroy* (2)). The question here is whether the bank's conscience is fettered against retaining the securities by notice of the relation between Gardiner and the respondent or of the circumstances in which Gardiner procured them. If notice should be imputed to the bank through Sheridan, it is of little, if any, importance whether the respondent saw the number 987 in the letter, unless the bank is able to remove the fetter on its conscience by proving that the giving of the securities was the uninfluenced act of the respondent's mind. The age and capacity of the respondent could have afforded her but little protection against Gardiner's influence, founded upon the confidence she reposed in him (*Rhodes* v. *Bate* (3)). And if notice of the relation of confidence and influence is to be imputed to the bank, the respondent's age and capacity would not be enough to defeat her equity against the bank.

The facts which Sheridan knew were that Gardiner lived at Semaphore, that he had no security to give the person who was evidently lending him the shares and that the shares, if deposited, would never be likely to be redeemed. There can be no doubt that the bank knew the address of the respondent, its surety of the account. Sheridan would know, therefore, that the respondent lived in Gardiner's home at Semaphore. Gardiner frequently asked

(1) (1911) 1 K.B. 489, at p. 495.
(2) (1731) 3 P.Wms. 129, at p. 131 [24 E.R. 997, at p. 998].
(3) (1865) 1 Ch. App. 252, at p. 257.

Sheridan to allow him to cash cheques for household expenses. It is more probable than not that Sheridan knew that the respondent was not a boarder or a guest at Semaphore. If Sheridan was indeed ignorant of the fact that the respondent was Gardiner's niece and had been treated by him as a daughter, it is probable that Sheridan realized that their living in the same house was significant of their near relationship. The inference from the diary entry of 19th June is that Gardiner's attitude was one of confidence in his power to obtain the respondent's signature to the letter and to get it promptly. An indication that Sheridan believed that there was some special relationship between Gardiner and the respondent is that he accepted the 570 shares from him on 19th June without any written authority from the respondent. Although the full number of shares promised by the letter of that date were not deposited, there is no notice in the diary that Sheridan ever referred to her about this departure from the terms of the letter. Sheridan did recognize the respondent as the owner of the shares, but in the period from May 1930 until February 1932 he never had any communication with her at all. If Sheridan had given any consideration to the matter, he had ample ground for thinking that her compliance with all the demands which he moved Gardiner to make on her was inconsistent with any prudent consideration on her part of the circumstances in which Gardiner stood and of her own interests. I think that the circumstances put Sheridan on inquiry whether the entering by the respondent into this suretyship was an act of pure volition uninfluenced by Gardiner. The respondent's dealing with her property does not look as if it proceeded from rational consideration on her part and from her own pure volition. If the bank had made reasonable inquiries, it would have ascertained the facts about the situation in which the respondent stood to Gardiner and that she was necessarily exposed to influence founded upon her relations of confidence and dependence with him. "When it is said that a person is put on inquiry, the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry" (*London Joint Stock Bank* v. *Simmons* (1), per Lord *Herschell*). There were strong grounds for suspecting that there was some special or peculiar relation between Gardiner and the respondent which enabled him to dominate her will, and also that she had no independent advice. No draft of the mortgage or of any letter was sent to her beforehand or to any person acting on her behalf. The respondent was, it is true, of mature age. But the dominion resulting from the long-standing quasi-parental relationship

(1) (1892) A.C. 201, at p. 220.

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undoubtedly remained in Gardiner even if the relationship had become modified in course of time. The bank is deemed to have known of this relation of influence. Sheridan's breach of duty may be described in the words of the Vice-Chancellor (Sir *L. Shadwell*) in *Maitland* v. *Irving* (1): "But it seems to me to be very extraordinary that, when men of mature age, who were carrying on a lucrative business, were told by a gentleman who was himself unable to perform his contract with them that he would procure a young lady who was residing with him, who was possessed of a large fortune, and to whom he had been guardian, to give them a guarantee for the fulfilment of his contract—it seems, I say, very extraordinary that, with full knowledge of all those circumstances, they should have at once acceded to the proposal, without making any inquiry or taking any pains to ascertain whether the young lady was a free agent, and perfectly willing, with a full knowledge of the consequences to do what the guardian said he would invite her or propose to her to do." In *Maitland* v. *Backhouse* (2), the court restrained a banker from suing a young lady on a note which was drawn in his favour by her guardian and which she indorsed at his request when she was still residing with him. At the time she indorsed the note she was twenty-three years of age. The Lord Chancellor (Lord *Cottenham*) said that the question was whether he found that "the facts raise a reasonable suspicion so as to affect the defendants with the equities which, beyond all doubt, affect the immediate parties to the transaction" (3). In *Espey* v. *Lake* (4) the Vice-Chancellor (Sir *G. J. Turner*) said: "I take it to be quite clear that the principles of this court go to this extent—that in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken, which constitutes anything in the nature of a trust, or anything approaching to the relation of guardian and ward, or of standing in *loco parentis* to the surety, this court will not allow such security to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favour the security is made, or by the party who was the medium or instrument of obtaining it." Speaking about the creditor, the Vice-Chancellor said:—"I do not believe that there was any

