[HIGH COURT OF AUSTRALIA.]

JENYNS . . . . . APPELLANT;
DEFENDANT,

AND

PUBLIC CURATOR (Q.) . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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1952, BRISBANE, *June* 24, 25, 26;

1953, MELBOURNE, *Feb.* 27.

Dixon C.J., McTiernan and Kitto JJ.

Undue Influence—Relation of confidence—Donor understanding nature of transaction—Failure to realize financial implications.

Trustees—Public Curator (Q.)—Aged and infirm persons—Power to maintain equity suit to set aside past disposition made by person subject to protection order—The Public Curator Acts 1915 *to* 1947 (*Q.*) (6 *Geo.* 5 *No.* 14—11 *Geo.* 6 *No.* 25), *ss.* 85B, 85C, 85D, 85L.

By s. 85B of *The Public Curator Acts* 1915 *to* 1947 (Q.), the court may, on the application of the public curator, make a "protection-order" in respect of any person who, by reason of age, disease, illness, or physical or mental infirmity, is, *inter alia*, partially or wholly unable to manage his affairs or subject to undue influence. Section 85K (1) provides: "After such notice or service as the court thinks fit to direct, any person may be made party to such proceedings generally or in any particular matter, and the court may grant and enforce against such party in matters relating to the protected person or the protected estate all judgments, orders, and remedies, including injunction and mandamus, as the court might grant and enforce in an action against such party at the suit of the protected person or of the public curator".

Held that s. 85K (1) did not confer upon the public curator the right to maintain a suit in equity to set aside, on the ground of undue influence or the like, a past disposition made by the protected person.

Held, further, that under Pt. IIIA. of the Act, and in particular under s. 85K (1), the public curator had no authority to conduct proceedings in respect of the estate of a protected person after that person's death.

[EDITOR'S NOTE.—On 19th July 1954 the Judicial Committee refused a petition for special leave to appeal against this judgment.]

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A woman, eighty-one years of age, who had for thirty-four years successfully carried on her own business, transferred it to a company at a price to be satisfied by the allotment to her of certain fully paid shares. She retained half of the shares and distributed the remainder among her sons, a daughter and certain employees. Nearly two-thirds of these shares were given to one son, who lived with her, managed the business, discussed business matters with her and gave her advice. For many years she had had religious obsessions and claimed in all her affairs to have acted under the special direction of providence. Nevertheless she visited the business premises regularly and was fully aware of what was going on there. In forming the company to which her business was transferred and in transferring the business, she had independent advice. After the making of a protection order under *The Public Curator Acts* 1915 *to* 1947, the public curator sought to have the gift of shares to the son set aside. The issues of fact were tried by a jury which found (1) that the son stood in a confidential relationship to his mother; (2) that the agreement made between her and the company and the transfer of shares to the son were the result of the free exercise of the independent will of the mother; (3) that she was capable of understanding these transactions and (4) that she did not sufficiently understand them.

Held that, on the findings of the jury, the trial judge should have entered judgment for the son.

Observations as to the inappropriate nature of trial by jury in a suit to set aside a gift on equitable principles.

Decision of the Supreme Court of Queensland (*Mansfield* S.P.J.): *Jenyns* v. *The Public Curator of Queensland*, (1953) Q.S.R. 225, reversed.

APPEAL from the Supreme Court of Queensland.

On the application of the Public Curator of Queensland, the Supreme Court of Queensland made a protection order under Pt. IIIA, of *The Public Curator Acts*, 1915 *to* 1947, in respect of Sarah Ann Jenyns of Brisbane and appointed the public curator manager of her estate with the powers and duties defined in those Acts. Later, on a further application by the public curator, her son Herbert Carrington Jenyns was made a party to the proceedings in respect of the transfer to him by Sarah Ann Jenyns of 13,665 shares in Jenyns Corset Co. Pty. Ltd. It was ordered that the issues of fact arising out of the claim be stated and tried between the public curator and the defendant as in an ordinary action.

By a statement of claim the public curator alleged that the son stood in a confidential and fiduciary relationship to his mother; that the transactions were not the outcome of her free volition; that she was induced to enter into the transactions by his undue influence and the unconscientious use of his fiduciary position;

that she did not understand the transactions and was mentally incapable of forming a proper judgment, and did not realize the extent of the disposition. The public curator sought to set aside the transaction and claimed declarations that Mrs. Jenyns was induced to enter into the transactions by the undue influence of the son; that it was inequitable that the son retain any benefit thereunder; that the son held the shares as trustee for his mother and should account for all benefits received from his holding of the shares.

The action came on for trial before *Mansfield* S.P.J. and a jury, whose findings were as follow :—

1. On 18th December 1946, the defendant stood in a confidential relationship to Mrs. Jenyns.

2. The agreement in writing of 18th December 1946, made between Mrs. Jenyns and Jenyns Patent Corset Pty. Ltd. transferring certain assets of Mrs. Jenyns to the company for a consideration of £42,000 was the result of the free exercise of the independent will of Mrs. Jenyns.

3. The transfer in writing of 18th December 1946, of 13,663 shares in the company from Mrs. Jenyns to the defendant by way of gift was the result of the free exercise of the independent will of Mrs. Jenyns.

4. On 18th December 1946, Mrs. Jenyns was capable of understanding the transactions referred to in 2 and 3 above.

5. On 18th December 1946, Mrs. Jenyns did not sufficiently understand the transactions.

On these findings, *Mansfield* S.P.J. entered judgment for the public curator with costs and made declarations that the defendant held the shares as trustee and was accountable for all benefits derived from such holding of the shares. Further he ordered an inquiry and payment of such moneys as may be found due and owing by the defendant in the taking of the account, and also ordered the defendant to execute a transfer of the shares to Mrs. Jenyns or the public curator as manager of her protected estate (*Jenyns* v. *The Public Curator of Queensland* (1)).

From this decision the defendant appealed to the High Court asking that the judgment be set aside and that in lieu thereof judgment be entered for the appellant or alternatively that a new trial of the claim of the respondent in this matter be ordered.

M. F. Hardie Q.C., *M. Hanger* Q.C. (with them *N. Stable*), for the appellant.

(1) (1953) Q.S.R. 225.

