1933

Present : **Akbar J. and de Silva A.J.**

PERERA v. TISSERA et al.

28 and 29—D. C. Chilaw, 8,811 and 8,812.

Trust—Administrator and heir—Settlement of accounts—Undue influence—Mortgage bond in favour of third party—Presumption attaching against third party—Sale of property to administrator—Creation of trust in favour of heirs—Judicial settlement of accounts—Passing of final account—Trusts Ordinance, No. 9 of 1917, s. 90—English law.

Where the widow of an intestate transferred her half share of certain lands to the administrator under an arrangement, the object of which was to preserve the property for the minor children of the intestate, and where by a subsequent deed, which purported to be a deed of agreement between the administrator and the guardian *ad litem* of the children, the administrator undertook to sell to the children the share of the lands, which he obtained, upon payment of a certain sum of money within a stated period,—

Held, that, in the circumstances, a trust had been established in favour of the children and that all the pecuniary advantages obtained by the administrator in dealing with the lands transferred to him must be held by him in trust for the benefit of the minors.

The English law of undue influence has become part of the law of Ceylon.

The circumstances, under which the presumption of undue influence arises in the case of transactions between parent (or person placed in *loco parentis*) and child, and how that presumption may be rebutted under the English law, indicated.

The presumption of undue influence would arise in the case of a settlement of accounts between the administrator and the heir of the intestate, who was living with the former at the time.

When at a settlement of accounts between the administrator and the heir a deed of agreement was entered into by which the heir acknowledged liability to pay the administrator a certain sum of money, and in order to discharge that liability mortgaged her property with a third party, who was aware of the facts and attendant circumstances,—

Held, that the presumption attached against the third party as well and that he took the mortgage bond at his peril.

Held, further, that in order to disentitle a party from seeking relief from a contract on the ground of ratification by acquiescence, there must be proof not only of assent, but also assent after the party became aware of the violation of his rights.

An administrator who desires to have a conclusive settlement of accounts and of the distribution of the assets must take steps under Chapter LV. of the Civil Procedure Code. Under that Chapter, after a proper scrutiny of accounts, the Court will proceed to enter a decree under section 740 directing payment and distribution to persons entitled according to their respective rights.

The passing of a "final" account after notice to all the parties interested does not constitute a judicial settlement and does not supersede the procedure by way of a judicial settlement.

IN these two actions Nos. 8,811 and 8,812, which were tried together, the plaintiff sought to set aside deed No. 3,418 dated March 12, 1926, executed by her in favour of the first defendant and bond No. 3,482 of the same date executed by her in favour of the second defendant on the ground of undue influence.

The plaintiff is the daughter of one Albanu Tissera, who died on July 23, 1915.

The first defendant is the brother of Albanu and took out letters of administration to his estate in testamentary proceedings No. 1,102 of the District Court of Chilaw. The first defendant was admittedly in possession of Albanu's estate until March, 1926.

The plaintiff's case was there was no proper settlement of accounts and that the defendant caused her to execute the deeds by the exercise of undue influence.

It was contended on behalf of the defendant that the accounts were looked into in March, 1906, and that the impugned deed and bond were executed in the settlement of accounts. The learned District Judge dismissed the plaintiff's action.

H. V. Perera (with him *N. E. Weerasooria, S. W. Jayasuriya,* and *Kottegoda*), for plaintiff, appellant.—First defendant's position is anomalous, viz., that of a self-appointed curator. Accounts have not been judicially settled. Section 111 of the Evidence Ordinance would apply.

First defendant's position is a position of influence (Spencer Bower on *Actionable Non-Disclosure (1915 ed.), Chapter V., pp. 362 et seq.)* Undue influence has been exercised *(Spencer Bower, ss. 409 and 405; Hatch v. Hatch*[1], *Melish v. Melish*[2]).

This doctrine of presumption of undue influence applies not only to gifts but also to contracts *(Spencer Bower, p. 364 ; Grosvenor v. Harratt*[3]*; Wright v. Carter*[4]).

The presumtion of undue influence has not been rebutted:—*Spencer Bower, ss. 406, 470, 471, and 476;* not only the moral soundness, but also the mercantile soundness of the contract made by the dominant person, should be considered *(Hugenin v. Basely*[5]); advice must be given to the servient party by an independent person, *i.e.,* a person entirely free from the influence of the dominant party *(Gibson v. Jeyes*[6]); or sufficient independent legal advice should have been given *(Inchnoriale v. Sheik Ali Bin Omar*[7]).

As regards confirmation by the servient, confirmation necessarily implies an election between two causes. Otherwise, it is not a confirmation. The confirmation itself may be the result and evidence of the continuation of undue influence *(Spencer Bower, s. 480)*.

First defendant is in the position of a trustee and had to render accounts *(Saminathan Chetty v. Vander Poorten*[8]).

As against second defendant, Counsel cited *Kempson v. Ashbee*[9], *Bainbrigge v. Browne*[10], *Espey v. Lake*[11].

Hayley, K.C. (with him *Croos Da Brera* and *C. T. Olegasagarem*), for first defendant, respondent.—The bringing in of English Law of Equity could only be justified on the basis of section 111 of the Evidence Ordinance. English Law of Equity is highly technical and has not been wholly

[1] *(1804) 32 Eng. Rep. 615.*
[2] *57 Eng. Rep. 27.*
[3] *(1862) 54 Eng. Rep. 520.*
[4] *(1903) 1 Ch. 27.*
[5] *(1807) 33 Eng. Rep. 526.*
[6] *(1801) 31 Eng. Rep. 1014.*
[7] *(1929) A. C. 127.*
[8] *2 Ceylon Law Weekly 123.*
[9] *(1874-75) 10 Ch. App. 15.*
[10] *(1881) 18 Ch. D. 188.*
[11] *10 Hare 260.*

adopted here where the Roman-Dutch law is almost complete in connection with land cases. The doctrine of undue influence is entirely a doctrine of the English law. In *Soysa v. Soysa*[1] a transaction was set aside on the ground of duress and not of undue influence. In *Lyles v. Terry*[2], Lord Esher resorted to a peculiarly English rule of equity. This rule, viz., that where there is a transaction between members of a family, a solicitor's advice should be taken first, cannot be insisted on in Ceylon, and there is no authority for it either here or in South Africa (*3 Nathan, p 1548*).

