WASYL KRYS (PLAINTIFF).....APPELLANT;

AND

ANTON KRYS (DEFENDANT).....RESPONDENT.

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*Oct. 25.
*Dec. 21.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Title to land—Parent and child—Father claiming right to property standing in son's name—Conflict of evidence—Findings at trial—Estoppel —Presumption and onus arising from relationship and other circumstances—Alleged attempt, by conveyance, to defeat creditors, as disentitling to relief of re-conveyance—Circumstances of conveyance—Exemptions Act, Alta.

Plaintiff claimed that his homestead, which he had conveyed to defendant, his son, was held by defendant in trust for him and should be reconveyed; also that he was entitled to an interest in two other parcels of land standing in the defendant's name. The trial judge (Boyle J.) held, on the evidence, in plaintiff's favour as to the homestead, and against him as to the other parcels. The Appellate Division, Alta., reversed his judgment as to the homestead, and affirmed it as to the other parcels. Plaintiff appealed.

Held, that, on the evidence and the circumstances of the case, the findings at trial should not be varied by an appellate court; and that the judgment at trial should be restored in plaintiff's favour as to the homestead, and should stand as to the other parcels.

Held, further, as to a certain document signed by plaintiff reciting the ownership of the homestead to be in defendant and purporting to give plaintiff certain rights thereon, that, in view of all the circumstances under which it was signed, the plaintiff was not estopped from asserting his claim. A presumption arose from the relation of the parties, the nature of the document, and the other circumstances, which cast upon defendant the duty to explain and satisfy the court that plaintiff realized what he was doing and acted as a voluntary agent; and there was no satisfactory evidence to overcome or rebut that presumption. The law as stated in Pollock's Principles of Contract, 9th ed., p. 648 *et seq.*, quoting from *Smith* v. *Kay,* 7 H.L.C. 750, at p. 779, and from *Tate* v. *Williamson,* L.R. 2 Ch. App. 55, at p. 61, approved. *Turner* v. *Collins,* L.R. 7 Ch. App. 329, at p. 338, and *Inche Noriah Binte Mohamed Tahir* v. *Shaik Allie Bin Omar Bin Abdullah Bahashuan,* 45 T.L.R. 1, also referred to.

Held, further, that there was not shown, in the circumstances of the conveyance of the homestead by plaintiff to defendant, any attempt to defeat creditors, so as to disentitle plaintiff to the relief claimed. *Scheuerman* v. *Scheuerman,* 52 S.C.R. 625, distinguished on the facts, and commented on as follows: "The facts in the *Scheuerman* case were special; that decision depends upon its own facts, and there does not seem to be that unanimity in the reasons handed down by

*PRESENT:—Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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the judges constituting the majority that is necessary for a ruling case." Further, under the *Exemptions Act* of Alberta, the homestead is exempt from seizure under execution, and therefore, if there be any creditors of plaintiff, the conveyance does not prejudice them.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta, reversing in part the judgment of Boyle J.

The plaintiff, who was the father of the defendant, sued for a declaration that the defendant held in trust for the plaintiff a certain quarter-section of land, being the plaintiff's homestead, which the plaintiff had conveyed to the defendant, and for an order that the defendant transfer the same to the plaintiff; also for a declaration that the defendant held in trust for the plaintiff a half interest in two other parcels of land, and for a certain sum alleged to be owing to the plaintiff in respect of one of these latter parcels.

The action was tried before Boyle J., who, at the close of the trial, delivered judgment orally, finding in favour of the plaintiff in regard to the homestead and ordering a re-transfer of the same by the defendant to the plaintiff, but finding in favour of the defendant as to the other parcels of land in question.

The defendant appealed, and the plaintiff cross-appealed, to the Appellate Division of the Supreme Court of Alberta, which allowed the defendant's appeal, and dismissed the plaintiff's cross-appeal, and ordered that the plaintiff's action be dismissed with costs. No written reasons were delivered. The plaintiff appealed to this Court.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed as to the homestead with all costs here and also in the Appellate Division (except costs of the cross-appeal in that court, which were to be allowed to defendant and set off against plaintiff's costs), and the judgment of the trial court was restored.

O. M. Biggar K.C. for the appellant.

N. D. Maclean K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The trial of this action occupied three days, beginning 22nd March, 1927. The parties are Ruthenian immigrants, father and son, who have lived for

twenty-five years in the province of Alberta, engaged in farming. Three parcels of land and some live stock are in controversy.