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M. F. Hardie Q.C.: On the answers given by the jury the trial judge should have entered judgment for the appellant. The court should have entered the judgment which flows in law from the jury's answers: *Edmond Weil Incorporated* v. *Russell* (1). The rights of the parties must be determined on the jury's findings alone. The trial judge should have given full effect to their findings. The whole transaction was a family arrangement made in good faith. The donor was not misled by anyone and the transaction was valid even though she may not have been aware of all her obligations. There was not the confidential relationship between parent and child which would make it necessary for the appellant to rebut the presumption of undue influence. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 15, p. 15, par. 19; p. 2, par. 2; p. 8, par. 7; p. 10, par. 12; *Chambers* v. *Crabbe* (2); *Cashin* v. *Cashin* (3); *Re Coomber*; *Coomber* v. *Coomber* (4); *Beanland* v. *Bradley* (5).] This is a case in which the subjects of capacity and undue influence should not have been treated as separate elements: *Armstrong* v. *Armstrong* (6). The transaction was a free and independent exercise of the will of the donor. It is not necessary to show that she had independent advice: *Inche Noriah* v. *Shaik Allie Bin Omar* (7); *Lancashire Loans Ltd.* v. *Black* (8); *Johnson* v. *Buttres* (9). However, this court would have power to order a new trial. The finding of the jury that there is a capacity to understand a gift of property by an old lady to a member of her family, coupled with other gifts to other members of her family, should not be set aside, merely because there is a further finding that she did not have as complete a grasp of relevant matters, including her financial position, as a younger person. The court will not by ordering a new trial give the public curator the opportunity of putting the appellant to further expense. Once undue influence and want of incapacity are negatived, the public curator cannot have the gift set aside merely because there is a want of understanding on the part of the donor. The judgment cannot stand in so far as it relates to one share, because the appellant paid for that share.

M. Hanger Q.C.: The public curator has no power to bring these proceedings: *Allcard* v. *Skinner* (10); *Clough* v. *London*

(1) (1936) 56 C.L.R. 34, at pp. 46, 47.
(2) (1865) 34 Beav. 457 [55 E.R. 712].
(3) (1938) 1 All E.R. 536, at p. 543.
(4) (1911) 1 Ch. 723, at pp. 726, 727, 729.
(5) (1854) 2 Sm. & G. 339 [65 E.R. 427].
(6) (1873) 8 I.R. (Eq.) 1, at p. 30.
(7) (1929) A.C. 127.
(8) (1934) 1 K.B. 380.
(9) (1936) 56 C.L.R. 113.
(10) (1887) 36 Ch. D. 145.

& North Western Railway Co. (1). The words used in s. 85D of *The Public Curator Acts*, 1915 *to* 1947 (Q.), are inapt for intangibles and apply only to tangible things. The public curator may have power to recover moneys or personal effects belonging to a protected person. The sections of Pt. IIIA. of the Acts are procedural and provide machinery to give effect to the powers conferrred on the public curator by those Acts. There is no right given to the public curator to elect to avoid a transaction. That right belongs to the protected person : *The Public Curator Acts*, 1915 *to* 1947, ss. 85B, 85C, 85D, 85E, 85L, 85K, 85M. The subject matter of this action is not property within the meaning of s. 85D. It is clear from those sections that the public curator has no power to elect, affirm or avoid. No power flows from the protection order and no specific powers are conferred on the public curator to attack any transaction.

T. M. Barry and *T. D. McCawley*, for the respondent.

T. D. McCawley : As to the power of the public curator to take these proceedings in s. 85A of *The Public Curator Acts*, 1915 *to* 1947 (Q.), real and personal property must be given meanings of the fullest extent : *Curtis* v. *Wilcox* (2). There is here an equitable interest on the part of the donor. Where a person has received a gift from another person there results an equitable interest to the donor. Here the donor never lost her equitable interest in the share certificates which she gave to the appellant. As incidental to the right of recovery there is the right to the appropriate remedy to recover. There is an inherent power in the court. No objection was taken by the appellant to the procedure. [He referred to *In re Coomber* ; *Coomber* v. *Coomber* (3).] The public curator had power irrespective of the protection order, and furthermore is given power to bring these proceedings by implication from the nature of the order itself. The protection order carries on after the death of the protected person.

T. M. Barry : Before he entered judgment on the jury's findings the trial judge was entitled to look at the facts in order to ascertain whether there was a confidential relationship. In fact there was such a relationship existing between the appellant and his mother. She did not sufficiently understand the nature of the transaction in that she did not appreciate her position and her liability for

(1) (1871) L.R. 7 Ex. 26.
(2) (1948) 2 K.B. 474.
(3) (1911) 1 Ch. 723.

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income tax and gift duty without assets left for their payment. There was great inequality between the parties and this was known to the appellant.

M. F. Hardie Q.C., in reply: The trial was fought on two issues, undue influence and want of capacity. There were no allegations against the appellant of failure to disclose to or mislead the donor. The jury found in favour of the appellant on these two issues. This case cannot be decided on the basis of a finding by the jury that the appellant took upon himself the responsibility of his mother not fully understanding the incidents of the transaction with regard to income tax and gift duty. [He referred to *Moody* v. *Cox* (1).] None of the findings would justify a judgment for the public curator. Two courses are open to this court. There should be judgment in favour of the appellant or an order for a new trial.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an appeal from a judgment of *Mansfield* S.P.J. declaring the appellant to be a trustee for his mother Sarah Ann Jenyns of 13,666 shares in a company called Jenyns Patent Corset Pty. Ltd. and ordering him to transfer the shares to Sarah Ann Jenyns or the respondent the Public Curator of Queensland as manager of her protected estate. The judgment also declared that the appellant is accountable to the Public Curator of Queensland for all benefits derived from his holding of the shares and directed an enquiry as to the nature and extent of such benefits. Although the relief granted by the judgment takes this form, its operation is to set aside a gift to the appellant of 13,665 shares by Mrs. Sarah Ann Jenyns and the subscription by him for one additional share as something it was unconscionable on his part to take and retain.

The action was tried, in consequence of the law of Queensland, with a jury, from whom certain findings were obtained by means of questions. The judgment is based on these findings.

The jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and

(1) (1917) 2 Ch. 71.

idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord *Stowell's* generalisation concerning the administration of equity: "A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case": *The Juliana* (1).

To attempt to hear cases of such a description with a jury is anomalous and inappropriate. It is a procedure beset with difficulties and embarrassments. Notwithstanding the very carefully framed questions which *Mansfield* S.P.J. put to the jury and the very clear explanation which his Honour's charge contained, the division which the procedure necessitates between the court and jury of what is really one inseparable function continues to encumber the case with unnecessary and adventitious difficulties. This perhaps might not have been so, had the jury answered all the questions submitted to them in favour of one side or the other, but this they did not do. It is important to bear in mind that as the appeal comes before us directly from the trial judge and not from the Full Court of the Supreme Court, which has authority to review the findings of the jury, we, like the trial judge, cannot go behind the findings of the jury. The appeal to us is against the judgment decree order or sentence of the court, not against the verdict or findings upon which the judge was bound by law to base his judgment. Our duty is to consider whether the judge was right or wrong in the legal conclusion which he drew from the findings and, if we think he was wrong, to substitute the judgment to which we think these findings lead. This has been settled from the earliest years of the Court: *Musgrove* v. *McDonald* (2); *Brisbane Shipwrights' Provident Union* v. *Heggie* (3); *R.* v. *Snow* (4); *Commonwealth* v. *Brisbane Milling Co. Ltd.* (5); *Menges* v. *The King* (6); *R.* v. *Weaver* (7); *Fieman* v. *Balas* (8); *McDonnell & East Ltd.* v. *McGregor* (9).

