WILLIAM N. McKAY (COMPLAINANT)....APPELLANT;

AND

J. CAMERON CLOW, G. HAZEL CLOW AND LUCY ADA McKAY (DEFENDANTS) ..... RESPONDENTS.

1941

* May 16.
* Oct. 7.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND

Contract—Suit to have conveyance and agreement set aside—Alleged improvident transaction—Relationship of parties—Condition of health of grantor—Circumstances prior to and at time of execution of documents—Evidence—Findings by trial judge—Onus of proof as to full comprehension by grantor of what he was doing and as to pressure or undue influence—Whether grantor's execution was spontaneous act with free and independent exercise of will.

Complainant sued to have a deed of conveyance and an agreement, executed by him, set aside. The deed conveyed his farm to his daughter and her husband, reserving a life estate, without impeachment of waste, to complainant and his wife. By the agreement (of the same date as the deed), made by complainant and his wife of the first part and their daughter and her husband of the second part, complainant assigned to his daughter and her husband a one-half share of complainant's farm stock, implements, crops, furniture and other movables on the farm; the parties were to live together on the farm, as they had done theretofore, were to carry on farming operations jointly, to share equally expenses and profits; said daughter and her husband were to care for complainant and his wife during their lives, their support and maintenance to be from their share of profits and to be in a manner in keeping with the farm's earnings; and on the death of complainant and his wife or the survivor of them, all their interest in said farm stock, etc., were to belong to the daughter and her husband. Complainant alleged that the documents were executed by him in advanced age, at a time when he was infirm

* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

1941

McKAY
v.
CLOW ET AL.

and of weak understanding and unable to resist the threats and importunities of defendants (complainant's wife, his daughter and her husband) or some or one of them; that they were executed without independent legal or other disinterested advice at a time when complainant was under defendants' influence; that they were executed improvidently, and without any power of revocation; that the consideration was grossly inadequate; and that the contents thereof did not express complainant's wishes. The trial judge made findings against complainant's contentions and dismissed the suit. His judgment was affirmed on appeal (on equal division of the court) and complainant appealed to this Court.

Held (Davis and Hudson JJ. dissenting): The appeal should be allowed, and the deed and agreement cancelled.

Per Rinfret, Crocket and Taschereau JJ.: Having regard to the evidence as to complainant's condition of health, the relationship of the parties, their feelings towards each other as shown by their conduct, and all the facts and circumstances leading up to and in connection with the execution of the documents, the documents, in their contents and effect, were such as to create doubt and suspicion as to their genuineness, so as to make it the duty of those who practically took the whole benefit thereunder to satisfy a court of equity that complainant not only fully comprehended what he was doing when he executed them but that he was not subjected to any pressure or undue influence in connection therewith; and the documents, read in the light of the evidence concerning the relations and feelings between the parties and the complainant's condition of health, did not show a fair and just and reasonable transaction on an equal footing, nor that complainant's execution of them was (as found by the trial judge) his "spontaneous act with a free and independent exercise of his will," but pointed quite to the contrary conclusion.

The established rule of equity is that, whenever it appears that any party to a transaction, from which he or she derives some large or immoderate benefit, occupies such a position in relation to his or her supposed benefactor as to give the recipient a dominating influence over him, that benefit is presumed to have been obtained by the exercise of some undue influence on the part of the recipient. In all such cases, whatever be the nature of the transaction, whether a gift *inter vivos* or a contract alleged to have been made for a good and sufficient consideration, the onus of proof lies on the party who seeks to support it, to show that the transaction by which the benefit is granted was the free, independent and unfettered expression of the grantor's mind.

Per Davis and Hudson JJ. (dissenting): It is unnecessary to decide whether the deed, in view of the collateral agreement, can strictly be said to be a voluntary conveyance to which the rule that the onus rests on the grantees to justify the transaction applies, because in both courts below the deed has been treated as a voluntary conveyance and complainant has had whatever advantage there was in that interpretation. The case was essentially one of fact for the trial judge, who had the advantage, so important in a case of this sort, of seeing and hearing all the parties to the impeached transaction. To reverse his findings in such a case this Court should have to be

convinced that he was wrong; and the evidence as a whole was far from convincing that there was any solid ground upon which this Court should interfere.

APPEAL by the complainant from the judgment of the Court of Appeal in Equity of Prince Edward Island affirming (on equal division of the Court) the judgment of the trial judge, Saunders J., Master of the Rolls, dismissing the complainant's suit, in which the complainant asked that a certain deed of conveyance of the complainant's farm to the defendants Clow (husband and wife, the latter being a daughter of complainant) (reserving a life estate without impeachment of waste to complainant and his wife), and also a certain agreement (of the same date as the deed) between the complainant and his wife (who was a defendant in the action) of the first part and the said defendants Clow of the second part, be set aside and cancelled; or in the alternative that said documents be reformed and rectified.

The formal judgment at trial adjudged and declared that the said deed of conveyance and agreement were established and were to stand as valid and subsisting (except that an amendment was directed in the habendum of the deed of conveyance, by striking out the words "as joint tenants and not" before the words "as tenants in common," so that the defendants Clow be tenants in common and not joint tenants).

The facts in dispute sufficiently appear, and the documents in question are sufficiently described, in the reasons for judgment in this Court now reported. The appeal to this Court was allowed with costs, Davis and Hudson JJ. dissenting.

J. J. Johnston K.C. for the appellant.

W. L. Scott K.C. for the respondents.

The judgment of the majority of the Court (Rinfret, Crocket and Taschereau JJ.) was delivered by

CROCKET J.—This is an appeal from the judgment of the Court of Appeal in Equity of Prince Edward Island, in a suit brought by the appellant, Willam N. McKay, by a bill of complaint in the Court of Chancery, praying that a deed of conveyance dated February 26th, 1936, from

1941

McKAY v. CLOW ET AL.

Crocket J.

the complainant to the respondents, and an agreement of the same date between the same parties be set aside and cancelled, or in the alternative that the said deed and agreement be reformed and rectified, so as to express the true agreement between the parties concerned, and that the true intention of the appellant might be carried into effect.

