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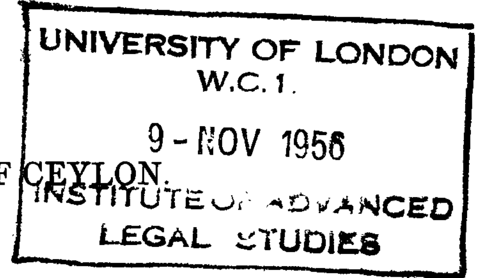
No. 13 of 1952.

In the Privy Council.


UNIVERSITY OF LONDON
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9 - NOV 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN—

Mrs. BRIDGET ANTONY, of Whist Bungalow, Modera Street, Mutwal, Colombo (Plaintiff) *Appellant*

(1) Miss IMELDA WEERASEKERA, and

(2) OLIVER GILES DE ZOYSA, both of Park Avenue, Borella, Colombo (Defendants) *Respondents*.

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CASE FOR THE APPELLANT.

RECORD.

1. This is an Appeal from a Judgment and Decree dated the 11th day of September, 1950, of the Supreme Court of the Island of Ceylon, which upheld a Judgment and Decree dated the 8th day of September, 1948, of the District Court of Colombo, in an action in which the Appellant was Plaintiff and the Respondents were Defendants. *p. 233–p. 234. pp. 209–229; p. 229, ll. 40–41.*

2. The issue in this Appeal is whether a Deed of Gift dated the 12th day of April 1946, (hereinafter sometimes called "the Deed of "Gift") which was executed by the Appellant in favour of the First Respondent, whereby certain valuable properties were conveyed to the First Respondent without any consideration other than natural love and affection, ought to be set aside. *pp. 301–4.*

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3. The grounds on which it is contended that the Deed of Gift ought to be set aside are that it was induced by pressure and surprise and through the exercise of undue influence and that at the time she executed it the Appellant did not know its nature or contents. *p. 12, ll. 13–16.*

p. 24, ll. 14–44.
p. 24, l. 20.
p. 24, l. 23.
p. 25, l. 15.
p. 24, l. 18.

4. The parties in this case are related. The Appellant, who at the material period was 70 years old and in poor health, is the widow of Chevalier C. S. Antony, who died in the year 1943, leaving the Appellant a substantial fortune. The First Respondent is the granddaughter of the Appellant. The First Respondent's mother, a daughter of the Appellant, died when the First Respondent was a few days old, and the First Respondent had, at the date this action commenced, lived her life with her grandmother, the Appellant, at Whist Bungalow. The Appellant adopted her granddaughter and brought her up as if she had been her own child. The First Respondent's father married a second time, and after his death his widow married a Dr. Van Dort who was a witness at the trial of this action. Since the death of the Appellant's husband, Chevalier C. S. Antony, the Appellant's son Simon Stock Antony, the uncle of the First Respondent, also lived with the Appellant and the First Respondent at Whist Bungalow. Some weeks after the execution of the Deed the First Respondent was married to the Second Respondent's son, then a medical student.

pp. 301–4.

5. It is not disputed by any of the parties to this Appeal that the Deed of Gift was signed and executed by the Appellant, nor is this Appeal directly concerned with its terms. The Deed is reproduced in full in the printed Record and is numbered P.1. This Appeal is concerned with the circumstances under which it was signed, and in particular with the state of mind of the Appellant when she signed it.

p. 25, ll. 16–40.
p. 125, l. 30.
p. 142, l. 20.
p. 138, l. 44.
p. 142, l. 35.
p. 25, l. 31.

6. The Deed was signed at the house of Dr. Van Dort at Bambalapitiya. There were present when it was signed the Appellant herself, both Respondents, Dr. and Mrs. Van Dort, and two proctors, P. D. A. Mack and J. A. V. Modder. Of the latter P. D. A. Mack was instructed by and represented the interests of the First Respondent. The other, J. A. V Modder, seems to have regarded himself as being instructed by the Appellant, but in fact his instructions derived not from her but partly from Dr. Van Dort and partly from P. D. A. Mack. All the above persons, with the exception of Mrs. Van Dort who was not called, gave evidence on behalf of the Respondents. On the day on which the deed was signed the Appellant's local priest, a French Roman Catholic, was fetched to the house in order that the Appellant might have independent advice. This priest, by name Father Bourgeois, was fetched to the house by the Second Respondent, and whilst his evidence can in parts be called in aid of the case of all parties, he had left the house before the Deed was signed. The remaining persons enumerated must be regarded as having interests adverse to the Appellant.

