[HIGH COURT OF AUSTRALIA.]

CHARLES JAMES SPONG . . . . APPELLANT;
DEFENDANT,

AND

CHARLES ALFRED SPONG . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1914.

MELBOURNE, *Sept.* 28, 29.

Griffith C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Contract—Rescission—Undue influence—Fiduciary relation—Transfer of land by father to son.

The plaintiff brought an action against the defendant, who was his son, for rescission of a voluntary transfer of land by the plaintiff to the defendant on the ground that the plaintiff when he executed the transfer was, as the defendant knew, incapable of knowing or understanding the contents or effect of the transfer, and of undue influence. The trial Judge found that the plaintiff was to the defendant's knowledge feeble-minded, weak, and incapable of transacting business; and he therefore gave judgment for the plaintiff. On appeal to the High Court,

Held, by the whole Court, that the appeal should be dismissed:

By *Griffith* C.J., *Isaacs* and *Gavan Duffy* JJ., on the ground that the evidence justified the finding of the trial Judge; and

By *Griffith* C.J., *Isaacs* and *Rich* JJ., on the ground that the evidence established the existence of a fiduciary relation between the plaintiff and the defendant, and that in the absence of independent advice to the plaintiff the transfer should be set aside.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Charles James Spong brought an action against his son,

Charles Alfred Spong, in which he alleged that up to 16th September 1913 the plaintiff was the registered proprietor of a certain piece of land; that on 15th September he executed a transfer of the land to the defendant which was registered on 16th September; that the defendant had acted prior to that date as confidential adviser of the plaintiff in business matters; that the plaintiff was at the time of the execution of the transfer 76 years of age and in an extremely weak and decrepit condition of body and mind by reason whereof he did not know or understand and was incapable of knowing or understanding the contents or effect of the transfer, and that the defendant knew of such incapacity and want of knowledge; that the plaintiff had no independent advice; and that the defendant by undue influence procured the plaintiff to execute the transfer. The plaintiff claimed a declaration that the transfer was invalid and an order that the defendant should re-transfer the land to the plaintiff. The action was heard before *Hood* J., who found that the plaintiff at the time he executed the transfer was feeble-minded, weak, and incapable of transacting business. He therefore made an order declaring that the transfer from the plaintiff to the defendant was void, and ordering the defendant to execute a transfer of the land to the plaintiff and to do all things necessary to re-vest the land and the title thereto in the plaintiff.

From that decision the defendant now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Bryant (with him *Cussen*), for the appellant, referred to *Baudains* v. *Richardson* (1); *Allcard* v. *Skinner* (2); *Aitken* v. *McMeckan* (3).

[RICH J. referred to *Bainbrigge* v. *Browne* (4); *Tate* v. *Williamson* (5).

GAVAN DUFFY J. referred to *In re Coomber*; *Coomber* v. *Coomber* (6).

ISAACS J. referred to *Griffiths* v. *Robins* (7).]

(1) (1906) A.C., 169.
(2) 36 Ch. D., 145, at p. 171.
(3) (1895) A.C., 310.
(4) 18 Ch. D., 188.
(5) L.R. 2 Ch., 55.
(6) (1911) 1 Ch., 723.
(7) 3 Madd., 191.

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Dethridge and *Macfarlan*, for the respondent, were not heard.

GRIFFITH C.J. This is a suit by father against son to set aside a voluntary transfer of land worth about £3,000 to the son, alleged to have been obtained under such circumstances that it cannot be supported. The case formally made by the plaintiff sets up the usual grounds for avoiding a voluntary conveyance made without full understanding.