Wright v. Carter[3], which considers *Hatch v. Hatch* (*supra*), is in our favour.

The question in our case is whether, in accordance with section 111 of the Evidence Ordinance, there was good faith or not. If not, was the consideration for the deed P1 inadequate or non-existent ?

Spencer Bower, s. 410, deals with "family arrangement", when not even a presumption of undue influence should be made. This cuts through all the authorities already cited on undue influence. See also *Spencer Bower, pp. 448-449.* Cases on family arrangement: *Stapleton v. Stapleton*[4], *Dimsdale v. Dimsdale*[5], *Jenner v. Jenner*[6], *Hartopp v. Hartopp*[7], *Stewart v. Stewart*[8]. Adequacy of consideration will not be minutely weighed where there is a family arrangement (*Parsee v. Persse*[9]).

Francis de Zoysa, K.C. (with him *L. A. Rajapakse*), for second and third defendants, respondents.—Deed P2 was subsequently ratified by poyment of interest. Counsel cited *15 Halsbury 104* and *Mitchell v. Homfray*[10]. There was *bona fides* on the part of second defendant.

H. V. Perera, in reply.—This is not a case of family arrangement. The purpose of family arrangement is to perpetuate the property in the family. The transaction which took place in this case was essentially one of accounting. *Stapleton v. Stapleton* (*supra*) will not apply, because there has not been even a fair compromise.

Section 5 of the Trusts Ordinance, No. 9 of 1917, and *Ranasinghe v. Fernando*[11] would apply.

May 31, 1933. AKBAR J.—

These three cases were heard together in the circumstances mentioned by the learned District Judge at the beginning of his judgment. It will be therefore necessary to discuss the appeal in case No. 8,811 first before I proceed to case No. 8,812.

D. C. 8,811 is a case brought by the plaintiff against her uncle the first defendant, who was the administrator of three testamentary cases in which the plaintiff was the principal heiress, for the cancellation of a deed marked P1 dated March 12, 1926, on the ground that it was obtained by undue influence (see amended plaint and issues) and for an accounting of the income of the lands. The learned District Judge has dismissed the

[1] *19 N. L. R. 314.*
[2] *(1895) 2 Q. B. 679, at p. 683.*
[3] *(1903) 1 Ch. 27, at p. 50.*
[4] *1 Atk. 2.*
[5] *25 L. J. Ch. 806.*
[6] *(1806) 30 L. J. Ch. 201.*
[7] *25 L. J. Ch. 471.*
[8] *C. & F. 911.*
[9] *(1840) 7 C. & F. 279 at p. 318.*
[10] *(1881) 8 Q. B. D. 587.*
[11] *24 N. L. R. 170.*

plaintiff's case preferring to believe the evidence of the first defendant to that of the plaintiff and her witnesses. Most of the facts which led to the execution of the deed P1 are common ground between the parties. Plaintiff's father was a man named Albanu, who married first Justina, the only child of a woman Maria, and he had two children by her, viz., Margaret the plaintiff, who was born on October 17, 1903, and a son Macarius, born on April 10, 1905. Justina died and after her death Albanu married Agnes, and on Agnes' death without any children he again married a young girl Isabella on June 8, 1915. Albanu died on July 23, 1915, intestate, leaving Isabella, without any issue by her, and the two children by his first wife as his heirs, Isabella getting half and the two children the other half. At the time of Albanu's death there were living the following : Albanu's brothers, Liyano (first defendant) and Graciano, and two sisters Emerencia and Theresia whose husband was a man named Pemiyanu. Both their father and mother Simon Tissera and his wife Anathasia were alive, the age of the latter being 70 years and the former about 80 years. The former died on August 2, 1924, and the latter was alive at the time of the trial and gave evidence. After Albanu's death on July 23, 1915, Liyano applied for administration of his estate on September 15, 1915, and in his petition named Isabella, Margaret, and Marcarius as respondents and also the grandmother Anathasia as fourth respondent. On his application Anathasia was appointed guardian *ad litem* over the two minor children. This appointment was in breach of section 495 of the Civil Procedure Code because Simon Tissera was then alive. As the first defendant admitted in evidence, he was the chief person in the family after his brother's death, Graciano being " a quiet man and an unlearned man " and Anathasia a feeble old woman, who cannot even read and write, she cannot even sign her name ". Margaret was then only 12 years old, and first defendant entered into possession of Albanu's property as administrator and remained in such possession till 1926.

On June 9, 1916, by deed P6 Isabella purported to sell her half share in Albanu's lands to the first defendant for a consideration of Rs. 6,890 said to have been paid to her, and she dropped out of the testamentary case. This deed was followed by another document D5 dated July 4, 1916, which purported to be a deed of agreement between Liyano and Anathasia as guardian *ad litem* by which Liyano agreed to sell the shares of the lands which he had obtained by deed P6 within 5 years after the expiration of 12 years from the agreement to the two minors, and Anathasia on behalf of the minors promised to pay Rs. 3,000 within 5 years of the expiration of the 12 years. Both these deeds were not brought to the notice of the Court in the administration case, and it was argued on behalf of the appellant that D5 was not binding on the two minors, because Anathasia had not been appointed as curatrix over the minor's property and no leave of Court had been obtained for the agreement.

The circumstances under which P6 was executed were as follows:—
As Isabella was a young widow the family of the deceased Albanu was very anxious to buy her off, and to get her half share transferred to the minor children for otherwise she would have been entitled to administer the estate. In first defendant's own words " we wanted to buy in Isabella's

share. We were all interested in Albanu's children. I was also interested in them. No one wanted to get lands for me. Isabella was a young girl. Father Joseph said Isabella's share should go to the children. So also said Maria and Anathasia. I also said so . . . . The object of everyone was that this half share should be transferred to the children. No one troubled about exact figures. We all wanted to benefit the children ".