The plaintiff (appellant) is Wasyl Krys, the father, and the defendant (respondent), Anton Krys, the son. The former gave his testimony wholly through an interpreter; the latter used an interpreter at critical places. Wasyl was seventy years of age at the time of the trial, and Anton was then forty-two. Anton lived with his wife and seven children on his farm, situated about a mile from the homestead upon which his father lived. Anton's mother had been dead for many years, and his father had married again, and, by his second wife, had several children, the eldest of whom, at the time of the trial, was seventeen or eighteen years old. Wasyl was industrious and thrifty, but he did not get on very well with his second wife. Anton was his favourite son, and Wasyl appears to have trusted and relied upon him. The evidence suggests that Anton looked with disfavour upon his step-mother and her children, and that he encouraged or promoted divorce proceedings which his father at one time prosecuted against his second wife.

Wasyl, in 1914, when his wife was in hospital, became suspicious that she was likely to ruin him with expenses. He consulted with Anton, and in the result he conveyed, or, as he says, "lent" to Anton his homestead upon which he lived—the North-East quarter of section 2, township 57, range 20, west of the 4th Meridian, and, at the same time, by bill of sale, transferred to Anton all the horses and horned cattle which he had upon the place. The secret understanding was that the property so conveyed should remain Wasyl's, and should be subsequently reconveyed. Wasyl remained upon the land and farmed it, and continued to take the crops and to use and dispose of them and the live stock as theretofore. Anton subsequently denied his father's equitable title, and claimed that the conveyance of the land, which was upon its face expressed to be in consideration of the sum of one dollar and love and affection, really represented a purchase of the land by him from his father in consideration of $2,000, which Anton says he paid at the time the conveyance was executed. The plaintiff, in these circumstances, claims a declaration that the land is held in trust for him by the defendant. and that the de-

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fendant should execute a transfer, and other appropriate relief. The bill of sale is not mentioned in the pleadings, but the facts connected with it were investigated at the trial, and the learned judge, who gave an oral judgment, at the conclusion of his remarks was requested by the plaintiff's counsel to dispose of that question, and he did so without any objection.

There were two other parcels of land with which the case is concerned, namely, an undivided half-interest in the South-West quarter of section 23, township 56, range 20, W. 4th Meridian, and the North-East quarter of section 14, township 56, range 20, W. 4th Meridian, which were standing in the defendant's name, and as to which the plaintiff likewise alleges that he has the equitable title, or an interest which the defendant holds in trust for him, though not represented upon the registry; the plaintiff claiming that he had been defrauded by his son in acquiring the titles, or otherwise in relation to the transactions. But as to these two parcels, it is exceedingly difficult to ascertain the true facts, owing to the confusion of the testimony and the conflict and character of the witnesses.

I have, since the hearing, read and considered the evidence, but I do not think it would be profitable to attempt to make an intelligible review of the facts, because there is certainly evidence to sustain the findings, and I am satisfied that this Court cannot displace these without a considerable risk of doing some injustice.

Boyle J., examined the case at considerable length in the oral judgment which he pronounced at the trial. He finds that the plaintiff, although "quite illiterate and unfamiliar with the language of the country," had obtained a good homestead and done fairly well; that he was not in any way above the average in intellect of the class of immigrants to which he belongs, while his son, the defendant, was particularly bright and intellectual above the average. He says that he does not think that the son

> is entirely without filial affection, nor do I think that up to the time that his father had the disagreement with the stepmother that he was anything but probably what a young man should be with respect to his father. The plaintiff's troubles started when he commenced to think about how he would prevent his wife from getting satisfaction out of him by way of his property, and I think the facts are that he consulted his son and decided he would have his son hide away his property from the wife so as to see that she did not get it. And he had sufficient confidence in the

son that the son would protect him. Whatever the arrangement was is not certain. We have the story of the two of them which is in some respects contradictory. It seems to me that was the motive that the plaintiff had in undertaking to transfer this land to his son. I am satisfied that the son agreed to act as trustee for the father, and that when the father thought it was safe to have the land reconveyed to him, the son was to reconvey it.

