THE TRUSTS AND GUARANTEE COMPANY, ADMINISTRATORS OF THE ESTATE OF JAMES HART (PLAINTIFFS) ..... APPELLANTS;

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*Mar. 24, 25.

*Nov. 8.

AND

GEORGE D. HART AND THE STANDARD BANK OF CANADA (BY ORIGINAL ACTION) AND JAMES D. HART, GEORGE P. HART AND LLOYD HART, INFANTS, ADDED PARTIES AT THE TRIAL (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Gift—Confidential relations—Evidence—Parent and child—Public policy—Principal and agent.

The principle that where confidential relations exist between donor and donee the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by showing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for benefit of the latter's children, when said son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later and by voluntarily paying it before he died, such presumption does not arise.

Judgement of the Court of Appeal (2 Ont. L. R. 251) reversing that of the Divisional Court (31 O. R. 414) affirmed, Sedgewick and Davies JJ. dissenting.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) and restoring that given at the trial in favour of the defendants.

*PRESENT:—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

(1) 2 Ont. L. R. 251. (2) 31 O. R. 414.

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The plaintiffs' action was brought against the defendant George D. Hart (1) for an account of the dealings of the defendant George D. Hart with the estate of the deceased since his death; (2) for the payment of the sum of $20,000, represented by a deposit receipt given by the Standard Bank at Picton; and (3) for $5,802. The second item only was pressed at the trial.

The deceased James Hart was in business as a general merchant at Demorestville where he continued to reside until 1869. In 1869 he opened a store at Picton and moved to Picton with his family except that the younger son James remained at Demorestville to look after the store at that place. From 1869 to the date of his death on 18th September, 1898, the deceased carried on both stores, James managing the store at Demorestville and George having the management of the store at Picton.

The evidence shows that deceased always persisted in carrying on the business of both stores in his own way and by the same methods he had always followed. He always refused to take stock, or carry any insurance, and, until a short time before 1883, to have any bank account. Some time before 1883, the deceased was induced to open an account with the Standard Bank, but he always refused to sign cheques, and the cheques were, accordingly, signed by the defendant George D. Hart. In 1883 the manager of the bank required a formal power of attorney to evidence George's authority to sign cheques, bills, etc., and a power of attorney was executed and delivered to the bank, and from that time George did all the banking business under this power of attorney.

James Hart's wife died in 1886, and in July, 1887, George D. Hart married, and from that time until his death James Hart resided together with George and

his wife and their children in the house in connection with the store premises.

In December, 1889 two children of George had been born, the elder of whom was named after the deceased and was a cripple with no prospects of ever being able to earn his own living. George was then 44 or 45 years old, and had been continuously in the employ of his father for over 30 years. He had devoted his whole energies to the business and had undoubtedly assisted materially in making it a financial success. He had never received anything out of the business except his bare living, and had no means whatever of his own. So long as he was unmarried he appears to have been content with this, but according to his own evidence and that of his wife, when his two children were born he pointed out to his father that he ought to have some definite assurance for his own and their future beyond the uncertain expectations he might have from his father's estate. Certain propositions were advanced by deceased and finally he proposed to give respondent a note for $20,000, without interest, to which the latter assented.

Accordingly, on the 26th December, 1889, the deceased gave George his promissory note for $20,000 without interest. The note was handed by George to his wife and by her deposited in a private drawer in the business safe where she kept her own valuables. On the 30th December, 1895, George drew his father's attention to the fact that the note was about outlawed, whereupon the father, in order that his liability on the note might not be barred by the Statute of Limitations, signed a new note for $20,000 and delivered it to George in substitution of the first note. The second note was handed by George to his wife and by her deposited in the same safe drawer as the first note had

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been kept in, and there it remained until 3rd June, 1898, when the deposit receipt in question was given.