It was argued for the appellant that if the evidence is scrutinized even by leaving out Isabella's evidence (as it was contended *contra* that under section 95 of Ordinance No. 14 of 1895, she could not vary the terms of her own deed) the clear intention was that Isabella's half share was to go to the benefit of the children and P6 was drawn as a sale for Rs. 6,890 although only Rs. 3,000 was paid as the parties apparently thought wrongly that a transfer in favour of the minors could not be drawn up without the sanction of the Court. There was a fear that the Court might not sanction such a transfer and the family of Albanu was very anxious to get Isabella out of the estate. It was urged that even supposing the full consideration of Rs. 3,000 was provided by Liyano, the deed P6 was a trust in favour of the minors, subject to a mortgagee's right in favour of Liyano to reimburse himself in the sum of Rs. 3,000 lent by him with reasonable interest (see *Saminathan Chetty v. Vander Poorten*[1]).

That this was the true construction appellant argued could be seen from many attendant and subsequent circumstances which I shall proceed to detail now. On Albanu's death his two children lived together with Liyano in the house of their grandparents Simon Tissera and Anathasia. In 1917, Liyano married and went to live with his wife's parents and the plaintiff was sent to a convent in Negombo where she stayed for two years. Margaret therefore had a semblance of an education from her 14th year till she was 16 and this is the education which the District Judge calls " a fairly good education ". On her return from the convent Margaret lived with Anathasia till first defendant built a house on one of Albanu's lands and Margaret lived with Liyano and his wife in this new house from 1921 till 1926. In the meantime Liyano filed a final account in Albanu's testamentary case. In this testamentary case (P18) the value of the estate is shown as Rs. 12,755, being the difference between the assets valued at Rs. 16,255 and debts on bonds Rs. 3,500 as required by the Stamp Ordinance. On November 14, 1916, although notice was to be issued on the respondents to accept or reject the final account, no such notice was issued, but Anathasia who was present not only on behalf of the minors but also of Isabella accepted this account as correct. All the lands and other properties of Albanu remained in Liyano's possession, who drew the income and spent it as he pleased till 1926. There was therefore a liability on Liyano to account to the plaintiff for all the income and expenditure from the time of Albanu's death till the year 1926. In my opinion he is liable even to account for the year 1915-1916, for Anathasia was wrongly appointed guardian *ad litem* as she was a feeble illiterate old woman, who had no independent advice in the matter, and whose significance of her acceptanc of the accounts could only be considered as nothing more than a formality to wind up the estate. Both P6

[1] 2 *Ceylon Law Weekly* 123.

and D5 had been executed when the final accounts were submitted, but the Court was not informed of their existence. Instead of vesting the minors' property in a properly constituted curator under the Civil Procedure Code, who would have been liable to account to the Court periodically, the first defendant took control of all the minors' property and having got rid of even the semblance of a supervision by the Court when the estate was being administered he did as he pleased with the income from 1916-1926. He appropriated half the income of Albanu's properties according to the account P27 which he had to submit to the plaintiff's lawyers after this case began.

It was argued for the appellant that all the circumstances show that even if Liyano had provided the full Rs. 3,000, which was paid to Isabella, he had no more than a mortgagee's right to recover the Rs. 3,000 from Isabella's half share and he was not entitled to appropriate to himself half the income from these lands. No Court would have sanctioned such an arrangement and that was why the deed P6 was not disclosed to the Court. The deed D5 which was not binding on the minors was apparently drawn up to meet the importunity of Anathasia, who probably had some qualms of conscience at that time as the whole title of Isabella's share was in Liyano's name. There is an interval of nearly one month between the two deeds. As the two deeds were not executed at the same time, and as D5 is not valid in law so as to bind the minors, and the two documents P6 and D5 were hidden from the Court which was administering Albanu's estate, there was a heavy burden on the first defendant to satisfy a Court that D5 represented the actual terms of the trust. It was urged for the appellant that he had failed to discharge this onus as shown not only by the evidence of the persons concerned, but also by his own account of how the Rs. 3,000 was raised. But before I mention the steps taken to raise this Rs. 3,000, let me allude to the incident of Isabella's necklace. Isabella agreed to waive her claims to Albanu's estate not only on payment of Rs. 3,000, but there was another collateral agreement with regard to the sale of a necklace by Isabella for Rs. 200. This necklace was given to her by Albanu on their marriage, and it was to be returned to the family on payment of Rs. 200 to Isabella.

By two mortgages, Rs. 3,200 was raised (P21 and P22). By P21 Rs. 2,200 was raised on September 8, 1915, with Maria as principal debtor and Liyano as surety, Maria mortgaging her lands as security. By P22 Liyano and Pemiyanu mortgaged four small lands for Rs. 1,000. These two sums make up exactly Rs. 3,200 to be paid to Isabella. And yet Liyano said (and he has been believed by the District Judge) that the extra Rs. 200 was paid as notarial fees, &c., and that it was he who paid Rs. 200 from his own pocket for the necklace and that the necklace became his property. He then according to his own account sold this same necklace to Maria for Rs. 200, which Maria repaid to him when she sold a land by deed 4,023 on October 26, 1918 (see D16 and Liyano's evidence at pages 301-302 and 347-348). At the time this Rs. 200 was paid to Isabella, Liyano obtained a promissory note from Isabella's father as security, and yet after Isabella signed P6 he sent a letter of demand P29 to Isabella's father threatening to sue him on this note which

he had failed to return. His evidence at pages 356-357 should be contrasted with the evidence of Isabella and of C. G. de Alwis at pages 502, 508, and 509.

The case for the plaintiff was that the full sum of Rs. 3,000 was really provided by her grandmother Maria in the following circumstances: By P21 Rs. 2,200 was raised, Maria mortgaging all her lands and as no further sum could be raised on these lands, Liyano and Pemiyanu raised the extra Rs. 1,000 by a mortgage of their lands.