Continuing, the learned judge refers to the documentary evidence, and to the divorce proceedings, which I shall mention again, and expressed the opinion that the defendant recognized that he held the homestead as trustee for his father, although he became unwilling to reconvey it. He says that

> The story told by the son in the witness box was not very convincing. He was fairly lucid on his transactions in connection with the other property, but when it came to giving evidence with regard to the homestead, it did seem to me that after all he had some conscience in the matter, and he did not really have the stomach to definitely press the matter in his evidence in connection with the homestead, the way he did with regard to the other land.

And he makes the following observations:

> when all is said and done, a man's actions are more likely to be the truth than his statements when it comes to a question of his own interest in a legal action. I do not think that the circumstances, considering the illiteracy of the plaintiff, considering his ignorance of both the language and the customs of the country—that the conditions are such that the Court is barred from compelling the son to make restitution.

He does not credit the evidence of Pullishy, the defendant's leading witness. He does not think Pullishy's recollection good enough to justify the evidence which Pullishy gave; about that the learned judge is very confident. And, on the question as to whether Anton bought the homestead from his father and paid $2,000 for it, as he testified he did, the learned judge expresses himself in these words:

> I am satisfied of one thing; I may have some doubts or some hesitation about some of the other facts, but I am absolutely confident on the evidence about one thing, and that is that there never was any consideration paid for this homestead.

He alludes also to the fact that

> The father never moved off, he was always there, he is there yet, and never was disturbed in his possession.

which, the learned judge says,

> helps to confirm my opinion that the son held that property in trust for the father all the time. When this land was encumbered the son knew that he only held it in trust and in my opinion he should not have encumbered it; the rights of the mortgagees, who were innocent parties, in so far as any evidence before me is concerned, cannot, of course, be

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disturbed. But in my view the plaintiff is entitled to succeed with respect to the homestead. He is entitled to a conveyance of that land back to him, and he is entitled to have the son remove that mortgage.

With regard to the S.W. ¼ of sec. 23, which was transferred to Anton by one Henkelman, "There is," as the learned judge says,

> the evidence of one side against the other side, and no documents of any kind, and the only thing I can do is to say that the onus is upon the plaintiff, and he has not satisfied it.

Then, as to the fact that the plaintiff made the first payment on the S.E. ¼ of sec. 14, the learned judge says:

> That seems to be fairly clearly established now from the documents. But what finally was done regarding that is not so clear. It is very difficult for me to be able to decide whether or not the old man received really consideration for turning that over or whether he just made a gift of it to his son. Of course, there is nothing in the law of this country that prevents a father from presenting his son with $700 if he wants to do it. I am going to take the documents in that case again and hold that while the father paid $700 on account of that property, he gave the property as a gift to the son, and I do not think that the evidence in that case is clear enough to say that he is able to recover that amount back.

After reading the evidence more than once and considering the well known advantages which the judge possessed for determining the facts, and which are of special weight in a case of this kind, where the parties and their witnesses go upon the stand, where it is necessary to introduce an interpreter, and where local knowledge is useful, I am impressed with the view that a Court of Appeal should not venture to vary any of these findings. It is, I think, abundantly clear that it would be impossible for any judge, upon whom the duty is cast to review the evidence, to find otherwise than did the learned trial judge with relation to the homestead; and, while I might at first instance have been disposed to come to a different result upon the other two parcels, especially the S.E. ¼ of sec. 14, I do not think I can properly reverse the conclusion reached.

There is no well founded complaint of misdirection. Neither party has the credit of strict reliability, and the trial judge said, towards the end of the trial, that he did not intend to accept as truth all the evidence that had been uncontradicted on either side.

There is, however, one feature of the case which was not, perhaps, adequately considered at the trial, and which was strongly pressed on behalf of the defendant upon the hearing of the appeal; to this I shall direct a few observations.

Wasyl Krys had sued his wife for divorce, and apparently she had counter-claimed for judicial separation. That action was tried in March, 1925, before Tweedie J., who dismissed both the claim and the counter-claim; but at the close of the trial, immediately after the judgment had been pronounced, the judge addressed the parties, evidently through an interpreter, as follows:

You have used up a great deal of time and spent a great deal of money in Court here. Neither of you get a divorce and there is no judicial separation between you. She is entitled to go back to that homestead and live, and he is bound to maintain her and support her, and he cannot in any way ill-treat or abuse her or drive her away from that place. And I think that the son has got that farm; that Krys ought to have the farm and she should not be working there all her life and raising children by him, and other people get his property, and she is entitled to be protected, and that they had better straighten out their property difference between themselves, and I do not think they will have any trouble. I think that the trouble is caused by the fact that this woman thinks the homestead is in the name of his son, and she is working there and raising children of her own for nothing.