7. Much of the evidence called at the trial, and one of the main issues of this Appeal, concerned the state of mind of the Appellant at the material time. To this end a great deal of the evidence was concerned with the family background. It was the Respondents' case that the Appellant signed the Deed of Gift in favour of the First Respondent because she had, only a few days previously, discovered that her son the said Simon Stock Antony had tricked her into signing a deed of gift in favour of himself by pretending that that deed was a document in connection with the family tea business. It was the Respondents' contention that the Appellant signed the Deed of Gift in favour of the First Respondent deliberately, for the reason that she feared her son might do the same thing again and she wished to preserve some of her property for the benefit of the First Respondent. Evidence tendered to this end was thus of prime importance, but no such matter was pleaded in the Answer of either Respondent, nor were any questions put specifically on the point either to the Appellant or to one of the witnesses called on her behalf, a proctor Rasanathan, who in fact had, as notary public, attested the deed of gift to her son. This line of defence was indeed first disclosed only when the First Respondent gave her evidence.

pp. 282, l. 35–p. 286, l. 19.

8. The Appellant instituted these proceedings in the District Court of Colombo by her Plaint dated the 11th day of July, 1946. By paragraph 14 of the Plaint the Appellant alleged that the Deed of Gift in question was not her act and deed inasmuch as she did not know the contents of the said deed. By paragraph 15 she alleged that the Deed was void on the grounds that it was obtained by pressure and surprise and without making her aware of the contents, and through the exercise of undue influence and by fraudulent misrepresentations. By the prayer in her said Plaint, which is set out fully in the printed Record, the Appellant prayed the Court to set aside the Deed and for other similar relief.

pp. 10–12. p. 12, l. 9. p. 12, l. 11. p. 12, ll. 22–32.

The issue of fraud was decided against the Appellant by the trial judge, and she does not now contest this issue.

p. 229, l. 25.

9. The Respondents filed separate Answers, the First Respondent on the 29th August, 1946, and the Second Respondent on the 30th August, 1946. These Answers are fully set out in the printed Record. Both Respondents denied that the said Deed was not the act and deed of the Appellant, and denied that it was obtained by pressure and surprise, through the exercise of undue influence or fraudulent misrepresentations, or without the Appellant being aware of its contents. They both further alleged that the Appellant instituted the proceedings at the malicious instigation of Simon Stock Antony, who was not well disposed towards the Respondents and who dominated the Appellant's Will. The Second

pp. 14–15. pp. 15–16. p. 15, l. 25. p. 16, l. 31.

p. 16, l. 27. Respondent further pleaded that the Plaint disclosed no cause of action against him.

10. On the pleadings the following issues were framed:—

p. 17, l. 13. (1) Did the Second Defendant (i.e., the Second Respondent) constitute himself friend and adviser of the Plaintiff in 1945 and 1946.

p. 17, l. 15. (2) Did the Second Defendant gain an ascendency over the minds of the Plaintiff and the First Defendant (the first Respondent) in the circumstances alleged in paragraphs 5, 6 and 7 of the Plaint. 10

p. 17, l. 18. (3) Was the Deed of Gift signed by the Plaintiff in the circumstances alleged in paragraphs 8, 9 and 10 of the Plaint.

p. 17, l. 20. (4) Was the Deed obtained by pressure and surprise in the circumstances set out in the Plaint.

p. 17, l. 24. (5) Was the Deed obtained by undue influence or fraudulent representation in the circumstances set out in the Plaint.

p. 17, l. 22. (6) If issues (3), (4) and (5) or any of them are answered in the affirmative, should the Deed be declared void or set aside.

p. 17, l. 27. (7) Even if the averments in the Plaint are established, do 20 they disclose a cause of action against the Second Defendant.

11. The hearing of the action began on the 23rd day of July, 1947, in the District Court of Colombo before Sinnetamby A.D.J.

p. 25, l. 10. 12. The Plaintiff herself gave evidence regarding the signing of the Deed and the events which immediately led up to it. She said that she had decided to put the First Respondent who was 21 years of age, into a convent for a time, on medical advice, but that the convent could not accept her at first, as it was closed for the Easter vacation; and her clothes were at Mrs. Van Dort's house. The Plaintiff then gave her version of the signing of the Deed and 30 the events which immediately preceded it, in the following terms:

p. 25, l. 18– p. 26, l. 7. "When we came out after Mass, Imelda" (the First Respondent) "said 'Here is a car, let us go'. Only the driver, myself and the "First Defendant were in the car. I did not know who the driver "was. I asked the driver to go to Mrs. Van Dort's house because "the child's clothes were there. The clothes had been kept there "earlier. We went there to remove the clothes and to go to the "convent. We got there and were told that the holidays were on "and I could bring the First Defendant when school had resumed. "When we were at Van Dort's—must be at Bambalapitiya—I saw 40 "Oliver Zoysa there. Oliver Zoysa wanted me to sign some docu- "ments saying my son had been taking a lot of property, more than