The plaintiff is an old man, who was 77 years of age in February last. The transfer impeached was made on Monday, 15th September 1913. The defendant had for some years been tenant of the land, where he kept an hotel. The then existing lease would have expired in May 1915, and arrangements had been made for a renewal of it. On Saturday, 13th September, instructions had been given to a solicitor to prepare a new lease on the agreed terms, and three o'clock on Monday the 15th was fixed for its execution. During the Sunday night the plaintiff's wife, the mother of the defendant, died. On Monday morning the defendant, while driving, saw his father walking in the street, took him into his vehicle, and drove him to the hotel, where a conversation took place between them which the defendant narrates. At that time the defendant's mother was lying dead at his father's house. The father was an old man and was in failing mental health. The extent of the failure I will refer to later. The defendant says that when they were at the hotel he said to his father, "Mr. Morton" (the clerk to the solicitor, Mr. Barnett) "has the lease all ready for us to sign," and that his father said, "I don't want the lease. I want to transfer the property to you and get it off my mind while I am able." The learned Judge who heard the witnesses says that he did not believe this evidence. I will, however, assume for the present that it is true. The son says that he asked his father whether he would stay and have some dinner before going into town, that is, to the solicitor's office, and that his father replied "No"; that he then at once rung up Mr. Barnett on the telephone, and said that his father wanted to transfer the property to him, and did not want a lease. He says, further, that when they started to drive to town his father said that they would have to call at the bank

for the deeds; that they then drove to the English and Scottish Bank at Ascot Vale, and that as they got out of the vehicle his father said, "Don't tell anybody that I have given you this property." Defendant went on to say: "I went into the bank and I said to the manager, Mr. Mills, 'Father asked me to ask for the deeds of the hotel property.' Mr. Mills brought out some deeds, and asked him was that the deed he wanted, and he said 'Yes.'" The son then gave an account of what took place at the bank. A document was put in, which contained a draft proof of the evidence the defendant was to give, which was sent to him for approval and correction, and which he corrected. I prefer to rely on the corrected proof as being what he was then prepared to swear. It is as follows:—"The manager," after producing the deeds, said, "'Will you be bringing the title back?' Plaintiff looked at me and I looked at him, and, thinking that he did not want the manager to know that he was transferring the property to me, I said, 'We don't know yet.' Plaintiff asked for his pass-book and we both looked at it and discovered there was an overdraft for £48 10s. I said, 'I am surprised at there being an overdraft; where has all your money gone?' Plaintiff said, 'I've drawn it and given it to the others' (the plaintiff's brothers and sisters). 'The others have been getting it.' Plaintiff could not give me any reason. I said, 'You had better let me transact your business for you.' Plaintiff: 'Very well.' I said, 'You had better give me an authority to operate on your account; I will look after your banking for you; you will always come to me when you want any money.' Plaintiff: 'I think it is the best thing to do as I am getting so old.'" In the box the son altered the words "You had better let me transact your business for you" to "You had better let me manage the business for you." The father then signed a document authorizing the son to sign cheques, and also to draw, indorse and accept bills, drafts and acceptances and to make promissory notes—practically to transact all kinds of banking business. It appears from the evidence on both sides, including that of the defendant himself, that on the following Wednesday it was understood by the family that the defendant had assumed the management of the

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plaintiff's business. The plaintiff had some other landed property from which he received rent.

After the conversation at the bank the plaintiff and the defendant took the certificate of title to the land, and drove to Melbourne to the office of Mr. Barnett, who had been instructed to prepare the new lease. While they were there the plaintiff executed the transfer, and it was registered on the following morning. No other member of the family was told of the transfer until some days later. The son, on being asked to explain why he asked his father to take over the management of his business, gave this explanation: "Other members of the family had told me that my sister, with whom he" (the father) "was living, and her husband—the husband was boasting of having £200 in the bank, and I thought as I was the oldest son I ought to look after his affairs. I came to the conclusion that he could not look after his own affairs under those circumstances. I was under the impression that some influence had been at work with him." That was the son's opinion of the father's condition on the Monday morning. The transfer was executed in the afternoon. After this defendant paid four sums of £1, £1 10s., £1 10s. and £1 10s. to his father at weekly intervals. The rent which he had previously received was £2 10s. per week. At the trial the plaintiff was called as a witness and said that he did not remember anything at all about the events of that Monday. The learned trial Judge says that the plaintiff was evidently quite incoherent, and he placed no reliance on his evidence. A daughter of the plaintiff with whom he had been living for some time said that her father's condition had been much the same in the previous September. A medical witness thought that the plaintiff was suffering from senile decay, and that this condition must have been coming on for some considerable time and was probably far advanced in September.

On these facts the learned Judge, who had the advantage of seeing and hearing the witnesses, came to the conclusion that at the time when the transfer was signed the plaintiff was feeble-minded, weak and unable to transact any business whatever. There was, I think, on the plaintiff's case alone sufficient evidence to justify that conclusion.