Then the parties left the Court. Anton and Pullishy had been in attendance, and they went out at or about the same time. They prevailed upon Wasyl to go to Mr. Ewing's office. It was, as I understand the evidence, Mr. Ewing, or his partner, Mr. Bury, who had conducted the divorce proceedings on behalf of Wasyl, and Wasyl says that Anton asked him to go to Mr. Ewing's office, so that Anton could give him back his land, a purpose that coincided with the view expressed as above by Tweedie J. Arrived at the office, a document was produced, or prepared, under instructions communicated either by Anton or Pullishy, which reads as follows:

MEMORANDUM OF AGREEMENT made this Twelfth (12) day of March, A.D. 1925.

BETWEEN:—

ANTON KRYS, of Skaro, in the Province of Alberta, farmer,
Of the First Part,

AND

WASYL KRYS, of Skaro, in the Province of Alberta, farmer,
Of the Second Part.

WHEREAS Anton Krys is the natural and lawful son of the said Wasyl Krys, and in consideration of natural love and affection, the parties hereto are desirous of entering into the arrangement hereinafter set out:

AND WHEREAS the said Anton Krys is the owner of the North-East Quarter of Section Two (2) Township Fifty-seven (57), Range Twenty (20), West of the Fourth (4) Meridian, free and clear of all encumbrances;

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NOW THIS AGREEMENT WITNESSETH:

(1) It is agreed between the parties hereto that, in consideration of natural love and affection, the said Wasyl Krys shall have the sole and exclusive right to reside in the Buildings situate on the South half of the North-East Quarter of Section Two (2), Township Fifty-seven (57), Range Twenty (20), West of the Fourth (4) Meridian in the Province of Alberta, during his natural life, without rent or charge of any kind, and shall have the right to use the stables, granaries and all other buildings on the said land.

(2) The said Wasyl Krys for the consideration above named shall have the sole and exclusive right to cultivate and crop the said South half of the South-East (*sic*) Quarter of Section Two (2), Township Fifty-seven (57), Range Twenty (20), West of the Fourth (4) Meridian without rent or other charge whatsoever, and all crop, hay or other produce grown upon the said land shall belong to and be the sole property of the said Wasyl Krys.

(3) The said Wasyl Krys agrees to pay the taxes on the above land.

(4) If at any time the said Wasyl Krys becomes physically unable to cultivate the said land owing to old age or infirmity, then, in such case, the said Anton Krys may cultivate the said land for the sole use and benefit of the said Anton Krys, but in such case the said Anton Krys shall pay the taxes on the said land.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and date first above mentioned.

(Sgd.) WM. PULLISHY,	(Sgd.) ANTON KRYS.	(Seal).
	his	
(Sgd.) E. MICHAJLUK.	WASYL X KRYS.	(Seal).
	mark.	

Anton signed this, and Wasyl, at the request of Anton and Pullishy, signed also. The subscribing witnesses are Pullishy and Michajluk. The latter was a law student in the office of Mr. Ewing, articled to him. It does not appear who prepared the instrument. Michajluk says that Mr. Ewing called him in from the general office, and when he went in, he found there, " the old gentleman, Krys, and his wife, and the young man Anton," and Pullishy; and that Mr. Ewing asked him to read out the contents of the document to them, and tell him (presumably Wasyl) what was in it, which Michajluk says he did very carefully. His testimony upon the point is this:

Q. And when you read that, I would assume that you understood it yourself?

A. I think so.

Q. And you read that, and you understand, don't you, that it says: " Whereas Anton Krys is the owner of certain property?"

A. I interpreted it to him just as it is in this document.

Q. And what did you understand the document to be?

A. Well, it was an agreement between the two Krys's.

Q. What is it called? Is it an agreement you would stamp as a bill of sale or is it an encumbrance or a mortgage? Has it the effect of an encumbrance or what?

A. I was not asked by Mr. Ewing to give the definition of the document, but just to interpret the contents of the document.

The COURT: What did you tell him it was?