"7 lakhs. I said I was not concerned about lakhs. I did not know "what that meant and I was not prepared to sign anything. There "were two other gentlemen there with Oliver Zoysa and they "persuaded me to sign it. I was very much worried and did not "know what to do. Fr. Bourjois also came there; I don't know why "the Father came; I did not send word for him to come, but when "he came I appealed to him, and the Father told me to settle these "disputes with the advice of my brothers. I was not aware that "there would be any signing of deeds. I signed some papers "because I was being harassed and I was not explained what and "what properties they were about. I did not know what I signed "or what the contents were. That is not the way how deeds were "executed before; I should know what I am signing. My deeds "were at home. I can see only with one eye and I could not see "exactly who else were there other than the three I mentioned. "Before I signed I did not know anything about it. I only went "there to take my child to the convent. If I wanted to sign deeds "I could have done that in my own house. Towards evening I went "home and from the time I returned I was contemplating what had "been done. Imelda remained with the Van Dorts. I called her "but she did not like to come. After I went home I was worried as "to what had happened to me and sent for my Proctor "Mr. Rasanathan who was attending to our work even during the "lifetime of my husband. I was informed he had gone to India. "After he came back he saw me and I informed him what had "happened. Two or three days later the Proctor informed me that "I had transferred all my properties away. Mr. Jayasekera also "attended to our work with Mr. Rasanathan. I do not know who "paid for the Deeds in question. No one asked me for money. I "do not know whether I signed any deed or not. I only signed some "papers; I did not pay anything towards those expenses."

p. 25, l. 18–p. 26, l. 7.

13. The Plaintiff was cross-examined at length on behalf of both Respondents. She was questioned generally about a previous transfer of property that she had made to her son, Simon Stock Antony, and to one such question she replied "In February, 1946, "I transferred those properties to my son subject to the payment of "debts. I sent for the Proctor, Mr. Rasanathan, and told him these "properties should go to my son and his heirs so that he may settle "my husband's debts and also subject to my life interest and to the "fidei commissum". The Plaintiff was also cross-examined regarding her trust in her son, and she denied that she mistrusted him or that on one occasion she had refused to sign a document put before her by him. When the Respondents in their turn gave evidence, it was alleged in detail, as indicated below, that the transfer of property to Simon Stock Antony had been induced by a trick

p. 26, l. 20–p. 48, l. 22.
p. 28, l. 42.
p. 30, l. 8.
p. 31, l. 17.

and, indeed, that the Appellant only discovered that she had made such a transfer the day before the signing of the Deed of Gift to Imelda. No such suggestion was ever put to the Appellant, with the result that she was unable to deny specifically the motive suggested by the Respondents, namely that the Deed of Gift to Imelda was made to prevent further depredations by her son, Simon Stock Antony. The District Judge in his judgment seems to have considered this matter irrelevant to a decision upon the validity of the Deed of Gift to Imelda; but it is submitted that, in a case in which the whole issue was the state of mind of the donor, any evidence regarding her motives was of the highest relevance and should have been put specifically to her if it was desired to call evidence upon the point or rely on it thereafter. Although the suggestion that the transfer to the son had been induced by a trick was never put to the Appellant, the suggestion that she had knowledge of that transfer was put to her, and her answer was unequivocal. To the question "Did you know that at least two or "three weeks prior to the date on which you signed the deed (i.e. "the gift to Imelda) you had transferred certain properties to your "son?" she replied "Yes. I transferred those five properties to him "and asked him to pay off all the debts and redeem the properties. "I did that with my full willingness". In view of so specific a reply, (to which the District Judge did not refer in his judgment), the Appellant should have been given an opportunity of dealing with the detailed and specific allegations later raised concerning the circumstances in which the transfer to the son was made.

pp. 301-4. p. 41, l. 8. p. 41, l. 10.

14. The Appellant called Father Bourgeois as a witness to support her case. He related that the Second Respondent came to his house on a Friday or Saturday in April and told him that the Appellant wished to see him. With some reluctance he went in the Second Respondent's car to Mrs. Van Dort's house, and on the way two other persons, whom he subsequently knew to be the Proctors, Mack and Modder, were collected.

p. 20, l. 17. p. 20, l. 30.

15. Father Bourgeois' account of the ensuing events was as follows. He said: "Mr. Oliver Zoysa did not tell me exactly why I "was wanted; he told me Mrs. Antony wanted to see me. I smelt "there was something about signing papers when I saw the two "Proctors, but I did not know exactly what was to take place". On arrival, Father Bourgeois said, the Second Respondent produced a paper which was a transfer from the Appellant to her son, and the Appellant talked about more than half her property having been taken away by her son. He said she seemed very excited and did not know anything about the properties. This witness told the Appellant to consult her brothers before signing any deed. Father Bourgeois in stating his reasons for leaving gives a clear picture of

p. 20, l. 35. p. 20, l. 44. p. 20, l. 40. p. 21, l. 6. p. 21, l. 18

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the atmosphere prevailing at the house at the time: "I did not want "to be there any longer as it was not my own business. I was "feeling uncomfortable because I thought the old lady was not in "a state of mind to sign anything; there were arrangements being "made to sign something. The others there were arranging things "to make the old lady sign a deed. I did not see any deed; I was "told after that that a deed was to be prepared. Then I left in a car "which was given to me". p. 21, ll. 20-26.

