ALICE R. COX AND EVELYN S. COX (DEFENDANTS) ..... } APPELLANTS;

AND

ANDREW A. ADAMS (PLAINTIFF).....RESPONDENT

1904
*Nov. 10.
*Dec. 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Security for debt—Husband and wife—Parent and child.*

C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt it was agreed between them that if he could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first the wife and daughter finally agreed to sign notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice.

*Held*, reversing the judgment appealed from, Taschereau C.J. dissenting, that though the daughter was twenty-three years old she was still subject to the dominion and influence of her father and the contract made by her without independent advice was not binding,

*Held* also, Taschereau, C. J. and Killam J. dissenting, that his wife was also subjected to influence by C. and entitled to independent advice and she was, therefore, not liable on the note she signed.

*Held*, per Sedgewick J. that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures of the notes and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required therefore the plaintiff could not recover.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

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The facts of the case are sufficiently stated in the head-note and in the opinions of the judges on this appeal.

*Laidlaw K.C.* and *G. T. Blackstock K.C.* for the appellants. Defendants are entitled to an account of securities obtained by Walmsley from Cox. *Newton* v. *Chorlton* (1); *Forbes* v. *Jackson* (2); *Dixon* v. *Steel* (3).

The notes were given under marital and parental pressure and plaintiff cannot recover. *Turnbull* v. *Duval* (4); *Bergen* v. *Udall* (5); *Delong* v. *Mumford* (6); *Lavin* v. *Lavin* (7).

The notes were obtained from the defendants by fraud and misrepresentation. *In re McCallum* (8).

*Shepley K.C.* and *D. M. Robertson* for the respondent, cited *Sercombe* v. *Sanders* (9); *Bainbrigge* v. *Browne* (10); *Smith* v. *Kay* (11) at page 772; *Turnbull* v. *Duval* (4).

THE CHIEF JUSTICE.—I would dismiss this appeal. The opinion delivered by the Chief Justice of Ontario is unanswerable. I entirely agree with his reasoning. A proper understanding of the facts of the case as they have been found by the trial judge and by the Court of Appeal, unanimously, leaves no room for the application of the law and of the authorities upon which the appellants have attempted to support their contentions.

SEDGEWICK J.—I entirely agree with the conclusions at which my brother Girouard has arrived in his very able and exhaustive judgment, but it appears to me

(1) 10 Hare 646.
(2) 19 Ch. D. 615.
(3) [1901] 2 Ch. 602.
(4) [1902] A. C. 429.
(5) 31 Barb. 9.
(6) 25 Gr. 586.
(7) 27 Gr. 567.
(8) [1901] 1 Ch. 143.
(9) 34 Beav. 382.
(10) 18 Ch. D. 188.
(11) 7 H. L. Cas. 750.

that the same end might have been reached by a less elaborate process. To my mind the transaction impeached in this case is a most unconscionable one, a transaction the like of which, so far as I know, no court of equity has ever ventured to affirm. Reading as well what is conspicuously between the lines as the lines themselves, the following facts may, I think, be fairly gathered from the evidence.

The real plaintiff, one Walmsley, is a stock broker of considerable wealth, in the City of Toronto. For three years, at least, he and the defendant, E. Strachan Cox, who was possessed of but little means, were dealing jointly in the purchase and sale of mining and other stocks, speculating to the extent of over a million dollars. For the purpose of carrying on this business Walmsley would discount Cox's paper whenever it was necessary for him to do so. The final result of these speculations was that, while Walmsley made out of them what may be regarded as a small fortune, Cox came out of them, not only penniless, but very heavily involved, owing Walmsley several thousands of dollars. Walmsley had managed to obtain from Cox an absolute transfer of all possible interests that he had in any mining stock in which they both, theretofore, had been interested, as well as all stocks he held in his individual name, and began pressing for payment of the balance due (a wholly usurious balance), although he was aware that Cox had no means whatever of paying the debt out of any assets of his own. He, however, was determined either to get his money or security for it.

Now it happened that the appellant, Mrs. Cox, was a lady who held a life estate in certain property devised or bequeathed to her by her father, and that their only child, a girl of twenty-three, Evelyn by name, had a reversionary interest in the *corpus* of the estate. It also happened that Cox was very anxious

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to raise the sum of $1,000 for his own personal benefit, probably to try his luck once more at the casinos or bucket shops which are becoming so numerous in the larger cities of this country, and the idea was conceived—Cox asserts by Walmsley, while Walmsley asserts by Cox—of achieving the desires of both of them, namely, security for Walmsley, and $1,000 for Cox, at the expense of Mrs. Cox and her daughter. So it was proposed that Walmsley should advance $1,000 to Cox, upon Cox inducing his wife and daughter to become surety to Walmsley for the debt which Cox owed him and for the $1,000 proposed to be advanced, Walmsley, in effect, saying:

> You will get the $1,000 cash, if you can manage (honestly if you can, but somehow, anyway), to get your wife's and daughter's signatures to promissory notes in my favour.

He knew, as I have said, that Cox was worse than worthless. He knew that he could give nothing of a pecuniary kind to his wife and daughter in consideration of their assisting him, but nevertheless, he held out as a bribe to Cox for the use of his marital and parental influence over the mother and child, the $1,000 which the latter was so feverishly anxious to obtain. Cox thereupon proceeded with his task. It is unnecessary to go into details. After many days, not only of expostulation and entreaty but also upon the most atrocious misrepresentation of his financial position and his prospects of ultimate success from property which he then falsely asserted that he owned, they both were induced to sign the notes which are the instruments sued on in this case.