(1) (1846) 15 Sim. 437, at p. 441 [60 E.R. 688, at p. 690].
(2) (1847) 16 Sim. 58 [60 E.R. 794].
(3) (1847) 16 Sim., at p. 65 [60 E.R., at p. 797].
(4) (1852) 10 Hare 260, at p. 262 [68 E.R. 923, at p. 925].

moral fraud on his part, nor might he have been aware of the principles which guide the court with regard to securities taken from a person in the situation of Miss Espey at that time. But what does the defendant say? Why, that he left it wholly to Speakman. That is, he himself allowed a party standing in the relation of guardian to this young lady to persuade her to join in this security for a sum of £500. In the application of the principles of the court, I see no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the guardian who obtains such a security from his ward" (1)—See also *Ardglasse* (*Earl of*) v. *Pitt* (2); but see also *Thornber* v. *Sheard* (3), and *Corbett* v. *Brock* (4), where the securities were not set aside. There was no attempt to explain to the respondent the nature and effect of the documents, except that described in Sheridan's notes of the business in his office on 3rd February 1932. Apart from the vagueness of Sheridan's account, there is the objection that the bank's own agent gave such explanation as was stated to have been imparted to the respondent. In *Archer* v. *Hudson* (5) the Master of the Rolls (Lord *Langdale*) said: —"I do not mean to say, that if this young lady had her trustees, or some friend or relation of the family, or somebody interested in her welfare, to advise and consult with, in the absence of the uncle and the aunt, that the circumstance of her situation and the circumstance of the uncle's situation might not have been such, that this court would have said that, having entered into this liability, she should be held by it. It might have been so; but to say that Mr. Hauxwell, the agent of the bank, a person with whom the uncle was dealing, the person through whom he is carrying on his business as a customer of the bank, by explaining to an inexperienced young woman who had just attained her age of twenty-one years the meaning of this note, offered anything like such a protection as would secure to her that free and independent judgment which she had a right to exercise, seems to me to go far beyond anything which has been proved in this case"—See also *Lancashire Loans Ltd.* v. *Black* (6). It is clear that the respondent had no independent advice at all. Besides, her evidence proves that she did not understand the nature and effect of the documents which she executed in favour of the bank, and that she did not freely concur in any of

(1) (1852) 10 Hare, at p. 263 [68 E.R. at p. 925].
(2) (1684) 1 Vern. 237, at p. 239 [23 E.R. 438, at p. 439].
(3) (1850) 12 Beav. 589 [50 E.R. 1186].
(4) (1855) 20 Beav. 524 [52 E.R. 706].
(5) (1844) 7 Beav. 551, at p. 561 [49 E.R. 1180, at p. 1184].
(6) (1934) 1 K.B., at p. 415.

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them. The bank had the onus cast upon it of proving that these instruments were the "pure, voluntary and well-understood" acts of her mind. It has failed to discharge that onus. The respondent was not severed from Gardiner's influence until his death, and there is no foundation for any suggestion that she adopted or acquiesced in the retention by the bank of her securities.

In my opinion, the appeal should be dismissed.

WILLIAMS J. This is an appeal by the Bank of New South Wales, the defendant in the action, against a judgment of the Supreme Court of South Australia setting aside certain securities, which the plaintiff Miss M. E. A. Rogers had executed over her 987 shares in the Adelaide Steamship Co. Ltd. by way of guarantee of the overdraft account with the bank of her uncle Charles Lennox Gardiner now deceased.

At all material times Sheridan was the manager of the appellant at Adelaide. He died in 1936. Gardiner died on 11th October 1938, aged ninety-four years.

The present action was commenced on 7th November 1938.

The evidence shows the respondent was born in 1868. In 1891, at the age of twenty-three years, her mother and father having died, she went to live with Gardiner at his home at Semaphore, and continued to do so free of charge for the rest of her life. Gardiner's wife died in 1923 and the respondent acted as his housekeeper until 1935, when a married daughter and her husband returned to live in the home. The respondent gave evidence that her uncle, while not exactly overbearing, used to force his will upon her, that she trusted him absolutely, and that he was the only person she consulted in her business affairs.