The deed in question, which was executed by the complainant and his wife, of the first part, R. Reginald Bell, Barrister, of Charlottetown, of the second part, and J. Cameron Clow and G. Hazel Clow, his wife, of the third part, purported, in consideration of the sum of one dollar paid by the grantees to the grantor, William N. McKay, to grant unto the said Bell, his heirs and assigns, all the complainant's farm land situate at Murray Harbour North, on Lot 63, in King's County, containing 177 acres more or less, with all the rights, privileges, appurtenances, etc., belonging thereunto, to have and to hold the same unto the said Bell and his heirs, to the use of the said complainant and his wife

for and during the term of their and each of their natural lives without impeachment of waste, and from and after the decease of the said William N. McKay and Lucy Ada McKay or the survivor of them to the use of the said J. Cameron Clow and G. Hazel Clow, their heirs and assigns forever as joint tenants and not as tenants in common.

The complainant was the exclusive owner of the land described, his wife having no interest therein other than her right of dower, the barring of which was the apparent reason for her joining in the execution of the deed. J. Cameron Clow and G. Hazel Clow, upon whom the deed purports to bestow the remainder in fee simple as joint tenants, are husband and wife, the latter being the daughter of the complainant and his wife, to whose use for the term of their or each of their natural lives Mr. Bell and his heirs were to hold the granted land.

The agreement in question purported to assign and transfer to Clow and his wife a one-half share in all the farm stock and implements

now owned by the parties of the first part, including all horses, cattle, hogs, sheep, poultry, carts, wagons, sleighs, harness; agricultural, farming and dairy implements and machinery, and all crops now on said premises, and a one-half interest in all household furniture and other movables in, on and about said farm premises.

The parties named therein as parties of the first part are the complainant and his wife, though admittedly all the property described in the agreement was also exclusively owned by the complainant himself, and his wife had no legal title thereto.

This agreement, which seems to have been executed immediately after the deed, recites that the said parties of the first part (the complainant and his wife) had

in consideration of natural love and affection and for services rendered the said parties of the first part by deed of even date herewith granted their farm of one hundred and seventy-seven acres to the said parties of the second part, subject to a life interest in favour of the parties of the first part;

that the said parties had

agreed to carrying on farming operations jointly on the said farm with equal rights and liabilities as to profits to be made and expenditures to be *received* [?];

and that

the said parties of the first part have agreed to give to the parties of the second part a one-half interest in all the stock, crop, farming implements, household furniture and all other movables and equipment about and on the said premises.

It then proceeds to assign the one-half interest to Clow and his wife, as already stated, and to provide that

the parties hereto agree to carry on farming operations jointly so that all expenses incurred and expenditures made and all profits derived henceforth in connection with the carrying on of said farming operations shall be divided equally, share and share alike;

that

all the parties hereto are to take part in the working and operation of the farm and to give all their time thereto and to work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned;

that Clow and his wife

are to have a home in the dwelling on said premises and all the parties are to live together as heretofore;

that Clow and his wife

are to *care for* the said parties of the first part during their lives and the life of the survivor, *their support and maintenance to be from their share* of profits of the farming operations and to be in a manner in keeping with the earnings of the farm;

and that

on the death of the parties of the first part or the survivor of them, all the interest of the said parties of the first part in the stock, crop, implements, furniture and other movables shall thenceforth belong to the parties of the second part.

1941

McKAY v. CLOW ET AL.

Crocket J.

The bill of complaint alleged, *inter alia,* that for many years previous to the execution of the deed and agreement the complainant resided with his wife and daughter on the said farm; that for some years previous to the execution of the said documents the complainant was physically and mentally ill and compelled to undergo treatment at the hospital for his physical and mental ailments and continued under these disabilities for a long period of time; that during this period of illness Clow married his daughter, Hazel, and came to live with his wife on the said farm; that at the time of the execution of these documents and for a considerable period preceding same the complainant was very ill and greatly deranged in his mind and altogether unable to transact business; that the defendants, taking advantage of his helpless physical and mental condition, kept importuning him to make over his property to them so that they would have the ownership, management and control of the same; that the complainant finally agreed with the defendants that he and Clow should carry on the operations of the farm jointly, and that there should be an equal division of the net profits of the farm between himself on the one part and the defendants on the other, and that the complainant would pay half the expenses and the defendants the other half of the expenses of running the farm and household, but that he never agreed to give any of the defendants any interest or ownership, present or future, in the farm or the stock, crop, farming implements, furniture or other personal property in and about the farm. The bill of complaint further alleged that the deed and agreement were executed by the complainant in advanced age at a time when he was infirm and of weak understanding and unable to resist the threats and importunities of the three defendants or some or one of them; that they were executed without independent legal or other disinterested advice at a time when the complainant was under the influence of the defendants; also that they were executed improvidently and without any power of revocation; that the consideration was grossly inadequate; and that the documents were prepared by solicitors selected and paid by the defendants, who gave the instructions for same without any consent on the part of the complainant, and the contents of which did not express the wishes or desires of the complainant.

The appellant at the time of the execution of the documents was in his seventieth year and his wife a few months older. They had been married upwards of fifty years and had three daughters, of whom Hazel was the youngest. The other two were married and were living in the United States with their husbands and children. Clow married Hazel in September, 1930, when, it seems, he was 34 and she 28, after a courtship of about four years, and went at once to live with her parents on the farm at Murray Harbour North, which had been the home of the appellant through his whole married life, though originally it was a farm of but 77 acres, on which his father and grandfather had lived before him. He and Hazel continued to make their home there until the execution of the deed and agreement referred to, and have since done so, as have also both Mr. and Mrs. McKay, except for a visit of a few weeks, which Mr. McKay himself made to his oldest daughter, Mrs. French, at Medford, Mass., in 1936.

The suit came on for trial before Mr. Justice Saunders, Master of the Rolls, in December, 1938. The trial judgment, delivered October 2nd, 1939, directed an amendment of the deed of conveyance by striking out the words "as joint tenants and not" in the habendum thereof, and adjudged and declared that in all other respects the said deed should stand as a valid and subsisting conveyance to the uses and purposes therein mentioned, and also that the agreement made between the complainant and his wife, of the first part, and the defendants, J. Cameron Clow and G. Hazel Clow, his wife, of the second part, on the same date, stand as a valid and subsisting agreement between the parties thereto.