I look upon the whole thing as a conspiracy between Walmsley and Cox to rob, for their mutual advantage, those weak and trustful ladies. I call it a conspiracy because both the conspirators must have known that there was no prospect or likelihood that Cox would

ever be able to make good the amounts for which his wife and daughter were to become responsible, and, therefore, it was a deliberate attempt on the part of both to defraud them. The evidence shows conclusively, and it was so admitted by all parties at the argument, that Cox obtained these signatures by false pretences, and that his proper place was in a penal cell. It is said, however, that Walmsley was not affected by the criminal conduct of Cox. I would have found, as a juryman, that he was a party to it, but that is not necessary, in my view, where he gets the benefit of his companion's crime.

It makes but little difference, the name of the particular relationship which existed between the two. Cox may not be in strict legal *parlance* the *agent* of Walmsley, but he was his instrument, a tool used by him to work out, at the expense of mother and daughter, Cox's indebtedness to him, and therefore he was responsible for everything that Cox had done in order to carry out their dishonest scheme.

I need say no more. If the case be such as I have represented it then the equitable principles regarding undue influence need not be resorted to, with reference to which I can usefully add nothing to what my brother Girouard and my brother Davies have said.

GIROUARD J.—As I understand the case there is only one serious issue, namely, that of undue influence which the courts below disposed of in a few words. The trial judge (Falconbridge C. J.), came to the conclusion that so far as the ladies were concerned, the provisions of the Bills of Exchange Act entirely covered the case. Without examining the effect in law of the notice which Walmsley had of the relation between his debtor and his wife and his only child, Miss Cox, the learned judge concludes:

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It would add new terrors to the conduct of the banking business, if the law were declared to be that if a person indorsing to effect a loan should suggest the name of his wife or daughter as joint maker of a note, or even if the banker intimated that he would discount a note made by the wife or daughter, that the would-be borrower should be hereby constituted the agent of the banker, so as to bind the banker by his statements or his mis-statements.

The same misconception of the case seems to have prevailed in the Court of Appeal. Chief Justice Moss said:

He (Walmsley), had no knowledge of the means employed by the defendant E. S. Cox, and the makers have failed to show any facts or circumstances from which notice or knowledge of any infirmity affecting the title to the notes can be attributed to him.

Knowing that these notes were to be obtained from the appellants as sureties by a man having control over them as husband and father, was not Walmsley bound to ascertain that they knew exactly what they were going to do? Was he not under some legal obligation to inform them of the nature of the transaction and recommend competent and independent advice? If that advice had been taken, is it probable that the gross misrepresentations and fraud perpetrated by the principal debtor would not have been discovered by the solicitor inquiring either from Walmsley or elsewhere, as was done later on, about the time of the institution of this action, when the ladies asked the advice of Mr. Laidlaw, K.C.? The courts below have not dealt with this branch of the case, and in the few remarks I intend to offer I will confine myself to that particular point.

Our duty is not to find out what would be most beneficial to banks and money lenders. I do not agree, however, that a decision reversing the courts below would add "new terrors to the conduct of banking business." The same banks which deal in Ontario find it profitable to have offices in the Province of

Quebec, where the law is far more sweeping. In that province no married woman, separated as to property, can bind herself either with or for her husband directly or indirectly, as surety or otherwise, even when fully understanding the facts and having competent and independent advice. In such a case her obligation is absolutely null and void even in the hands of a third party in good faith and for cash value, for instance the holder in due course of a note, at least to the extent to which she failed to take any benefit. I am not aware that any bank, although bound to use extraordinary precautions, has left the Quebec field of operation, or has suffered materially in consequence of this rigourous law, although it has been in force for more than sixty years; (Art. 1301 C. C.). If we are able to judge from the law reports of the province, even sharpers have not been frightened, for they are flourishing in Montreal as well as in Toronto. The reports of the Judicial Committee of the Privy Council for the current year afford an interesting and most remarkable illustration of the application of the Quebec law in *Trust and Loan Co. of Canada* v. *Gauthier* (1). Like the English equity rule respecting undue influence, it is founded on the best interests of society, the peace and harmony of families, which is not only equal but superior to the welfare of banks. Whatever may be the consequences, the law must be applied whether the creditor represents a regular banking house or a mere bucket or shaving shop. If by possibility incorporated banks should place themselves in the position of Walmsley, I do not see how they could receive better treatment. The sooner it is understood that a perfect knowledge of the transaction by all the immediate parties is necessary in matters where confi-

(1) 20 Times L. R. 15.

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dential relations exist, the better for society, the banks and all concerned.

But is it not mere irony to compare a regular banker to a common shaver or financial shark? Is it possible to imagine a bank lending for years thousands of dollars upon the mere name of one person in bad repute from a business point of view? Can any one conceive a bank charging interest at a rate varying from one-quarter of one per cent per day to three per cent per month as Walmsley did for years. But it must be added, however, that when he secured the signatures of both ladies, he generously reduced it for the future to one and one-half per cent per month or 18 per 100 per annum. Banks do not enter into mining or other speculations, although they frequently promote them upon the security of shares and other securities furnished by the individual speculators—an operation to which Walmsley, a man of wealth, often resorted, paying a moderate rate of interest, in this instance 5 or 6 per cent per annum.

The notes sued upon were largely the ultimate result of a series of transactions between jobbers or dealers in mining stocks, one having no money and no credit, but any amount of energy and self-confidence and all the illusions peculiar to his profession, and the other having large means enabling him to carry them on to a profitable end. Their dealings were large; sometimes shares were bought on separate account and sometimes on their joint account especially 1980 shares of Crow's Nest Pass Coal Company; but in every instance Walmsley was always careful to get an absolute transfer of Cox's interest as security for any balance which might be due to him in any transaction. The Crow's Nest shares cost $104,940, which was advanced by the Imperial Bank to Walmsley, he getting from Cox, as usual, the full title to the shares which he