Under her father's will the respondent had a life interest in a sum of £385 with a general power of appointment by deed or will over the principal. The moneys were held by the Executor Trustee and Agency Co. Ltd., and she received £6 a quarter from them. This was paid to her by cheque payable to her order, the cheques being indorsed by her and paid into her savings bank account. In 1897 she received a legacy of £500 on the death of her grandfather. After consulting with her uncle, who was the executor of the will, she invested it in a house property. She received the rents personally. She held this property for seven years, and then became dissatisfied with it as an investment on account of troubles with tenants and the expense of repairs. She consulted her uncle again, sold the house, and, on his advice, invested the proceeds in shares in the Adelaide Steamship Co. Ltd. She acquired sixty shares of £5 each. In November 1908 the company reconstructed and gave

seven £1 shares for each £5 share, making her holding 420 shares. In February 1920 the company again reconstructed, giving three £1 shares for each £1 share, making her holding 1,260 shares.

In 1920 the respondent, on her uncle's advice, purchased a further forty shares, and, in 1921, still another forty shares, making her final holding 1,340 shares. The shares were in three certificates, one for 1,260 shares and two for forty shares each. The scrip was held on her behalf by Messrs. Fisher, Powers & Jeffries, solicitors. The respondent received the dividends from the shares herself, indorsed the dividend warrants and paid them into her savings bank account. The dividends, together with the interest from her father's estate, gave her an income of about £2 10s. a week.

Gardiner was a man of property and had been fairly well off; but, about 1930, presumably in consequence of the economic depression, he found himself in financial difficulties. He had an overdraft of about £7,000 with the appellant for which it held securities, including a mortgage over portion of his pastoral property, of about 160 acres, situated at Woodside in the hills. Gardiner had also guaranteed the account of a nephew, D. W. Brock, with the appellant. In the early months of 1930, the appellant began to press him to sell the Woodside property so as to reduce his indebtedness. It threatened to serve a demand if he did not do so.

The first request that Gardiner made to the respondent for assistance related to 200 shares. She said he told her he wanted to borrow some of her shares temporarily. At that time, namely on 19th and 20th May 1930, she signed two authorities, addressed to the solicitors, which authorized them to hand her three scrip certificates to Gardiner so that 200 shares might be transferred. The share certificates were of the dimensions already mentioned, so that he had to receive all three to have two hundred shares transferred. The second authority stated that the balance of the shares, namely 1,140, were to be returned to the solicitors for safe keeping. Gardiner having received the three certificates gave them to a share-broker named Turner and instructed him to sell the 200 shares, which he did. Turner received the purchase moneys, £176 9s. 2d., on 24th May. Gardiner received this money in some manner which does not appear from the evidence, but, presumably, either the respondent authorized Turner to pay it to him or she indorsed a cheque made out in her favour by Turner and gave it to him. This money was not paid into his bank account. The respondent executed two transfers, each for a hundred shares, to the purchasers Alchin and Young. These transfers were dated 21st May and

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21st June 1930. She swore she had no recollection of signing either of them.

On 28th May two scrip certificates each for 570 shares, accompanied by a letter stating that they were enclosed, were sent by the company to the respondent by registered post accompanied by receipt forms. She signed the two receipts and returned them to the company. It appears to me that she must have realized that these two certificates were for the balance of her shares, after the 200 shares had been taken from her original holding by Gardiner; but she swore she had no recollection of ever receiving the letter or the certificates or giving the receipts. She then signed her name to a blank transfer on the back of each certificate and handed them to Gardiner. Gardiner was under an obligation to return them to the solicitors in pursuance of the undertaking already mentioned. The exact date the scrip was handed to Gardiner is not proved, but it appears from Sheridan's diary entry of 3rd June to have been prior to that date.

The appellant must either have handed the two certificates to Gardiner to return to the solicitors for safe keeping as previously arranged or in order that he might deal with them. If they were handed to Gardiner for the former purpose it would have been fraudulent for him to deal with them, but the whole of the documentary evidence and some parts of her own evidence appear to me to show that she knew he was going to do so. She used to receive the dividend warrants from the company twice a year in March and September and she admitted that she knew from the reduced amounts of the dividends she was receiving that he had used more than 200 shares.

Gardiner handed one of the certificates to Turner. On 18th June Turner caused the shares to be transferred into his own name and sold 153 shares. Gardiner received the proceeds of sale, presumably pursuant to her authority given to Turner or by receiving from her a cheque made out by Turner on her behalf.

Gardiner deposited the scrip for the other 570 shares with the appellant.

Until 19th June it might have been possible for the respondent to have believed that Gardiner had returned the two certificates to the solicitors in accordance with the undertaking, although in this case there would have been no need to execute the transfers on the back in blank. On that date she executed the following document:—"Adelaide, 19th June 1930. The Manager, Bank of New South Wales, Adelaide, S.A. Dear Sir, Mr. C. L. Gardiner will lodge

with you certificate No. 13248 for 570 shares in the Adelaide Steamship Co. Ltd., of which I am the registered holder, and I have to request that you will realize on the said 570 shares at current market prices and place the proceeds of such sale to the credit of Mr. C. L. Gardiner's account with you. Mr. Gardiner will also lodge with you a further 430 shares in the Adelaide Steamship Co. Ltd. on which I shall be glad if you will realize similarly, placing proceeds of these shares also to the credit of Mr. Gardiner's account with you. Yours faithfully, M. E. A. Rogers. One thousand shares (1,000 shares)."

