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*Present :* Wood Renton C.J. and Shaw J.

## SOYSA *v.* SOYSA *et al.*

*375—D. C. Colombo, 40,696.*

*Donation by uncle to nephew, who was a minor—Deed accepted by father of minor—Action to set aside deed on the ground of undue influence and unsoundness of mind—Acceptor of deed standing in a position of active confidence towards donor when deeds were executed—Burden of showing honesty of impeached transaction—Communication made by client to proctor—Is it admissible in evidence?—Evidence Ordinance, ss. 111 and 126.*

Under the Roman-Dutch law a contract made by an insane person—and under that law a donation is closely assimilated to a contract—is absolutely void, and the doctrine of undue influence does not seem to be recognized except in the form of duress, or what the authorities describe as fear.

Under the English law a contract is voidable if one contracting party is to the knowledge of the other incapable, by reason of unsoundness of mind, of understanding the nature and quality of his act; the burden of establishing unsoundness of mind of this character is imposed upon the party alleging its existence. The mere presence of delusions, even if they are not altogether unconnected with the subject-matter, does not, *ipso jure*, destroy contractual capacity, unless the delusions constitute the real *motif* of the transaction. Where a donee either stands in one of certain recognized relationships towards the donor, such as parent and child or solicitor and client, or is shown by the evidence to have been in a position of active confidence towards him, the burden of proving that the gift was the voluntary act of the latter will rest upon him, and the donation cannot be maintained unless it appears that the donor had independent advice. There may be mental conditions which fall short of insanity, but which may be productive of a facility of disposition over which undue influence might very readily be exercised with effect.

SHAW J.—In order to create a position of active confidence, it is not necessary for one of the usual relationships of solicitor and client, guardian and ward, parent and child, &c., should exist, and there is no reason why one brother should not stand to another in such a position. Every case must depend upon its particular facts.

THE facts are set out in the judgment.

*A. St. V. Jayawardene* (with him *Zoysa* and *D. Obeyesekere*), for appellant.

*Bawa, K.C.* (with him *Elliott, Samarawickreme, B. F. de Silva,* and *C. H. Z. Fernando*), for respondent.

*Cur. adv. vult.*

December 20, 1916. WOOD RENTON C.J.—

In this action the plaintiff sues the defendants to set aside two deeds of gift, Nos. 605 and 606, dated May 31, 1912, executed by him in favour of the second defendant. The plaintiff is the younger brother of the first defendant, who is the father of the second. At the date of the execution of the deeds in question the second defendant was a minor, and the first defendant, therefore, accepted the gifts on his behalf. They were subject to a reservation of a life interest in favour of the plaintiff himself, and their subject-matter consisted of lands alleged to be of the value of Rs. 245,000. The grounds on which the two deeds were impeached in the original plaint were (*a*) that at the date of their execution the plaintiff was, to the knowledge of the first defendant, subject to delusions and of unsound mind, and incapable of understanding the effect of the transactions into which he was made to enter; (*b*) that at the said dates the first defendant was acting as the plaintiff's attorney, and in a position of "active confidence" towards him, and had him under his sole charge, care, and control; and (*c*) that the deeds were gifts, *mortis causa*, made in contemplation of the death of the plaintiff from a disease from which he subsequently recovered. No issue was suggested by the plaintiff's counsel at the trial as regards the last of these allegations, nor was any reference made to it at the trial or on the argument of the appeal. It must, therefore, be taken to have been tacitly abandoned. The learned District Judge, on an objection by counsel for the defendants, held that, as the plaintiff had not specifically alleged that the first defendant had fraudulently taken advantage of his position in the matter of the execution of the deeds, the plea as to the relation of active confidence between them contained no statement of facts on which an issue could be framed. But the Supreme Court on a previous appeal reversed this decision and allowed the plaint to be amended, so as to raise the issue of undue influence between the parties. The only use that the defendants' counsel made of this incident on the hearing of the present appeal was to argue that it showed that the plaintiff had not been prepared at the outset of the litigation to make a bold allegation of undue influence. I do not myself attach any weight to this argument. The original plea was clearly founded on section 111 of the Evidence Ordinance, 1895,[1] which provides that "where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

The plea has no meaning unless it is interpreted as containing an implied allegation of undue influence. The defendants in their answer denied that the plaintiff was of unsound mind at the critical

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period, or that the first defendant had procured the execution of the impugned deeds by undue influence. The case went to trial on those issues. The learned District Judge decided each of them in the defendants' favour, and dismissed the plaintiff's action with costs. Hence this appeal.