Although the District Judge refers in his judgment to the evidence of this witness, he does not appear to have considered or to have attached any weight to this important evidence, given by an impartial observer, regarding the Appellant's state of mind, nor does he cite this passage in his judgment. p. 211, l. 39– p. 212, l. 48.

16. The last witness called on behalf of the Appellant was the Proctor, K. Rasanathan. This witness said that he had acted as Proctor to her husband, the late C. S. Antony, during his lifetime, and to the Appellant thereafter. He said that on the 12th April, 1946, he went away to Jaffna, and on his return on the 16th April, 1946, he found a message from the Appellant asking him to call and see her. This he did, and he said that "she was very much worried "and excited, and she told me that on the previous Friday she was "taken to Dr. Van Dort's house and there she was made to sign "some document which was not explained to her; she was so excited "that after a great deal of time she signed but she did not know what "she signed. She asked me to find out what it was". This witness related how he had made enquiries at the Land Registry, and, though the Deed of Gift had not by that time been filed, a clerk at the Registry told him that the document in question was a deed of gift. No copy was available from the Land Registry as the deed had not been registered, so the witness sent his clerk to Mr. Modder for a copy. This was refused, but was eventually supplied by Mr. Modder in May. This witness was cross-examined as to there having been displeasure at the Appellant's house during the previous March or April and said there was some over the engagement of the First Respondent. He denied that his instructions to search the Registry came from Simon Stock Antony, though the District Judge seems to have believed that this was so. The matter is one of importance, since it was the Respondents' case that the Appellant deliberately kept her son Simon Stock Antony in ignorance of the existence of the Deed. This factor, however, in its turn, depends upon the Appellant mistrusting her son, which she denied. p. 49, l. 38. p. 51, l. 1. p. 51, l. 6. p. 51, l. 12. p. 51, l. 25. p. 51, l. 28. p. 54, l. 17. p. 68, l. 29. p. 220, l. 24. p. 29, l. 30.

17. The one question upon which Mr. Rasanathan's evidence could have been conclusive, if the Respondents' case were right, was never put to him. It was he who had drawn up, and in his capacity p. 50, l. 17.

p. 282, l. 30–p. 286, l. 17.
p. 54, l. 28.

as notary public attested, the deed transferring property to Simon Stock Antony. He of all people, therefore, must have known if that transfer was obtained by a trick, and indeed it is difficult to see how such could have been effected without the active connivance of this witness. No such suggestion was ever put to this witness, nor was he challenged in any way regarding the transfer to Simon Stock Antony. He was asked about the occasion on which, it was alleged, the Appellant refused to sign a document her son wanted her to sign, but denied knowledge of any such incident.

p. 70, l. 39.
p. 78, l. 42.
p. 80, ll. 22–44.
p. 80, l. 15.
p. 81, l. 18.
p. 54, l. 40.
p. 81, l. 23.
p. 185.
p. 81, l. 32.
p. 81, l. 45.
p. 82, l. 3.
p. 82, l. 14.
p. 82, l. 17.

18. The case for the First Respondent opened with the evidence of the First Respondent herself, Mrs. Imelda de Zoysa. Her account of the signing of the Deed of gift to herself and of the events leading up to it was that after the death of her grandfather her relations with her uncle, Simon Stock Antony, deteriorated to such an extent that the Appellant thought it wise to remove her from the house. She went so far as to say that Simon Stock Antony used also to revile and even to beat the Appellant herself, a suggestion which had not been put to the Appellant in cross-examination. She said that the Appellant first discovered that she (the Appellant) had transferred properties in the Fort and Pettah districts of Colombo to her son Simon Stock Antony from investigations made by one Mack at Dr. Van Dort's suggestion; that when the Appellant heard of this she was very surprised and angry, and that as a result of this discovery on the 10th April she refused to sign papers put in front of her for signature by Simon Stock Antony, saying "I have "been tricked once, I will not be tricked again", and that a row ensued, in which Mr. Rasanathan got his coat torn. (Mr. Rasanathan had denied this, and the statement attributed to the Appellant was never put to her in the witness box). This witness then stated that the papers which the Appellant refused to sign were torn up by Simon Stock Antony. (In fact, it transpired later in the trial that not only were the papers mentioned not torn up but that the First Respondent herself was a signatory to them.) The First Respondent went on to say that on the 11th April the Second Respondent, Oliver de Zoysa, called at Whist Bungalow, and that it was arranged that he should collect both herself and the Appellant in his car after church the next day, the 12th April. The First Respondent said that the Appellant then took money and jewellery out of her safe and put them in a suitcase; that on the next day they both went to church, and after church they got in the car and were driven first to the Second Respondent's offices in the Pettah, and from there to Dr. Van Dort's house. At Dr. Van Dort's house there were Dr. Van Dort and his son and wife; and later the Second Respondent joined them. Later still the Proctors, Mack and Modder, arrived, and left again with the Second Respondent

who returned again later with Father Bourgeois. She said that Father Bourgeois asked her if she would allow the Appellant to retain a life interest in the properties to be transferred, to which the Appellant said "I trust her, I knew she will give it to me". The Proctors then left, and returned after lunch, when the Appellant signed the deed, and after signing said "Eh Keruwe thakkadi "kamai, meh keruwe yuthu kamai" (Then I was cheated; now I have done my duty). This again had not been put to the Appellant in the witness box. The First Respondent then went on to say that she remained in residence at Mrs. Van Dort's after the Appellant had returned, but that the Appellant remained on affectionate terms with her, came to visit her, and gave her money.