She swore she could not remember signing this document. She does not suggest that Gardiner made any false statement as to its contents. She said all he would have said would have been : " I just want you to sign this paper." Even if the figure " 430 " and the footnote " 1,000 shares " were added by Gardiner after she had signed the document, the typewritten part plainly referred to one parcel of 570 shares and to a further parcel of shares the number of which was to be filled in.

On 1st July she signed the following documents :—" Messrs. Fisher Powers and Jeffries. Please deliver to Mr. C. L. Gardiner all scrip in my name in the Adelaide Steamship Co. Ltd. M. E. A. Rogers."

There is no evidence about this document except that the respondent in her affidavit of discovery swore that it was in the possession of her solicitors on that date. Presumably Gardiner caused the respondent to sign it and then delivered it to the solicitors because of the previous undertaking. No scrip had in fact been returned to them, and it is unfortunate that they should have accepted a document which did not accord with the facts, but its importance in the case is that she should have signed a further simple document relating to the balance of her shares twelve days after that of 19th June.

In August Turner retransferred to the respondent the 417 shares which he had not sold. He had authorized the company to deliver five certificates in his own name for these shares, four for 100 shares and one for 17 shares, to the appellant on 12th August, and this had been done. On 25th August the respondent executed five transfers of these shares as transferor. The appellant delivered them to the company. On 26th August the company issued five new certificates in her name. On that date she executed five transfers in blank to be attached to the certificates. She never took possession of this scrip, which was handed by the company to the bank. She said that Gardiner told her to go to the company's office and sign a paper. She does not say Gardiner accompanied her. He witnessed her signature to all ten transfers. This may have been

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done at his home or at the company's office. If at the former place, she probably went to the company's office to sign an authority to hand the scrip to the bank. The company believes she must have signed such an authority, but has been unable to find it. On 25th August the respondent executed a document in the following terms:—"Adelaide, 25th August 1930. The Manager, Bank of New South Wales, Adelaide, S.A. Dear Sir, I hand you herewith the under-mentioned scrip certificates: certificate No. 13248 for 570 £1 f.p. shares in Adelaide Steamship Co. Ltd. Certificates Nos. 13252, 13283, 13284, 13285, 13539 for 417 £1 f.p. shares in Adelaide Steamship Co. Ltd. which are to be held by your bank as security for advances already made and which your bank in its discretion may continue to make from time to time, but only during its pleasure, to Mr. Charles Lennox Gardiner of Semaphore, retired civil engineer, and I, my executors, administrators and assigns hereby undertake to execute such form of security over the above-described scrip certificates as your bank may require whenever called upon to do so, and at the expense of myself, my executors administrators and assigns in all things. Yours faithfully, M. E. A. Rogers."

This document was mainly typewritten, but the date, the certificate numbers for the five small parcels of shares and the word and figures "for 417" were written in ink, presumably by Gardiner, and these figures and words may have been added after the respondent signed the document, which bears date the day before the issue of the new certificates in her name, but the typewritten part of the document plainly relates to the certificate for 570 shares and was plainly intended to relate to a further certificate for additional shares. The respondent swore she did not remember signing this document or any of the ten transfers.

The respondent put in evidence Sheridan's diary entries relating to Gardiner's account commencing 17th February 1930 and ending on 31st December 1932. They show Gardiner was in serious financial difficulties; and that, in March, April and May, the appellant was insisting that he should either sell his Woodside property or reduce his overdraft by £2,500, in which case the bank was prepared to release this property from its securities. This property consisted of an area of about 160 acres, and Gardiner was obviously unwilling to sell it unless he could get his price of £40 per acre. At that time Gardiner owed the appellant on overdraft approximately £7,000. He had guaranteed the account of D. W. Brock and lodged a thousand of his own shares in the company as security therefor. This account was £1,000 in debt. He had also apparently guaranteed a small overdraft in the name of Miss Daenke, who was managing the

Woodside property. This may have been his own farm account kept in her name.

On 30th May 1930 Sheridan made the following diary entry:— "30/5/30. Came in and asked if he paid about £1,000 in permanent reduction of his account, whether the bank would withhold its pressure for him to sell the Woodside property immediately. He proposes to raise this £1,000 by selling the Adelaide Steamship Co.'s shares which we hold as collateral security for his guarantee in respect of D. W. Brock, and to replace these shares by another 1,000 shares in the same company, which are evidently being lent to him."