P21 was discharged on October 3, 1918, by P26 which replaced P21. By P26 Rs. 2,200 was raised which went to discharge P21. In P26 both Maria and Liyano were co-mortgagors, Maria mortgaging two of the three lands in P21 and Liyano two of the lands to which he derived title from Isabella on P6. It will be seen that as a result of this change one land Anji-tennaidui was released by Maria and sold by D16 of October 26, 1918, to Abaran Kurera, father-in-law of Liyano, for Rs. 850. The attestation clause says that out of this sum Rs. 500 was acknowledged by the vendor to have been previously received and the balance was set off in payment of the balance debt due from Liyano to the vendee upon bond P22. This confirms to a remarkable extent the case for the plaintiff that this sum of Rs. 850 was really paid by Maria to wipe off Liyano's liability on P22. To explain this attestation clause the first defendant gave an elaborate explanation recorded at pages 346-358. At page 343 Liyano said that Maria raised the Rs. 2,200 by P21 and P26 for his benefit. At pages 354-355 he said that he was paying the interest on P26 and Maria paid nothing and yet he had debited Rs. 330 to Maria's estate in Maria's testamentary case (P20). At page 355 he could not account for it, but the District Judge at page 89 of his judgment says that it was included by error. It must be mentioned by me here, as I have referred to Maria's testamentary case, that she died on October 30, 1921, leaving a last will giving all her property to her two grandchildren. Her estate was proved by Liyano as executor (see P20) in D. C., Chilaw, 1,421. Here too Anathasia was guardian *ad litem* of the minors, and on April 11, 1924, Anathasia accepted the final account. P20, as I have said, debited the estate with Rs. 330 paid as interest on bond P26 and Rs. 1,100, *i.e.*, half share of the debt due on bond P26 is shown as a debt due by the estate.

It is hard to believe that the old woman Maria raised the loan of Rs. 2,200 on P21 and P26 for the benefit of Liyano to enable him to pay this sum to Isabella so that he may buy her share of Albanu's estate and enjoy its income in order that finally Liyano may transfer it to the minor children within 12 years on the latter repaying the Rs. 3,000.

The District Judge comments on the omission of Maria to mention the fact that she was bequeathing the Rs. 2,200 to the children in her last will as a factor corroborating Liyano's story. But why should she, when by P26 the mortgage is a joint and several one and the mortgage is one over her lands and these lands have now vested in Margaret? But even supposing we accept Liyano's evidence as the District Judge has done what is the position? We have only his word that he has paid half this debt of Rs. 2,200 to the Chettiar mortgagee and all interests up to date. He has produced no receipts. Maria's lands have now devolved on the plaintiff with this mortgage over them. Further Margaret is the sole

heir of Maria's estate and is therefore responsible on the personal liability to repay the full Rs. 2,200 with interest to the mortgagee. Had it not been for this case the Chettiar could have brought an action to recover the full sum with interest against Margaret and sold not only the lands mortgaged but the other lands of Margaret.

It may be interesting to note that the mortgagees on P26 are the same Chetty firm as the second and third defendants in this case. It suits first defendant's case in these proceedings to come now and say that he is responsible to the Chettiar to pay the half of the full debt and that he has paid the other half with full interest on the whole sum. But on paper P26 still exists undischarged. This state of affairs becomes a matter of importance when one considers the question of undue influence, as I shall do later, for if Margaret had a competent adviser, who was in possession of all the facts in this case, he would not have assented to Margaret signing the document P1 in the circumstances disclosed in this case.

Macarius died on April 17, 1924, leaving Margaret as his sole heir who thus became entitled to the whole of her father's estate, if we exclude Isabella's half share which had been dealt with by P6 and D5, Liyano was again the administrator and Anathasia the guardian *ad litem* of Margaret. Final account was filed on March 15, 1925, and Anathasia accepted this account by signing with a cross on behalf of Margaret, although Margaret attained majority on October 17, 1924. I may say that in Maria's testamentary case the petitioner Liyano stated that Margaret was 15 years old in 1922, when she was in fact 19 years. If Liyano was really mistaken as to the exact age of Margaret in 1926, he must have been under the impression that she was 19 years old in 1926, until the Chettiar produced Margaret's birth certificate P12 on March 10, 1931 (see page 321).

We now come to the events directly leading to the signing of P1. First defendant's case was that P1 was the result of negotiations between Margaret (assisted by Anathasia and Graciano) and himself and that the various instructions given to the notary (see the translation to P5 furnished by Mr. Gunaratne, the Sinhalese Interpreter Mudaliyar of this Court attached to this judgment which was furnished to us during the argument of the appeal), on December 14, 1925, March 3, 1926, March 8, 1926, and March 10, 1926, were given in concert. The District Judge has discussed the evidence at great length on this point. The salient facts that emerge from the evidence of the defendant on this point are: (1) That these instructions were not given by Margaret but by Liyano and at the later stages by Liyano and the Chettiar. (2) The notary was in no sense an independent legal adviser of Margaret. His duty was merely to draft the deeds on the instructions given to him and to take the signatures of the executants after reading them to Margaret and the other executants. (3) On the date that Margaret actually signed the deeds P1 and P2 Margaret was living with the first defendant in her new house and the attempt of the first defendant to prove that he had left this house some time before and that Margaret was living with Anathasia was a bold attempt to deceive the Court which attempt failed (see page 90 of the judgment). (4) Anathasia was not present in the house (see pages 490-492 of the first defendant's own evidence). Even Graciano was not there. According to Liyano " on March 12, 1926, Anathasia was not present. On March 12,