At the date of the transaction of 3rd June, 1898, the deceased was worth from $80,000 to $85,000. George Hart was 54 years old, his brother James Hart a year or two younger, and the sister Mrs. Bongard, 50 or 51 years old. James had never married (and is still unmarried). Mrs. Bongard had married in 1876 and had no children. She had been provided with (and occupied) a house purchased by the deceased. George had three children and the probability was strong that they were the only grandchildren the deceased would ever have. At this time the deceased had in the Standard Bank $17,000 on deposit and $7,486 to his credit on current account. On the day mentioned he directed George to take the deposit receipt for the $17,000 to the bank and place it to the credit of the deceased's current account there, and then to have a new deposit receipt for $20,000 issued to George D. Hart. The defendant did as he was directed and brought the new deposit receipt and the bank book to his father, who examined them. The father then handed the new deposit book back to George saying, "all right, I want this kept intact for your children," and he asked for and received back the $20,000 note which he destroyed.

The trial judge dismissed the action holding that the note was given as a free gift for deceased's grandchildren. This judgment was reversed by the Divisional Court on the ground that confidential relations existed between the donor and donee and that independent advice to the former should have been established. The Court of Appeal restored the original judgment and the plaintiffs appealed to the Supreme Court of Canada.

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Wallace Nesbitt K.C. and *Young* for the appellants. The rule is well settled that where confidential relations exist between donor and donee the gift is presumed to have been made under the influence of such relationship which presumption can only be rebutted by establishing that the donor acted under independent advice or by proving circumstances equivalent thereto. *Barron* v. *Willis* (1); *Wright* v. *Carter* (2); *Liles* v. *Terry* (3).

The case of a gift from parent to child is no exception to the rule. *Morley* v. *Loughnan* (4); *Armstrong* v. *Armstrong* (5).

Aylesworth K.C. and *Davidson* for the respondents, infant children of George D. Hart and *Widdifield* for the respondent George D Hart, referred to *Armstrong* v. *Armstrong* (5); *Beanland* v. *Bradley* (6); *Wright* v. *Vanderplank* (7).

The judgment of the majority of the court was delivered by

TASCHEREAU J.—In this action, the plaintiffs, the administrators of the estate of James Hart, deceased, seek to make George Hart, his elder son, accountable for twenty thousand dollars which he, acting under a power of attorney, withdrew from his father's account, not long before the death of his father, and deposited to his own credit. The trial judge, Meredith J., found as a fact that the father had of his own free will given these twenty thousand dollars to his son for the benefit of his grandchildren, and dismissed the action. His holding was reversed by a Divisional Court, (Armour C.J. and Falconbridge and Street JJ.),

(1) [1900] 2 Ch. 121.
(2) 18 Times L. R. 256.
(3) [1895] 2 Q. B. 679.
(4) [1893] 1 Ch. 736.
(5) 14 Gr. 528.
(6) 2 Sm. & G. 339.
(7) 8 DeG. M. & G. 133.

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but was restored by the Court of Appeal for Ontario (1). The plaintiffs now appeal. I would dismiss their appeal.

The case, as I view it, turns upon questions of fact. The law that it involves is well settled. It is principally upon the application of the law to the facts of this case that the diversity of opinion between the Divisional Court and the Court of Appeal has arisen.

The appellants rightly argue that where confidential relationship exists between a donor and a donee, the law, on grounds of public policy, presumes that the gift, even although in fact freely made, was the effect of the influence produced by those relations. That presumption is rebutted, however, as argued by the respondents, if it is shewn that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances. *Morley* v. *Loughnan* (2).

It is settled law that when the gift is by a client to a solicitor, it is impossible to rebut the presumption of undue influence if the gift is made while the confidential relation exists, unless the donor had competent advice. *Morgan* v. *Minett* (3); *Holman* v. *Loynes* (4); *Liles* v. *Terry* (5); *In re Haslam* (6).