This was the first time the appellant had heard of the suggestion that Gardiner should lodge the assets of a third party to secure his overdraft. His diary entry of 3rd June 1930 states that Gardiner informed him that he had obtained some 1,100 shares in the Adelaide Steamship Co. Ltd. and was going to see his friend Mr. Hamilton to borrow £1,000 from him on the security of the same to pay to his account in permanent reduction of his overdraft. This entry shows that the two scrip certificates for the 1,140 shares had been handed to Gardiner by this date. It also shows that at this stage his idea was to raise £1,000 from a friend named Hamilton and lodge the respondent's shares with him as security. He evidently abandoned this plan, because the entry on 19th June 1930 says:— "Referring to diary memo of 16th inst. Mr. Gardiner today lodged the share certificate for 570 shares in the Adelaide Steamship Co. Ltd. in the name of Miss M. E. A. Rogers and requested us to sell same to R. W. E. Turner and place proceeds to the credit of his account with us. He stated that in a day or two he will also lodge further scrip certificate, making the total number of shares 1,000. These shares are to be treated similarly. Handed him an authority for Miss Rogers to sign and return to us which he promised to bring in tomorrow."

Gardiner returned the authority to the appellant about 20th June.

The following entry appears on 24th June 1930. "Has given authority to sell his 1,000 Adelaide Steamship Co. Ltd. shares, proceeds to be applied in reduction of Brock's account. Has taken away with him an authority to be signed by Miss Rogers depositing as security 1,000 shares in the Adelaide Steamship Co. Ltd. as additional security for his own overdraft, and 570 of these shares have been deposited already."

The authority referred to was the one signed by the respondent on the 25th August. The fact that it was prepared on this date explains

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why the typewriting only gives particulars of the certificate for 570 shares which the appellant then held, leaving a blank space for the number of the second certificate. The appellant evidently thought there would be only one certificate for the additional shares. The evidence does not explain the delay that took place between the date Gardiner received the authority and the date when the respondent signed it. An entry dated 31st July states: "Arranged with him to get from Miss Rogers a proper charge over her thousand shares in the Adelaide Steamship Co. Ltd. as a security for Mr. Gardiner's overdraft." There is no explanation of the delay in obtaining this "proper charge."

It is to be noted that on the face of the documents the respondent had received notice of every transaction to date. She had received two certificates each for 570 shares from the company showing that 200 of her shares had been used by Gardiner. She then handed these two certificates to him indorsed in blank. By the authority she signed on 19th June the appellant told her one of the certificates had been lodged with them and they were expecting a further certificate for additional shares. The transfers executed by Turner told her that he was only transferring 417 shares back to her, showing that 153 had been sold. She had already executed a transfer on sale of the 200 shares to the purchaser. The authority of 25th August told her she was pledging 570 shares plus an additional number to the appellant. The transfer of the 417 shares into her name by Turner, the issue of the new scrip in her name, the execution of the five transfers in blank of these shares, and her instructions to deliver them to the bank, told her that these were the additional shares.

I am not satisfied that she could have carried out all these transactions without having any knowledge that she was dealing with the 1,140 shares. It is also difficult to believe that if Gardiner was engaged in defrauding her by inducing her to believe the transactions related to the 200 shares, he would have placed before her so many opportunities of discovering what he was doing. She was a woman of good education and average intelligence; her health sight and hearing appear to have been normal; she had a bank account of her own; and she had executed several transfers of shares before. The authorities to the solicitors, the company and the appellant were couched in the simplest language. She was able to understand the transaction of December with which I am about to deal.

In December 1930 Gardiner was still in financial difficulties. The respondent of her own motion offered, if it were legally possible, to make available to Gardiner £200 out of the moneys which were held

by the executor company. She herself says in her evidence: "I said I had the money there and he said he would find out if I could get the capital. I raised the topic. I said I would help him if I could get the money. He seemed rather worried about money matters and I then offered to give him a little help."

A deed was accordingly prepared under which the respondent exercised her general power of appointment under her father's will and thereby obtained dominion over the principal moneys. She signed this deed on 5th December 1930. She gave an order to the executor company to pay portion of the principal moneys to or on behalf of Gardiner; and, in January 1931, under this order, sums totalling £200 were paid to Gardiner, £25 to his creditor Hamilton, and she received the balance of the moneys, namely £165 14s.

The respondent's evidence is to the effect that at the date of this transaction she believed she still owned the 1,140 shares. She does not say that there was any discussion whether she would assist Gardiner by using some more of her shares or by realizing on her interest under the will. This suggests she knew her interest under the will was her only remaining free asset apart from the money in the bank. It was not a choice between two assets. It was a resort to the only asset available. In her evidence she remembered many of the details of this transaction; for instance, the execution of the document; the necessity to procure evidence of her sister's death; and the disposal of the moneys.