The appeal is the outcome of a protracted litigation, itself the product of family discord sustained for a great number of years. Sarah Ann Jenyns, who was born on 1st March 1865, established

(1) (1822) 2 Dods. 504, at p. 522 [165 E.R. 1560, at p. 1567].
(2) (1905) 3 C.L.R. 132.
(3) (1906) 3 C.L.R. 686.
(4) (1915) 20 C.L.R. 315.
(5) (1916) 21 C.L.R. 559.
(6) (1919) 26 C.L.R. 369.
(7) (1931) 45 C.L.R. 321.
(8) (1930) 47 C.L.R. 107.
(9) (1936) 56 C.L.R. 50.

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and conducted a matriarchal business in corsets and surgical appliances. The business was registered in her name in 1912 as the Jenyns Patent Corset Proprietary. Her husband, Ebenezer Randolphus Jenyns, who seems to have been four or five years her senior, after conducting a separate business in the same building, parted company with her in 1919 and he plays no significant part in the events affecting this appeal. They had seven children who grew up to take some part in the business, five sons and two daughters. Of these one, a daughter, died in 1937. The rest survived.

By the energies and capabilities of the mother the business was built up into a profitable enterprise of some size. It remained vested in her until 18th December 1946 when she transferred it to a company incorporated on the previous day under the name of The Jenyns Patent Corset Proprietary Limited. At the same time she distributed parcels of shares among five of her children to the exclusion of the other two and thereby planted the seeds of this litigation.

From an early time in her life Mrs. Jenyn's mind seems to have been unusually preoccupied with the place that divine guidance might have in the practical affairs of life. As she grew older she became accustomed to claim that she acted under the special protection and direction of Providence and when she became an old woman she represented even her most trivial desires as manifestations to her of the divine will. She formed the odd habit of committing to scraps of paper, sometimes in the middle of the night, the expression of her wishes in the guise of communications from the Almighty. Another oddity on her part was to appoint for herself a period of complete silence. When she did this the scraps of paper would multiply and form a means of expressing her minor personal wants alike with the divine commands she purported to convey. All this combined with other idiosyncrasies to provide a foundation for imputing to Mrs. Jenyns an irrationality of mind unfitting her for the transaction of important business and the management of her affairs. But, as will appear, the jury found that she was capable of understanding the transaction now in question. It certainly appears that, at all events for a long period of her life, her professed reliance upon direct heavenly intervention in her business and family affairs was not inconsistent with a shrewdness and capacity in the control she exercised over both her business and her children. One of the difficulties in determining the weight to be given to evidence, whether documentary or oral, of irrational conduct or statements on the part of Mrs. Jenyns consists in the fact that she turned to rum and whisky and at

times consumed enough to affect her mind. Moreover, one of her sons, John, says that as early as 1937 when she returned from China she used opiates.

The use she made of her children in her business varied from time to time and now one was constituted her lieutenant, now another. From the time of the rupture with her husband, Harold, the eldest son, seems to have been in charge of the office. The second son Randolphus then seems to have been recognized as manager, a position he occupied from March 1920 until about November 1925. He was then dismissed. In 1922 a proposal had been started to form a company to take the business over. Mrs. Jenyns was to hold half the share capital and the daughters and three of the sons, that is, Randolphus and the two youngest, were to hold the rest. Randolphus, according to a note made by his mother and still preserved, was to be manager definitely for twelve months and if he did well for the company he could continue. He made the mistake of pressing for a greater proportion of share capital and also of siding with his father in some litigation between the latter and Mrs. Jenyns. Hence, doubtless, his dismissal. After an interval in which a stranger was brought in as manager, the fourth son John was given that office. Of the third son George, little is heard. John became manager about 1927 and continued to be so until 1942, subject to an interruption in 1933 when he visited the United Kingdom. During his absence Herbert the youngest son acted as manager. Herbert is the appellant in this appeal against whom the order complained of was made setting aside a transfer to him of shares in the company ultimately formed in 1946. In 1942 John was called up for military service and Herbert became manager again. The purpose of forming a company to take over the business was never abandoned. Indeed in or about 1926 the documents by which it would be effected were, it is said, all ready for signature. According to John his mother said that there must be alterations and then discussed the matter from time to time over a number of years. In 1944 the subject was renewed. John arrived back from his war service in June of that year and rejoined the business. Apparently friction between him and Herbert arose almost at once. On 13th October 1944 Mrs. Jenyns announced to the brothers the appointment of John as manager. The announcement was expressed in the form of a divine message and the message included the information, which can hardly have been received by Herbert with much satisfaction, that the purpose for which Herbert had been brought into existence in answer to his mother's prayer was to help and protect his brother and that the one position was

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as important as the other. Apparently John then assumed the managerial chair but Herbert retained the management in his own hands, at all events that is John's story. Whether because of the difficulties between the brothers or for other reasons Mrs. Jenyns set up a committee of management. She herself, John, Herbert and an employee named Gilmore were members. She authorized Mr. R. C. Hancock, a public accountant who had been called in as adviser, to act as chairman. This seems to have lasted from the beginning of December 1944 until August 1945. Mr. Hancock recommended them to form a company for the carrying on of the business and to redistribute the work for which the various members of the family were responsible. Three of Mrs. Jenyns' children and Mr. Hancock met her on 14th December 1944 to discuss the formation of the company. John and Herbert were there and so was her surviving daughter Mrs. Sadie Scott. There was an idea of transferring her landed property not employed in the business to the company in exchange for preference shares and of transferring the business in consideration of ordinary shares and then of distributing the two classes of shares in different proportions among the family. Of the ordinary shares Mrs. Jenyns was to retain a comparatively small number; John and Herbert were to be on an equality and were to be the largest shareholders, Sadie was to participate substantially and Harold was to be included, but Randolphus, like George, was omitted. An agreement was actually prepared for execution by Mrs. Jenyns and dated 16th January 1945. It was an agreement by her with John as trustee for the intended company for the sale of the business to the company as a going concern, in consideration of 27,000 paid up shares of £1 each. The company was actually registered. But Mrs. Jenyns refused to proceed with the transaction, her reason being, according to a note in her handwriting, that after reading the agreement (with divine guidance) she felt impressed with the view that it was worded in favour of John as manager of the business and of the draftsman as solicitor for the business. Some attempt was made in May 1945 to obtain her assent to a transfer of the business to the company, the distribution of the shares being stood over for independent consideration, but eventually the name of the company was struck off the register. In the meantime she had remonstrated with both Herbert and John in a letter to them jointly and this led to incidents which provoked John into abuse of Herbert. They seem to have brought to her their complaints of one another. Her notes show, however, that John was falling more and more into disfavour and correspondingly the cause of