But the principle cannot be so strongly applied to the relation of parent and child; *Wright* v. *Carter* (7); or of principal and agent. If it is proved, as found by the learned judge at the trial and the judges *à quo*, that there was no undue influence by George Hart over his father when he received the notes and the deposit receipt in question, and that his father perfectly understood what he was doing, and was not taken advantage

(1) 2 Ont. L. R. 251.
(2) [1893] 1 Ch. 736-752.
(3) 6 Ch. D. 638.
(4) 4 DeG. M. & G. 270.
(5) [1895] 2 Q. B. 679.
(6) 18 Times L. R. 461.
(7) [1902] 18 Times L. R. 256.

of in any way, the action fails. Bigelow's Story's Equity Jurisp., vol. 1, Nos. 309, 315.

The findings of fact by the trial judge, concurred in by the unanimous judgment of the Court of Appeal, are amply sustained by the evidence. At three different times at long intervals, the deceased repeated the determination he had reached of giving twenty thousand dollars for his grandchildren. First, in 1889, nine years before his death, when he gave the first note; then in 1895, when he renewed it, and lastly, in 1898, when, of his own motion, without any suggestion whatever from his son, he paid it.

It would indeed require strong, very strong, evidence to make me believe that during those nine years (for the note of 1889 was merely evidence of the gift he then made, or at least of his intention), this man was not a moment free to change his intention and revoke the gift, had he been disposed to do so. He never in fact was under his son's influence. It is a gift by his son to him that might have been suspicious. Pollock on Contracts (5 ed.), page 591; *Beanland* v. *Bradley* (1).

To allow this appeal, we would have to reject as incredible the evidence under oath of George Hart and his wife, though the trial judge who heard them and the Court of Appeal believed them. That evidence, moreover, is fully corroborated by witnesses Widdifield, Yerex, German, Pine, Slater and Williams, and the amount given was not an unreasonable one, under the circumstances.

Since the argument, we have been referred by counsel for the appellants to the recent decision (March, 1902), in *Radcliffe* v. *Price* (2), where gifts by a patient to her medical adviser are set aside, though there was no evidence of pressure or misrepresen-

(1) 2 Sm. & G. 339. (2) 18 Times L. R. 466.

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tation, or that the patient was of weak intellect when she made them. That case, it seems to me, goes very far, and I would probably not feel bound to follow it. However, here the facts proved are different and entirely rebut the presumption of undue influence or pressure and it is unnecessary further to allude to the *Radcliffe Case*.

GIROUARD J. concurred in the judgment dismissing the appeal for the reasons stated by His Lordship Mr. Justice Taschereau.

SEDGEWICK J. dissented for the reasons given by His Lordship Mr. Justice Davies.

DAVIES J. (dissenting).—The facts of this case are stated by Mr. Justice Street in delivering the judgment of the Divisional Court, consisting of himself and Chief Justice Armour with Mr. Justice Falconbridge, as follows:

The defendant, George D. Hart, had acted from the year 1883 down to the time of the death of his father, the deceased James Hart, in September, 1898, as the manager of his business at the town of Picton. In 1887, George married, and he and his wife and the deceased from that time forward, with the three children who were born of the marriage, lived together at the back of or over the shop of the deceased until his death. The deceased had been ill for about two years before his death, but it was not until about the 24th of May, 1898, that his illness became serious and acute. The defendant, George D. Hart, transacted the whole of the banking business of his father from 1883, under a power of attorney under seal authorising him to sign cheques and to accept and sign drafts, bills of exchange and all other documents necessary for conducting his father's business with the Standard Bank of Picton. He had the entire control and handling of the cash, and took what he wished for the use of himself and his family without rendering any account to his father, who appears to have trusted him implicitly.

The deceased had two other children, a son James, who had a shop at a place called Demorestville, and a daughter, Mrs. Bongard, who

also lived away from him. The manager of the Standard Bank, where the account of the deceased was kept, stated that he had been manager at Picton for eleven years and that, in that time, although his office was only two doors from the shop of the deceased, he had never signed cheques upon his own account; all had been drawn by George under the power of attorney.