p. 82, l. 29. p. 82, l. 35. p. 82, ll. 37–38. p. 83, l. 1. p. 83, l. 20.

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19. It is clear from the testimony of the First Respondent and of the other witnesses called for both Respondents that an important element in the defence—accepted as such by the District Judge—is that the Appellant was unaware of the transfer of the Fort and Pettah properties to Simon Stock Antony and that this fact afforded the motive for the latter transfer. This suggestion goes to the root of the whole case, affecting as it does the Appellant's state of mind, and it should not only have been pleaded specifically in the Answer but should have been put to the Appellant so that she might have an opportunity to deal with it. In fact, not only was this suggestion raised for the first time when the First Respondent gave her evidence, but at a later stage in the trial, when Counsel representing the Appellant applied to call Simon Stock Antony to rebut the suggestions, leave to do so was refused. It is clear from the judgment of the District Judge that he accepted this suggestion, which had nothing to support it save the testimony of the Respondents and their witnesses, and could not be refuted by the Appellant as the suggestion was never put to her.

p. 211, l. 35. p. 179, l. 1. p. 185, l. 1.

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20. Dr. H. C. Van Dort gave evidence which generally supported that given by the First Respondent. After describing conversations between himself and the Respondents, much of which was inadmissible as hearsay, he admitted that it was upon his initiative that the First Respondent consulted Mr. Mack concerning the properties transferred to Simon Stock Antony. He also gave detailed evidence about a visit paid by the Appellant and First Respondent to his house on the 26th March. He said that it was on this occasion, that the Appellant first discovered that she had transferred properties to Simon Stock Antony. He said that when he asked the Appellant if she had signed any deeds she said "Yes, "I signed some document, both my son and his lawyer said it had "something to do in connection with my husband's tea business and "that he cannot work unless I signed". This, if true, would imply that certainly her son, and in all probability the Proctor also, were

p. 105, l. 10– p. 118, l. 8. p. 107, l. 35. p. 108, l. 11. p. 108, l. 15.

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guilty of fraud. Such a suggestion must have affected the mind of the District Judge, but was never put to either the Appellant or to the Proctor in question, Mr. Rasanathan; and leave to call Simon Stock Antony was refused. This witness said that it was on the Appellant's instructions that he instructed Mr. Mack, who in his turn instructed Mr. Modder. Neither of these Proctors was instructed directly by the Appellant, who had never seen Mr. Modder before the day of the signing. This witness gave in detail his version of the events which occurred in his bungalow on the 12th April, but many of the details he gave had not been put to any of the Appellant's witnesses or the Appellant herself.

p. 108, l. 37.
pp. 110–111.

21. The two Proctors, J. A. V. Modder and P. D. A. Mack, gave evidence supporting the Respondents. It is clear that Mack was instructed by Dr. Van Dort to protect the interests of, and represent, the First Respondent. For that reason he declined to draw up the deed to be signed by the Appellant. Modder was instructed to do this, having been first rung up by Dr. Van Dort and then given detailed instructions by Mack. At no time did either of these Proctors receive instructions from the Appellant, although Dr. Van Dort purported to be speaking on her behalf; the Appellant, however, denied that she had authorised him to do so. If in fact it had been the Appellant's desire to execute a deed of gift, there was no reason who she should not have instructed her own Proctor to prepare it; at the least Modder should have had his instructions confirmed by her. In the result, both these Proctors, one of whom drafted the deed in dispute, represented interests in fact adverse to the Appellant. It is submitted that their evidence regarding the mental state of the Appellant at the time of signing the Deed is clearly unreliable; Mr. Mack said: "She did not appear to be "excited", but Mr. Modder says "She seemed rather excited" and "the old lady was certainly excited". Both of these witnesses by their evidence contributed to the suggestion that the motive of the Appellant was to prevent further fraud by her son, Simon Stock Antony.

p. 125, l. 33.
p. 126, l. 26.
p. 138, l. 44.
p. 139, l. 10.
p. 46, l. 13.
p. 138, l. 23.
p. 139, l. 23.
p. 141, l. 24.