The next event of importance occurred on 3rd February 1932. On that date the respondent, accompanied by Gardiner, went to the bank, saw Sheridan, and signed an equitable charge, which she also initialled in nine places. She also signed the following document in two places:—"Adelaide, 3rd February 1932. The Manager, Bank of New South Wales, Adelaide, S.A. Dear Sir,—I hand you herewith equitable mortgage executed by me this day to secure certain advances and accommodation afforded and to be afforded by you to Charles Lennox Gardiner of Semaphore, S.A., retired civil engineer, against the security, *inter alia*, of shares already lodged by me with your bank as particularly described at foot hereof. I am aware that the account of C. L. Gardiner with your bank is at this date overdrawn £6,772 17s. 6d. exclusive of interest. Yours faithfully, May E. A. Rogers. 987 shares £1 f.p. Adelaide Steamship Co. Ltd. as comprised in scrip certificates Nos. 13248, 13479, 13480, 13481, 13482, 13483. May E. A. Rogers."

Sheridan's note of the interview is as follows:—"Mr. Gardiner brought in Miss Rogers, who signed the equitable mortgage over the shares formerly deposited by her and to secure Mr. Gardiner's

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account. The whole situation was fully explained to Miss Rogers, who stated that she was quite content to sign the equitable charge and appreciated that the shares covered by same which she had lodged as security were to stand as a full security for any overdraft Mr. Gardiner might have with the bank."

The respondent in her evidence admitted that Sheridan read the equitable mortgage to her deliberately and slowly, and that she knew it gave the bank power to sell her shares. She said he asked her did she understand the bank had control of her shares and her answer was: "Yes." She also admitted she read the second document, signed it in two places, and saw the reference to the amount of Gardiner's overdraft and understood it. But she maintained she could not remember seeing the number of shares in the postscript. She read the document at the hearing and admitted that there was no difficulty in understanding it. I find it impossible to believe that the respondent did not read the postscript and understand that it referred to 987 shares. In fact I think it is safe to infer from the diary entry and the terms of the second document that Sheridan specifically referred to the number of shares. His object at the interview was to satisfy himself that she understood her obligations to the appellant, and to obtain her signature to the two documents in which those obligations were set out. He was bound to refer to the number of shares in explaining "the whole situation" to her. If Gardiner was engaged in defrauding her he ran a grave risk in taking her to the bank.

The respondent admitted that between the date of this visit and of Gardiner's death she never asked him where her scrip was. She said she found out, immediately after Gardiner's death, from her cousin Mr. Brandt Gardiner that his will stated the shares were at the bank. The will was not tendered.

I have dealt with the evidence at considerable length, because counsel for the appellant has asked this court to review the finding of fact by the learned trial judge that he was satisfied "the plaintiff had no intention to part with her 987 shares at any time. It is not too much to say that the possession of the scrip was obtained by fraud and I feel bound to add fraud of a very heartless character." His Honour meant Gardiner's possession, because he also said that he did not think for a moment that the bank was a party except through Gardiner to any imposition, fraud or undue influence and that he had no doubt the bank was ignorant of Gardiner's conduct.

It is clear, of course, that in determining the credibility of a witness the trial judge is in a definitely better position to come to a correct conclusion than a member of the court of appeal who has only the

printed record before him. The learned trial judge in this instance came to the conclusion that the respondent was a truthful witness; that he would estimate her as being a person with a will of her own; not an aggressive woman nor one who yields too easily.

Nevertheless the court of appeal is bound in the last resort to review the finding of fact if clearly satisfied it is wrong (*Powell* v. *Streatham Manor Nursing Home* (1)). In the present case the respondent's evidence must be regarded with great care, even with suspicion, seeing that both Gardiner and Sheridan are dead. It is not a case where there was a conflict of oral evidence and the trial judge has preferred one witness or set of witnesses to another or others. It is a question how far the evidence of an apparently truthful witness can carry conviction that Gardiner perpetrated a deliberate fraud upon her in view of the documents and the probabilities of the case.

The respondent's case was that after Gardiner had obtained possession of the three scrip certificates for 1,340 shares on 19th and 20th May, she never knew what had happened to the bulk of her shares until after his death. In view of the documentary evidence I do not think her evidence to this effect can be accepted. In her case in chief she gave no evidence of anything which had happened between the date when Gardiner had first obtained possession of the scrip until she went to the bank in February 1932, except that she thought that he had used more than 200 shares because the dividends were not so large as they had been. If this was so it would have been possible for her to think that Gardiner had only deposited 200 shares with the bank, but in view of all the intervening transactions I am not satisfied that she could have had such a belief.