1926, there was no independent adviser present on behalf of Margaret. Pemiyanu and Elaris were present, but no others besides me, the Chettiar, and the clerk. Elaris was a witness to the deeds. So was Pemiyanu. They came as witnesses. I did not think it necessary that any one should represent Margaret. In my view Margaret was quite capable of acting for herself ". The evidence on this point is confirmed by the notary and corroborates to some extent what Margaret said. But the first defendant at page 492 (just a few lines below his evidence given by me above) contradicted his previous evidence by saying " I think Anathasia was present ". (5) According to Liyano's evidence accounts were looked into by Pemiyanu, Anathasia, Margaret, and himself. Margaret was then a young girl who had just attained majority, Anathasia a feeble old illiterate woman, and Pemiyanu is dead and cannot give evidence. His suggestion was that D19 were the accounts which were looked into. His whole evidence suggests that he regarded Margaret as quite competent to look after her affairs and that he treated her as an ordinary contracting party. But if Liyano was in a position of active confidence towards Margaret this was not enough. Liyano should have explained all the points including the existence of P6 and D5 and it is hard to believe that Margaret was told and that she understood all the details of the complicated accounts which have now been put forward by Liyano and in which he himself admits that he has made gross blunders which he corrected in Court when giving evidence. As far as I can make out from the English authorities which I shall discuss later there was an obligation on a person in the position of the first defendant to have explained all the details of this vast transaction to Margaret and to have given disinterested advice as if Liyano was advising Margaret in a transaction against a third person. There are certain recitals in the mortgage bond P2 which the first defendant attempted to explain at pages 425-430. He had to admit that he himself did not give the instructions which were embodied in the recitals, but that they were given by a proctor's clerk on behalf of the Chettiar and that some of the recitals were not correct.

Further as I have already pointed out Liyano failed to explain to Margaret that the bond P26 was still undischarged and that she was liable on this bond, unless he himself paid the full sum and the interest. There are many other points which Liyano seems to have failed to explain to Margaret. Did he for instance point out to Margaret that the accounts filed in the testamentary cases were not binding on Margaret and that she could ask for a judicial accounting under the Civil Procedure Code? And that the tavern profits were not inventoried ? Did he explain how a debt of Rs. 1,000 from Albanu's estate in his favour came to be included in the accounts and about which he gave contradictory explanations in Court ? Did he explain to Margaret why no income from the owita lands was shown and only pickings from the coconut lands were included ?

As far as I can see from Liyano's evidence he has nowhere stated that he had disclosed all the material facts to Margaret. Liyano assumed that Margaret assented because she carried out his bidding. Did first defendant explain to Margaret the exact implications of P6 and D5, that according to him he was the absolute owner of half Albanu's lands ?

At page 325 Liyano stated that he considered he was bound to pay half Albanu's debts and that he charged himself with half the expenditure on his estate and testamentary expenses. And yet P27 shows the full testamentary expenses debited to Margaret. In spite of three mortgagors being shown in D13 he charged the whole debt to Albanu's estate (page 423).

On March 12, 1926, all the four deeds P1, P2, P3, and P4 were signed and, even if we accept the circumstances in which these deeds were signed as found by the District Judge, the first defendant has not explained that Margaret agreed to the raising of the loan, the rate of interest or even as regards the choice of the properties which she purported to mortgage. If we turn to the instructions given to the notary by Liyano and the Chettiar as regards the drafting of P2 (see translation of P5) the lands given in the instructions seem to be different to the lands actually mortgaged by P2. P2 as signed by Margaret includes Margaret's residing land. The notary brought the deeds drafted for signature on March 12, 1926, and there is no suggestion by Liyano that Margaret agreed to the altered terms after March 3, 1926, when instructions were given. Both P2 and P3 mention Rs. 2,000 as expenditure incurred by Liyano in respect of Macarius' estate owing to his medical treatment, death and expenses in connection with his estate, but this is in excess of the sums shown in P27 in respect of these items. Was Margaret's attention drawn to this difference?

It is time now that I come to the questions of law involved. The District Judge was right in holding that owing to the position occupied by Liyano towards Margaret, there was a presumption of undue influence and that section 111 of the Evidence Ordinance applied. In my opinion the law that should be applied is the English law, not only because there is an implied recognition of the English law by statute (see sections 91 and 118 of the Trusts Ordinance, No. 9 of 1917) but also because the Roman-Dutch law seems to have been undeveloped (see Lee's *Introduction to the Roman-Dutch Law, p. 221* and also *Soysa v. Soysa*[1]). A large number of English cases was cited to us, but the law seems to be correctly stated in the cases in Spencer Bower's *Actionable Non-Disclosure* (1915 ed.). *ss. 406, 470, 471 and 476.*

If we look upon these transactions as contracts between Liyano and Margaret, the defendant can only rebut the presumption by proof that there had been a full disclosure of all the material facts to Margaret, and that Margaret had independent and competent advice either from a third person or from the first defendant and Margaret got full and fair value at the time of the contract. From the facts I have narrated the first defendant it seems to me has failed on all the three points. Even on Liyano's evidence it is quite clear that Margaret was not acquainted by the first defendant with all the facts which he himself had in his possession. P27 it will be remembered was put in after the case began, and D19 is obscure on many points. What is the meaning of the item "paid to the Chetty Rs. 4,500"? Were receipts, vouchers, and discharged documents shown to Margaret? The first defendant's evidence negatives the suggestion that Margaret was given that degree of competent and

[1] *19 N. L. R. 314.*

independent advice which the law requires. In my opinion it is idle to suggest that that advice was given by Anathasia, Graciano, and Pemiyanu or by the notary.

As regards the fair value, I may mention one circumstance. P1 states that Margaret transferred the eight lands mentioned in it for a consideration of Rs. 3,000 which is negatived by first defendant's own pleadings, for by paragraph 9 of his answer Liyano says that three of the eight lands were conveyed to him for a consideration of Rs. 1,250 and interest paid by him and also owing to the trust mentioned by him in the paragraph. Paragraph 9 goes on to say that the remaining five lands were conveyed in payment of the sum of Rs. 3,000 due on P4.

First defendant's whole case depends on the correct construction of P 6. His evidence and the document D5 come to this: that the title to the whole of Isabella's share was vested in him, with only an obligation to convey these shares to the minors within a period of 5 years from and after the expiration of 12 years from the date of D5, *i.e.*, July 4, 1916, upon payment of Rs. 3,000 by the minors. The very fact of the existence of document D5 proves that there was a trust, and even though that document does not bind the minors yet it can be used against Liyano, for it is put forward by him as a valid document. To my mind the recent decision of the Privy Council in *Saminathan Chetty v. Vander Poorten (Privy Council Appeal No. 117 of 1930)* (*supra*) will apply if one takes into account all the circumstances leading up to P1-P4, the first defendant's evidence and documents P1 and D5. To my mind Liyano's interest on P1 was that of a mortgagee and he had to account for all the income with interest on Isabella's lands for the whole period 1915-1926, which he had no right to claim as his. In spite of deed 472 in *Saminathan Chetty v. Vander Poorten* (*supra*) the decree framed by the Privy Council directed the defendant in that case to account for all the rents and profits which the defendant not only received, but which he might have received but for his default, with reasonable interest from the dates of receipt to the date of decree.