A. I told him word for word just what it was, Your Lordship.

Q. Mr. MACKIE: You did not tell Mr. Krys: "Your son is the owner of the land, and in consideration of the love and affection he has for you, he is going to let you stay on that land with your wife, but if you should die before she does, she has to get off?" You did not explain it that way to him?

A. Well, to be earnest about it, I could not say. I did not tell him anything that is not in this document, but I am sure I explained everything to him that is in this document.

Q. What explanation did you give?

A. I explained to him the contents of this document.

The COURT: What did you tell him?

A. I could not tell you what I told to him. I know this much, that I was asked by Mr. Ewing to translate the document as it is.

Q. But you told us now you explained to him as to what the document was?

A. When I read this over to him once, I read it sentence by sentence, and I did not read the whole document over, but I was explaining to him after each sentence. I told him the contents of the sentence in Ukrainian and explained it to him where it was necessary.

Q. You mean you translated it?

A. Yes, that is right.

Q. But outside of translating it, quite apart from the question of translating it, what explanations did you give?

A. I did not give any explanations unless he asked me.

There is no evidence of any conversation between Mr. Ewing or Mr. Bury, or any solicitor in the office, and Wasyl, or that Wasyl gave or concurred in any instructions for the preparation of the agreement. Pullishy, however, who appears usually to have been at Anton's elbow when business was being transacted with Wasyl, and who says he had an intimate knowledge of their affairs, also signed as witness, and it was he who accompanied the father and son to the solicitor who prepared the document by which, in 1914, Wasyl transferred the homestead to Anton. It is not shewn that either Mr. Ewing, or anybody belonging to his office, knew that Anton held the title under a transfer without consideration in trust for his father, who remained in possession, and it is sufficiently apparent that Wasyl re-

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ceived no independent advice or explanation whatever as to the purpose and effect of the agreement, or as to the inadvisability of his entering into any such transaction. It must be realized also that he did not speak English, and could not read a word; that he was relying upon his son, to whose hands he had committed this property in trust, and that it was either his son or Pullishy, or, perhaps, both, who contrived the meeting and originated the project for the agreement. A more foolish or improvident arrangement, in the interest of the old man, it is difficult to imagine. It was made a strong point of the defendant's case that the plaintiff was conclusively estopped by the recital that Anton was owner of the homestead, free and clear of all encumbrances. But the Court has to deal with the particular circumstances of the case, and, having regard to these, I am satisfied that the learned trial judge was right in reaching the conclusion that the plaintiff ought not to be bound.

The law is admirably stated in Sir Frederick Pollock's Principles of Contract, 9th Edition, 648 *et seq.*, where he quotes a passage from the judgment of Lord Kingsdown in *Smith v. Kay* (1); also the following from Lord Chelmsford in *Tate* v. *Williamson* (2):

> Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

See also *Turner* v. *Collins* (3).

The most recent case is that of *Inche Noriah Binte Mohamed Tahir* v. *Shaik Allie Bin Omar Bin Abdullah Bahashuan*, an appeal from the Straits Settlements, decided only a few weeks ago in the Judicial Committee of the Privy Council (4). That was the case of a deed of gift of considerable property by a Malay woman, wholly illiterate and of great age, to the respondent, who was of Arab birth, and the appellant's nephew by marriage. The facts

(1) (1859) 7 H.L.C., 750, at p. 779.
(2) (1866) L.R. 2 Ch. App. 55, at p. 61.
(3) (1871) L.R. 7 Ch. App., 329, at p. 338.
(4) (1928) 45 T.L.R. 1.

cannot very well be stated in the space here available. They are, no doubt, more convincing than those upon which the present case depends; nevertheless I am persuaded that the principles enunciated by the Lord Chancellor are not irrelevant to the determination of the present appeal. His Lordship, having referred to the judgment of Lord Justice Cotton in the well known case of *Allcard* v. *Skinner* (1), and some of the other authorities, expresses the views of their Lordships as follows:

> The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard* v. *Skinner* (1). But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Lord Justice Cotton, and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.
>
> In the present case their Lordships do not doubt that Mr. Aitken (the solicitor) acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties; and they regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made under circumstances which

(1) (1887) 36 Ch. D., 145, at p. 171.

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give rise to the presumption must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption.