The complainant thereupon appealed to the Court of Appeal in Equity, consisting of Chief Justice Mathieson and the Vice-Chancellor, Mr. Justice Arsenault. The Chief Justice gave judgment in favour of dismissing the appeal, simply stating in doing so that he agreed with the reasons of the Master of the Rolls, as set forth in his judgment. The Vice-Chancellor, on the contrary, was of the opinion that the appeal should be allowed and that there should be a decree that the deed be declared void and delivered up to be cancelled. The two judges in appeal having thus differed in opinion, the judgment of the Master of the Rolls was confirmed without costs.

1941
McKAY
v.
CLOW ET AL.
Crocket J.

It is from this judgment that the complainant now appeals to this Court.

It is best, I think, first to deal with the construction and legal effect of the two impeached documents, the actual execution of which by all the parties thereto is not questioned.

As to the deed, which is under the Short Form Act (P.E.I. Statutes, 1894, Cap. XI), there can be no doubt that it evidences an intention on the part of the complainant—provided he understood it and comprehended what he was doing when he executed it—to irrevocably renounce his exclusive ownership and control of the described land and to make his wife a joint tenant thereof with him so long as both should live, and that, in the event of his death, his wife should continue to hold and enjoy the exclusive possession and control of the property until her own death, whereupon it should pass to the use of J. Cameron Clow and G. Hazel Clow, their heirs and assigns, forever, as joint tenants with right of survivorship. If valid, the deed conveys a present vested estate to the Clows, as well as to Mrs. McKay.

Having regard to the relationship of the parties and to the purpose for which and the consideration upon which it is now claimed the deed was executed, it is singular, to say the least, that it should state the consideration at one dollar paid by the grantees to the grantor, William N. McKay, and set out as well the usual covenants, warranting title, quiet possession, etc., and guaranteeing the execution of such further assurances of the said lands as may be necessary, as being entered into between "the said grantor" and "the said grantees," (presumably the beneficial grantees), one of whom was "the said grantor" himself.

As for the collateral agreement, it is one which must be examined with the closest attention in the light of the relationship existing between the parties concerned and all the facts and circumstances leading up to and in connection with its execution, if its true import and effect as respects those who signed it is to be fully realized.

The agreement, if valid, at once vested in Clow and his wife the absolute ownership of an undivided one-half share in all the live stock, farming and dairy implements and

machinery, as well as all crops then on the farm premises, and in "all household furniture and other movables in, on and about said farm premises" with a covenant that on the death of the complainant and his wife, or the survivor of them, that the other one-half share in all the personal property specified shall "thenceforth belong to" them also. In addition to this, it provides that all four (the donors and the donees alike) shall "carry on farming operations jointly," and that all expenses incurred and all profits derived henceforth in connection with such joint operation shall be divided equally, share and share alike, and also that all four shall "take part in the working and operation of the farm," and "give all their time thereto," and "work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned." Furthermore, the agreement secures for Mr. and Mrs. Clow "a home in the dwelling on said premises," in which "all the parties are to live together as heretofore." It is difficult to discover in any of these provisions any benefit or advantage for the complainant (the owner of the property) as against Mr. and Mrs. Clow, which he had not enjoyed during the nearly five and one-half years he had provided a home and subsistence for them after their marriage, while both were supposed to be taking their proper part in the working of the farm with himself and his wife, unless it is to be inferred that during that period they had not in fact been doing so. And Clow himself admits that in the year 1935 it became his regular habit, after assisting in the morning milking, to leave the place for the day and not return until night, usually taking with him the automobile which Mrs. McKay gave his wife as a wedding gift. Apart from this the only obligation towards the complainant the agreement places on Clow and his wife is that which is expressed in its penultimate paragraph, viz.: that they "are to *care for* the said parties of the first part during their lives and the life of the survivor,"—and this with the significantly drastic qualification that "their support and maintenance [is] to be from their share of profits of the farming operations and to be in a manner in keeping with the earnings of the farm." Yet it has been suggested that this one-sided agreement constitutes in equity a good and sufficient maintenance agreement.

1941

McKAY v. CLOW ET AL.

Crocket J.

With all due respect, it seems to me that the two instruments themselves betray such incongruities and inconsistencies as cannot fail to raise doubt and suspicion of their genuineness, and, having regard to the relationship of the parties, to make it the duty of those, who practically take the whole benefit thereunder, to satisfy a Court of Equity that the grantor or donor (or donors if the complainant's wife was in truth a donor as well as her husband), not only fully comprehended what he was doing when he executed the deed and agreement, but that he was not subjected to any pressure or undue influence at their hands in connection therewith.

One rather remarkable feature of the agreement is the joining of Mrs. McKay as a joint owner with the complainant of all the personal property, the one-half share of which it purports to assign, notwithstanding the undeniable fact, already pointed out, that she had no legal title, so far as the evidence discloses, to any part of it, unless her husband's joining with her in the execution of the agreement *ipso facto* made her a joint owner with him. Although she was obviously concerned in the other terms of the agreement regarding the joint operation of the farm by all four, and might, therefore, naturally be expected to join in its execution, it can hardly be said, I think, that the fact of her being joined with her husband as parties of the first part itself, either made her a joint owner with her husband of all the stock, crop, farming implements, household furniture and other personal property on or about the farm premises, or vested in her a distinct but undivided one-half share therein. It may be that, if the complainant at all comprehended the effect of what he was doing when he joined his wife in the execution of such a document, he would, as his counsel suggested, in strictness of law be estopped from afterwards claiming that his wife was not part owner of the personal estate, which she purported with him to assign, but that would not give her the right to represent herself, as she did, as part owner of all the personal estate, one-half of which she purported with her husband to assign to the parties of the second part (her son-in-law and daughter).

Another thing of marked significance about the agreement is that its first recital regarding the conveyance to

Clow and his wife of the farm land and the consideration for that conveyance does not accord with the statement in the deed itself. The deed says that that conveyance was made in consideration of the sum of one dollar then paid by the grantees to the grantor, while the first recital of the agreement declares that it was "in consideration of natural love and affection and for services rendered." This recital also alleges that the deed granted *their* farm (that is, Mr. and Mrs. McKay's farm) " to the said parties of the second part," which is also a contradiction of the deed itself, and of the undisputed fact that the complainant was the exclusive and absolute owner thereof. Furthermore, the principal paragraph of the agreement, which purports to assign and transfer to the parties of the second part a one-half share in all the personal property therein specified, distinctly states that all this personalty is " now owned by the parties of the first part," and that the assignment is made " in consideration of the premises [the three recitals already mentioned] and of the natural love and affection of the said parties of the first part for the parties of the second part."