Even under our Trusts Ordinance, No. 9 of 1917, the circumstances under which P6 was executed would appear to bring it within section 90. Liyano was in a fiduciary capacity towards Margaret and he has gained, by availing himself of his character, a pecuniary advantage for himself, or Liyano being bound to protect Margaret's interest has entered into P1 under circumstances which are adverse to Margaret. He must hold this advantage for the benefit of Margaret. In this connection it might be noted that by section 5 of that Ordinance it is specially enacted that the Ordinance of frauds cannot be pleaded to create a fraud and the chapter on constructive trusts does not seem to be exhaustive. As far as I can understand Mr. Hayley's argument on the law, he did not dispute the law set forth by me above from Spencer Bower as regards the duty of a person in a fiduciary capacity similar to Liyano's towards the person to whom he stands in that relation when a Court is considering contracts between the two. Mr. Hayley's argument was that these rules did not apply when the contracts had been entered into as the result of a family arrangement. The cases he cited can be differentiated from the

facts of this case. In none of these cases (*Dimsdale v. Dimsdale*[1], *Jenner v. Jenner*,[2] *Hartopp v. Hartopp*,[3] *Bellamy*[4] *v. Sabine*,[5] *Stewart v. Stewart*[6]), did the question arise whether the defendant was under a liability to account for income wrongly received by him on behalf of the plaintiff. Most of the cases were concerned with the resettlement of estates in which both plaintiff and defendant had interests and the resettlement was effected to preserve the family honour and dignity. The case now before me is not a case of that kind and it would be unfair for a person in the position of Liyano to be able to plead that the transaction was a family arrangement in order that he may evade his liability to account to his former ward.

So far as the Chettiar respondent is concerned, he too is affected with the taint of undue influence exercised by Liyano over Margaret. The very recitals in P2, which are unnecessary and unusual in an ordinary mortgage bond where the mortgagee *bona fide* lends money, fix him with notice of the relationship between Liyano and Margaret. According to Liyano's evidence the instructions relating to the recitals were given by a solicitor's clerk whose services the Chettiar had requisitioned for the purpose, and this proceeding shows not only that the Chettiar knew of the unusual nature of the transaction but that he was uneasy about it. Liyano's evidence at pages 426-430 and 462-466 is strong evidence against the Chettiar and he has not gone into the witness-box to refute it. Document D9 purporting to be a receipt signed by Margaret and produced by the Chettiar for interest paid by Margaret to the Chettiar on P2 is significant. The receipt should have been given by Margaret to the Chettiar and its execution and production in evidence are on a par with the unnecessary recitals in P2. The same remarks apply to D8. This payment cannot be pleaded as a confirmation by Margaret of all the transactions on March 12, 1926, for she and her witnesses have given an explanation which appears to be perfectly natural.

According to the English authorities, notably *Baibrigge v. Browne*[6], the second and third defendants-respondents are affected with the undue influence exercised by Liyano over Margaret in the circumstances of this case. But as the District Judge has accepted the evidence led by the defendants and of the notary that money was paid on P2, our order allowing this appeal must give effect to this portion of the trial Judge's judgment, but there is no reason why plaintiff should not be allowed to reopen the question whether the money that went to pay Isabella was not after all Maria's money and not Liyano's. I have had the advantage of reading my brother's order at this stage of my own judgment and I agree with the order proposed by him both as to costs and the further trial of the case.

DE SILVA A.J.—

By consent of parties cases Nos. 8,811 and 8,812 have been tried together. The question for decision in these cases is whether deed No. 3,481 dated March 12, 1926 (P1), executed by the plaintiff-appellant

[1] *25 L. J. Ch. p. 806.*
[2] *30 L. J. Ch. p. 201.*
[3] *25 L. A. Ch. p. 471.*
[4] *(1847) 2 Philips Reports, p. 425.*
[5] *Clerk & Finnelly, 911.*
[6] *(1881) 18 Chancery Division, 188.*

in favour of the first defendant-respondent, and bond No. 3,482 of the same date executed by her in favour of the second defendant-respondent are liable to be set aside on the ground of undue influence. Mr. Perera for the appellant confined the appeal to this point.

The plaintiff is the daughter of one Albanu Tissera who died on July 23, 1915. The first defendant is the brother of Albanu and took out letters of administration to his estate in testamentary proceedings No. 1,102 of the District Court of Chilaw. Albanu's father was a humble padda boatman but Albanu advanced himself considerably in life, and, at the time of his death had been appointed a headman. He had married several times, his last marriage having been contracted 45 days before his death. He left as his heirs his last wife and two children, by an earlier wife Justina, Margaret the plaintiff and a son Macarius. Margaret, born on October 17, 1903, was at the time 11 years and some months old, Macarius, born on April 10, 1905, was 10 years and some months. Besides their uncle the first defendant the following relations of the plaintiff were alive: Maria, plaintiff's grandmother, mother of plaintiff's mother Justina; Gracianu an uncle, elder brother of the first defendant; two aunts, sisters of first defendant, Theresia married to one Pemiyanu and Emerencia married to one Augustinu. Also Simeon and Anathasia, Albanu's parents.

The first defendant was admittedly in possession of Albanu's estate until March, 1926. His position (paragraph 8 c. of the answer) was that accounts were looked into in that month and that the impugned deeds and others were executed in the settlement of the accounts. The plaintiff's position is that there was no proper settlement of accounts and that the defendant caused her to execute the deeds by the exercise of undue influence. Undue influence was pleaded in case No. 8,812 but was not specifically pleaded in case No. 8,811. It has however been raised in the issues and counsel for the respondents did not argue that it had not been adequately put in issue.