But the learned Judge went on to consider the evidence given for the defendant, and to that I will now address myself.

According to the defendant's own version this transaction was hurriedly and secretly entered into on a day when the plaintiff's wife had not been twelve hours dead. During the morning the son came to the conclusion, as he says, that his father was incapable of managing his own business and ought to entrust the management of it to him, the son. The father acceded to that suggestion; and the first thing the son did under these circumstances was to take the father to a solicitor whom he had never seen before, and allow him to execute the transfer now sought to be impeached, without telling the solicitor of the father's condition, or what he had done in the morning. If there were no more in the case than that, I think that under the circumstances it was the son's duty not to allow him to execute the transfer in his (the son's) favour without independent advice. It is manifest that the defendant would not have allowed his father to execute such an instrument in favour of any other member of the family. It is clear that a voluntary transfer made under such circumstances without independent advice cannot stand unless it is made abundantly plain that the father fully understood what he was doing.

I have referred to the defendant's evidence that the proposal to make the gift first came from the father. The learned Judge did not believe him. Even if we suppose that it did, it does not make any difference. It seems to me that the words used by Sir *John Leach* V.C. in *Griffiths* v. *Robins* (1) are exactly applicable:— "She" (the donor) "had entire trust and confidence in them" (the persons who induced her to execute the deed of gift); "and it may be stated that they were the persons upon whose kindness and assistance she depended. They stood, therefore, in a relation to her, which so much exposed her to their influence that they can maintain no deed of gift from her unless they can establish that it was the result of her own free will, and effected by the intervention of some indifferent person."

From whatever point of view the evidence is considered, it seems to me that this is a transaction that cannot stand. It

(1) 3 Madd., 191, at p. 192.

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may be that no case exactly similar has ever arisen; but, as was said by Lord *Cottenham* L.C. in *Dent* v. *Bennett* (1), "the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another."

I think, therefore, that the appeal fails.

A surrender of the existing lease of 1st December 1909 was executed contemporaneously with the transfer, and was part of the same transaction. It is obvious that, on the principle that he who seeks equity should do equity, if the father recovers the land the lease should stand. The plaintiff is willing to undertake to do all that may be necessary to reinstate the lease, and on that undertaking the appeal should be dismissed.

ISAACS J. I agree with what the Chief Justice has said, and will only add a very few words.

This is a voluntary gift of a large amount of property. The law on the subject is well summarized in various cases, and among recent ones in *Morley* v. *Loughnan* (2). There *Wright* J. said:—"There is no doubt about the law, which is illustrated by numerous cases collected in *White* and *Tudor's* work under the leading case of *Huguenin* v. *Baseley* (3) and continuing down to the case of *Allcard* v. *Skinner* (4). That law is, that where large voluntary gifts are made and accepted *inter vivos*, the recipient may be called upon to show that the donor had capacity and knowledge of what he was doing." That is the first step. The rule does not apply to small matters, as was pointed out in *Allcard* v. *Skinner* (5), because in such a case the gift might very reasonably be accounted for on ordinary grounds. But when a large amount is involved an unusual element is introduced, and the donee must show as a first step that the donor had capacity and knowledge of what he was doing. In this case, so far from that onus being satisfied, the learned Judge has found as a fact that the donor had not that capacity, and I agree with him. That would end the matter. But then *Wright* J. goes

(1) 4 My. & Cr., 269, at p. 277.
(2) (1893) 1 Ch., 736, at p. 751.
(3) 14 Ves., 273; 2 Wh. & T. L.C., 6th ed., 597.
(4) 36 Ch. D., 145.
(5) 36 Ch. D., 145, at p. 185.

on to say in *Morley* v. *Loughnan* (1):—"Proof may then be given against the recipient to show that the donor's intention to give was produced by undue influence, and then the Courts of course set it aside, unless the transaction as a whole was a benefit to the donor." That position assumes that the onus lies in the particular circumstances of a given case upon the donee. But that is not always so. The learned Judge says (1):—"Or the donor may show that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations, and the burthen lies on the recipient to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances."