deposited with the bank. After a few years of more or less unprofitable operations, for Cox at all events, in the fall of 1899, the mining excitement collapsed and Cox was found to be indebted to Walmsley in a large balance, some $13,000, covered by scrip in various mining companies, which, ultimately, all went to grief, except Crow's Nest Pass Company. As at that time, 1899, there was a great falling off in the value of mining stock generally and Crow's Nest shares in particular, Walmsley—for reasons it is difficult to understand, as he already had an absolute transfer—exacted from Cox a complete and final release of his interest in these shares which was signed on the 11th of October, 1899, although Cox swears that Walmsley promised him verbally to let him share in the profits, if any, a statement emphatically denied by Walmsley. It was about this time that Mrs. Cox appeared upon the scene. Cox was in great straits for money. Walmsley was demanding the arrears of interest. He knew that Mrs. Cox enjoyed a life interest in the wealthy estate of her father, James Gooderham Worts, securing her an annual income of $10,000, sufficient for the needs of the family, subject to a reversionary interest to her daughter, worth about $200,000, and besides this she had the homestead and furniture in Toronto. Cox brought two notes signed by his wife and indorsed by him, one for $3,000 and the other for $900. Walmsley discounted these notes in October, 1899, after the release of the Crow's Nest shares was signed. He gave Cox, in cash, $1850 on the first note and $819 on the second, charging a discount of 36 per 100 per annum. When speaking of the last note for $900, Cox writes that

> much against my will I persuaded her to give me the inclosed. I do not know why you should always get your own way.

Of course, these notes were not met and remained on sufferance for some time. In August, 1900, Walms-

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ley pressed for a settlement. He writes to Cox on the 23rd that he

> would like to see it closed to-morrow, or otherwise I shall hand matters to my solicitor.

On the 29th he repeats the threat. Cox wanted more money for his own use, for neither wife nor daughter ever benefited by the advances made to him even to the extent of one farthing. Cox swears Walmsley suggested that he should get the three notes sued upon signed by his wife and daughter, and he would give him $1,000 more. Walmsley swears, on the contrary, that the suggestion came from Cox himself. Be that as it may, I think the difference in their statements is immaterial. This passage of Walmsley's evidence is sufficient for the purposes of the case:

> Q. You thought if you could get the note of the girl and the note of her mother, you would agree to renew the old debt and give a fresh advance?—A. Yes.

One thing is certain; at all times Walmsley knew of the confidential relations existing between Cox and his wife and daughter, whatever that may mean in law, and did nothing to prevent fraud and misrepresentation by informing either of these ladies of the true state of affairs and recommending them or either of them to take competent and independent advice. He did not do so before Cox applied to the ladies, nor pending the negotiations which lasted a few days, nor before making the fresh advance of $1,000, or rather, to use perhaps more correct language, before paying to Cox what appears to me to be his reward for the violation of his natural trust and protection. As might be expected Cox had a most plausible story; these notes were wanted to carry the Crow's Nest shares and everything would be all right in the end. Such, he said, was also the opinion of Walmsley, known to the ladies as a shrewd and prudent speculator. The

daughter, although affectionate and inclined to please her father, did not like to sign the notes at first, but, after three or four days of persuasion, she was willing to do so. The mother, who had more than once previously been deceived, was very reluctant, as she was at the time of signing the two notes in 1899; so the daughter says; discussions took place in the morning and evening, after breakfast and dinner; many tears were shed. Finally they both signed the notes and the $1,000, less interest, were paid to Cox who was very careful not to divulge to them this little secret.

I am not prepared to admit, with the judges of the courts below, that Walmsley is not responsible for the false statements and misrepresentations of Cox; but I humbly submit that he knew it was a case of presumptive undue influence, that the daughter was about twenty-three years of age and was living with her father and mother under the same roof, and, finally, that she had an expectant interest in a wealthy estate; he knew that she would not benefit by the transaction to the extent of one cent. Under these circumstances, was it not his duty to inform this affectionate and confiding young lady, having no business experience, to take independent advice? The practical *dénouement* of all these manœuvres has been that Walmsley, at the time of the trial, had realised or might realise the little profit of over $68,000 out of the Crow's Nest shares and that the wife and daughter of Cox are condemned to pay him $7,642.73, the principal and interest of the above notes, composed, to the extent of nearly one-half, of arrears of interest.

This extraordinary result induced the trial judge to express the hope

that the real plaintiff, Mr. Walmsley, relieved by this judgment of any possibility of having to account to Mr. Cox for any shares of the profits, in view of the enormous gain which has eventually accrued

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to him out of the transaction, would see his way to forbear pressing his suit to the bitter end against these ladies.

The expression of such a reasonable hope by a judge who saw and heard the witnesses, was useless. Not only is Walmsley resisting the highly equitable contentions of these ladies; he has even resorted to the extreme process of execution on the furniture of the homestead.

But what are the consequences, in law, of such a state of affairs? Is the wife liable because she is considered "in all respects" as a *feme sole* under the statutory law of Ontario, at least to the extent of her separate property? I will discuss this point later on, after having disposed of Miss Cox's case. Is she also liable? I have come to the conclusion that she is not, undue influence or fraud in law being presumed.

All the authorities agree that even a third party knowing the relation which is the foundation of this legal presumption can derive no benefit from the transaction, unless he establishes that competent and independent advice had been given to the party acting under such influence. *Bridgman* v. *Green*, 1755, (1); *Huguenin* v. *Baseley*, 1807, (2); *Molony* v. *Kernan*, 1842, (3); *Archer* v. *Hudson*, 1844, (4); *Maitland* v. *Irving*, 1846, (5); *Cooke* v *Lamotte*, 1851, (6); *Espey* v. *Lake*, 1852, (7); *Baker* v. *Bradley*, 1855, (8); *Smith* v. *Kay*, 1859, (9); *Nottidge* v. *Prince*, 1860, (10); *Berdoe* v. *Dawson*, 1865, (11); *Sercombe* v. *Sanders*, 1865, (12); *Rhodes* v. *Bate*, 1866, (13); *Kempson* v. *Ashbee*, 1874, (14); *Bainbrigge* v. *Browne*,

(1) 2 Ves. Sr. 627.
(2) 14 Ves. 273.
(3) 2 Dr. & War. 31.
(4) 7 Beav. 551.
(5) 15 Simons 437.
(6) 15 Beav. 234.
(7) 10 Hare, 260.
(8) 7 DeG. M. & G. 597.
(9) 7 H. L. Cas. 750.
(10) 2 Giff. 246.
(11) 34 Beav. 603.
(12) 34 Beav. 382.
(13) 1 Ch. App. 252.
(14) 10 Ch. App. 15.

