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*Nov. 4, 5
*Dec. 20

SERGE CALMUSKY AND ANOTHER (PLAINTIFFS) ..... APPELLANTS;

AND

EVA KARALOFF (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contract—Vendor and purchaser—Sale of homestead by aged father to son—Action to set aside agreement—Fraud and undue influence—Fiduciary relationship—Whether onus of establishing validity on son—Whether inadequacy of consideration sufficient to disturb the agreement.

In an action brought to set aside, on grounds of fraud and undue influence, an agreement for the sale of a homestead made by an aged father in good health and in possession of all his faculties to his grown-up son (since deceased), these facts do not constitute a fiduciary relationship between the parties whereby the courts will presume "confidence put and influence exerted" by the son, nor was any evidence adduced

*Present:—Kerwin, Hudson, Rand, Kellock and Estey JJ.

(1) (1879) L.R. 5 Exch. Div. 264, at 273.

of such "confidence put and influence exerted" that would place the burden upon the respondent (the widow and administratrix *at litem* of the son) to prove the agreement was made by the father voluntarily and with an understanding of its nature and effect. The appellants, administrators of the father's estate, are not entitled to the benefit of this presumption arising from the relation of parties. The onus of proof remained upon them. *Krys* v. *Krys* ([1929] S.C.R. 153) and *McKay* v. *Clow* ([1941] S.C.R. 643) distinguished.

Under the circumstances of this case, relative to the question of consideration of the contract, while the courts will inquire as to whether advantage is taken or influence exerted, yet when it is found that neither of these exist and that the parties were equally in possession of all the facts, mere inadequacy of consideration or that it was an improvident agreement will not suffice to disturb the contract.

Judgment of the Court of Appeal, dismissing the appellant's action ([1946] 2 W.W.R. 32) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, Taylor J. and dismissing the appellant's action to set aside an agreement for the sale of a homestead by an aged father to his son on grounds of fraud and undue influence.

G. H. Yule K.C. for the appellants.

J. E. MacDermid K.C. for the respondent.

The judgment of Kerwin, Hudson, Kellock and Estey JJ. was delivered by

ESTEY J.—The appellants, executors of the late Sam W. Karaloff, ask in this action that an agreement for sale, dated the 3rd day of November, 1934, between the late Sam W. Karaloff and his son, the late John S. Karaloff, be set aside on the ground that the latter had fraudulently and by the exercise of undue influence induced his father to make the said agreement. Plaintiffs also ask the defendant, Eva Karaloff, the widow of the late John S. Karaloff and executrix of his estate, to account for the crops grown upon the said lands and assets that came into her hands, the property of or for the late Sam W. Karaloff.

Sam W. Karaloff died January 2, 1938; John S. Karaloff died December 10, 1943, and Polly Karaloff, the wife of the late Sam W. Karaloff, died August 10, 1944.

(1) [1946] 2 W.W.R. 32; [1946] 2 D.L.R. 513.

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The learned trial judge found in favour of the plaintiffs (appellants), and his judgment was reversed by unanimous decision of the Court of Appeal in Saskatchewan.

The late Sam W. Karaloff and his wife, the late Polly Karaloff, resided for years on the quarter section in question (North-West Quarter of Section Sixteen (16) in Township Forty-Four (44), in Range Five (5), West of the Third Meridian). They had a family of eight. One of their sons, John, had farmed in the same district. He lost his farm and went to British Columbia, where at times he worked and at other times was on relief. In 1930 the appellant, Serge Calmusky, at the request of his father-in-law, the late Sam W. Karaloff, wrote John asking him to return home. John did so and worked upon the farm with his father, then a man of about 70 years of age.

The agreement in question was executed on the 3rd of November, 1934, between the late Sam W. Karaloff and his son, the late John S. Karaloff. Under this agreement John purchased from his father the above described quarter section (N.W. 16-44-5-W-3), together with all livestock and machinery thereon

> for the price of one-fourth of share of wheat grown on the land above till my death or till the death of my wife, Polly.