The questions for determination are whether, at the date of the execution of these instruments, the plaintiff was of unsound mind, or, in the alternative, was induced to execute them by the undue influence of the first defendant. Under the Roman-Dutch law a contract made by an insane person—and under that law a donation is closely assimilated to a contract—is absolutely void (*Molyneux v. Natal Land and Colonization Company, Limited*[1]), and the doctrine of undue influence does not seem to be recognized except in the form of duress, or what the authorities describe as "fear."[2] The present appeal was, however, argued before us with special reference to the rules of English law, and the law of England applicable to the decision of the issues that have here to be disposed of has long been settled. A contract will be voidable if one contracting party, at the time of making it, is to the knowledge of the other incapable, by reason of unsoundness of mind, of understanding the nature and quailty of his act[3]; the burden of establishing unsoundness of mind of this character is imposed upon the party alleging its existence. The mere presence of delusions,[4] even if they are not altogether unconnected with the subject-matter,[5] does not, *ipso jure*, destroy contractual capacity, unless the delusions constitute the real *motif* of the transaction. Where a donee either stands in one of certain recognized relationships towards the donor, such as parent and child or solicitor and client, or is shown by the evidence to have been in a position of active confidence towards him, the burden of proving that the gift was the voluntary act of the latter will rest upon him, and the donation cannot be maintained unless it appears that the donor had independent advice.[6] There may be mental conditions which fall short of insanity, but which may be productive of a facility of disposition over which undue influence might very readily be exercised with effect. In the view, however, that I take of the facts of the present case, it is immaterial whether the evidence be considered from the standpoint of Roman-Dutch or English law.

[His Lordship set out the facts at length and discussed the evidence and continued]:—

On the contrary, the *vivâ voce* evidence called on behalf of the defendants is corroborated by a body of letters written by the

[1] *(1905) A. C. 555.*

[2] *Nathan, vol. IV., s. 2171.*

[3] See *Imperial Loan Co. v. Stone, (1892) 1 Q. B. 599.*

[4] *Banks v. Goodfellow, (1870) L. R. 5 Q. B. 549.*

[5] *Jenkins v. Morris, (1880) 14 Ch. D. 674.*

[6] See *Huguenin v. Baseley, (1807) 14 Ves. Jun. 723, 1 Wh. & T. 274;* and the notes to the latter report.

plaintiff to various parties covering the whole critical period, and pointing decisively to the conclusion that he was perfectly capable of understanding, and did understand, and voluntarily approve of, the deeds which he now seeks to set aside. The learned District Judge has examined these documents in detail, and I do not propose to repeat what he has said about them. They show further that the plaintiff's statement that he was unaware of the execution of the deeds of gift till the meeting on March 10, 1914, to which I have already referred, is untrue. Mr. Perera stated that on the morning of that day the plaintiff came to his office and asked him to show his proctor, Mr. Abeywardene, the deeds that he had executed in favour of the second defendant, and that at the meeting itself the plaintiff said that he had very little concern in the matter as he had only a life interest in the property. In support of Mr. Perera's evidence as to the plaintiff's mental capacity on May 31, 1912, the defendants' counsel produced, and the District Judge received in evidence, certain notes (D 42 and D 43) made by Mr. Perera of the instructions given to him by the plaintiff. In view of the provisions of section 126 of the Evidence Ordinance, 1895,[1] it appears to me to be open to grave doubt whether such portions of the instructions in question as are in the nature of communications made to Mr. Perera by his client can be legal evidence in the case. I have not myself looked at these productions. But there can, of course, be no valid objection to Mr. Perera's statement that the plaintiff was able to give, and did give, him precise and reasonable instructions with regard to the two deeds executed by him on May 31, 1912. The plaintiff's case on the issue of unsoundness of mind or delusional insanity fails.

I have already dealt with the evidence in such detail as to render a decision on the issue of undue influence a matter of little difficulty so far as the merits are concerned. The sheet anchor of the appeal on this point was the fact that the first defendant did not come forward as a witness on his own behalf. Had he done so, fresh light would undoubtedly have been thrown upon the case. His counsel informed us, however, that he had advisedly abstained from calling his client, as he did not consider that on the issue of undue influence there was any real evidence against him, and that to have, in such circumstances, allowed the first defendant to be subjected to cross-examination, not only would have been needlessly painful to himslf, but would have gone far to prevent any future reconciliation with his brother. Here, again, we must be content to take the case as it stands. The plaintiff's counsel contended that the facts that at the critical period his client had constituted the first defendant his attorney, that in the power of attorney the common form of statement that the principal was about to leave the Island had been struck out and a special clause inserted to the effect that no person

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dealing with the attorney or his substitute or substitutes should be required to ascertain whether it had ceased to be in force from any cause whatsoever, or to inquire whether he or they were acting within the scope of the authority conferred by it, and that the first defendant had complete control over the movements of the plaintiff at the time, created a relation of active confidence within the meaning of section 111 of the Evidence Ordinance, 1895,[1] between them, and imposed upon the first defendant the duty of showing the honesty of the impeached transaction. The defendants' counsel maintained, on the other hand, that the execution of the deeds of gift was not a "transaction" within the meaning of the section just mentioned; that the circumstances disclosed no relationship of active confidence between the plaintiff and the first defendant; and that, even if it did, the burden of proving the good faith of the transaction had been amply discharged.