22. The Second Respondent, Oliver de Zoysa, gave evidence. In substance his evidence corroborated that of the First Respondent. His evidence, however, was not satisfactory, and the District Judge says of his testimony: "it is difficulty to accept his evidence that he knew nothing about the proposed gift until he heard about it for the first time on the 11th May from Dr. Van Dort . . . . I think Oliver de Zoysa knew more about the execution of the deed than he in the witness box pretended to know." The District Judge, however, intimated that on other points he accepted this witness's testimony. It is submitted that he should not have done so. The Second Respondent was an Excise inspector earning Rs. 400 per

p. 150, l. 39.
p. 227, ll. 23–34.
p. 227, l. 39.

month. His son, who married the First Respondent after the Deed was signed, was a medical student without any means. This Respondent appears at all stages of the transaction. It is impossible to accept his evidence that his actions were disinterested when, by reason of the Deed of Gift, his penniless son married the First Respondent who was not only wealthy in her own right but also acquired by virtue of the Deed of Gift an absolute right to a further Rs. 150,000.

p. 161, l. 17.
p. 161, ll. 32–39.

23. The last witness for the Respondents was one K. C. Nadarajah, a barrister. His evidence was directed solely to events which occurred at St. Bridget's convent after the dispute, the subject of this Appeal, had arisen, and did not really carry the matter any further.

p. 176, l. 32–
p. 177, l. 31.

24. After the evidence was concluded Counsel for the Appellant moved the Court to allow evidence to be called to rebut the allegations made concerning the transfer of property in the Fort and Pettah districts to Simon Stock Antony. He desired to call Simon Stock Antony to rebut such allegations, and to deal with the matters in the evidence adduced on behalf of the Respondents which had not been put to the Appellant in cross-examination, concerning the events which took place at Whist Bungalow on the 10th and 11th April. The District Judge refused the application; it is submitted that it was wrong on his part so to do. He seems to have based his refusal on the fact that the question whether the transfer to Simon Stock Antony was fraudulent was not relevant to the issues in the case. The learned Judge indicated that the issue in the case was the state of mind of the Appellant at the time the Deed was signed, and stated that the Appellant had opportunities of knowing that the Respondents' case rested on the Appellant being afraid that Simon Stock Antony would induce her to transfer her remaining properties to him. There was, however, no plea to that effect in either Answer and, as indicated above, the cross-examination of the Appellant was seriously deficient. The real gravamen of the case, that the Appellant had discovered that her son was a fraudulent trickster, was never put at all. From his judgment it is clear that the District Judge accepted this as the main line of defence. In such a case, therefore, the point should have been put specifically and in detail to both the Appellant and to Mr. Rasanathan, and an opportunity should have been given to the Appellant to call her son, Simon Stock Antony. Until this line of defence was disclosed by the evidence of the First Respondent, the Appellant had no reason to anticipate the point or to prepare to deal with it. The District Judge has assumed that the allegation in the Answers that the Appellant was under the influence of Simon Stock Antony was sufficient, when taken with the questions which were put to the Appellant regarding

p. 179.
p. 185, l. 1.
p. 184, l. 27.
p. 184, l. 28.
p. 211, l. 35.
pp. 14–15–16.

her relationship with her son. In fact, however, the two are entirely different allegations; and, even if they were not, any allegation of fraud should have been both pleaded and put with the greatest clarity and in full detail

p. 185, l. 11.

25. Counsel for the Appellant then moved that the First Respondent be recalled. The application was made under Section 165 of the Civil Procedure Code. The grounds of the application were that in her evidence the First Respondent described an incident on the 10th April in which the Appellant refused to sign a document which Simon Stock Antony subsequently tore up. Counsel for the Appellant stated that he had the document in question, and that it was not only not torn up, but was signed by the First Respondent herself. The District Judge refused the application on the grounds that it had nothing to do with the issues in the case, and that the document was in existence whilst the First Respondent was in the witness box and could therefore have been put to her then. Whilst it is true that the document was physically in existence then, its existence was not then realised, and it was in fact in the possession of Simon Stock Antony and not in that of the Appellant or her legal advisers. It was clearly of the utmost relevance, for the same reasons that the events of that day were relevant, since the evidence of the First Respondent regarding Simon Stock Antony on that day was directed to showing the state of mind of the Appellant, which was the main issue in the case.

p. 185, l. 16. pp. 186–7. p. 186, l. 39. p. 187, l. 1. p. 186, l. 4.

26. The Judgment of the District Court was delivered on the 8th day of September, 1948. After reviewing the evidence the learned Judge answered all the issues framed in the negative, except for issues (6) and (7), with which he was not concerned in view of his findings on the other issues. The judgment as a whole clearly proceeds upon the basis that the Appellant had a motive for executing the Deed of Gift in dispute. In the course of his judgment the learned Judge said: "It was suggested that the deed "to her son was obtained by fraudulent means but I do not think it "necessary to go into that question . . . . . in point of fact it seems to "me that that question is irrelevant to the present question." In this view, it is submitted, the learned Judge misdirected himself, since this was the whole basis of the Respondents' case; as the learned Judge said in his judgment: "The case for the Defendant, however, "is that the Plaintiff was not aware at the time that she had executed "a deed transferring these valuable properties in the Fort and Pettah "to her son." Furthermore, the learned Judge clearly based his findings upon the case as a whole upon this being the fact. If the evidence regarding the transfer to the son be ignored, as it should be seeing that it was never put to the Appellant and permission to

p. 209, l. 1– p. 229, l. 29. p. 229, ll. 20–27. p. 226, l. 6. p. 211, l. 35. p. 185, l. 1.

call rebutting evidence was refused, there is nothing in the evidence to justify such a finding.