Herbert was prospering with her. At length on 20th June 1945 she, as in professed pursuance of a divine decision, announced that John was dismissed and Herbert invested with the management of the business. The agreement was returned to the solicitor for necessary alterations. John's case was examined by the authorities under the *National Security* (*Man Power*) *Regulations*, with the result that John was temporarily reinstated. Presumably the business was a protected undertaking. At all events, according to the evidence Jenyns Patent Corsets Proprietary appealed to a tribunal which decided to permit the termination of his employment: cf. regs. 14 and 16. Mrs. Jenyns attended the appeal and heard some of the evidence. This took place about September 1945. Herbert was thus enabled to resume the management of the business without John. Harold at this time lived in the house with his mother, whom he was supposed to look after, and received some allowance for doing so. Randolphus visited his mother from time to time. Sadie (Mrs. Scott) lived in Newcastle with her husband and family but came up to stay with her mother for some weeks practically every year. In Sadie her mother seemed to have unbroken confidence. Herbert, besides managing the business, supplied Hancock with the information and figures for making up his mother's returns for income tax and he attended to questions for her concerning her landed property outside the business. For many years she had ceased to go to the business premises regularly and doubtless the frequency of her visits had progressively diminished. But she had never lost touch altogether with what was going on. Probably in 1946 her visits to the premises would not average two a month. She would speak to members of the staff and sometimes question them. She made occasional visits to her accountants, bankers and perhaps others in order to make some particular enquiry or seek some advice or information. At this time Herbert discussed business affairs with her and gave his advice, solicited and unsolicited. Besides Hancock, she occasionally consulted another accountant, a Mr. Offner. She had first done so in 1927.

On 9th June 1946 Mrs. Jenyns wrote to Herbert saying that she wanted him to help her form the business into a company and requesting him to get a solicitor whom she named to draw the agreement and articles of association. The solicitor she named had in fact died some years before. Instead of seeing a solicitor in the first instance Herbert procured a model memorandum and set of articles of association through the agency of a law stationer. These he left with his mother, pointing out, however, that they

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were out of date. According to his evidence she asked him to enquire for the names of some good solicitors and on a subsequent day he returned with the names of several firms which had been recommended. From these she chose, with his help, the firm of which Mr. Rowland is a member. Herbert consulted Mr. Rowland who pronounced the model memorandum and articles useless. He produced a new draft memorandum and articles which he sent to Herbert for Mrs. Jenyns' consideration on 12th November 1946. Harold says that Herbert gave him documents about September or October which his mother read and discussed : there was a meeting at the shop in the evening at which they were discussed. Perhaps Harold is wrong in the time he gives and she was in fact considering Mr. Rowland's draft. But it may have been the model memorandum and articles obtained through the law stationer. Mr. Offner says that she visited his office on 16th August 1946 with a memorandum and articles to ask him whether they were suitable. Later he consulted with Mr Rowland about the matter. He was instructed by Herbert to do so on behalf of Mrs. Jenyns. Mr. Rowland received back the first draft with a request for alterations and sent a final draft on 19th November 1946. Mr. Offner says that on 23rd November Mrs. Jenyns again called on him and discussed various matters concerning the proposed transfer of the business to a company including the draft memorandum and articles. She made another visit to him, he says, on 13th December in which they discussed the agreement, the capital of the company and proposed gifts of shares to members of the family and to certain employees. Then on 17th December Mr. Offner met Mrs. Jenyns, Harold and Herbert at the office of Mr. Rowland.

At this point it is perhaps desirable to state what were in fact the more important elements in the transaction. The company was a proprietary company with a share capital of £100,000 divided into £1 shares. The leading object was to acquire the business and carry it on. The articles vested the management of the business in the directors, on whom all the powers of the company were conferred. The qualification for a director was fixed at 200 shares. The first directors were named and were to be Mrs. Jenyns, Herbert, the old employee named Gilmore already mentioned and a secretary named Wood who had joined the staff two or three years before.

Mrs. Jenyns was appointed by the articles to be governing director and chairman of directors during her life and in that character she was to be capable of exercising all or any of the powers given to the directors or any of them by the articles or by law and might at her discretion appoint and thereafter remove any

other director. On her death Herbert was named to succeed her as governing director with the like powers and he was given a testamentary power of appointing his successor. The articles provided for the appointment by the board of a managing director for a term of five years but appointed Herbert by name as the first managing director for five years. They provided, moreover, that during the absence or inability to act of the governing director, the managing director should be capable of exercising all or any of the powers given to the directors or any two or more of them by the articles or by law.

The agreement for the sale of the business to the company fixed a consideration of £42,000 to be satisfied by the allotment to Mrs. Jenyns of 42,000 paid up shares in the company. Of these 42,000 shares it was proposed that Mrs. Jenyns should retain only 21,000. She was to transfer the remaining 21,000 by way of gift as follows : to Herbert 13,665, to Sadie (Mrs. Scott) 3,200, to Harold 3,200, to George 500, to Gilmore 200, to Wood 200, and 5 each to seven old employees. The purpose of Mrs. Jenyns' visit on 17th December 1946 to the office of Mr. Rowland was to subscribe the memorandum and articles of association. These Mr. Rowland discussed, referring particularly to the position of governing director. Mr. Rowland had asked that Mrs. Jenyns' capacity should be investigated by a medical practitioner and he had as a result a certificate or certificates of her mental and physical capacity to transact the business. He considered that she understood the transaction. She and Herbert subscribed the memorandum and articles and the company was registered on that day. On the following day, 18th December 1946, they met to sign the agreement of sale, to hold the first meeting of directors and to allot the shares and execute the transfers. Of these proceedings some shorthand notes were taken. From the transcript it appears that when Mr. Rowland was going over the transaction Mrs. Jenyns made what in effect were three points. The first was that she had an invention she intended to patent and she did not want the patent to pass to the company. As to this she was told that since it would come into existence after the agreement it would belong to her and not the company. The second point was to enquire whether if she wished she could raise, say, £25,000 or £10,000. This produced an explanation or discussion of how she might realize her shares or raise money upon them or upon her own private estate. Her third point, to which she made a transition, was that she had been accustomed to give or to lend without interest money to deserving people. Could she do this ? She described the religious guidance under which, and the religious