1881, (1); *Allcard* v. *Skinner*, 1887, (2); *Liles* v. *Terry* (3); *De Witte* v. *Addison*, 1899, (4); *Powell* v. *Powell*, (5); *Barron* v. *Willis*, (6); *Tunrbull* v *Duval*, (7).

The learned Chief Justice of Ontario, speaking for the Court of Appeal, and dealing with the defence of Miss Cox, finds that she is

a lady of intelligence, knowledge and firm will. She was fully aware of the nature of the act she was called upon to do and of its consequences. She may have been misled as as to the true purposes for which her father needed the notes, but beyond stating his need and the reasons for it he does not appear to have exercised any control over her will. Apparently she was left without restraint to exercise her own free will and judgment after hearing her father's statement. Her mother was at first opposed to signing the notes, and to her daughter signing, and there appears to have been a considerable interval between the time when the matter was first broached and the signatures. She does not now say that she did not fully understand and appreciate the explanation of the transaction given by her father, nor has she sworn that she yielded to his parental authority, surrendering her own will to his without the exercise of her own judgment, and the circumstances do not demonstrate that she did. But the title of Walmsley to recover upon the notes is not to be effected by evidence such as offered in this case. Miss Cox had, undoubtedly, the capacity to contract generally. When it is sought to show want of capacity in the particular instance disabling her from incurring liability on the promissory notes in question, the right of the holder in due course should not be taken away unless upon clear and distinct proof of the infirmity and of his knowledge of it.

I do not think the evidence goes so far as stated by the learned Chief Justice. Miss Cox is intelligent, it is true, but has no knowledge of business. She knew that she was signing notes to help her father, but she knew nothing of the nature of the transaction. She understood, from the repeated statements of her father, that she was helping him in a mining stock specu-

(1) 18 Ch. D. 188.
(2) 36 Ch. D. 145.
(3) [1895] 2 Q. B. 679.
(4) 80 L. T. 207.
(5) [1900] 1 Ch. 243.
(6) [1899] 2 Ch. 578; [1900] 2 Ch. 121.
(7) [1902] A. C. 429.

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lation which he was carrying jointly with Walmsley. This was all untrue, but she never dreamed of asking him for paper or document showing his interest in the speculation, or of going to Walmsley, or elsewhere, for information, as a competent or independent adviser would have done; she simply believed every statement of her father as gospel truth. She had, undoubtedly, capacity to contract generally, but not under the special circumstances of the case unless she had independent advice. Walmsley knew of the confidential relationship existing between the father and daughter; that she was living with him and her mother in the same house; that she was young and yet under the dominion and control of her father; and, if he took no care to see that she got that independent advice, he did so at his own risk and cannot consider himself a holder in due course within sections 29 and 30 of the Bills of Exchange Act. The expression "holder in due course" has no magic effect. It means nothing more than the "holder in good faith and for value" known to the commercial law in force before that Act, but he is in no better position under the Act. He had notice of the defect in his title, and knew, or is presumed to have known, of the illegality of the obligation of Miss Cox without competent and independent advice, and for that reason he cannot recover, even under the provisions of the Bills of Exchange Act. This is fully established by the cases cited above and it will be sufficient to quote from a few of them.

In *Powell* v. *Powell* (1), Farwell J. said:

> On the authorities it seems to me not to be a question of actual pressure or deception, or undue advantage or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption and must be rebutted.

In *Allcard* v. *Skinner* (2), Lord Lindley said:

(1) [1900] 1 Ch. 243. (2) 36 Ch. D. 145.

So long as the relation between the donor and the donee which invalidates the gift lasts, so long it is necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor.

In *Rhodes* v. *Bate* (1), Sir G. J. Turner, L. J. said:

Age and capacity are great considerations in cases in which the principle does not apply; but, I think, they are of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence.

In *Liles* v. *Terry* (2), Lopes J. said:

I do not think that evidence of any explanation by the solicitor of the document or any assistance given by him to enable the client to understand the effect of it is of any avail to prevent the application of the general rule. What the solicitor ought, in such case, to do is to suggest to the client that, in order to make the gift effectual, the client should procure independent professional advice.

In *Berdoe* v. *Dawson* (3), securities obtained from sons, aged twenty-five and a half and twenty-three years respectively, for their father's debt were set aside although the solicitor of the creditor declared positively that they knew what they were doing and that he gave them full information upon the subject and explained everything to them. The Master of the Rolls, Sir John Romilly, said:

Now one of the principal things which the court always requires, in matters of this description, is, (as Lord Eldon observes in several cases), proof that it was a "righteous transaction," and the strongest and best evidence is this—that the person giving up his property should have an independent solicitor and independent advice in the matter. * * *

The case of *Baker* v. *Bradley* (4) is a distinct authority on subject. The marginal note is this: "A mortgage was made of proper by a father and son, immediately after the latter had obtaine his majority, to secure debts due from the father, to some extent incurred in improvements on the property and in maintaining and educating the son. The mother joined in the security for the purpose of subjecting to it her separate estate, which she was, however, by a clause

(1) 1 Ch. App. 252.
(2) [1895] 2 Q. B. 679.
(3) 34 Beav. 603.
(4) 7 DeG. M. & G. 597.