The purchaser agreed to pay the balance ($70) owing on a cream separator, all the taxes, of which there was a small amount in arrears, and not to ask wages for his services since he returned in 1930. It also contained the two following clauses.

> The Vendor and his wife shall have full right to reside in the buildings on this said land till their respective deaths. I revoke all my former Wills or Agreements made by me prior to the date of this agreement.

This agreement was prepared in the office of one Anton Kryzanowski, a notary public and justice of the peace in the nearby village of Blaine Lake. He deposed that the parties came to his office and both of them instructed him as to the contents of the agreement; that as he was a Ukranian he had an interpreter present who spoke Russian, the language of both Sam W. Karaloff and his wife, Polly. This interpreter also signed as a witness. After the agreement was executed by the parties and witnessed by John Molchanoff, Wasyl Hrycuik and Anton Kryzanowski, the

latter, who was acquainted with the parties and had done business for the late Sam W. Karaloff, retained both copies in his possession.

The requirements of *The Homesteads Act,* 1930, R.S.S., c. 82, designed for the protection of the wife, were complied with in this case, not on the 3rd day of November, 1934, when the agreement was executed by the husband, but over nine months later on the 8th day of August, 1935, when the late Polly Karaloff attended at the office of Mr. J. J. Coflin, a justice of the peace in Blaine Lake, and signed the agreement:

> And I, Polly Karaloff, wife of the above-named Sam W. Karaloff, do hereby declare that I have executed these presents for the purpose of relinquishing all my rights to the said homestead in favour of John S. Karaloff the within-named purchaser.
>
> Witness — her — Polly X Karaloff — mark
>
> J. J. Coflin

Mr. Coflin discussed the matters relative to this agreement through an interpreter and after examining Mrs. Karaloff, as required by *The Homesteads Act,* he completed the following certificate which is endorsed upon the agreement:

> Certificate under *"The Homesteads Act, 1920"*
>
> I, Jay J. Coflin, a Justice of the Peace in and for the province of Saskatchewan and residing at the village of Blaine Lake therein, do certify:
>
> That I have examined Polly Karaloff, wife of Sam W. Karaloff, the owner and vendor named in the within indenture, separate and apart from her husband, and she acknowledges to me that she signed the same of her own free will and consent and without any compulsion on the part of her husband and for the purpose of relinquishing her rights in the homestead in favour of John S. Karaloff, the purchaser named in the within indenture, and further that she was aware of what her rights in the said homestead were.
>
> And I further certify that I am not disqualified under section 3 of *The Homesteads Act* from taking the above acknowledgment.
>
> Dated the 8th day of August, 1935.
>
> J. J. Coflin J.P.

The revocation of "all my former Wills or Agreements" in the above quoted provision of the agreement has reference to a document dated February 22, 1932. On that date the late Sam W. Karaloff executed a document written by Alexander Nazaroff, a local school teacher, and witnessed by Alexander Nazaroff and Fred Derkachenko. It provided that at his death his son John Karaloff should "remain the sole owner of all my property movable and

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immovable", and then followed a description of the above quarter section, his livestock and machinery. It provided that he and his wife, so long as either might so live, would be joint managers with John S. Karaloff, and that the farm should be managed in the best interests of all, including "the future wife of John S. Karaloff". It further provided that

> John is to take care of me and my wife during the whole period kindly, politely and generously during our old age in sickness and in other adversities.

It further provided for certain specific gifts to other members of the family. John had not been paid for his services since his return in 1930, and it contained a provision that if Sam W. Karaloff should at any time sell the farm that he would pay John $2,500.

The fact of its execution nor the competency of Sam W. Karaloff to do so is not questioned, nor is there any suggestion of fraud or undue influence with respect to this document.

John S. Karaloff married the respondent, Eva Karaloff, on October 12, 1932.

Under date of September 24, 1934, the said John S. Karaloff purchased from his brother, Alexander S. Karaloff, 80 acres of land, being the South Half of the South-West Quarter of Section 21, in Township Forty-Four (44), in Range Five (5), West of the Third Meridian, for $1,000, payable $125 in cash, $75 on the 24th of October, 1935, and the balance by crop payments.