His Honour explains her state of complete mental forgetfulness as to the intervening events by stating that she was not mistress of herself and she did not know what she was signing at the time. There is no reason why she should have been in this mental condition if, as she states, she really thought that only the 200 shares were being dealt with, because she was always ready and willing to allow Gardiner to use these shares, so that these dealings would have been in accordance with her wishes and not such as to cause her any mental perturbation. It follows, in my opinion, that the proper conclusion of fact is that the evidence does not establish a charge of deliberate fraud against Gardiner. It does, however, prove that Gardiner was her uncle and confidential adviser and that the circumstances were such that a relationship existed between them from which undue influence would be presumed. She had always sought

(1) (1935) A.C. 243.

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his advice on the few occasions she had any business to do. He occupied a position in which, by reason of her affection for and trust in him, he could exercise dominion over her. The transactions which she entered into were very improvident. The shares represented about two-thirds of the value of her small estate. She had no separate legal advice. She was never freed from his influence. As between the respondent and Gardiner the transactions could not have been valid unless he could have proved the gift was her own spontaneous act, acting under circumstances which enabled her to exercise an independent will. This would have involved a knowledge by her of all relevant circumstances and a full appreciation of what she was doing (*Lancashire Loans Ltd.* v. *Black* (1)).

According to the diary entry of 19th June Gardiner's object in lodging the respondent's shares was to induce the bank to refrain from unduly pressing him to sell his Woodside property, as he hoped by further negotiations to get a better price than was then being offered to him. The entry goes on to say the appellant informed him that the arrangement proposed was only acceptable to the bank as a temporary expedient, and the appellant reserved its right at any time to enforce the sale of Woodside property. It was a very advantageous transaction to the appellant, which received the additional security without giving any reciprocal undertaking on its part. There is no evidence that the respondent knew that this was his object in dealing with her shares or what the bank's attitude was. These were very relevant circumstances of which she was ignorant. She was never in a position to form an opinion whether to make her shares available for such an object or not.

A full disclosure would certainly have included a complete statement of his financial position. If his financial difficulties could have been considered to be only temporary, so that by her assistance there would have been a real chance of his recovery, then, in view of the fact that her income was only £2 10s. per week, which was a small amount for her to live on if she had lost her home, it might have been to her advantage to do what she did, but the evidence shows that his financial position was hopeless. Although she knew he was in serious difficulties she did not realize their true extent. He kept up appearances to the last, although he had frequently to ask the bank to honour the smallest cheques. She believed that she would get her shares back some day, but what she conceived to be a loan was in reality an absolute and irrevocable gift. Any flimsy prospect of recovery that existed prior to the sale of the Woodside property had been destroyed prior to February 1932, as the property

(1) (1934) 1 K.B., at pp. 412, 413.

was sold in 1931 at £15 an acre instead of the £40 an acre which he had hoped to obtain. Gardiner can be acquitted of any actual fraud or pressure, but nevertheless "the court interferes, not on the ground that any wrongful act has been done by the donee, but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused" (*Allcard* v. *Skinner*, per *Cotton* L.J. (1); *Inche Noriah* v. *Shaik Allie Bin Omar* (2)). To quote the words of Lord *Eldon* in *Huguenin* v. *Baseley* (3):—"Take it that she intended to give it to him, it is by no means out of the reach of the principle. The question is, not, whether she knew what she was doing, had done, or proposed to do, *but how the intention was produced*: whether all that care and providence was placed round her, as against those who advised her, which from their situation, and relation with respect to her, they were bound to exert on her behalf." The evidence does not establish that the transaction was the result of the free exercise of the respondent's will uninfluenced by Gardiner. The transaction as between Gardiner and the respondent could not have stood.

The final question is whether in the circumstances the appellant can maintain its securities.

In *Bainbrigge* v. *Browne* (4) *Fry* L.J. pointed out that the inference of undue influence operated "against the person who is able to exercise the influence . . . against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity." In several cases securities in the hands of third parties who have given value have been set aside where the conditions referred to by *Fry* L.J. have been proved to exist (*Maitland* v. *Irving* (5); *Archer* v. *Hudson* (6); *Kempson* v. *Ashbee* (7); *Bainbrigge* v. *Browne* (8); *De Witte* v. *Addison* (9); *London and Westminster Loan and Discount Co. Ltd.* v. *Bilton* (10); *Lancashire Loans Ltd.* v. *Black* (11); *Yerkey* v. *Jones* (12)).

It is therefore necessary to examine the circumstances of which the appellant had notice in the present case. It knew the state of Gardiner's account was such that he was unlikely to obtain a guarantee that was not in the nature of a gift. He was an old man, out of business, and hopelessly in debt. He was not embarking on some new project with possibilities of success which might have

(1) (1887) 36 Ch. D., at p. 171.
(2) (1929) A.C. 127, at pp. 132, 133.
(3) (1807) 14 Ves., at pp. 299, 300 [33 E.R., at p. 536].
(4) (1881) 18 Ch. D., at pp. 196, 197.
(5) (1846) 15 Sim. 437 [60 E.R. 688].
(6) (1844) 7 Beav. 551 [49 E.R. 1180].
(7) (1874) 10 Ch. App. 15.
(8) (1881) 18 Ch. D. 188.
(9) (1899) 80 L.T. 207.
(10) (1911) 27 T.L.R. 184.
(11) (1934) 1 K.B. 380.
(12) (1939) 63 C.L.R. at p. 677.