27. Although the learned Judge specifically found that the Appellant did know the nature of the deed she was executing, he did not consider this on the basis of paragraph 14 of the Plaint, since no issue was framed upon this point. Nor did he consider any of the relevant authorities concerned with a plea of *'non est factum'*. Upon this aspect of the case the learned Judge quoted, as supporting his finding that the Appellant knew full well what she was doing, parts of the evidence of Father Bourgeois. He did not, however, appear to consider or to attach sufficient weight to this witness's statement: "I thought the old lady was not in a state of mind to "sign anything." Furthermore, the learned Judge concludes from Father Bourgeois's evidence that the Appellant had not been aware, at the time she made the transfer to her son, of the nature and extent of the lands transferred, when in fact no such inference can be drawn from the evidence of that witness, even if such conclusion be correct.

p. 229, l. 18.
p. 211, l. 39–p. 212, l. 48.
p. 21, l. 22.
p. 212, l. 24.

28. Evidence had been given by the Respondents, (and upon this there had been some cross-examination of the Appellant), directed to showing that the Appellant was not troubled by what she had done until some weeks had elapsed after the Deed of Gift was signed. Thus there was evidence that the First Respondent had collected jewellery from Whist Bungalow some two weeks after the deed was signed, at the request of the Appellant. Evidence was also tendered regarding the Appellant's reactions to the First Respondent's marriage. It was suggested, and seems to have been accepted by the District Judge, that for some time after the signing of the deed the Appellant visited the First Respondent at Dr. Van Dort's house and subsequently at the convent. He does not, however, have regard to the fact that the Appellant did not attend the wedding, or pay for the cost of the reception, and indeed wrote a letter to the Press expressly repudiating it; all of these matters are inconsistent with an approval of the conduct of her granddaughter whom she had brought up and treated as a daughter, and to whom she had previously shown great love and affection.

p. 83, ll. 3–17.
p. 88, ll. 12–20.
p. 220, l. 45.
p. 26, l. 19.

29. The judgment of the District Court clearly proceeds upon the basis that the Appellant acted freely and knew what she was doing because she had a clear motive for her actions. It is submitted that all the evidence in support of such a motive is derived either from evidence which is inadmissible as hearsay, or from the evidence of both Respondents and of Dr. Van Dort which was never put to the Appellant or to her witnesses; and that in such circumstances the findings at which he arrived cannot be accepted or supported.

p. 228, l. 43.

30. The District Judge found, on the issue of fraud, that there was on the evidence nothing to justify such an inference. It is not sought to disturb this finding.

31. On the issue of undue influence, however, it is submitted that the Judge failed to direct himself fully or adequately. He p. 228, l. 1– p. 229, l. 2. regarded the law on this topic as being limited to cases of domination by one party over the other, and drew—quite properly so far as it went—the well-known distinction between cases where relationship creates a presumption of such domination so as to throw the burden on the Defendant to show that there was no undue influence, 10 and cases where no such presumption arises. He wholly failed, however, to consider the different field of undue influence, consisting of abuse of the duties of care and confidence which may be imposed on one party towards another as a result of a particular relationship which emerges from the special circumstances of their association (*Tufton v. Sperin* (1952) 2 T.L.R. 516, 520 per Sir R. Evershed, M.R.). The law on this field of undue influence was well stated in *Morley v. Loughman* (1893) 1 Ch. 736 by Wright J.:—"The law is that when large voluntary gifts are made "and accepted *inter vivos* the recipient may be called upon to show 20 "that the donor had capacity and knowledge of what he was "doing ..... or the donor may show that confidential relationship "existed between the donor and the recipient, and then the law on "grounds of public policy presumes that the gift, even though freely "made, was the effect of influence induced by those relations." Again in *Huguenin v. Baseley* (14 Ves. 273, 300) it was said by Lord Eldon: "The question is not whether she knew what she was "doing ..... but how the intention was produced; whether all that "care ..... was placed around her or against those who advised her "which, from their situation and relation with respect to her, they 30 "were bound to exercise on her behalf."