After the death of his father, George claimed a sum of twenty thousand dollars, represented by a deposit receipt of the Standard Bank, payable to himself, bearing date on 3rd June, 1898, which he alleged was a gift from his father. The money represented by this deposit receipt had been at the credit of the deceased in the Standard Bank in the shape of a deposit receipt for seventeen thousand dollars and accrued interest and cash at the credit of his current account, down to the 3rd June, 1898, when the defendant, George, purporting to act under the power of attorney from his father, had surrendered the deposit receipt, the amount of which, with accrued interest, was then placed to the credit of the deceased. George then drew a cheque payable to himself, for twenty thousand dollars, signed his father's name to it, under the power of attorney, and handed it to the bank, which then, at his request, issued a new deposit receipt payable to George, for the twenty thousand dollars.

This transaction does not appear to have been known to any person outside the bank manager, George and his wife, until after his father's death. George sent for his brother James, a fortnight before his father's death, for the special purpose of discussing the desirability of a settlement of his father's affairs, in view of his approaching death, and, in the discussion which took place between the brothers, both in the presence of and in the absence of the father, the fact of this gift was not made known to James, and the proposed arrangement of the affairs of the father was discussed by James in ignorance of any such transaction. No settlement was in fact arrived at and the father died intestate.

The present plaintiffs were appointed administrators of his estate, and the transaction was first brought to light when George was asked for and produced his father's bank-book containing the entries of the transaction, which was then, and afterwards upon his examination for discovery, stated by George to have been for his own benefit, but upon the trial he stated that it was for the benefit of his three children and not for himself at all. Upon each occasion, however, he stated that the transaction which ended in the gift to him of the deposit receipt began in December, 1889, when he says that his father made a note to him for twenty thousand dollars, payable three days after date. The account he gave at the trial and upon which the learned judge

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who tried the case acted, was that this note was given to him, not for his own benefit, but as a settlement for his children, with regard to whose future he himself had expressed some anxiety, to relieve which his father declared his own desire to see them provided for and, at once, drew and gave him the note in question. George further stated throughout, that this note remained in his wife's possession until December, 1895, when he called his father's attention to the fact that it was almost outlawed, whereupon his father gave him a new note for the same sum, in the same form, and destroyed the original note. He says that the new note likewise remained in his wife's custody until the 3rd June, 1898, when his father directed him to take the deposit receipt in his own name in lieu of it, and that when he had carried out this direction, the second note was likewise destroyed. This story was corroborated in all its details by George's wife and a clerk, who had been employed in the shop, gave evidence that, at the time the second note was given, he had happened to see it lying upon a desk after it had been signed by the deceased, and before it had been seen by George. There was no other evidence that the notes in question had ever been seen by any person. There was, however, the evidence of several persons to whom the deceased had stated when they applied to him to borrow money or for similar purposes that George held his note for a large sum or for twenty thousand dollars which he had to pay.

Upon these facts the Divisional Court unanimously found that the alleged gift of twenty thousand dollars should be declared void on the ground that, at the time it was completed, the donee, George Hart occupied towards his father, James Hart, such confidential relations as in the absence of "independent advice" raised an irrebuttable presumption of "undue influence." Chief Justice Armour added that, apart from the question of law, he was not convinced beyond reasonable doubt by the evidence that there ever was a gift by the father to the son of the money in question.

There is no doubt very much in the evidence to justify these reasonable doubts, and I confess that, at times during the argument and since then when reading the evidence over, I have entertained also doubts upon this important fact. It must be remembered that both notes, the original and the renewal, said to

have been given by the deceased father to George, were destroyed, that the cheque transferring the twenty thousand dollars to George's credit was signed by George himself as his father's attorney, that not a scrap of writing from the father remains to shew what his intentions were, and that at the family conference, held shortly before the father's death at which George and his brother James were both present, not a hint was given with reference to this alleged gift.