The examination of the events between July, 1915, and March, 1926, is necessary to form an opinion on the state of affairs which existed in March, 1926, immediately before the execution of the impugned deeds.

The learned District Judge after a lengthy trial has rejected the evidence of the plaintiff and her witnesses and accepted the evidence of the first defendant. The earlier part of my observations will be based entirely upon the evidence of the first defendant himself and upon material furnished by him in the various proceedings to which he has been a party.

The first question of importance for consideration in the case is, as stated by the learned Judge (page 66), " Whether Albanu died in solvent or insolvent circumstances ". The learned Judge has found (page 70), " It is clear that on July 23, 1915, when Albanu died, he died in debt " and again (page 71) " The position of affairs at the time of Albanu's death was (*a*) he had lands, (*b*) he was in debt " but he has not answered the specific question raised by him, namely, whether when Albanu died his estate was in solvent or insolvent circumstances. This question and the nett

value of Albanu's estate at the time of his death has an important bearing on the reasonableness or otherwise of the transactions of March, 1926, between the first defendant and his niece, the plaintiff.

. . . .

The answer then to the first question is that Albanu's estate was solvent even on the figures submitted by the first defendant and that it was in fact solvent to a greater extent than those figures indicate. What that extent is it is not possible nor necessary to determine exactly for the purposes of the order which I propose to make.

We have next to examine the position in law of a transfer made by Isabella to first defendant by deed P6 on June 9, 1916, of the half share of Albanu's lands, to which she as his widow was entitled. This deed was executed as a result of an effort made by the family to get rid of Isabella and to preserve Albanu's property for his children. It is claimed by the plaintiff that the first defendant held this half share in trust for herself and her brother Macarius. It is common ground between the parties that Isabella received a total sum of Rs. 3,200, Rs. 3,000 for the lands conveyed on P6, and Rs. 200 for a necklace which Albanu had given her and which she returned to the family. This sum of Rs. 3,200 was raised in the following manner. Rs. 2,200 on bond P21 (October 14, 1915) executed by the first defendant and Maria, by which certain lands of Maria were hypothecated and in which the first defendant joined only as surety. Rs. 1,000 on bond P22 (September 11, 1915) executed by the first defendant and Pemiyanu, in which the lands of both were hypothecated. P21 was cancelled on October 3, 1918, and replaced by bond P26 for the same amount of Rs. 2,200. By P26 lands of Maria were hypothecated as well as lands which had passed to the first defendant under deed P6, but no lands of first defendant which had not belonged to Albanu were hypothecated. It is claimed by the first defendant that although he was not the only person liable on the bonds, the whole of the sum of Rs. 3,000 paid to Isabella on P6 must be regarded as his. His story is that the arrangement between himself and the other members of the family was that this sum should be regarded as his money and that he should pay off the liabilities on the bonds referred to. The co-debtors on the bonds are unfortunately dead. The learned Judge has accepted this evidence and I proceed to consider the transaction on the basis asserted.

For reasons which I have given I am of opinion that the half share of Albanu's lands (subject to a half share of Albanu's debts and testamentary expenses) transferred by Isabella on P6, was definitely more than Rs. 3,000, in value. According to the first defendant's own affidavit of 1915 the value of the interest conveyed by Isabella was half of Rs. 14,815 (value of lands) less half of Rs. 6,908.08 (amount of total debts), viz., Rs. 3,953.46, but for reasons which I have already given I am of opinion that it was worth considerably more. Now this fact might or might not have been known to Isabella but it was without doubt known to the first defendant.

It has been found by the learned Judge and I think found correctly, that " the predominant wish of their (of the family) hearts at this stage was firstly to get rid of Isabella and secondly to benefit the minors.

This is common ground in the case" (page 74 of the judgment). The first defendant himself says, "we wanted to buy in Isabella's share. We were all interested in Albanu's children. I was also interested in them. No one wanted to get the lands for me", (page 334), then again, "the Rs. 2,200 was raised by Maria. I admit she raised this to benefit the children" (page 341), and again, "Maria trusted me to transfer the half share to the children. It was on this understanding that this Rs. 2,200 was raised" (page 349). The defendant no doubt in certain other passages of his evidence tried to qualify the evidence which I have set out, for instance he said "I say that Rs. 2,200 was raised by Maria for me" (page 343), but I have no doubt that when the money was raised no one intended to benefit the first defendant. The sole object was to benefit the children.

The first defendant's financial position at this time is relevant. Referring to it he said "I could not raise Rs. 3,200. I had no property to raise Rs. 3,200. I mortgaged my own land and raised Rs. 1,000" (page 339). "I mortgaged these lands and Pemiyanu his lands to raise that Rs. 1,000 for Isabella. Then I had nothing left" (page 340). It is clear therefore on his own evidence that the utmost limit of his financial capacity was to raise Rs. 1,000 and that he had nothing more than the lands mortgaged by the bond on which he raised it. He was therefore himself not in a position to purchase the half share of Albanu's lands from Isabella even if he desired to do so. The document P6 sets out the consideration as Rs. 6,890 although it is common ground that only Rs. 3,000 was paid. The reason for this has not been explained and the only reason that I can think of was that for stamping purposes the property could not be valued at less than the amount stated. This was probably the reason although I could not be sure of it.

The learned Judge (page 76 of judgment) thinks it probable that everyone imagined that the lands could not be conveyed to minors and I think the evidence strongly supports this view.

In these circumstances what was the effect of the transfer P6? The other members of the family, if not defendant himself, were asserting themselves on behalf of the minor children. They do not appear to have had recourse to legal assistance and it is clear on the Judge's findings as well as from the evidence that at this time they trusted the first defendant implicitly. I think a great deal has to be gathered from the implications arising from the circumstances attending the transaction. Accepting the learned Judge's view that the Rs. 3,000 paid must be regarded as the money of the first defendant, I think the position is that the lands were held on trust by the first defendant for the minor children to pay himself the Rs. 3,000 and interest accruing thereon and thereafter absolutely for them. A long chain of decisions—*Nanayakkara v. Andris*[1], and the decisions referred to therein, *Ranasinghe v. Fernando*[2], *Narayanan Chetty v. James Finlay & Co.*[3]—of this Court supports this view.