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not recited or noticed in the mortgage, restrained from anticipating. The son had no separate advice on the occasion. *Held*, that the mortgage was not capable of being supported as a family arrangement, but was void as obtained by undue influence."

In *Sercombe* v. *Sanders* (1), the same eminent judge observes:

It is not sufficient to show that a man knew what the actual transaction was, you must also show that he is emancipated from control and had the advantage of a separate solicitor.

In *De Witte* v. *Addison* (2), a case much similar to the present one, where two daughters, one nearly twenty-three years old and the other just over twenty-one, mortgaged their reversionary interest under a certain will to pay their father's debts and save him from being adjudicated a bankrupt, Romer J. said:

I may here state that I repudiate the suggestion made on behalf of the defendants in this case, that the plaintiff must be taken not to have acted under parental influence, within the meaning of that phrase as used in the authorities, because no direct threat by the father is apparent, or because the plaintiff acted from affection for the father, and from that pressure that was brought to bear upon her morally by his pecuniary position and liabilities. Under these circumstances, under this parental influence, under the pressure of the father's position, she executes the mortgage in question. In the transaction she has no independent advice, in my opinion, within the meaning in which that phrase is used in the authorities that are cited and bear upon a case like this.

In the same case on appeal, after quoting the language of Fry J. in *Bainbrigge* v. *Browne* (3), Lord Lindley says:

Then the next point which arises is this: Against whom does this inference of undue influence operate? Clearly, it operates against the person who is able to exercise the influence (in this case it was the father), and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity.

In this case of *Bainbrigge* v. *Browne* (3), the trans-

(1) 34 Beav. 382. (2) 80 L. T. 207.
(3) 18 Ch. D. 188.

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action was upheld, however, on the evidence. Fry J. added in conclusion:

I think that the defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control, fully emancipated from him, assisted by the advice of their friends, and by the advice of a solicitor who was bound to do his duty to them.

In *Huguenin* v. *Baseley* (1), which is looked upon as the leading case upon the subject, the Lord Chancellor, Lord Eldon, says:

With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt should be entertained, whether it is not competent to a court of equity to take away from third parties the benefits which they have derived from the fraud, imposition or undue influence of others. The case of *Bridgman* v. *Green* (2), is an express authority that it is within the reach of the principle of this court to declare that interests, so gained by third persons, cannot possibly be held by them.

In *Maitland* v. *Irving* (3) the Vice-Chancellor, Sir L. Shadwell, said:

There may not have been in the minds of Mr. Brown and Mr. Irving the knowledge of the principles which govern this court. But it seems to me to be very extraordinary that men of mature age, who were carrying on a lucrative business, were told by a gentleman, who was himself unable to perform his contract with them, that he would procure a young lady who was residing with him, who was possessed of a large fortune and to whom he had been guardian, to give them a guarantee for the fulfilment of his contract—it seems, I say, very extraordinary that, with full knowledge of all these circumstances, they should have at once acceded to the proposal without making any inquiry or taking any pains to ascertain whether the young lady was a free agent and perfectly willing, with a full knowledge of the consequences, to do what her guardian said he would invite her or propose to her to do.

The last case I wish to quote is *Espey* v. *Lake* (4), which is, perhaps, more in point, as the liability of

(1) 14 Ves. Sr 273.
(2) 2 Ves. Sr. 627.
(3) 15 Sim. 437.
(4) 10 Hare 260.

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the child, a young lady in her twenty-second year, appeared on the joint promissory note of herself and her step-father, given as surety for the debt of her step-father, in whose house she had been residing with him and her mother for many years. The holder of the note, Lake, was not charged with any misrepresentation or personal negotiations or interviews with the daughter who signed solely on the representations of her mother and step-father. Lake knew of the relations between the step-father and daughter; he was his brother in-law and constantly in the habit of meeting the daughter.

The Vice-Chancellor, Sir G. J. Turner, found this knowledge beyound doubt, but nothing more. He said:

> The loan was to be a loan by Lake to Speakman, the step-father of the young lady. Now, what next took place? I take the circumstance from Lake's own affidavit in reply to this case. Lake says, "I asked for security, and he, (Speakman), said he had no security to offer but that of his step-daughter, meaning Miss Espey." It is clear, therefore, that Lake knew that the only security he could have was that of the plaintiff, the step-daughter of Speakman, who was, at the time, living in the house with her step-father, and under his influence. Lake, knowing these circumstances, nevertheless took the joint and several promissory note of Speakman and the plaintiff, dated the 1st of January, 1843, for securing the £500.

The question arose on a motion in restraint of execution. The Vice-Chancellor, Sir G. J. Turner, finally said:

> I take it to be quite clear that the principles of this court go to this extent,—that, in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken which constitutes anything in the nature of a trust, or anything approaching to the relation of guardian and ward or of standing in *loco parentis* to the surety, this court will not allow such security to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily and without any

influence having been exercised by the party in whose favour the security is made, or by the party who was the medium or instrument of obtaining it. * * * * *

In the application of the principles of the court I see no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the guardian who obtains such a security from his ward. The defendant, Lake, left it to Speakman, who had influence over his young ward, as she may be called, to induce her to join in the security, thereby placing her more directly under undue influence than if he had applied for the security himself. Such a security cannot be maintained consistently with the principles of this court.

It has been contended that our decision in *Trust and Guarantee Co.* v. *Hart* (1), conflicts with this conclusion. I cannot see that it does. The gift in that case was not by the son to his father for the benefit of a creditor, but by a father to his son for the benefit of his grandchildren; it was a just family arrangement, resting on a very different basis from the one involved in this case. As stated by Mr. Justice Taschereau, who delivered the judgment of the court, at p. 559;

He, (the donor,) never, in fact, was under his son's influence. It is a gift by his son to him that might have been suspicious.