The learned trial judge, however, who characterised the transaction as an "extraordinary" one, was of the opinion that there was enough of corroborative evidence of disinterested persons to satisfy him that the father had given the twenty thousand dollar note to George for his children and he found accordingly and directed the money to be paid into the court to their credit in equal shares.

This finding has not been reversed either by the Divisional Court or the Court of Appeal for Ontario and we must therefore assume that it is justified by the evidence. The Court of Appeal reversed the judgment of the Divisional Court, Mr. Justice Maclennan dissenting, and from that judgment this appeal is taken.

Mr. Justice Osler, who expressed himself as satisfied with the findings of the trial judge, was of the opinion that it

> would be extremely difficult to maintain that the notes were gratuities or without consideration and did not constitute a valid claim against the maker or the estate,

while Mr. Justice Moss is still stronger upon this point, saying:

> It is quite apparent that neither he nor George considered the notes as given as a merely voluntary gift for which there was no consideration whatever. They were given not only as a recognization of past valuable services, but as compensation for the years spent and to be

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spent by George in sustaining the burden of a business in which, as he said, he had no tangible prospects.

If I was able, on the evidence, to concur in this conclusion of fact, I would have no difficulty in agreeing with the legal conclusion these learned judges reached. If the notes were given for valuable consideration and were legally binding on the father there was no gift at all and no room for the invocation of the equitable principle on which I think this case should be decided. I am free to say also that it seems to me beyond doubt that such was the case with which the defendant George entered upon his defence. His pleadings clearly shew that. Such too seemed to be his view when he was examined for discovery. But the evidence not only failed to support such a defence but clearly negatived it. The learned trial judge found himself compelled to find that the notes were not given for George but for his children. The father, of course, was dead; there was no writing extant of the transaction and the only witness who could speak to it was George. In his main examination he says, speaking of the circumstances under which the note was first given:

Q What was the outcome of the conversation?

A. And he went on to say, "You can feel no greater interest in your children than I do, and as an assurance of my wish to make special provision for them I will give you a note for twenty thousand dollars without interest." It was an argument, of course, that would satisfy so far as my ambition went in relation to my children. I was satisfied to accept his promise, and he gave the note, remarking at the same time, so far as the note is concerned; "It has no relation as to the future prospects of yourself in the final disposition of my estate."

HIS LORDSHIP.—That is to say, it was for the children's benefit, not for you?

A. No sir, he remarked, at the time, for the "special benefit of your children."

Q. That is to say, the twenty thousand dollars was not to go to you but to your children, your prospects remaining the same?

A. That is what I mean ; that is what I understood.

Mr. AYLESWORTH.—Had he ever said anything before that as to his intention ?

A. He had talked with me several times about providing for my children by way of real estate in tail.

Q. That had been discussed ?

A. Yes.

Q. What was your own idea about that ?

A. I offered pretty strong objections to it on the ground that of course my children were very young, and farm property, as he expected me to continue the Picton business——

Q. At all events you raised objections to that or reasoned against it ?

A. Yes.

And, in cross-examination, he says that his father said ;

he would give him a note for twenty thousand dollars to represent * * a special gift in the interest of his children.

I frankly confess that, if the witness had felt himself able to say that this note had been given in consideration of his services past or future, I would have had no difficulty in accepting his statement It would not appear to me to have been an unfair or unreasonable family arrangement. The length of time George had spent in his service, the nature of his services, the whole of the surrounding circumstances, would have satisfied me that the contract and arrangement was one which the court would not interfere with. But, with every deference to the learned judges whose opinions I have quoted on this material point, I am bound to say that George's evidence completely negatives any such theory. There was no hint of the note having been given "in compensation for the years spent and to be spent by George." On the contrary, it was given, if given at all, "as an assurance of his wish to make special provision for them" (the children). The old man expressly told him—

It (the note) had no relation as to the future prospects of yourself in the final disposition of the estate (but), was for the special benefit of his children.