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induced someone with business experience to guarantee the necessary finance. The guarantee was required mainly to secure a heavy existing liability. The entry in the diary of 30th May refers to the shares as having been lent to Gardiner, showing that Sheridan knew the person who was making them available thought the accommodation would be temporary. Then Gardiner in a short period of time told Sheridan he was thinking of using the shares in three different ways; firstly, by pledging them to Hamilton, who would provide a thousand pounds for Gardiner to pay to the bank; secondly, by depositing them with the bank and allowing it to sell them through his broker; and, thirdly, by charging them in favour of the bank. During this period Sheridan learned that they belonged to a Miss Rogers. The first share certificate for 570 shares deposited with the bank showed her address as being Semaphore, South Australia. The transfer in blank was witnessed by Gardiner. The five subsequent share certificates for the 417 shares referred to in the document of 25th August showed a similar address and the transfers in blank attached thereto signed by the respondent were all witnessed by Gardiner. The five transfers of these shares by Turner to the respondent which also came into the possession of the bank were all witnessed by Gardiner and her address was given as the Esplanade, Semaphore. The documents of 19th June and 25th August were handed to Gardiner to obtain the respondent's signature and return to the bank. When Sheridan desired to see the respondent he commissioned Gardiner to bring her to the bank. In fact the whole of the business in connection with the shares was done through Gardiner. At the critical interview of the 3rd February 1932, Sheridan was careful to note in his diary that the whole situation was explained to the respondent and this statement, coupled with all the surrounding circumstances, seems to me to show that Sheridan must have known she was Gardiner's niece and living with him, that she was not a woman of any real business experience, and that Gardiner was doing her business for her. That was why he wanted to see her, explain things fully to her, and satisfy himself that she fully understood the nature of the documents she was executing, the then amount of the overdraft she was guaranteeing, and the property she was charging. I have no doubt he considered that was all it was necessary for him to explain to her and that the question whether she would then execute the documents or not was one for her alone. Sheridan acted in a perfectly bona-fide manner throughout. He believed that she had freely intended to make her shares available to Gardiner for motives which were her and not his affair. But for the reasons already given, in view of the circumstances of which he had notice, such knowledge was

not sufficient. The onus was on the appellant to establish that she acted spontaneously in the sense already mentioned and it has not discharged the same. She was never free from Gardiner's influence. He acted for her throughout. He was present on every occasion. A gift can be valid although the donor did not have independent legal advice, if the donee, or the person claiming under the donee with notice, can prove the gift was the result of the free exercise of the donor's independent will. Where the donor is making a gift of property it may be sufficient if he or she understands the terms of the instrument of gift, because this can be knowledge of all relevant circumstances, but where the transaction is complicated it would usually be impossible for a donee or the third party to establish such knowledge in the absence of independent legal advice. The giving of a guarantee is usually a complicated matter. The instrument itself is often involved. The guarantor has rights against the debtor in the event of the creditor calling upon him to pay the debt. A knowledge of the debtor's financial position is therefore material. In the circumstances of the present case it was essential that the respondent should have had the protection of some independent legal advisor who would have fully explained the whole position to her. To adapt the words of Sir *John Romilly* in *Sercombe* v. *Sanders* (1), would not a separate solicitor have said to her: "You must understand that you are losing your shares for ever. Are you quite sure you are relieving Mr. Gardiner from his difficulties or are you only putting off the evil day? For if he became bankrupt you had better give him these shares afterwards, unless your object is to benefit the bankers." In most of the cases the person entitled to the benefit of the inference has been a son or daughter or other younger relative who has shortly before attained the age of twenty-one years; but there are cases in which the transaction has been set aside against third parties where the donor was a mature age (*Harvey* v. *Mount* (2); *Sharp* v. *Leach* (3)). Apart from the different ages of the donees the facts in the present case are very similar to those in *Archer* v. *Hudson* (4).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Scammell, Hardy & Skipper.*
Solicitors for the respondent, *Fisher, Jeffries, Brebner & Taylor.*

O. J. G.

(1) (1865) 34 Beav., at p. 386 [55 E.R., at pp. 683, 684].
(2) (1845) 8 Beav. 439 [50 E.R. 172].
(3) (1862) 31 Beav. 491 [54 E.R. 1229].
(4) (1844) 7 Beav. 551 [49 E.R. 1180].