But is Mrs. Cox standing in a different position from that of her daughter? That is the last question we have to examine. Was she not, like her daughter, known to Walmsley to be under the control and influence of her husband? True, a married woman may validly contract to the extent of her separate property "in all respects as if she were a feme sole." (Ont. Rev. Stat., 1897, ch. 163). But her daughter, being of age, can exercise the same and even greater rights. Why then a different rule in the determination of undue influence?

The point does not seem to be settled by authority binding upon us. There are decisions pro and con which will

(1) 32 Can. S. C. R. 553.

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be found collected in White and Tudor's Leading Cases in Equity, (ed. 1886), vol. 2, pp. 621 to 641; Kerr on Fraud and Mistake (ed. 1902), pp. 172, 173; and in Cyclopedia of Law and Procedure (1903), vol. 9, pp. 456 to 459. Mr. Justice Cozens-Hardy, in the late case of *Barron* v. *Willis* (1), referred to some of these decisions and held that the relation of husband and wife is not one to which the doctrine of *Hugenin* v. *Baseley* (2) applies, although he admits that text-writers seem to adopt the opposite view. In appeal, his decision was reversed and the transaction set aside, not on that ground, which was not even discussed by the judges, but on a different conclusion of fact.

In a more recent decision rendered by the Privy Council of *Turnbull* v. *Duval* (3), a Jamaica appeal, it was conceded that the question was not yet settled, the case turning specially upon the ground of fraud by the husband for which the creditors were held responsible. Lord Lindley said:

> Whether the security could be upheld if the only ground for impeachment was that Mrs. Duval had not independent advice, has not really to be determined. Their lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Company are unaffected by such pressure and ignorance. They left everything to Duval and must abide the consequences.

Relief was granted, but to do so in the present case the point of law must, I conceive, be determined.

I confess that the view advocated by the text-writers commends itself to my judgnent and knowledge of human nature. Can the wife be considered an entirely free agent as long as she lives with her

(1) [1899] 2 Ch. 578. (2) 14 Ves. 273.
(3) [1902] A. C. 429.

husband in matters where her interest conflicts with that of her husband? Is the mother more capable than the daughter of forming a full and true comprehension of business affairs? Experience teaches us and the law reports establish abundantly that married women, in nearly all cases, are under the control and influence of their husbands and rarely can resist their mere demands and requests, much less their solicitations and supplications, and that these generally prevail, while threat and violence seldom do. The presumptive influence of the husband over his wife so permeates the laws of England that, till recently changed by parliament, all offences committed by a married woman in presence of her husband, except high treason and murder, were presumed to have been committed under coercion. Upon what ground can coercion and undue influence not be presumed in civil matters, when husbands or third parties through them claim extraordinary benefits and unfair advantages from their wives, is more than I can conceive. I cannot see that a material distinction can be made between the case of the mother and that of the daughter; the control may exist on some occasions in a less degree, but it is not a question of degree which may depend upon circumstances; some daughters may be more intelligent and firm than others; boys, especially those trained in business, may be more competent than their sisters; it is conceded that all hold the same legal position and that it always raises the presumption of undue influence. Why a different rule in the case of the wife? Can it be supposed that Walmsley did not know that Mrs. Cox was not free from that influence? He had not only presumptive but positive knowledge of the situation. In 1899, when one of the first notes was signed, Cox writes to him that *at last he persuaded her to sign it.* I have

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come to the conclusion that the rule which governs the case of Miss Cox applies also to that of Mrs. Cox and that, in fact, it applies to all near relations or persons placed in the same position of dependence and control. I think that this conclusion comes within the language of Lord Cranworth, in *Smith* v. *Kay* (1).

> In my opinion, although this bill is framed upon the ground of this supposed fraud, the circumstances of the case, as now proved, make it abundantly clear that this fraud was totally immaterial in order to entitle the plaintiff to set aside this bond, upon the ordinary principle of this court which protects an infant or any other person who is from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. My lords, there is, I take it, no branch of the jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons, in a situation of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependent. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances. The principle is not confined to those cases, as was well stated by Lord Eldon in the case of *Gibson* v. *Jeyes* (2), in which he says, it is "the great rule applying to trustees, attorneys or anyone else."

I have less hesitation in arriving at this conclusion that I am inclined, on the evidence, to think that both these ladies, as in *Turnbull* v. *Duval* (3), *Bridgeman* v. *Green* (4), *Huguenin* v. *Baseley* (5) and *Smith* v. *Kay* (1), were, in fact, badly pressed and grossly deceived as to the nature of the transaction and that Walmsley became an active party to the fraud by the promise of $1,000 which it is hardly possible, under the circumstances, not to consider as a reward to Cox for betraying the persons who were entitled to his protection.

I would, therefore, allow the appeal and dismiss the action of the respondent against the appellants with costs in all the courts.

(1) 7 H. L. Cas. 750.
(2) 6 Ves. 266, 278.
(3) [1902] A. C. 429.
(4) 2 Ves. Sr. 627.
(5) 14 Ves. 273.

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DAVIES J.—After much consideration and considerable doubt so far as the appellant, Alice R. Cox, the wife of E. S. Cox, is concerned, I have reached the conclusion that the appeal must be allowed as regards both the appellants.

I rest my decision upon the principle that both the wife and daughter, at the time they signed the notes sued on, stood towards E. S. Cox in the position of parties having confidential relationship with him; that the law, on grounds of public policy, presumes that the transaction was the effect of influence induced by these relations, and that the burden lay upon Walmsley, the indorsee of the notes and the beneficial plaintiff in the action, who took them with notice and full knowledge of the relationship, of showing that the makers had independent advice.

I concur with my colleagues in holding that the Bills of Exchange Act does not relieve an indorsee getting possession of a note under circumstances and with knowledge, such as in this case, from such burden.

I also agree that, apart from this beneficial and salutary rule of public policy, the facts would not in themselves be sufficient to justify interference with the judgment of the Court of Appeal.