It is the same quarter section (N.W. 16-44-5-W-3), the livestock and farming equipment which constituted the subject matter of both the document of February 22, 1932, and the agreement for sale in question. Under the former they were all managers and all worked for the "common benefit" with the added provision that

> John is to take care of me and my wife during the whole period kindly, politely and generously during our old age in sickness and in other adversities.

All of these parties, the father, mother and their son John, had died prior to the trial and therefore no explanation is given as to why this second agreement was made.

The agreement for sale dated November 3, 1934, was made between a father about 74 years of age, in good health, active and in posession of all his faculties, and one of his sons about 44 years of age. These facts do not constitute a fiduciary relationship between the parties, nor was any evidence adduced of "confidence put and influence exerted" by the son that would place the burden upon the respondent to prove the agreement was made voluntarily and with an understanding of its nature and effect. The contention of the appellants that they were entitled to the benefit of this presumption cannot be maintained. The onus of proof remained upon them. *Wallis* v. *Andrews,* (1); *In re Coomber,* (2); *Axeworthy* v. *Staples,* (3).

In cases where a fiduciary relation does not subsist between the parties, the Court will not, as it does where a fiduciary relation subsists, presume confidence put and influence exerted: the confidence and the influence must in such cases be proved extrinsically, but when they are proved extrinsically the rules of equity are just as applicable in the one case as in the other. Kerr on Fraud and Mistake 6th ed., p. 197.

The case of *Krys* v. *Krys,* (4) relied upon by the appellants, is distinguishable in that there the learned trial judge found "the son agreed to act as trustee for the father." In that relationship there is the presumption of "confidence put and influence exerted". Then, too, in the case of *McKay* v. *Clow,* (5) a deed of conveyance and an agreement were executed by "an enfeebled old man" who, though he requested it, was denied the privilege of obtaining legal advice, and who was threatened that if he did not sign the agreement he would be left in a helpless condition. In addition there was evidence of disagreement and domination extending over a period of time. It was upon evidence of this character that the Court placed the onus upon the transferees.

There is no finding of the learned trial judge that John was a trustee for his father, nor is there any evidence upon which such a finding could be made as in *Krys* v. *Krys,* (4) and there is no evidence of such weakness on the part of the father, nor such evidence of domination and threats on the part of the son as were present in *McKay* v. *Clow* (5).

(1) (1869) 16 Gr. Ch. 624.
(2) [1911] 1 Ch. 723.
(3) (1924) 26 O.W.N. 219.
(4) [1929] S.C.R. 153.
(5) [1941] S.C.R. 643.

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Chief Justice Martin, on behalf of the Court of Appeal, appropriately summarized the position up to the conclusion of the agreement:

> What took place between the parties prior to the execution of the agreement for sale does not appear. There is no evidence that the execution of the agreement was obtained by fraud, undue influence or duress on the part of John at or prior to the time when the parties respectively signed the agreement or that he took advantage of their illiteracy. The fact that Polly Karaloff executed the agreement nine months after her husband's execution of it indicates that the agreement was not entered into without due consideration. The father was at the time 75 years of age, almost three years older than when he executed the will of February 22, 1932, which provided for joint management of the farm and it may well be that a reason for the second agreement was that he desired to be relieved from any responsibility and to place the entire management in the hands of his son. Moreover, if John at the time was engaged in a scheme to take advantage of his father as suggested he might have had him execute a transfer of the land, which no doubt in his opinion at least would have made his position more secure.

A witness, who was councillor for the municipality for a period of ten years from 1931, deposed that John and his father were at the municipal office on a Saturday late in 1934 when the father stated that he had sold his land to John and to collect the taxes from him. When the secretary-treasurer stated there were some arrears owing, John said he would take care of them. That was in accord with the terms of the agreement.

The appellants stressed the importance of certain incidents in 1937. It appears that after the making of the agreement there was no reference thereto until that year. The father retained his health until some time in 1937 and he and John worked together on the farm.