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principles on which, she had conducted her business and said that she could not hand over to this company as if it was just her. She felt she must continue under divine guidance. This led to reassurances from Mr. Offner based chiefly on her position of governing director, while Mr. Rowland reminded her of her private account. Mr. Offner's picture was possibly open to criticism as obscuring the limitations which might well restrict the use of the company's money for ends outside the objects of the company. But perhaps the difference between the things she had in mind and what the company might do within its objects would not have been very material to her if it had been explained and analysed. When they passed to the directors' meeting the agreement was adopted and executed by the company, the 42,000 shares were allotted to Mrs. Jenyns as well as the one share for which she had subscribed the memorandum, the share for which Herbert had subscribed was similarly allotted to him, and the transfers were executed and their registration approved. Mr. Rowland asked Mrs. Jenyns some brief questions directed to the comprehension of the meaning of what was in hand and her desire that it should be done. Income tax was mentioned but all that was said was by Mr. Offner, who expressed the optimistic view, true only of future earnings, that she would benefit from the formation of the company.

In fact the chief objection to the transaction which a business man might see in it was that she was left to find the outstanding tax on past profits. These profits were of course hers and her liability to tax upon them was not a proper item in the balance sheet on which the figure of £42,000 was based as the purchase price satisfied in shares. The accounting period of the business ended on 31st March. She had not been assessed to tax on the income derived in the twelve months ending 31st March 1946, and she would of course be liable to assessment on the profits derived between that date and 18th December 1946. In the event the tax and provisional tax for the first of these two periods turned out to be £15,972. The tax on her taxable income for the year ending 31st March, 1947, which took into account the business profits of the second period was £3,957. Further, the gifts of the shares attracted state and federal gift duty. Apparently that was mentioned to Mrs. Jenyns at an earlier stage but it may be doubted if she understood how large the amounts would be. In the result state gift and stamp duty was assessed at £3,609 and federal gift duty at £2,518. No doubt in point of logic Mrs. Jenyns could have no complaint on the score that she bore her own income tax in respect of profits earned before the transfer of the business

to the company. For if the company had borne that liability, the amount of the consideration for the sale must have been proportionately reduced, if the value of the assets was put at the same figure. But for the business or the company to find cash and for her to do so in order to discharge the liability might be two different things. Further, according to the valuation of the Stamps Commissioner another 7s. 6d. a share was contained in the net value of the business. These considerations do not seem to have been fully present to the minds of those responsible for framing the transaction and for advising Mrs. Jenyns. How far she would have regarded them as material is a matter of speculation.

What is attacked in these proceedings is the validity of the transfer to Herbert of the 13,665 fully paid shares. The events upon which its validity depends necessarily stop at this point of time. But much evidence was led as to what Mrs. Jenyns did afterwards and what occurred as material throwing a light on the events brought to a close on 18th December 1946. It is not necessary to go into these matters beyond stating their general effect. Mrs. Jenyns' religious and other obsessions increased as time went on, there were signs of a progressive deterioration of her powers, and the strangeness and the irrationality of the notes she scribbled became more marked. But she attended meetings of directors and continued to be a person to be reckoned with. At the end of 1947 she decided to dismiss Gilmore and did so. In his stead she appointed her daughter Sadie.

During March 1949 the capital of the company was increased by 10,501 shares. The curator decided, in accordance with a letter from her, that he could not take up on her behalf her proportion. The result was that Herbert took up 7,066 shares at par. This is said to have brought his voting strength as a shareholder above hers though as she retained 21,005 shares and his total would be 20,732 it is not clear why this should be so unless he acquired shares from other members of the company.

On 16th December 1949, Mrs. Jenyns made a will. By this will after making a gift of a piece of land to her daughter Sadie and gifts of shares numbering in all 800 to various old employees, disposing of 2,500 shares to charities and 500 shares to a friend and her family, she devised and bequeathed the residue on trust for conversion with a power to postpone. She directed that the proceeds should be divided into ten equal parts and that two of such parts should be held in trust for each of the following children—Harold, George, John and Herbert. One part was to be held in trust for Randolphus and one part for his wife with a substitutional gift to

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Sadie in case of the death before the testatrix of Randolphus or his wife respectively.

After John's dismissal in September 1945 he had turned his attention to the possibility of causing a protection order to be made with respect to his mother under Pt. IIIA. of *The Public Curator Acts* 1915 *to* 1947 (Q.), legislation which it will be necessary to examine later in this judgment. But for the time being no steps were taken. Then in September 1948 at his instigation the curator applied to the Supreme Court of Queensland for such an order. On 16th December 1948 a protection order was made in respect of Mrs. Jenyns and the court ordered that the public curator should be appointed manager of her estate with the powers and duties defined in *The Public Curator Acts* 1915 *to* 1947. On an application made under s. 85K of those Acts by the curator an order was made on 16th August 1950, making Herbert a party to the proceedings (*scil.*, the proceedings on which the protection order was made) in respect of a claim by the public curator as manager of Mrs. Jenyns' estate in respect of shares acquired by Herbert in December 1946, and all benefits derived by him from the possession of those shares. It was further ordered that the issues of fact arising out of the claim should be stated and tried by the Supreme Court as between the curator as such manager and Herbert as in an ordinary action, and directions were given for pleadings, discovery of documents and interrogatories. Pursuant to O. XXXIX, r. 4, of the Rules of the Supreme Court (Q.) a jury was required for the purpose of trying the issues of fact. By his statement of claim the curator alleged that Herbert at the material time stood in a confidential and fiduciary relationship to his mother; he was manager of the business and had gradually assumed the control and conduct of her affairs in relation thereto; she was dependent upon him to such an extent that she was not a free agent and the transactions were not, nor were any of their subordinate details, the outcome of her free volition. The statement of claim also alleged that Mrs. Jenyns was induced to enter into the transactions by the undue influence of Herbert and by the unconscientious use of his fiduciary position and by his taking unfair advantage of her mental weakness and of her reliance upon him. A third allegation was that Mrs. Jenyns did not understand the transactions; that she was mentally incapable of forming a proper judgment and did not realize the extent of the disposition made by her, its effect upon her financial position or the fact that she was obliged to assume obligations in respect of gift duty and otherwise or the extent of such obligations and that she had no independent advice. Strangely enough, although

the company was not made a party to the proceedings, the relief claimed, like the allegations, covered all the transactions of 17th and 18th December 1946.