With respect to the case of Evelyn S. Cox, the daughter, I content myself with concurring in the judgments prepared by my brothers Girouard and Killam which I have read, and I adopt the reasoning and conclusion of my brother Girouard so far as Mrs. Cox's case is concerned.

I admit that the authorities are by no means clear as to whether or not the wife does stand towards her husband within those degrees of confidential relationship requiring independent advice as a necessary condition precedent to the presumption of the validity of

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the gift or grant from her to him. Cozens-Hardy J. in the late case of *Barron* v. *Willis* (1), seemed to think that he was bound by authority to hold that the relationship of husband and wife was not one of those within the doctrine established by *Huguenin* v. *Baseley* (2), and the Court of Appeal (3), which reversed his decision upon another point, makes no reference to his judgment on that question.

In addition to the cases cited and commented upon by my brother Girouard, and as being at variance with those by which Cozens-Hardy J. thought himself bound, I would refer to *Coulson* v. *Allison* (4). There a widower had married the sister of his deceased wife (a marriage not legal by the laws of England), and it was held, nevertheless, by Lord Chancellor Campbell, that the relationship thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister (with whom he had gone through the form of a marriage), the onus of showing that, at the time of entering into the transaction, she was fully and duly informed of all the circumstances of the case and of the possible consequences of what she was about to do.

In the case of *McClatchie* v. *Haslam* (5), it was said by Kekewich J. in setting aside a deed given by a wife to secure a debt due by her husband to a society of which he was secretary, that the rule laid down by Lord Westbury in *Williams* v. *Bayley* (6), was at least as strong in the case of a husband and wife as of a father and a son.

A security given by one person for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon

(1) [1899] 2 Ch. 578.
(2) 14 Ves. 273.
(3) [1900] 2 Ch. 121.
(4) 2 DeG. F. & J. 521.
(5) 63 L. T. 376.
(6) L. R. 1 H. L. 200-218.

the free and voluntary agency of the person who enters into it. Where the person giving that security is the wife of the debtor it does appear to me desirable and necessary that the same guarantee of that freedom and voluntary action should be made plain to the court before the security is upheld as would be required in the case of a child and a parent. I would even go so far as to say more desirable and necessary because, in my opinion, the peculiarly sacred and confidential relationship existing between husband and wife renders the exercise of undue pressure more easy and effective on the part of a husband than a father.

The influence of a man over a woman to whom he is engaged to be married is presumed to be so great that the court will not only look with great vigilance at the circumstances and situation of the parties, but will *require satisfactory evidence that it has not been used.* See *Page* v. *Horne* (1), where, at page 235, Lord Langdale, master of the Rolls, says:

> It is true that no influence is proved to have been used, but none can say what may be the extent of the influence of a man over a woman whose consent to marriage he has obtained.

In the case of *Cobbett* v. *Brock* (2), which was an action brought by a married woman to set aside an ante-nuptial security she had given for the debt of a man to whom, at the time, she was engaged to be married and whom she subsequently married, Sir John Romilly, the Master of the Rolls, said:

> I fully adhere to what I expressed in the cases of *Cooke* v. *Lamotte* (3) and *Hoghton* v. *Hoghton* (4), and, *if this were a case between Mr. Brock and his wife, I should require him to prove all the requisites I have pointed out in those cases as necessary to give validity to the transaction.*

See also Pollock on Contracts (7 ed.), 600-603; Kerr on Fraud (3 ed.), page 172.

(1) 11 Beav. 227.
(2) 20 Beav. 524.
(3) 15 Beav. 234.
(4) 15 Beav. 278.

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The law as it prevails in the United States on the question is thus summed up in 27 Am. & Eng. Encycl. (1 ed.) pp. 480-482, under the head of "Undue Influence."

> No relation known to the law affords so great an opportunity for the exercise of undue influence as that existing between husband and wife. Owing, however, to the common law disabilities of a married woman, the older cases do not present many instances of the application of the rules governing their transactions with their husbands.

And, after referring to the close scrutiny to which transactions between husband and wife will be subjected in equity, where they will be set aside upon evidence which might be insufficient were the parties in no confidential relation to each other, the text goes on:

> The principle is independent of any presumption and is universally recognized. Nearly all the courts, however, go further than this and bring the matter in line with the decisions as to agreements between other parties to fiduciary relationship, viz., that a *presumption of undue influence exerted by the husband arises* which is rebuttable by proof of the fairness of the transaction, full understanding and free agency on the part of the wife and that there was no fraud, concealment or imposition on the part of the husband.

The compiler refers to many authorities in support of the doctrine as laid down in the text, the reasoning in which is satisfactory and which seems fully to support the principle above quoted. See also Cycl. Law & Proc. vol. 9, page 456; Bispham's Principles of Equity (6 ed.), sec. 237; Pomeroy's Equity Jurisprudence (2 ed.) sec. 963.

I would also refer to the case of *McCaffy* v. *McCaffy* (1), where the same principle was recognized and approved.

The Judicial Committee of the Privy Council in the late case of *Turnbull* v. *Duval* (2), seems to have left the question still an open one.

(1) 18 Ont. App. R. 599. (2) [1902] A. C. 429.

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On the whole, and after much consideration, I am of the opinion, on grounds of public policy, that the safest and best rule to adopt is to hold that the confidential relations existing between the husband and wife bring them within the rule established by *Huguenin* v. *Baseley* (1), and that this appeal should be allowed as regards both appellants.

As regards third parties the rule is clear that where a gift has been obtained by undue influence, either presumed or actually proved, a purchaser for value subsequently taking with notice of the equity thereby created or with notice of the circumstances from which the court infers the equity will be bound thereby. *Bainbrigge* v. *Browne* (2). In the case before us, no possible doubt can exist that Walmsley, the beneficial plaintiff, when he took the notes in question, was fully aware of the existence of the relations between Mrs. and Miss Cox and E. S. Cox, and was, therefore, bound by the rule.