I think a presumption arises from the relation of the parties; the astonishing nature of the instrument which emerged from their meeting on 12th March, 1925, when Anton took his father to the lawyer's office on the pretence of giving him back his property, and from the other circumstances of the case, which casts upon Anton the duty to explain, and to satisfy the court that his father realized what he was doing, and acted as a voluntary agent; and no satisfactory evidence has been produced to overcome or to rebut that presumption; the testimony of the Ukrainian law student is quite inadequate to clear up the situation.

There was an appeal, and a cross appeal, to the Appellate Division, and upon the hearing, the appeal was allowed and the cross appeal was dismissed, without reasons. There is nothing in the record to suggest why this was done, but it is said that the Court considered that, at least with respect to the homestead and the chattels, it was bound by the decision of this Court in *Scheuerman* v. *Scheuerman* (1), and that the plaintiff was disentitled to relief, because the conveyance by Wasyl to his son evidenced an attempt to defeat creditors, and was fraudulent and void as against them under the statute of 13 Eliz., Ch. 5, and that to give effect to the claim would be a breach of the principle that the court will not assist a suiter to obtain relief from the consequence of his own unlawful act. The facts in the *Scheuerman* case (1) were special; that decision depends upon its own facts, and there does not seem to be that unanimity in the reasons handed down by the judges constituting the majority that is necessary for a ruling case. I need not, however, review the judgments, because the present facts are entirely different. Here there are no pleadings and no proof of intent to defraud creditors, and that question was not raised or suggested at the trial. The plaintiff testified as follows:

Q. When did Anton begin to tell you things about your wife?
A. Every time he came up to me.
Q. Did he say anything about her before she went to the hospital?
A. He said "She will ruin everything for you."
Q. When did he say that? Did Anton say that to you before your wife went to the hospital, or after she went to the hospital?

(1) (1916) 52 S.C.R. 625.

A. He told me that before she went to the hospital and after she was in the hospital.

Q. Do you know why your wife went to the hospital?

A. Well, she took sick. I could not tell you what was the cause of it.

Q. Well, did you beat her up?

A. I did not.

And, referring to his homestead,

Q. And did you give it to Anton in some way?

A. The time my wife was in the hospital I decided I should assign that land to my son to protect myself from the expenses which my wife put on me in the hospital and arranged it then he had to assign it back to me again.

Q. Your wife went to Lamont Hospital, did she?

A. Yes.

The impression which this evidence left with the trial judge was, as already shewn, that the plaintiff consulted with his son, "and decided he would have his son hide away his property from the wife so as to see that she did not get it." There was obviously trouble between the plaintiff and his wife at the time, the particulars of which were not investigated; but there was no proof that he had creditors or that any creditor was defeated, hindered or delayed by the transfer; and a judicial inference, in these circumstances, that the conveyance was unlawful under the Statute of 13 Eliz., Ch. 5, is, in my opinion, not only unjustified, but seems directly to conflict with the venerable principle propounded in the Year-Books by Brian C.J., that

> Having in your mind is nothing, for it is common learning that the thought of man is not triable; for even the Devil has not knowledge of man's thoughts.

That is said by Lord Macnaghten, in *Keighley, Maxsted & Co.* v. *Durant* (1), to be a sound maxim, at least in its legal aspect.

Moreover, it is provided by the *Exemptions Act* of Alberta, R.S.A., 1922, ch. 95, sec. 2 (i), that

> The homestead of an execution debtor actually occupied by him, provided the same be not more than one hundred and sixty acres.

is free from seizure by virtue of all writs of execution, and also, by paragraph (*d*) of the same section, that horses and cattle, substantially including those which were subject to the bill of sale, are also exempt; and it was in fact admitted at the hearing that the homestead and the chattels are not available to the creditors. Therefore the conveyance and transfer which the plaintiff made to the defendant in 1914 does not prejudice Wasyl's creditors, if there be any, and,

(1) [1901] A.C. 240, at p. 247.

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so far as the later transactions are concerned, it was not even hinted that there was evidence to manifest or to suggest any unlawful purpose on the part of Wasyl.

For these reasons, I would allow the appeal and restore the judgment at the trial; and I think the plaintiff should have his costs throughout, except the costs of his cross appeal to the Appellate Division, the defendant to have his costs of that cross appeal, to be set off.

Appeal allowed in part, with costs.

Solicitor for the appellant: *H. A. Mackie.*

Solicitors for the respondent: *Maclean, Short & Kane.*