The whole tenor of the agreement, when read with the deed and in the light of the entire testimony concerning the then existing relations between the parties and the complainant's physical and mental condition, far from showing a fair and just and reasonable transaction between the parties on an equal footing, and that the complainant's execution of the deed and agreement was his " spontaneous act with a free and independent exercise of his will," as the learned trial judge has found, points, in my respectful opinion, quite to the contrary conclusion.

Manifestly the relations existing between the respective parties before and at the time of the critical transaction and their motives and feelings towards each other cannot be satisfactorily determined in a case of this kind solely by the impressions which they have succeeded or failed to make upon the mind of the trial judge as to their comparative cleverness, competence or credibility by their demeanour upon the witness stand more than two years after the consummation of the transaction. A witness's true feeling and intention towards another at any particular time can surely more safely be inferred from his

1941
McKAY
v.
CLOW ET AL.
Crocket J.

proven or admitted acts and conduct towards that person before, at the time of and after the transaction under investigation. While in many cases such an issue may be said to be a pure question of fact dependent entirely upon the credibility of witnesses and in such cases the trial judge's finding would ordinarily be held to be conclusive in the absence of any misdirection or misapprehension on his part, the trial finding, upon which the respondents so much rely, is, in my humble opinion, one which must be carefully reviewed in the present appeal, if well known principles of law and equity are not to be ignored.

That finding involves not only the relations and feelings of the parties to and towards each other, but it involves as well the interpretation of the two written instruments and the righteousness and reasonableness of their terms in the light of those relations and feelings.

Before dealing with the relations and feelings of the parties to and towards each other, it may be stated that it was proven conclusively by the hospital records and by medical testimony, and not denied by anybody, that prior to November, 1929, the complainant had suffered very severely from varicose ulcers and veins and eczema of both lower legs, for which he was treated in the Prince Edward Island hospital for nearly a month; that, though he was discharged from the hospital with the ulcers temporarily healed, he was readmitted in August, 1930, when he was found by the hospital physicians in consultation to be suffering from a condition of acute mental depression, diagnosed as melancholia, and that, though he was discharged and returned to his home on September 6th—four days before Clow married his daughter—his condition was entered as unimproved. Mrs. McKay admitted that she knew before he went into the hospital the second time that he was not all right in his head, and that he was sick in his mind in 1930, so much so that on one occasion, when she spoke of his carrying a rope about with him, she thought he might do away with himself, and that she kept watching him. She did, however, say that he looked better on his return from the hospital, and that from that time on he was in good health except that his legs at times were in bad shape. Clow in his evidence took the same position, though in the course of his cross-examina-

tion as to an assault that he made upon the complainant in 1934, he admitted he was a crippled old man at the time.

Mrs. McKay's aggressive and dominating influence over her husband and daughter, as well as her lack of affection and respect for the complainant, is apparent throughout her own entire testimony. Notwithstanding that for more than 20 years she had been investing and reinvesting moneys, which her husband had given her out of the profits of his farm and of the store, which years before he had established in connection with the farmhouse, but of which she had taken full charge, and had thus established quite a substantial independent estate of her own, out of which she was able herself to give her daughter, Hazel, an automobile as a wedding present, and that the latter had also invested and reinvested moneys derived from her father's property in a number of other mortgages, she described her husband not only as inconsiderate and stingy, throughout their whole married life, but as one who "would put his child on the road," and whose presence would "pretty near put a fear in you any time,"—"a terrible boss," who "made his own feel it," and of whom "we were in a dread all the time."

At the risk of prolonging what is, perhaps, already too lengthy a judgment, I quote the following extract from her cross-examination, as it appears on p. 218 of the appeal book, regarding Clow's coming to live on the place:—

Q. No arrangement was made, you say? A. No.

Q. You told Mr. Bell no arrangement made at the time, Hazel didn't want to leave so you invited him to stay, didn't you? A. I asked him to stay, yes.

Q. You asked him to stay; were you running the business at that time? A. Well, when I was doing the most of the work I wanted some help.

Q. You wanted some help? A. Hazel and I had the most to do, we wanted some help.

Q. It was you asked him to stay? A. Yes, I asked him to stay.

Q. You didn't want your daughter to live—you didn't want her to go down and live at this other place with his people? A. *I didn't want us to be separated and we will not be only by death.*

Q. So it was you insisted upon him staying there? A. Yes.

Q. All right. Now, your husband didn't want him to stay there you told us? A. He wanted his work.

Q. Did he want him there? A. He wanted his work.

Q. Did he want him living there? A. Well, I don't know that he objected only at times when they would disagree.

1941

McKAY
v.
CLOW ET AL.

Crocket J.

Q. At times when they would disagree he told him he didn't want him, is that right? A. Well, I never heard the disagreement very much.

Q. Well, did you hear that your husband had told him, did you hear from him or from your daughter or from anybody that at times your husband didn't want him there? A. I don't know.

Q. You knew he was not wanted there? A. I knew he was not wanted there—

Q. By your husband, he was wanted by you? A. Yes.

Q. But he was not wanted by your husband? A. I suppose not.

Q. And of course then there was trouble, wasn't there? A. Sure.

Q. Sure there was trouble, oh, you bet! A. But there was trouble long before he came there.

Q. There was trouble? A. Yes.

Q. But the trouble got intensified because he didn't want him there and you did? A. Our lives were not safe there without a man.

Q. Your lives were not safe there without a man? A. No, they were not.

Having thus completely subordinated his own wishes to his wife's in a matter upon which she was so firmly set, one would have thought that this would have softened her feeling towards her aging and enfeebled husband, but unfortunately such was not the case. Her own evidence, far from exhibiting any disposition on her part to avoid further disagreement with him regarding the conduct of the farm, and to make things as comfortable as possible for him in the circumstances in the home, of which he was still supposed to be the head, indicates only constantly increasing animosity towards him. Of course she blamed this entirely upon his irritable and disagreeable nature. "You could live," she said, "but he would not agree to anything we wanted to do." She gave no particulars as to what these things were, which they wanted to do, but did mention two instances, where Clow and her daughter did things in open defiance of her husband's wishes and positive instructions. These were the sinking of the water pump in a location chosen by Clow and Mrs. McKay, and the use of a particular mare for the spreading of fertilizer. Both these instances appear to have occurred in the year 1934.