On the 6th of July, 1937, the appellant, George S. Karaloff, who farmed about a quarter of a mile from his brother John and his father, took the latter into Saskatoon for medical attention and while there his father executed his will. Under its provisions he gave 1/3 of his real and personal estate to his wife, 2/9 to John and 4/9 to be divided between his other seven children.

Within a week or two of that trip into Saskatoon on July 6, 1937, George and his father called at Kryzanowski's office where the agreement in question had remained. George deposed that he there read the agreement to his

father who became very angry, made serious accusations against Kryzanowski and said that he meant "different kind of papers."

The statements made by the deceased, Sam W. Karaloff, in this conversation were admitted in evidence by the learned trial judge but rejected in the Court of Appeal. Counsel for the appellants submitted the statements were admissible upon the authority of *Shanklin* v. *Smith,* (1). In that case in the Courts below the statements were not admitted as evidence of the facts asserted but only evidence as to the deceased's state of mind. An appeal to this Court was dismissed (2), but the reception of this evidence was not discussed. Nor is it necessary to decide the question of its admissibility here because even if the statements of Sam W. Karaloff are admitted on this limited basis as in *Shanklin* v. *Smith,* (1) they do no more than evidence his state of mind in 1937 and perhaps provide a basis for an inference of his state of mind in 1934. The lapse of time as well as the age and illness of Sam W. Karaloff, and the circumstances under which they were made, make it very doubtful if any inference, the weight of which would be so negligible, ought to be drawn therefrom.

At Kryzanowski's office the conversation was concluded, as George deposed, when his father became so excited and angry that George was "afraid that he might collapse". As a consequence he took him home. At home, George deposed, the father became involved in a heated conversation with John with respect to this agreement when he accused John of fooling him and used language vile and abusive and said that he was going to call in the elders. The latter was explained to be a Russian custom for settling difficulties.

This conversation was admitted in evidence as statements made in the presence of John. As such they are admissible but constitute evidence against John only in so far as he by words or conduct adopted or admitted them: Phipson, 8th Ed., 240; *Rex* v. *Christie,* (3) *Chapdelaine* v. *The King,* (4). No evidence is given as to John's

(1) (1932) 5 M.P.R. 204.
(2) [1933] S.C.R. 340.
(3) [1914] A.C. 545.
(4) [1935] S.C.R. 53.

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conduct and there is no finding with regard thereto. All that the evidence discloses is that when the statements were made John, apparently addressing George, said ". . . you find out, that is finished, it is my land". Under these circumstances his not refuting the alleged statements does not constitute an admission, and therefore, as Chief Justice Martin stated, this conversation:

> * * * has no probative force in an inquiry which must be directed to ascertain the circumstances under which the agreement of November 3, 1934, was executed.

This conversation at John's home was also concluded, as George deposed, because he was concerned lest his father should "collapse again", and as a consequence he took him outside to his car. However, George left his father at John's home and the evidence discloses no further conversations between John and his father with regard to this matter. There his father remained, as provided in the contract, apart from the time he was in the hospital, until he died in January, 1938. Thereafter the mother remained with John until she went to live with her daughter in April, 1943. If John were not giving his father a fair share of the crop, it would seem rather unlikely that he would employ George to thresh for him in 1935 and 1936, and thereby provide George with complete information with respect to the wheat crop. Then after the alleged disclosures of 1937 and the death of his father, when his mother was entitled to the same one-quarter share of the crop, it would seem even more unlikely that he would employ the appellant, his brother-in-law Serge Calmusky, to thresh for him in 1938, 1939, 1940 and at least in part in 1942. There does not appear to be any disputes or discussions with regard to the division of the crop upon any of these occasions. Indeed, apart from a short conversation between Serge Calmusky and John, when they were upon friendly terms, when Serge made some inquiry of John about the deal between himself and his father and John replied: "It is too late, no use to talk", after which Serge Calmusky stated: "Well, I didn't do anything", and the delivery of a letter written on behalf of the appellants to the auctioneer in October, 1943, claiming the proceeds of personal property which was being sold by Mrs. Karaloff

after John had enlisted in the Armed Services, nothing was done with regard to the matter until this action was started in 1945.