The first defendant was himself a party, as acceptor of the donation on behalf of his minor son, to each of the deeds in question, and the execution of those deeds was, in my opinion, a "transaction" in the statutory sense of the term. But the special clause, to which our attention has been directed in the power of attorney, may well have been intended merely to protect the attorney and persons dealing with him for valuable consideration on faith of the power,[2] and I doubt whether it results from any of the authorities cited to us that, in such circumstances as the present, a relationship of active confidence will arise, unless the person said to stand to the donor in that position has had something to do with the bringing about of the transaction itself. Certainly the case of *Sital Prasad v. Parbhu Lal*,[3] on which the plaintiff's counsel relied in this connection, does not support any such proposition. In that case there is a specific finding that the party alleged to have used undue influence himself obtained the execution of the impugned deeds. Be that as it may, however, even if the *onus probandi* under section 111 of the Evidence Ordinance, 1895,[1] rested on the first defendant, it has, I think, been discharged by the large body of evidenc, *vivâ voce* and documentary, which I have already considered, and which shows that the execution of the deeds in question was a free will act on the part of the plaintiff himself. The first defendant was not bound to go into the witness box. He was entitled to discharge the burden of proof *ex hypothesi* imposed upon him by reason of his position of active confidence towards the plaintiff, in any way that he chose, and he has done so successfully. Mr. Perera stated that he had not told the first defendant about the execution of the two deeds till they were ready for signature, and that all that the

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[2] *Elliot v. Ince, (1857) 7 De G. M. & G. 475; and cf. Daily Telegraph Co. v. McLaughlin, (1904) A. C. 776.*

[3] *(1888) I. L. R. 10 All. 535.*

first defendant had done was to accept them formally for the benefit of his son. Mr. Perera was, in my opinion, the plaintiff's independent adviser within the meaning of the well-known English authorities on this branch of the law.

I would dismiss the appeal with costs.

SHAW J.—

This action was brought to set aside two deeds of gift made by the plaintiff in favour of the second defendant, on the grounds, first, that the plaintiff was, at the time he executed the deeds, of unsound mind and incapable of understanding their contents; and, second, that he was induced to execute the deeds by the undue influence of the first defendant.

By the deeds in question the plaintiff gifted to the second defendant, an infant, who was his nephew and godson, a number of valuable properties, reserving to himself a life interest, and the gift was accepted by the first defendant, who was an elder brother of the plaintiff, on behalf of his son, the second defendant.

Two issues only were contested in the District Court:—

(1) Was the plaintiff incapable of understanding the effect of the transaction impeached in this case, namely, the execution of the deeds 605 and 606 of May 31, 1912?

(2) Was first defendant in a position of active confidence towards the plaintiff when deeds 605 and 606 were executed, and was their execution obtained by the exercise by the first defendant of undue influence?

The learned District Judge has answered both the issues in the negative, and the plaintiff has appealed . . . . . .

With regard to the issue of undue influence, it was contended that the evidence showed that the first defendant, at the time the deeds were executed, stood in a position of active confidence to the plaintiff within the meaning of section 111 of the Evidence Ordinance, 1895,[1] and that, therefore, the burden of proving good faith of the gift to his son lay upon the first defendant, and that, not having gone into the witness box, he had not discharged the burden. I am not going to discuss in detail the numerous cases cited by the appellant in which such a position was held to exist, and in which conveyances and gifts have been set aside on the presumption or proof of undue influence. Undoubtedly, in order to create a position of active confidence, it is not necessary for one of the usual relationships of solicitor and client, guardian and ward, parent and child, &c., to exist, and there is no reason why one brother should not stand to another in such a position. Every case must, however, depend upon its particular facts, and I agree with the District

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Judge that the evidence, worthy of credit, in the present case does not establish that such a position existed between the first defendant and the plaintiff. So far as the evidence discloses, the first defendant did no more than to exert himself to the utmost to help his brother in difficulties and misfortune he had brought upon himself, and he was in no way instrumental in procuring the settlement of the plaintiff's property on the second defendant. In these circumstances, I do not think that the law necessitates any presumption of fraud against him, but even if it did so, the presumption is amply negatived by the evidence in the case, showing that the deeds were prepared by the family solicitor of the De Soysa family, who was in no way acting for the first defendant in the matter, at the sole instance, and even insistence, of the plaintiff, and that the plaintiff, long after the deeds were executed, and when it is impossible to suppose that he could still have been under any influence of the first defendant, publicly expressed his approval of what he had done.

I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*