Without going into the unpleasant details of the last mentioned, as related by Mr. and Mrs. Clow, suffice it to say that it culminated in Clow assaulting the complainant in the stable doorway, clinching him and throwing him down on the stable floor on his back. His excuse was that the old man (who was then admittedly lame and

unable to fight) was standing in the stable doorway shaking his fists at him, after he (Clow) had taken out in Hazel's presence the mare he had just forbidden the latter to use for that purpose, and that he did not intend to hurt him, but only "to give him a fright," that he "thought a fright would do him good."

And here I should point out—and I do so with much regret—that the daughter's own evidence discloses that she herself on another occasion, before the execution of the documents, also assaulted her father and knocked him down. Her explanation is that he tried to stop her from taking another horse out of the stable, and that she pushed him and he fell down. Whether he tripped and fell on his face she said she could not remember. "Do you think," she was asked, "it was right to do that to your own father?" to which she answered, "Well, I was looking after the horse, so I think I had as much to do with the horse as he had." She said she reported that incident to her mother but could not remember what the latter said. Later she said she was taking the horse out to put it in a sleigh, but could not remember whether her husband was going with her or not.

All three respondents admitted that the relations between themselves on the one side and the complainant on the other were all the time getting worse and worse. It is not surprising, therefore, to read in Mrs. McKay's examination-in-chief that when four hired men came to the place to assist in haying operations in the season of 1935, that she refused to get dinner for any of them, as had been her custom in the past, and that they had either to return to their own homes for dinner or be fed at neighbouring houses; and that when the complainant brought one of these men to the house and particularly ordered her to get dinner for him that the complainant became irritated at her refusal.

This, of course, precipitated another altercation and Mrs. McKay declares that after they had their own dinner he caught her by the back of the neck and shoved her in the corner. "So I thought then," she declared, "it was time to do something and I went to a magistrate and had him bound over to the peace." This she said she did after hay-making. McKay in his evidence admitted that he had given his wife a shake on the occasion mentioned,

1941
McKAY
v.
CLOW ET AL.
Crocket J.

and swore that he heard her call Clow to come to her assistance and that he heard Clow say she had "a chance now to pull him and why not do it." It is not denied that he was summoned before a magistrate at Montague, charged with assaulting his wife, or that the three respondents appeared in the magistrate's court against him, or that he was fined $5 and costs, or $15 or $16 in all, including their witness fees, and bound over to keep the peace for one year.

Notwithstanding the humiliation to which he had thus been subjected by his wife and daughter and son-in-law, and the advantage which they had thereby gained over him, the appellant was still the exclusive owner of the 177-acre farm and all the live stock, farming implements and other personal property upon it, and, unless he was prepared to abandon it entirely to the respondents, had no other recourse than to make his home in the farm house along with them during the approaching winter at least. One has only to read his wife's testimony together with his as to their attitude towards each other during that fall and winter, to see which of them was now the dominating spirit in the management, not only of the household, but of the entire farm. The ownership of the property had yet to be transferred. That was accomplished by the execution of the deed and agreement of February 26th.

Seventeen or eighteen days before the execution of these documents, on February 8th or 9th, around the noon hour, there was a fire in the dining room, which seems to have originated from a defective flue. According to Clow, there were three or four places where the fire came out between the bricks, and the plaster had to be removed from the wall and some of the floor boards taken up to extinguish the blaze. He himself was away, as he usually was during the day, at the time, but on his return he learned what had happened, and says that he stayed home that night and watched the flue, and that it was in such condition that he did not feel like sleeping in the house, and that he and Hazel didn't sleep "or at least there was always one of us awake that night in case the house should catch and we would be burned in it." He couldn't afford, he said, to lose his clothes should the house catch fire again, so the next morning he got all his clothes he didn't need in

his trunk—"all my best clothes"—as he later put it, and Hazel and he brought the trunk downstairs and put it outside. Mr. McKay was in the kitchen when they came down, and Clow's story is that when he and Hazel came back in, McKay wanted to know why he was taking this out. His answer was, "the house is not safe." Without any discussion whatever as to the safety of the house, according to Clow, McKay wanted to know then, "What did I want and stay," to which Clow answered he "would not ask him for anything."

Q. You told him you would not ask him for anything? A. The next thing he said to me, "You want it all."

Q. "You want all." Yes. A. Well, my answer to that was there was a long ways between it all and nothing. That was my answer.

Q. A long ways betwen it all——? A. And nothing, which I had been getting up till that time; so he still wanted to know what I would take, I said "I would not ask you for anything and I am not going to ask you for anything but if you will make me an offer, I will tell you whether I will accept it or not.

* * *

Q. What was his offer? A. Mr. McKay's offer was that he would give us one-half of everything on the place and at his death and Mrs. McKay's death we were to have the place, everything in connection with the farm, and the farm.

Q. Whose offer was that? A. Mr. McKay's. Now, I had not asked him for one thing.

Q. You had not asked him for one thing? A. And I told him that we would accept that offer.

Q. Right there that day? A. Yes, and we talked it over. And Mr. McKay thought that I would go right to work that day and I told him no, that we had to have this on paper, this offer, all fixed up in a legal way.

Q. Yes. Had to have this on paper, all fixed up in a legal way? A. He wanted to put it off till the next spring.

Q. Till the spring? A. I told him that would suit me. He wanted to have the thing postponed then till the next spring and I told him that would suit me but I would not do one day's work until the papers were signed.

Q. The papers were signed? A. So he spoke about,—I would not work until this agreement and all those things were signed. Well, he said it was too cold for him to go away for a lawyer and in the state his legs was in he could not get around very good. So Mrs. McKay, she suggested Will McLure.

Q. So Mrs. McKay—she suggested Will McLure—who was Will McLure? A. Our Magistrate in Murray Harbour North.

Q. Your Magistrate in Murray Harbour North? A. Now, we talked this over in the house there, I just can't give the exact words of what went on but after she suggested Will McLure, now I asked Mr. McKay——

Q. You asked Mr. McKay? A. Would he have William McLure.

Q. Would he have William McLure—? A. Come to the house. And he said he would. And I asked him would I go in that day when I was going to my mother's and ask Mr. McLure to come down, that he wanted him. And he said yes, to tell Will McLure to come down.