The issue which loomed largest at the trial and contributed perhaps most to its length—it occupied twenty-eight days—was that of the mental capacity of Mrs. Jenyns. There were conflicts of expert and other evidence characteristic of such issues but doubtless the root cause of this controversy lay in the unusual nature of Mrs. Jenyns' personality and the complex and inconsistent psychological elements forming it. In a woman of proved business capacity, and considerable practical experience, possessing a peculiar understanding of her specialized trade and its profitable exercise, never separating her business and family life and always striving to dominate in both, and yet long accustomed to profess that her actions were guided by direct communications from a divine source, lacking all sense of the incongruous in the purposes for which she vouched heaven as her authority, temperamental in many of her attitudes and judgments, uninhibited either by a sense of humour or a fear of ridicule, it must have been difficult as she advanced in age to distinguish in her what was merely temperamental or perhaps histrionic from what was irrational, and difficult to judge whether her less rational expressions and ideas had any bearing on her business instinct and understanding and how far family predilections competed in her judgment with practical considerations affecting her own business advantage. One curious feature of the case is that at the trial Mrs. Jenyns was still living and might have been called as a witness. According to her daughter Sadie, whose evidence exhibits unswerving loyalty to her mother, Mrs. Jenyns was mentally quite able to give evidence but it would not have been fair to her to require her to do so. She was not called. We are informed by counsel that since the trial and while the appeal was pending Mrs. Jenyns has died. She died on 29th February 1952.

The question whether Herbert occupied a position of influence or confidence with respect to his mother and the question of the extent of her actual understanding of the transaction seemed of less consequence at the trial than that of capacity. Indeed upon this appeal Herbert's counsel suggested that no independent alternative case of this sort was made at the trial by the curator on the footing that Mrs. Jenyns possessed mental capacity. The jury, however, by their findings changed the whole basis of the curator's claim for relief against the transfer of shares to Herbert.

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The following are the questions submitted to the jury and the answers the jury made: 1. On 18th December 1946 did Herbert Carrington Jenyns stand in a confidential relationship to Sarah Ann Jenyns? A. Yes. 2. If Yes to 1—(a) Was the agreement in writing of 18th December 1946 made between Sarah Ann Jenyns and The Jenyns Patent Corset Pty. Ltd. transferring certain assets of Sarah Ann Jenyns to the said company for a consideration of £42,000 the result of the free exercise of the independent will of Sarah Ann Jenyns? A. Yes. (b) Was the transfer in writing of 18th December 1946 of 13,665 shares in the said company from Sarah Ann Jenyns to Herbert Carrington Jenyns by way of gift the result of the free exercise of the independent will of Sarah Ann Jenyns. A. Yes. 3. If No to 1—Was Sarah Ann Jenyns on 18th December 1946 induced by the undue influence of Herbert Carrington Jenyns to enter into—(a) The transaction referred to in Question 2 (a)? (b) The transaction referred to in Question 2 (b)? 4. On 18th December 1946 was Sarah Ann Jenyns capable of understanding—(a) The transaction referred to in Question 2 (a)? A. Yes. (b) The transaction referred to in Question 2 (b)? A. Yes. 5. On 18th December 1946 did Sarah Ann Jenyns sufficiently understand—(a) The transaction referred to in Question 2 (a)? A. No. (b) The transaction referred to in Question 2 (b)? A. No.

On these findings the learned judge held that the curator was entitled to relief against the gift of shares to Herbert. The ground of his Honour's decision can be seen from the following passage in his reasons: "It is true that there was no undue influence brought to bear upon her by the defendant, but in my opinion it is not necessary that undue influence should be present before a transaction can be classed as an unconscientious dealing capable of being upset by the court. The fact that the defendant occupied a fiduciary relationship to his mother, coupled with the other circumstances which I have mentioned, made it obligatory upon him to take precautions to see that his mother substantially and sufficiently understood the true nature and effect of the transaction. The jury found that she did not sufficiently understand them and in such circumstances it would, in my opinion, be acting contrary to established principles if I failed to grant the relief claimed".

In considering the effect of the findings of the jury it is legitimate to use the evidence to ascertain their meaning and operation as determining the facts. But it is not legitimate to find further facts to add to what the jury found, except that under O. XLII, r. 6, the court may draw any inference of fact not inconsistent with the findings of the jury. But that does not permit the Court to disregard

any actual finding or to substitute itself for the jury on a substantive issue which should have been submitted to them: cf. per *Isaacs* A.C.J., *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (1).

It is important to keep steadily in mind the finding that the transfer of the 13,665 shares to Herbert as well as the agreement of sale to the company was the result of the free exercise of the independent will of Mrs. Jenyns. The question eliciting this finding is of course a consequence of the question which precedes it enquiring whether Herbert stood in a confidential relationship to his mother. In his charge to the jury the learned judge said: "This is a case in which the question of capacity is largely interlaced with the question of undue influence. It is by reason of the alleged mental incapacity of Mrs. Jenyns that the case arises, or is presumed to arise because of the trust and confidence which she placed in her son in making him the manager of her business and in placing—it is said—implicit confidence in him." But, as the jury found, she was capable of understanding both transactions. His Honour directed the jury that a relation of confidence raised a presumption that a gift was made by reason of undue influence but one which the donee might rebut. The charge proceeded: "It has been said that there are several ways of rebutting the presumption. If you find there was a confidential relationship then the onus of proving that there was no undue influence is upon Herbert Jenyns. This may be done by showing either that the relationship has ceased; in other words, that she is an entirely independent person; or if it still continues, by showing that she had independent advice. 'Independent advice' means it must be that of some independent person who is not connected with the donee in business or in any other confidential way and he has a knowledge of all the material facts and he, in fact, advises the donor, Mrs. Jenyns, on all matters which might affect her consideration in determining whether to make a gift. The onus, therefore, of proving—if you find there was a confidential relationship—that there was no undue influence, falls upon Herbert Jenyns. He is the one who has to prove that the gift is all right and is free of any undue influence".

Now there could be no suggestion that whatever relation of confidence existed in Herbert with respect to his mother, it had ceased, and the first finding of the jury is inconsistent with such a supposition. The jury evidently accepted Herbert's case that Mrs. Jenyns had the independent advice of Mr. Rowland and Mr. Offner and acted in the exercise of an independent judgment she was quite capable of forming. Then what did the jury mean by finding

(1) (1924) 35 C.L.R. 14, at p. 31.

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that Mrs. Jenyns did not sufficiently understand the transaction by which the business was transferred to the company and that by which the 13,665 shares were transferred to Herbert? Some light is thrown upon this answer by the direction the jury received, which in effect was that sufficient understanding meant that she understood it " to the extent of being able to comprehend the effect of it on her position and that she was giving the property away and so on, what difference it would make in her financial position ".