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This latter object is again, in his cross-examination, repeated and still more explicitly:

It was to represent a special gift in the interest of his children.

There was, therefore, neither payment nor compensation for services, past or future, or "advancement," as it was to have no relation to his future prospects in the final disposition of the estate. It was, as expressed, "a special gift in the interest of his children" and "for the special benefit of the children."

This being the only witness who did or could testify to the facts connected with the giving of the note, I cannot, while accepting his testimony, have any doubt as to the transaction being a voluntary gift. If the notes then were without consideration, the validity of the gift must be determined with reference to the relation of the parties and the state of facts existing in June, 1898, when the twenty thousand dollars were transferred to George's credit.

We are thus brought face to face with the main question argued before us. Is a gift of such an amount, about a quarter of his entire estate, given under such circumstances, from a father to one of his sons, standing in the confidential and fiduciary relation that this son did to his father, to be sustained in the absence of any evidence shewing that the father had independent advice, or that there were circumstances surrounding the gift which the court might hold equivalent to that advice?

There is no suggestion made that, as a fact, the father had obtained independent advice when he made the gift, though attention is called by Mr. Justice Moss and reliance evidently placed by him upon the testimony of Mr. Widdifield, that when, shortly before his death, the father, James Hart, went to consult him as his solicitor about his will, in the course of a discussion which arose about the disposition to be made

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of his estate and the proportions in which the residue (after making certain provisions for the daughter), was to be divided between his two sons, he, the father, said,

I have already made a large provision for George which I want to consider in making the division of the estate ;

and further, that thinking this referred to a farm which George had received from his father some years previously, and so suggesting, the old gentleman replied,

I am not thinking of that. James has the Whitney farm ; they are about equal on that score.

I am quite unable to agree that this general statement can possibly be held, even combined with the evidence relative to his examination of the bank-book and cheques after the withdrawal of the twenty thousand dollars, to amount to such "equivalent circumstances" as would dispense with the necessity for independent advice. There was not only nothing to shew that the old gentleman had informed Mr. Widdifield of the facts connected with the alleged gift but much to negative any such suggestion. While George's testimony with respect to the alleged gift of the twenty thousand dollars, was that his father had expressly stated that

it was to have no relation to his future prospects in the final disposition of the estate,

the "large provision" Mr. Widdifield understood the father to say he had made for George was

to be considered in the division of the residue of his estate.

There was clearly some misunderstanding, therefore, either on George's part or on the part of his father.

With regard to the most important fact, the relation in which George stood towards his father, I have no difficulty whatever in adopting the conclusion reached by the Divisional Court.

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That relation, for many years before the father's death, was of a highly confidential and fiduciary character. George was, in fact, the trusted agent, manager and adviser, having the fullest control of his affairs. His transactions were, no doubt, to some extent overlooked by the father, and the records of them appear to have been always open to and from time to time more or less carefully examined by the father. But there was the fullest authority given and the fullest trust reposed. If such confidential and fiduciary relations had existed between the father and a third person, could it be contended that a gift of one-quarter of his estate to that third person, without any independent advice having been taken, could stand? Wherein does the mere fact of the donee having been the son take it out of the rule? If the son was a trustee, or solicitor, or held any other special relation towards the father from which and during the existence of which the law prohibits large gifts being made and accepted, except under prescribed conditions, would the fact of his being a son absolve him from the rule requiring proof of compliance with those conditions?

The rule of equity is clear that, where persons stand in such confidential relations to each other, the party benefited by a gift must be able to shew that the donor had competent and independent advice, and that, in such cases, the age or capacity of the person conferring the benefit and the nature of the benefit would seem to be of minor importance. These latter are of importance only when no such confidential relation exists and the gift is attacked on the ground of undue influence having been used. When confidential relations exist between the donor and the donee undue influence is assumed; *Rhodes* v. *Bate*

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(1). The rule is stated by Lord Justice Lopes and Lord Justice Kay, in the Court of Appeal in *Liles* v. *Terry* (2) to be a rule "founded on public policy" and of great importance. It is a "definite rule of equity" and, as Lord Esher says, in the case just quoted, "raises such a presumption of undue influence as cannot be met or rebutted by evidence."