1941
McKAY
v.
CLOW ET AL.
Crocket J.

From Mrs. McKay's evidence we learn, not only that she had told her husband the night before that Clow and Hazel were going to leave, but that she herself had made up her mind to leave with them, and that in the conversation that took place between Clow and her husband and herself in the kitchen when Clow brought his trunk down next morning, she made that clear to her husband. Also that, when Clow accepted Will's offer and he told him to go to work, she (Mrs. McKay) herself said "Not till that goes on paper."

Notwithstanding that Clow must have understood that the enfeebled old man wanted to postpone the putting of the alleged verbal agreement in proper legal form until the spring (when he could go and consult his lawyer), till Mrs. McKay "suggested Will McLure" (as Clow put it), or "that William McLure could do that as good as anyone," (as Mrs. McKay herself stated it), Clow obligingly stopped at McLure's on his way to his mother's home that very morning, and told McLure "that Will McKay wanted him." McLure went down to McKay's that day, as Clow says he found out when he returned from his mother's that night. "They told me," he said, "what they had told Mr. McLure to do." By "they" he explained he meant Mr. and Mrs. McKay and Hazel. Asked if they said what had gone on, he replied: "Well, they told me that they had told Mr. McLure the offer that Mr. McKay had made and that he was to draw up—to write this out to the best of his ability on a paper and to come back in a few days." Mr. McKay, he had explained, did not do "all the talking"—the three were there—"and Mr. McKay done some of the talking." In the meantime all fear that they might be burned up if they remained in the house any longer seems to have completely vanished from both Mr. and Mrs. Clow's minds. They all waited for McLure to come back with his "writing." He did come back in a few days. On this, his second visit, Clow was there, as well as Hazel and Mr. and Mrs. McKay, and, according to Clow, "Mr. McLure had a paper drawn up with things in it that they wanted in the business we were getting done,"—or, as he later described it, "about three sheets of paper wrote out"—and it was Mr. McLure and Mr. McKay "that done all the talking." He (Clow) had

nothing to say, "any more than when they would say anything he would agree with it." He did say that when Mr. and Mrs. McKay were describing the boundaries of the farm and talking it over, they both wanted something in the agreement, when it was drawn up, which would prevent any of his (Clow's) people, if anything should happen to him, from claiming during the life of Hazel anything that he would have there. If such an instruction were given it is quite evident that McLure paid no attention to it, for neither the deed nor the agreement contains any safeguard whatever against either the land or the personal property going outside the McKay family. As a matter of fact, McLure expressly denied that Mr. McKay told him it was not to go outside the McKay family. Moreover, McLure's statement to the defendant's counsel in his examination-in-chief regarding his instructions in connection with the proposed transfer was that Mr. and Mrs. McKay were going to give the half of the place to the son-in-law and daughter and the remainder at their death, and that they were to live together and work together on the halves. Having said this, he added, he went home and drew out the memorandum to the best of his ability. But before that he had told the parties that he would not have anything to do with the preparation of the necessary papers, that he was going to take what he had written as a memorandum to some lawyer to have it legally done, as he didn't consider himself capable. However, he did prepare a written memorandum, took it back to the McKay house and said he read it over and that they were all agreed.

According to Clow, Mr. McKay wanted to know how Mr. McLure was going to get to a lawyer, and Mr. McLure said he could have him (Clow) take him to Murray River and the two agreed on a time to go either one or two days after the memorandum had been read and agreed to. Clow called for McLure and took him to Murray River and thence by train to Charlottetown. On their arrival at Charlottetown Clow says McLure wanted to go to Mr. Lowther but as the latter was not in his office they went along the street and saw Bell & Mathieson's sign so they went in there. Clow says Mr. McLure had the memorandum of instructions with him, but he does not say whether

1941

McKAY v. CLOW ET AL.

Crocket J.

or not he gave it to Mr. Bell, with whom he says McLure did the talking. Clow admitted that he paid McLure's expenses as well as Bell & Mathieson's bill out of his own pocket. The two returned to Murray Harbour North that night and Clow says he never saw McLure again until the latter came to McKay's to have the documents executed, when he and Hazel and Mr. and Mrs. McKay were all present. According to Clow, McLure read over the documents and explained anything that Mr. McKay asked him, to the best of his ability, and he says that after this Mr. McKay asked his wife if she was satisfied and would sign it, and that she said she would sign it after he did. At any rate, the documents were signed by all four. McLure took the deed away and gave Clow one duplicate of the agreement and left the other on the table for Mr. and Mrs. McKay. The deed was registered within a few days.

A most unfortunate circumstance regarding the written instructions, upon which the documents were supposed to be based, and one which would seem to throw added suspicion upon the whole transaction, is the complete failure of the record to explain the disappearance of the memorandum of instructions. McLure says he never saw it after he left Bell & Mathieson's office. Mr. Bell says that he remembered a sheet of paper with some memorandum on it concerning an agreement of settlement between Mr. and Mrs. McKay and Mr. and Mrs. Clow, and that he had no record of having that memorandum or whether it was left with him that day or not, and that since the commencement of the suit he had made a careful search through all the files and records at their office but had not been able to find it anywhere. As Mr. Justice Arsenault says in his reasons, there is no reflection whatever to be cast on Mr. Bell, who prepared the documents, but we are not told what was in the memorandum or what instructions were given by either McLure or Clow, or whether the documents correspond or were in conformity with what was contained in the memorandum, and Mr. McLure, who prepared it, could not recall what was in it.

The appellant's counsel in the course of his argument before us stated, and it was not denied, that Mr. McLure was one of the magistrates, who had in the previous autumn or fall convicted the appellant of the assault on his wife, and bound him over to keep the peace.

Then, having procured the execution of the deed and agreement in the manner and under the conditions and circumstances described by Mr. McLure, Clow and Mrs. McKay, the two last mentioned immediately proceeded to take complete charge of the farm, as their own evidence plainly shows, without accounting in any way to the complainant for any of the receipts or expenditures. They both said no profit had been made out of the so-called joint operation of the farm in the nearly three years that had elapsed to the time of the trial, on account of their having turned all their receipts into the improvement of the place through replacement of farm machinery, acquiring more live stock, repairing the barns, painting the house, etc., which they admitted doing themselves without consulting Mr. McKay. He was away, she said, most of the time with his stallion, earning $30 a day. She was asked, however, if he went home from court and this case stopped, would she permit him to take charge of everything? She answered that none of them could live with him.