The conduct of the parties after July, 1937, does not support the contention of the appellants. Apart from the fact that the mother and father continued to reside with John, as contemplated by the contract, neither of the appellants, George who lived about a quarter of a mile and Serge about one and a half miles distant, took any steps or made any effort to have the agreement altered or rescinded, or on the other hand to insure that the parents got their share under the agreement, although throughout their evidence they suggest that the father and mother were not receiving what was called for by the agreement.

After the father died in January, 1938, the mother was still entitled to a quarter of the crop under the agreement, and still no effort was made to have the agreement altered or rescinded. In his will the father had named George Karaloff and Serge Calmusky as his executors. They made no effort to have the will proved until John had consulted a solicitor who took steps with regard to the appointment of an administrator. Then the appellants made application for Letters Probate, which were issued on September 2, 1943. Steps to bring this action were not taken until August, 1944, and the writ was not issued until April, 1945. Laches is not pleaded but that does not prevent their conduct being examined in relation to the allegations of fraud and undue influence.

The appellants contended that the consideration was inadequate, basing their contention in the main on the fact that one-quarter of the crop was to be delivered in each year to his parents. There was further consideration: John had received no wages for his work during the preceding four years and was not now to receive any; the parents had the right to live in the home and to enjoy their own furniture; John was to pay the balance owing on the cream separator and the arrears of taxes. In 1934 farm values were very low and speculative; in fact the evidence indicates there was no sale for farm lands at that time. The father apparently wanted John to remain upon the farm, no doubt with a view to him and his wife being cared for

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as their ages advanced. They had shared everything in the house since 1930 and the evidence is that they continued to do so. Under such circumstances, while the courts will inquire as to whether advantage is taken or influence exerted, yet when it is found that neither of these exist and that the parties were equally in possession of all the facts, mere inadequacy of consideration is not a ground for disturbing the contract.

The judgment of the Court of Appeal dismissing the appellants' action should be affirmed and this appeal dismissed with costs payable by the appellants personally.

RAND J.—I agree with the conclusions reached by my brother Estey, whose reasons I have had the privilege of reading, and I have only a word to add.

Whether or not the statement of the father said by the son, George, to have been made on the occasion of the visit to Kryzanowski's office was admissible, and I do not mean to imply any doubt of the soundness of the holding in the Court of Appeal, in substance it was repeated to the son, John, and its effect on that occasion can properly be taken into consideration. It is significant that notwithstanding this scene, the father continued to live with John until his death five months later. It is significant, too, that the father left the document with the notary, that he did not "call in the elders" of the community, the practice of this Russian group, nor did he take any other step to confirm what is said to have been his repudiation. Although at that time he was suffering from a heart ailment, he was clearly a man of strong spirit and temper, and it would be inexplicable on the facts before us if in a matter carrying such importance to people of this class he should have meekly or fatalistically abstained from undoing such a fraud. The only plausible inference would be that reflection either had recalled what he had forgotten or had brought him rather to a confirmation of what had been done.

The evidence does not enable us to gather the instigation of the making of the will in July, 1943, or his visit to the notary's office in August; nor do we know what he thought or claimed the document was intended to be. His execution of it is undoubted and the acknowledgment

by his wife many months afterwards and his notification to the assessors are corroborating circumstances of the strongest sort.

The only ground arguable is fraud, but an allegation of fraud against a deceased in a situation such as that presented to us is to be received with suspicion, and here that suspicion has not been relieved. The trial judge was mistaken in treating the 80 acres as being involved in the dealings of John with his father; the agreement of September 24, 1934, for this land is between John and his brother Alex. He was evidently influenced also by what he considered the unreliability of the witness Derkachenko, but a close examination of the latter's evidence makes it clear that he misapprehended several of the answers given and on this misconception rejected the testimony as a whole.

The appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Makaroff & Bates.*

Solicitors for the respondent: *Ferguson, MacDermid & MacDermid.*