Now, Mr. *Bryant* says that there was here no fiduciary relationship in the sense that the law requires. Equity does not tie itself down to any formal classes of relationships. The various cases of solicitor and client, physician and patient, &c., are instances of the necessary relationship, but the real question always is: Was there a fiduciary relationship, no matter how it was created? *Wright* J. in *Morley* v. *Loughnan* (1) refers to what Lord *Eldon* said in *Huguenin* v. *Baseley* (2):—"The rule stands on a general principle applying to all the variety of relations by which dominion may be exercised by one person over another." In that particular case of *Morley* v. *Loughnan* (3) there was an element of religious influence; but the learned Judge, although he decided on that ground, thought also that on the ground that there was a confidential fiduciary relationship the money could be recovered. That appears to be established by the cases of *Griffiths* v. *Robins* (4) and *Sharp* v. *Leach* (5). In the latter of those cases the confidential relationship was held to be constituted by the fact that the defendant was the only brother of the plaintiff, that he was the person she consulted about her business and that she was living in his house at the time of the gift. The principle upon which the decision was

(1) (1893) 1 Ch., 736, at p. 752.
(2) 14 Ves., 273.
(3) (1893) 1 Ch., 736.
(4) 3 Madd., 191.
(5) 31 Beav., 491.

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rested was that it was unconscientious for one person to take a gift of a large amount from another when that other is in such a position that confidence is reposed by him in the donee. Of course the relationship must have reference to the matter in dispute—it must be such as in the opinion of the Court would naturally be relevant to the matter. Where that relationship exists the obligation rests upon the donee to disprove undue influence. In this case, whether the onus lies upon one side or upon the other, the appellant upon the facts proved must, in my opinion, fail.

GAVAN DUFFY J. I agree that the appeal should be dismissed. I must not be taken as in any way dissenting from the various legal propositions laid down by the other members of the Court; but for the purposes of this case it is enough to say that the learned Judge who heard the case was justified in finding that the father was not in a position to appreciate the nature of the act he was doing and that the son knew it, and that, having seen and heard the witnesses, he was in a better position than we are to come to a conclusion upon their conflicting testimony.

POWERS J. I agree that the appeal should be dismissed.

RICH J. I agree that the appeal should be dismissed. Courts of equity have exercised jurisdiction over transactions between persons standing in certain fiduciary relations from which undue influence is inferred. Specific instances of this principle are well known. But the Courts have refrained from defining what constitutes such a relation. "There are endless variations of the fiduciary position which do not fall under any strictly defined head. Some of those relations are continuing, others temporary; but in all the question is, whether the person parting with property by way of gift, or entering into a contract, had a full and free opportunity of judging for himself": Notes to *Huguenin* v. *Baseley* (1). "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed": *Smith* v. *Kay* (2).

(1) 1 Wh. & T. L.C., 8th ed., p. 296. (2) 7 H.L.C., 750, at p. 779.

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Rich J.

The facts in this case to which the Chief Justice has referred establish the existence of such a fiduciary relation as justified *Hood* J. in inferring undue influence. The evidence given on behalf of the defendant does not, in my opinion, rebut that presumption.

The respondent undertaking at the appellant's costs to do all necessary acts to reinstate the lease of 1*st December* 1909 *for the residue of the term thereof, appeal dismissed with costs.*

Solicitor, for the appellant, *Charles Barnett.*
Solicitor, for the respondent, *C. J. McFarlane.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (ON THE RELATION OF BRADLEY) . . . . . PLAINTIFF, } APPELLANT;

AND

THE MAYOR &c. OF THE CITY OF GEELONG AND OTHERS . . . DEFENDANTS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 7, 8.

Local Government—Power of corporation—Contract—Expenditure—Condition precedent—Estimate of expenditure—Rate—Geelong Corporation Act 1849 (*N.S.W.*) (13 *Vict. No.* 40), *sec.* 5—*Melbourne Corporation Act* 1842 (*N.S.W.*) (6 *Vict. No.* 7), *secs.* 1, 67, 98.

Griffith C.J., Barton, Gavan Duffy, Powers and Rich JJ.

The respondents, a municipal corporation, were governed by the Act 6 Vict. No. 7 (N.S.W.), sec. 67 of which provides that the annual income of the corporation from property or dues shall be carried to an account called