Now in applying this direction it is necessary to contrast on the one hand the long and repeated consideration which over almost a quarter of a century she had given to the course of transferring her business to a company and giving shares to her children, the discussions that had taken place over the transaction of 1946 and its various elements and her own obvious attention to its nature and significance, with on the other hand the failure not merely on her part but on the part of Mr. Offner to realize the consequences with respect to the discharge of her more immediate liabilities for income tax, the optimistic character of the answers given by her advisers to her questions about the accessibility of large sums of money should she need them and her powers as governing director. It must also be borne in mind that the central question here is the gift of 13,665 shares to Herbert and that she could hardly fail to understand that she was parting with half her interest in the company in conferring that and the gifts to the other members of her family and employees. The record indeed shows that she did not fail to understand it. The meaning of the jury's answer must be that she failed to grasp the consequences that would ensue to her financially from the course she was taking in view of her tax position and the difference between the position of a governing director owning only half the shares in a company and the position of a sole proprietor of the business.

This reduces the case to the question whether a donee standing in a relation of confidence to the donor cannot retain a gift made by the donor, notwithstanding that she has capacity to understand the transaction and acts in the free exercise of her independent will (having independent advice) if she fails to appreciate or realize the financial implications and detriment to herself the gift involves.

Now in answering this question it must not be forgotten that the expression " relation of confidence " does not describe a category possessing fixed and uniform characteristics. The expressions " relation of influence ", " relation of confidence " and " fiduciary relation " are often used as interchangeable. They are not, however, necessarily the same or coextensive in their application. But it is

worthwhile quoting in reference to the expression "relation of confidence" used in this case what *Fletcher Moulton* L.J. said in *In re Coomber*; *Coomber* v. *Coomber* (1) with reference to the expression "fiduciary relationship", for it is true also of the former expression. His Lordship said: "It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them" (2).

We are not here dealing with any of the traditional relations of influence or confidence—solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and *cestui que trust*. It is a special relationship set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.

Again we are not here dealing with a case where some material fact or consideration of which the donee has gained knowledge in the course of executing his trust or employment is not disclosed to the donor. If for instance as manager of the business Herbert had become aware of facts affecting the wisdom or value of the gift to him which he had withheld from his mother, different considerations would arise. The duty of disclosure which a fiduciary agent owes to a principal with whom he deals in a matter within the province of his agency or employment does not depend on

(1) (1911) 1 Ch. 723.

(2) (1911) 1 Ch., at pp. 728-729.

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influence or undue influence : *Moody* v. *Cox* (1). Nor is this a case in which the donor was dependent upon the donee physically as was the case in *Equity Trustees, Executors & Agency Co. Ltd.* v. *Haskew* (2), where it was found " that he was weak and for a great part of the time ill and that he was entirely dependent on the defendant and her son for food, nursing and necessary attendance " : cf. *Spong* v. *Spong* (3).

Mrs. Jenyns resided in her own establishment. Harold lived with her and she used his services. But she moved about as she chose. She clearly placed great reliance in family matters upon her daughter Sadie, with whom she kept up a correspondence. To none of her sons had she ever given her unreserved confidence. They seem to have succeeded one another in her good graces, and though Herbert retained her favour longest, it by no means appears that he had gained any ascendancy over her will. What the facts in the case show is that Mrs. Jenyns was dependent upon Herbert for the proper conduct of the business, for all information about the state of the business and the circumstances affecting its future and present prosperity and for assistance in reference to her property outside the business. She relied upon him for advice in all such matters. Her reason for giving him a commanding position in her business was simply that he was her chosen manager who amongst her sons satisfied her most.

It is true that in the earlier part of his charge to the jury *Mansfield* S.P.J. described the confidential relationship as one in which influence could be brought to bear to make Mrs. Jenyns do something which she might not otherwise do. But when his Honour dealt with the actual question he directed the jury as follows : " Question 1 is whether Herbert Jenyns stood in a confidential relationship to Mrs. Jenyns. If you are satisfied—and it would seem to me that on the evidence as given, on the admissions as given here (but as I say, it is entirely a matter for you), owing to the position which he occupied he was his mother's business manager ; he was her confidential consultant, we shall say, about her own affairs, and he was right up to that time discussing this particular business document with her, it would seem to me (but as I say, it is entirely a matter for you) that at that date the confidential relationship did exist. But if you are not prepared to accept that, do not accept it. It is a matter to determine for yourselves, the degree being : was he a person in the position which

(1) (1917) 2 Ch. 71, at p. 80.
(2) (1918) 24 A.L.R. 322 ; (1919) V.L.R. 634 ; 27 C.L.R. 231.
(3) (1914) 18 C.L.R. 544.

I explained to you yesterday, that is, was he in the position of persons who are in such a confidential relationship that the law casts the onus on such a person if he receives a gift of proving that the gift was the result of the free exercise of the will of the donor ? "

It will be seen that what his Honour had in mind was the rebuttal of influence by proof of free and independent volition, not by proof of complete comprehension of the nature and consequences of the transaction. On this view the jury displaced the effect in favour of the curator of their first answer by finding that the transaction was the outcome of the free and independent will of Mrs. Jenyns.

The finding that she did not sufficiently understand the transaction, relating as it does to matters of general reasoning and business wisdom and acumen, as opposed to facts known to the donee in virtue of his position and not disclosed, is not enough by itself to invalidate the gift. The truth about the whole case is that the real complaint is not that shares were given to Herbert but that shares were not given to John. The reasons why they were not given to John were not concerned with any question of adequate comprehension of the effect of the transaction. In the view this judgment adopts the learned judge ought not to have granted relief to the curator against the transfer of the 13,665 shares to Herbert, still less against the allotment of the one additional share subscribed for. But there is a further ground, independent of the merits, for refusing relief to the curator. That ground is that Pt. IIIA. of *The Public Curator Acts* 1915 *to* 1947 does not enable him to sue on behalf of the protected person to set aside a dealing with her property on the equitable ground that the disponee stood in a relation of confidence or influence to the protected person and failed to fulfil the conditions necessary in equity to maintain the disposition.

These statutory provisions appear to be peculiar to Queensland and New Zealand. They contain provisions which throw upon the Supreme Court the highly responsible duty of determining whether a given person should in his own interests be deprived of the legal power to govern his own affairs. Section 85B gives the court power to make a protection order in a form which it prescribes if the conditions are fulfilled which it sets out. There are two situations in which a protection order may be made. One relates to alcoholism and addiction to drugs and it may be put aside. The other is expressed by s. 85B (1) as follows :—Where it is made to appear to the satisfaction of the court upon the application of the public curator that—(i.) Any person, by reason of age, disease, illness, or physical or mental infirmity—(*a*) Is unable, wholly or partially,

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to manage his affairs; or (*b*) Is subject to, or is liable to be subjected to, undue influence in respect of his estate, or any part thereof, or the disposition thereof; or (*c*) Is otherwise in a position which in the opinion of the court renders it necessary in the interest of such person or of those dependent upon him that his property should be protected.