32. It is respectfully submitted that these principles are peculiarly applicable in the present case. An old lady in frail health was suddenly faced, without any warning, with a deed giving away property to the extent of Rs. 150,000/-. The persons present consisted of the donee, the donee's aunt and uncle by marriage, the donee's prospective father-in-law, and two lawyers representing in reality the donee. The only person purporting to have been brought to assist the Appellant was a Roman Catholic priest, who came in unprepared at the last moment, and left before the deed was even 40 p. 142, l. 2. in final draft and a long time before it was signed. According to Mr. Modder, the only document the priest saw was a list of the p. 139, l. 39. properties involved; this seems to be correct, because the "rush job" of typing was being done at Mr. Modder's office. Why a priest

should be summoned at all, if it was intended that he should represent the secular interests of the old lady over against two experienced lawyers and a number of other interested parties is a mystery, particularly when it was well known that the Appellant had a regular lawyer of her own. The only conclusions which can, it is submitted, be drawn from all the circumstances are that there was a confidential relationship which required that the inference of undue influence should be rebutted by clear and cogent evidence, and that that inference was certainly not rebutted.

10 33. The District Judge clearly regarded the case as one in which the onus of proving undue influence was on the Appellant, and held that this onus had not been discharged. He did, however, consider the matter on the assumption that the burden was on the Respondents to show that there was no undue influence, and held that in that case "all that is required is that she should be made "to understand the nature and consequences of the act which "she does", his own conclusion being that "I am satisfied on the "evidence that she knew exactly what she did on the 12th "April, 1946". This finding seems to have been based largely on the 20 evidence of Mr. Mack that Father Bourgeois suggested that she should reserve a life interest, a point which had not even been put to Father Bourgeois in cross-examination. Father Bourgeois's own version of the matter, it will be recalled, was that the Appellant was not in a fit state to sign anything, and that his advice to her was to consult her brothers. If he is relied on by the Respondents as a source of independent advice, there is no reason why his account of his actions should not be accepted. But in any event the test applied by the District Judge is, it is submitted, wrong because the real question was not so much whether the Appellant knew what she 30 was doing, but how and in what circumstances she was brought to sign the deed. And if the Respondents' case rested on an intention formed by the Appellant in a spontaneous reaction to the discovery that her son had perpetrated a fraud upon her, it was vital that this should be properly investigated, which it never was.

p. 228, l. 28.
p. 229, ll. 5–7.
p. 229, l. 8.
p. 229, ll. 32–44.
p. 21, l. 22.

34. The Appellant appealed to the Supreme Court from the judgment and decree of the District Court of Colombo dated the 8th September, 1948. The appeal was argued before the Supreme Court on the 6th, 7th, 8th and 11th September, 1950, and on the 11th September, 1950, Jayetileke C.J. delivered judgment, merely saying 40 "We do not think it is necessary to call upon Counsel for the "Respondents. There are no merits in this appeal. We would "dismiss it with costs". The Appellant submits that from no reasonably tenable point of view could the case properly be described or dealt with in this way.

pp. 209–229.
p. 229, ll. 40–41.
p. 234, ll. 1–2.

p. 236.

p. 239.

35. From the judgment and decree of the Supreme Court dated the 11th day of September, 1950, the Appellant was on the 26th day of September, 1950, granted by the Supreme Court conditional leave to appeal to the Privy Council, the leave being made final on the 24th day of October, 1950.

p. 234.

p. 229.

36. The Appellant humbly submits that the Judgment and Decree of the Supreme Court dated the 11th day of September, 1950, affirming the Judgment and Decree of the District Court of Colombo dated the 8th day of September, 1948, was wrong and ought to be set aside for the following amongst other 10

REASONS.

1. BECAUSE the circumstances established the existence of a confidential relationship.
2. BECAUSE in the circumstances the onus was on the Respondents to establish that the Appellant's signature was not obtained by undue influence.
3. BECAUSE the evidence failed to establish that care and advice was accorded to the Appellant of such a kind, or in circumstances in which she was capable of understanding it, as to discharge that onus. 20
4. BECAUSE the evidence established that the Appellant was induced to sign the deed by pressure and surprise and by the exercise of undue influence.
5. BECAUSE the District Judge misdirected himself on the law, and did not properly apply the law relating to undue influence to the facts of the case.
6. BECAUSE the findings of the District Judge were vitiated by reason of the Appellant having had no opportunity of knowing or meeting the basic case sought to be established against her, so that the Judge 30 in effect decided important questions of fact on the evidence of one side only.
7. BECAUSE, correctly interpreted, the evidence established that the Appellant was not in a fit state to sign anything, and that her mind was not behind her act and deed.
8. BECAUSE the Judgment of the District Court of Colombo and the Judgment of the Supreme Court of Ceylon affirming it were wrong and ought to be set aside. 40

D. N. PRITT.

STEPHEN CHAPMAN.

No. 13 of 1952.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

Mrs. BRIDGET ANTONY

v.

1. Miss IMELDA WEERASEKERA.
2. OLIVER GILES DE ZOYSA.

CASE FOR THE APPELLANT.

DARLEY CUMBERLAND & Co.,
36, John Street,
Bedford Row,
London, W.C.1,
Appellant's Solicitors.

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