KILLAM J.—I agree that the appeal of the defendant Evelyn S. Cox should be allowed and the action dismissed against her, with costs here and in all the courts below.

After the exhaustive examination of the authorities made by my brother Girouard it is quite unnecessary to discuss them further. The equitable principle is well known and firmly established. A child recently come of age and still subject to parental dominion and influence to the extent of not having wholly become a free agent, is not deemed capable of making a binding donation to the parent or of becoming security for the parent or entering into a transaction with the parent under which the latter obtains a benefit, without inde-

(1) 14 Ves. 273.

(2) 18 Ch. D. 188.

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pendent advice. Family settlements are a class by themselves and do not now require consideration.

I think that the defendant Evelyn S. Cox was still under the parental dominion when she signed the notes in question, so far as to be entitled to the application of this principle.

The plaintiff held the note for the benefit of Thomas Walmsley and was subject to all the equities to which Walmsley was subject. Walmsley had full notice of the relative positions of E. Strachan Cox and his daughter and of the latter's prospects. This was sufficient to make him subject to the equities between them in taking the note.

In my opinion, the Bills of Exchange Act did not affect the exercise of the principles upon which a court of equity raises and enforces trusts or avoids transactions for fraud, actual or constructive.

The definition of a "holder in due course" given by section 29 of the Act excludes one having notice of any defect in the title of the person who negotiated the bill or note, and it appears to me that this is not to be confined to defects recognized by courts of law.

On the other hand, it is not shewn that Walmsley had notice of the actual misrepresentations made by Cox to his wife and daughter which operated towards inducing them to join in making the notes in question. In my opinion the presumption arising from the mere relation of parent and child and the circumstances known to Walmsley do not apply to the relation of husband and wife and the circumstances affecting them known to Walmsley.

In *Field* v. *Sowle* (1), a wife had joined her husband in a promissory note to the plaintiff for money advanced by him to the husband. The wife set up

(1) 4 Russ. 112.

undue influence and coercion, but gave no proof thereof. Sir John Leach M.R. said:

> The signature of the promissory note by the defendant Sarah Cowle is *primâ facie* evidence to charge her; and it is upon her to repel the effect of her signature by evidence of undue influence and not upon the plaintiff to prove a negative.

In *Barrow* v. *Willis* (1), Cozens-Hardy J. said, at page 585:

> It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Basely* (2), applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid.

While the decision was reversed on appeal (3), it was upon the ground of the giving of a benefit to the son of the solicitor who advised in the transaction.

In *Turnbull* v. *Duval* (4), Lord Lindley, in delivering the judgment of the Judicial Committee of the Privy Council, said, at page 434:

> In the face of such evidence their lordships are of opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it.

The decision rested upon the ground that the security was obtained by pressure to which the appellant's agent, who was trustee under the will of the wife's father, was directly a party.

While the Judicial Committee left the point in a measure open, I am of opinion that the weight of

(1) [1899] 2 Ch. 578.
(2) 14 Ves. 273.
(3) [1900) 2 Ch. 121.
(4) [1902] A. C. 429.

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English authorities is in favour of the view that the mere relation of husband and wife does not give rise to such a presumption that the giving of a security by a wife for a husband is obtained by undue influence as to place upon the party obtaining it in good faith in other respects the onus of displacing the influence. The trend of modern legislation towards the emancipation of the wife renders the presumption more difficult.

There is, however, a further contention that Walmsley had procured Mr. Cox to release to him certain shares of stock held by Walmsley as security for previous notes given by Mrs. Cox, the amounts of which were included in the notes now in question, and that this had the effect of discharging Mrs. Cox from liability on the previous notes and constituted a defence to the present action in favour of her and her daughter, either wholly or *pro tanto*. This contention was disposed of by the learned Chief Justice of Ontario, as follows :—

> It is true that the amount of the three promissory notes sued on is made up in part by taking into account the two promissory notes previously made by the defendant, Alice R. Cox, and held by Walmsley. These defendants say that their co-defendant, E. Strachan Cox, procured the defendant, Alice R. Cox, to sign them by representing that he was interested in the shares and needed money to pay advances in respect of them. In point of fact, the smaller of the two notes, that for $900, was not made until some weeks after the release had been given, and although that for $3,000 bears date eleven days previously to the release, it was not discounted by Walmsley until after the release had been agreed upon.

Walmsley advanced moneys to Cox on Mrs. Cox's note for $3,000 at different times. As I read the evidence, $600 were advanced upon it upon the 10th of October, 1899, the day before the giving of the release, but the balance not until after the release.

The note for $900, as the learned Chief Justice has said, was not made for some weeks after the release.

But I am further of opinion that the released shares were not held as security for the $3,000 note at all. When the note was transferred to Walmsley, Cox signed a memorandum in these words:

> In consideration of Thomas Walmsley making an advance to me of (3,000) three thousand dollars, re-payable on call with interest at..... per cent per annum, I have assigned to him as collateral security for the due payment of said advance, 10,000 shares Diamond Jubilee Mining Dev. Co., Limited, and agree that these and all previous collateral securities shall be held as securities generally, for all advances previously or hereafter made, and I agree to keep up a cash margin thereon of not less than twenty per cent.

The released shares had been bought by Walmsley and Cox on joint account and were held by a bank to secure advances to both of them for the purchase. They do not appear to me to come within the terms of the memoradum, which related to securities previously given to Walmsley for loans by him to Cox, and I think that the negotiation by Walmsley of Mrs. Cox's note should not be deemed to have effected the right of Cox and Walmsley to deal with those shares as their interest might appear to demand.

Thus, the fact that an advance was made upon the note for $3,000 before the release seems immaterial.

The other defences raised below were not set up before us.

In my opinion, the judgment against Mrs. Cox should stand but that against Miss Cox should be set aside.

*Appeal allowed with costs.*

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Robertson & Maclennan.*