The form of protection order given, which was followed in the order made in reference to Mrs. Jenyns, appoints the public curator manager of the estate of the protected person with the powers and duties defined in the Acts. Section 85D gives the curator as such manager a number of powers. One power is to take possession of the protected estate and to recover possession thereof from any person holding the same. Another is to demand, recover and receive moneys and personal effects payable to or belonging to the protected person. The others are not material. Section 85E enables the court to confer certain other powers to which it is unnecessary further to refer. Section 85K (1) provides that proceedings under the Acts shall be commenced by originating summons " which shall remain open for application to be made therein from time to time to the court by the public curator, or the protected person, or by any relative of the protected person, or by any person interested in the protected estate ". Then follows the clause in purported pursuance of which the present proceedings were framed: " After such notice or service as the court thinks fit to direct, any person may be made party to such proceedings generally or in any particular matter, and the court may grant and enforce against such party in matters relating to the protected person or the protected estate all judgments, orders, and remedies, including injunction and mandamus, as the court might grant and enforce in an action against such party at the suit of the protected person or of the public curator ".

By s. 85A the expression " protected estate " is defined to mean the real and personal estate of a protected person or such part thereof as is the subject matter of a protection order.

Of the remaining sections it is enough to say that s. 85L restricts the protected person's powers of alienation and s. 85M enables the court to supervise the exercise by a protected person of his power of testamentary disposition, an authority of the court not invoked in this case.

The point is that none of these provisions goes as far as conferring on the curator a right to maintain as manager a suit in equity to set aside a past disposition of the protected person on the ground of undue influence or the like. Property so disposed of does not

form part of the real or personal estate of the protected person; not until by, or in pursuance of, a decree it is revested. Whether it is revested depends upon the exercise of the equitable jurisdiction to set aside transactions. That jurisdiction is exercisable according to principles which are affected by such matters as laches, acquiescence, unequitable conduct, on the part of the donor, the impossibility of *restitutio in integrum* and so on and it involves specific relief which is not necessarily absolute but may be subject to conditions. Until a decree is made, the subject of the disposition cannot be considered the property of the disponor. To invoke the jurisdiction involves, or is based upon, an election to rescind on the part of the disponor, which must depend on many considerations that might not be regarded as within the province of the curator. If the protected person has not sufficient capacity to judge for himself after receiving proper information and advice, a suit can be maintained by a next friend.

If it is suggested that under the paragraph quoted from s. 85K (1) such a suit must be a matter relating to the protected person, if it is not one relating to the protected estate, the answer is that the two expressions do not cover between them all subjects of suit or action. The expression " matters relating to the protected person " has no such object in view. The words are intended to cover matters in which remedies or relief are desired in order that he as a person shall be protected or secured against violation of his rights.

Accordingly the attempt by the curator to obtain the setting aside of the transfer to Herbert of the 13,665 shares, to say nothing of the one share subscribed for, was outside the curator's statutory authority.

There is one further matter that is relevant arising under Pt. IIIA. of *The Public Curator Acts* 1915 *to* 1947. The provisions of that Part are entirely concerned with the protection of a living person regarded as incompetent to manage his affairs or property. There is nothing in the legislation to continue the operation of the order or the curator's powers beyond the life of the protected person. The question thus involved was raised by this Court during the hearing of the appeal and it was suggested that the appeal might not be properly constituted in the absence of some representative of the estate of Sarah Ann Jenyns as a deceased person. However, the parties passed this suggestion by. But in view of the conclusion already expressed that the curator in the lifetime of the deceased exceeded his statutory powers in maintaining these proceedings, there appears to be no reason why the appeal should not be decided as it stands in favour of the appellant Herbert

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Jenyns, although the estate is not represented before the Court. There is no reason why Herbert should not have his costs of the appeal and of the proceedings in the Supreme Court where the issues were "stated and tried" to quote from the order as an ordinary action. But a question must arise, if not now at some subsequent time, whether or not the costs should be paid out of the protected estate or whether or not the curator should be indemnified out of the estate for the costs payable to the appellant. It may be that as the curator was suing in a representative capacity in the purported exercise of his functions that an order could have been made in the originating summons which could not have been made in an action. Even so it may be another question whether such an order is or was proper in the circumstances. Moreover it may be necessary that the estate should be represented, even if death has not made it too late to act under s. 85K (1). None of these questions was argued before this Court on the appeal and as the question of the curator's right to be recouped out of the estate for the costs he must pay to the appellant must be one of great importance, it is better that this Court should leave the whole question to the Supreme Court and make an order simply against the curator without prejudice to his right to be recouped.

The order will be: Appeal allowed. Judgment of the Supreme Court discharged and in lieu thereof order that the claims in the statement of claim be refused and that the curator pay the costs of and incidental to the proceedings in the Supreme Court from and including the order of *Mack* J. of 16th August 1950, but without prejudice to any claim of the public curator to be recouped out of the protected estate or to the exercise of any authority of the Supreme Court to order that he be so recouped or that such costs be paid out of the protected estate in the first instance. Order that the respondent public curator pay the appellant his costs of this appeal but without prejudice to any claim of the public curator to be recouped out of the protected estate or to the exercise of any authority of the Supreme Court to order that he be so recouped or that such costs be paid out of the protected estate in the first instance. Liberty to apply to the Supreme Court as the parties may be advised. Remit the cause to the Supreme Court.

Appeal allowed. Judgment of the Supreme Court discharged.

In lieu thereof order that the claims in the statement of claim be refused and that the respondent the public curator pay the costs of and incidental to the proceedings in the Supreme Court from and including the order of Mack J.

of 16th August 1950 but without prejudice to any claim of the respondent the public curator to be recouped out of the protected estate or to the exercise of any authority of the Supreme Court to order that he be so recouped or to order that such costs be paid out of the protected estate in the first instance.

Order that the respondent the public curator pay the appellant his costs of this appeal but without prejudice to any claim of the respondent the public curator to be recouped out of the protected estate or to the exercise of any authority of the Supreme Court to order that he be so recouped or that such costs be paid out of the protected estate in the first instance.

Liberty to apply to the Supreme Court as the parties may be advised.

Remit the cause to the Supreme Court.

Solicitors for the appellant, *Chambers, McNab & Co.*

Solicitor for the respondent, *W. B. Finn*, Official Solicitor to the Public Curator of Queensland.

B. J. J.