In a late case, heard last January, of *Wright* v. *Carter* (3), Mr. Justice Kekewich, delivering judgment, says:

> After reflection on the numerous authorities cited in argument and the comments of counsel thereon, I am satisfied that the accepted rule of the court is as stated by Lord Justice Turner in *Rhodes* v. *Bate* (1), and that, notwithstanding large differences in the language employed by different judges in other cases, there has been no intention to depart and really no departure from that statement. This is what Lord Justice Turner says, at page 257: "I take it to be a well established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can shew, to the satisfaction of the court, that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." The Lord Justice there speaks of persons standing in a confidential relation generally, but he intended to embrace solicitors in that description, and what he says has always been so understood. There are many cases to shew that other relations, and especially that of parent and child, stand on the same footing as that of solicitor and client, but to the latter there is applied more strongly than to any other the principle stated by Lord Justice Kay in *Liles* v. *Terry* (2), that while the confidential relation exists it is impossible to rebut the presumption of undue influence unless the donor had competent and independent advice. This presumption of influence is the key to all declarations on the subject.

In the case now before us the father, the donor, was, it was contended, a man of strong mind, the founder of his own fortune and, beyond doubt, fully capable of understanding thoroughly what he was

(1) L. R. 1 Ch. 252. (2) [1895] 2 Q. B. 679.
(3) 18 Times L. R. 256.

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doing when he is alleged to having signed the note, and probably also when the cheque was signed. But, even if that were so, it cannot affect the result. Assuming the donor did understand what he was doing, the presumption of undue influence still exists. The rule of equity is a hard and fast one, founded on public policy, and although in some exceptional cases it may possibly work hardship, in the generality of cases it is highly beneficial. It peremptorily demands that, where confidential relations exist at the time of the donation, and the voluntary gift is large as in this case, and made and accepted *inter vivos*, independent advice must be shown to have been had or what, in the absence of such advice, the law holds amounts to equivalent circumstances. Otherwise, the presumption of undue influence is irrebuttable. Now in this case, where the absence of independent advice is conceded and the presumed influence existed, where is the evidence of any adoption of the transaction, at any time, when the influence was removed?

I have already attempted to shew that there were no circumstances which the law accepts as equivalent to such independent advice, and I am, therefore, of the opinion that the appeal should be allowed and the judgment of the Divisional Court restored. *Morley* v. *Loughnan* (1).

MILLS J.—I agree with the judgment of the trial judge for the reasons stated by Mr. Justice Moss in his judgment.

I would, apart from the testimony of Mr. Widdifield, have had great doubt as to whether James Hart, Sr., had ever given to his grandchildren the sum of $20,000; but I think the testimony of Mr. Widdifield makes it plain that this was done, and that because of this

(1) [1893] 1 Ch. 736.

liberal provision he had not, when conversing with Mr. Widdifield, quite made up his mind how he would apportion, amongst his children the balance of his estate. I have little doubt from what was said that he would have dealt more liberally with James than he will be dealt with under the law, and perhaps Mrs. Bogrand will fare as well as if her father had disposed of his property by will. But, however this may be, we can only recognise the estate as he left it. He had already, as he said to Mr. Widdifield, made a large provision for George, and could thereafter only deal with what remained to him, upon which he never took any action.

I think the judgment of the trial judge should be restored.

Appeal dismissed with costs

Solicitor for the appellants: *E. Malcolm Young.*

Solicitor for the respondent, George Hart: *C. H. Widdifield.*

Solicitors for the respondents, The Standard Bank of Canada: *Francis & Wardrop.*