When one recalls the representations of the executed agreement about the natural love and affection of the parties for each other and the undertaking of all four "to work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned," and considers the confusing character of the two impugned documents when read together, all this evidence of Mrs. McKay and Clow seems to me itself to demonstrate, not only the onesidedness and improvidence, but the falsity and sinister underlying purpose of the whole transaction.

Notwithstanding this testimony of the defendants themselves, the learned trial judge found that no evidence had been submitted to establish that any undue influence was used by the defendants or any of them to procure the execution of the two documents. Apparently he did so upon the assumption that the relationship of the parties and the circumstances leading up to the execution of the documents were not such as to create any doubt or suspicion as to their genuineness, and that the burden consequently rested upon the plaintiff to affirmatively prove that some undue influence was in fact exercised. He attached no importance to the fact that the defendants had the complainant bound over to keep the peace, to the latter's

1941
McKAY
v.
CLOW ET AL.
Crocket J.

expressed desire to consult his own lawyer before signing any formal agreement, to the threat of all three to leave him in his helpless condition, if the agreement should not be put in legal form and signed, to the fact that Clow accompanied McLure to the solicitor's office when the instructions for the preparation of the required papers were given, and himself paid all the expenses in that connection, to the mysterious disappearance of the written memorandum of instructions, which McLure carried with him to the lawyer's office, or to the fact that neither the deed of conveyance nor the collateral agreement under seal contained any power of revocation. "The complainant," His Lordship said,

> trusted his friend [McLure] and was satisfied he would have things completed as he had instructed without any independent advisor. Why then the necessity of independent legal advice? Surely any sensible man has a right to have a well-considered business transaction such as the one under consideration completed without the necessity of engaging the services of any independent legal advisor.

The question, however, was not, whether the complainant had trusted a friend, but whether his execution of the deed and collateral agreement was the result of the domination of the mind of someone else, rather than the free, independent and unfettered expression of his own. Or, as Lord Chancellor Eldon expressed it in *Huguenin* v. *Baseley* (1):

> The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.

As regards that vital question, the established rule of equity is that, whenever it appears that any party to a transaction, from which he or she derives some large or immoderate benefit, occupies such a position in relation to his or her supposed benefactor as to give the recipient a dominating influence over the latter, that benefit is presumed to have been obtained by the exercise of some undue influence on the part of the recipient. In all such cases, whatever be the nature of the transaction, whether a gift *inter vivos* or a contract alleged to have been made for a good and sufficient consideration, the onus of proof lies on the party who seeks to support it. The passages quoted in the appellant's factum from pages 103, 110 and

(1) (1807) 14 Ves. Jr. 273, at 300.

119 of vol. 29, Am. & Eng. Enc. of Law [2nd ed.], very accurately, I think, sum up the law as now recognized by the courts of law and equity alike in this country and of England upon this point.

Anglin J., as he then was, reviewed the leading authorities on this important question in 1908 in his trial judgment in *Smith* v. *Alexander* (1), and clearly pointed out that it is not merely where such well defined confidential relations as those of trustee and *cestui que trust,* guardian and ward, solicitor and client, or physician and patient exist between the beneficiary and the grantor that courts of equity cast upon the beneficiary the burden, not only of establishing clearly that the grantor fully understood and intended the transaction, but that he voluntarily and deliberately performed the act, knowing its nature and effect. He held that the contents and effect of the deed there in question themselves threw upon the defendants the burden of proving its validity, "that is to say, that it emanated from the pure, uninfluenced will of the plaintiff, after having the extent and effect of it fully explained to her," and that that burden the defendants had not discharged.

In *Beeman* v. *Knapp* (2), Mowat V.C. refused to uphold the validity of a deed made by an old man to his son, who had managed his father's farm for years, in consideration of a bond to maintain the grantor and his wife, because it was not shown to have been made freely and voluntarily after competent independent advice. "Considering the relation of the parties," he said (3),

> the transaction in question could only be sustained on evidence of the fullest information to the grantor as to these possible consequences of what he was doing; and evidence of his having had competent independent advice,

(citing *Sharp* v. *Leach* (4)). He pointed out that the son had alarmed his father in his old age by the threat of a law suit, and also that the son "had on his side the active and zealous influence of his mother." He further said:

> *Prima facie,* a conveyance of all a man's property in his old age, without any power of revocation, in consideration of a mere promise of maintenance, whether under seal or not, is extremely improvident.

(1) (1908) 12 Ont. W.R. 1144.
(2) (1867) 13 Grant's Chancery Rep. 398.
(3) At p. 405.
(4) (1862) 31 Beav. 491.

1941
McKAY
v.
CLOW ET AL.
Crocket J.

In *Hopkins* v. *Hopkins* (1), the Divisional Court of Ontario, presided over by Chancellor Boyd, overruled a trial judgment and set aside a transfer of 300 shares of bank stock, which had been obtained from an elderly husband, who had suffered from heart disease and other infirmities and some weakening of mental faculties, by a younger wife, on the ground that upon the authorities there appeared to be "quite insufficient care taken to see that the donor understood what he was doing, and to guard him from acting improvidently and from surrendering weakly to the clamour of his wife." And this notwithstanding that a Mr. C., a Registrar of Deeds, who had been a solicitor, and had sometimes acted as such for the husband, testified that the latter made up his mind to assign the shares to his wife for the reason he had willed it to her, and it would be for only two or three months before he died and she might as well take the deed of it now. "The intervention of Mr. C.," said the Chancellor, "gave no assistance to the alleged donor; he did no more than give the matter legal form, and was not there as the adviser of the person who needed advice."

See also the judgment of Chancellor Spragge in *Lavin* v. *Lavin* (2), in which he carefully reviewed the leading authorities.

For my part, I can conceive of no case where independent and indeed highly competent legal advice would be more necessary than in the consideration and carrying out of such an involved and perplexing transaction as that which is the subject of this appeal.

The learned trial judge himself found that the deed, as executed, omitted a most important provision which, on the strength of Clow's own evidence, he found that McKay desired, viz.: that the deed and agreement should contain a proviso that the property was not to go outside the McKay family, though McLure denied there was any such instruction. What Clow had really sworn to was that it was only in the event of anything happening to him that both Mr. and Mrs. McKay wanted to be protected against any claim from the Clow family during the life of Hazel against anything that he would have there, or, as he attempted to put it in other words to his own counsel,

(1) (1900) 27 Ont. A.R. 658.
(2) (1880) 27 Grant's Chancery Rep. 567.

that, should he die before Hazel, the Clows were not to step in. Accepting, therefore, the statement of Clow, and rejecting the denial of McLure, His Lordship said his impression was that the insertion of a joint tenancy to Mr. and Mrs. Clow after the death of both Mr. and Mrs. McKay was an inadvertent mistake on the part of the lawyer, who had no definite knowledge of the wish and desire of the complainant and his wife in regard to this particular point. For this reason the trial court decreed that the words "as joint tenants and not" in the habendum of the deed should be expunged, so as to make them both tenants in common. Just how the proposed amendment would make the deed conform to the wishes and instructions of the grantor and his wife in so essential a particular I confess I am unable to understand. While a joint tenancy would, of course, mean that Clow's death before Hazel's would end his interest in the property, it would give him the whole absolutely in the event of Hazel's predeceasing him. On the other hand, a tenancy in common would vest in each a distinct, though undivided, half share, which would go to Clow absolutely, whether his wife predeceased him or not.

I would allow the appeal and direct that both the deed and the agreement be delivered up to be cancelled and that the appellant have his costs in the appeal to this Court.

The judgment of Davis and Hudson JJ. (dissenting) was delivered by

DAVIS J.—The action out of which this appeal came to this Court was commenced by the appellant by bill of complaint, dated July 8th, 1938, in the Court of Chancery of Prince Edward Island, against his wife and his daughter and his son-in-law, praying that a deed of conveyance dated February 26th, 1936, of his farm in Prince Edward Island and an agreement of the same date between the parties, be set aside, rescinded and cancelled.

By the said deed of conveyance the appellant conveyed his farm (his wife joining to bar her right to dower) to his married daughter and her husband, who were living with him on the farm, but reserving a life estate, without impeachment for waste, in favour of himself and his wife

1941
McKAY
v.
CLOW ET AL.
Davis J.

and the survivor of them. By a collateral agreement of the same date, which his counsel agreed must be read with the deed of conveyance, the appellant and his wife and his daughter and his son-in-law agreed " to carrying on farming operations jointly on the said farm with equal rights and liabilities " as to profits and expenditures, and "all the parties hereto are to take part in the working and operation of the farm and to give all their time thereto and to work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned." The daughter and her husband, it was agreed, were to have a home in the dwelling on the farm " and all the parties are to live together as heretofore." The daughter and her husband agreed "to care for" the mother and father during their lives and the life of the survivor, " their support and maintenance to be from their share of profits of the farming operations and to be in a manner in keeping with the earnings of the farm."

The appellant, who was about seventy years of age at the time of the transaction, by his bill of complaint alleged that both documents, the deed of conveyance and the agreement between the parties,

> were executed by him in advanced age, at a time when he was infirm and of weak understanding, and unable to resist the threats and importunities of the defendants, or some or one of them; they were executed without independent legal or other disinterested advice, at a time when the complainant was under the influence of the defendants; the same were executed improvidently, and without any power of revocation; the consideration was grossly inadequate; the documents were prepared by solicitors selected and paid by the defendants, who gave the instructions for same without any consent on the part of the complainant, and the contents of which did not express the wishes or desires of the complainant.

The action went to trial before Saunders J., Master of the Rolls, and a great deal of evidence was taken. The husband (appellant) and his wife and their daughter and son-in-law were all present and gave evidence. The learned trial judge, in such a conflict of testimony as there was in the unfortunate family dispute, had the advantage, so important in a case of this sort, of seeing and hearing all the parties to the impeached transaction. The case was one of fact essentially for the trial judge to determine and he found on the facts in most definite language that the transaction was a fair and reasonable one. The trial judge said that the complainant gave his evidence in as rational

a manner as a man could possibly do, and that he regarded him as a man of more than ordinary intelligence and quite capable of transacting his business affairs, without any one being able to take advantage of him. Further, the trial judge said the complainant realized he was no longer able to do very much farm work and wished to make some proper provision for his wife and himself in their advancing years and took this method of consummating his wishes and desires; it was the spontaneous act of the complainant with a free and independent exercise of his will. "The evidence indicates conclusively," said the trial judge,

> that no advantage was taken of the complainant and that everything was done and completed as the complainant had requested. There was no duress or fraud practised on the complainant by any one. He knew full well what he wanted to do and what he did was his own offer, his own voluntary and deliberate act and no undue influence whatever was used.

The learned trial judge held that the deed of conveyance (with an amendment striking out the words "as joint tenants" and leaving the words "as tenants in common") and the agreement between the parties were valid and subsisting. No costs were allowed to any of the parties to the suit.

The appellant appealed to the Court of Appeal in Equity of Prince Edward Island. Only two judges sat in that Court on this appeal and they were divided in their opinions. Chief Justice Mathieson agreed with the reasons of the Master of the Rolls and would dismiss the appeal without costs. Arsenault J., Vice-Chancellor, in his judgment examined the evidence in great detail and concluded that the transaction was "so fraught with the elements of compulsion, if not with fraud and deceit," that the deed "executed under such suspicious circumstances" ought not to be allowed to stand. He would therefore have declared the deed void and have ordered it to be delivered up to be cancelled, but would have given no costs. The formal judgment of the Court of Appeal merely dismissed the appeal and confirmed the judgment of the Master of the Rolls (Saunders J.) without costs. From that judgment the appellant then appealed to this Court.

It is unnecessary to decide whether the deed of conveyance, in view of the collateral agreement, can strictly be said to be a voluntary conveyance to which the rule that the onus rests on the grantees to justify the transaction

1941

McKAY v. CLOW ET AL.

Davis J.

applies, because in both courts below the deed has been treated as a voluntary conveyance and the appellant has had whatever advantage there was in that interpretation of the deed.

This sort of case, in our opinion, is essentially one of fact for the trial judge who sees and hears the several members of the family who unfortunately find themselves in a bitter family controversy. It is very difficult, if not impossible, on a paper record of the evidence to form any conclusion as to the rights and wrongs of the various contentions advanced by the parties. To reverse the findings of a trial judge in such a case we should have to be convinced that he was wrong. Notwithstanding the very forcible argument of appellant's counsel, we are far from being convinced that there is any sound ground upon which this Court should interfere.

In our opinion, the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *J. B. Johnston.*

Solicitor for the respondent: *D. L. Mathieson.*