It is necessary in this connection to consider the observations of Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty*[4]. The question was whether a trust arose on a certain agreement. His Lordship observed "The object of the agreement was, in their Lordships'

[1] *(1921) 23 N. L. R. 193.*
[2] *(1922) 24 N. L. R. 170.*
[3] *(1927) 29 N. L. R. 65.*
[4] *(1921) 22 N. L. R. 417.*

view, to create something much more resembling a mortgage or pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into where one man with his own proper moneys buys landed property and gets the conveyance of that property made to another. In such a case the other has no claim upon the property vested in him. It would be a fraud upon his part to contend that it belonged to him, or to insist that he was entitled to a charge or incumbrance upon it, or had a right to retain the possession of it against the will of the man who purchased it", and again "It was not a formal mortgage in that respect, but the agreement the parties entered into was much more an agreement to create a security resembling a mortgage than to create a trust. It was in effect a parol agreement providing for the conveyance of land to establish a security for money, and creating an incumbrance affecting land, that Perera desired to prove the existence of by parol evidence". I think that the agreement in the case before me was more of a trust than a mortgage or pledge. The money paid for the property in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) was entirely the money of the transferee which no one had helped to raise, and with which the transferee could have done what he liked. P6, however, does partake of the nature of a security for money, although as I said before it was intended by its execution to create a trust rather than a mortgage. In the course of the argument before the Privy Council the case of *Rochefoucauld v. Boustead*[1] was referred to. It was held in that case that in certain circumstances, which I need not go into, a person who bought property with his own money held it nevertheless in trust for another person subject to the repayment to him of the amount which he paid for it, and of the expenses which he incurred in managing it. (*Vide* judgment of Lord Justice Lindley.) That is to say the transferee held the property transferred in trust but also as security for money advanced. Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) has not referred to this case, but Viscount Haldane in the course of the argument remarked that it had been fairly proved in *Rochefoucauld v. Boustead* (*supra*) that the transferee (purchaser) was acting as the agent of the other party and it may be that it was on this ground that a distinction was drawn. In the case before me the first defendant was the uncle of minor children. He was the administrator elect and the chief person in the family, and I think it can fairly be concluded that in dealing with Isabella he was acting as the agent of the minor children in the sense in which the defendant in *Rochefoucauld v. Boustead* (*supra*) could be considered to have been acting as an agent.

Lord Atkinson in the course of his judgment observed that our Ordinance No. 7 of 1840 was much more drastic than the 4th section of the Statute of Frauds, and it may be for this reason that it was not possible to establish a trust in the case considered by him, because the parol agreement before him provided for the conveyance of land to establish security for money, and as such was not "of any force or avail in law" for any purpose under our Ordinance, but as against this Lord Chancellor Halsbury in the case of *Rochefoucauld v. Boustead* (*supra*) appears to have

[1] *(1897) 1 Ch. (C.A.) 196.*

observed that our local Ordinance did not appear to affect equitable rights. This view was definitely taken in *Narayanan Chetty v. James Finlay (supra)*.

In the case of *Saminathan Chetty v. Vander Poorten*[1] the Privy Council considered not merely the language of an agreement relating to land but considered also the circumstances leading up to and surrounding its execution and came to the conclusion that a trust had been established. The attendant circumstances in the case before me point very strongly in the direction of a trust. On a consideration of the decisions I have referred to I am of opinion that apart from the reasons set out in the next paragraph a trust in favour of the children has been established.

The effect of section 90 of our Trusts Ordinance, No. 9 of 1917, appears to me to put the matter beyond doubt. The section reads thus: "Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained". The first defendant was the administrator elect, he was I think acting as the agent of the minors and he was in the circumstances in which he was acting bound in a fiduciary character to protect the interests of the minor children. If he obtained on the transaction anything more than the Rs. 3,000 and the interest payable thereon, he gained for himself a pecuniary advantage by acting in a fiduciary character. The facts show that he could not have gained this advantage if he had not acted in the fiduciary character in which he did act. I am of the opinion that under the section, if for no other reason, all pecuniary benefits obtained by him in dealing with the land transferred to him under P6, over and above the repayment of Rs. 3,000 and interest, are "pecuniary advantages" which he must hold in trust for the benefit of the minor children. In the result from the moment when he became entitled to property under P6 he was bound to account for the whole of its income, to repay himself the money spent by him and interest, and thereafter to hold the property and the income derived in trust for the minor children.

The first defendant's view of his rights and liabilities is clear from the document D5 which was executed on July 4, 1916, within one month of the execution of D6. This was an agreement between the first defendant and Anathasia the grandmother of the minor children who purported to act on their behalf. By this agreement the first defendant undertook to transfer to the minor children the property acquired by him under P6 after the expiration of a period of 12 years on the payment to him of a sum of Rs. 3,000. If this agreement was valid the first defendant would have received the income from the half share of the estate for himself for a period of 12 years, he would have paid therefrom the interest on a sum of Rs. 3,000 advanced by him and perhaps interest on a half share of the debts of Albanu and appropriated the balance. The income from half

[1] 2 *Ceylon Law Weekly* 123.

the estate is on the first defendant's own showing Rs. 9,002 (P 27). He would definitely have received a benefit for himself by the transaction and it is this benefit which he still attempts to keep. Anathasia Fernando was appointed guardian *ad litem* of the minor children in testamentary case No. 1,102. She was not even curator of the estate of the minors in properly constituted proceedings. It is clear law that she had authority to act for the minor children only in the testamentary case and that she had no authority whatever to act for them in the way she has purported to do. D5 therefore is not binding on the minor children. It serves to indicate the course which the first defendant sought to take and to impose upon the children.

I will next proceed to consider the settlement of accounts in March, 1926. At this date both Maria and Macarius were dead and the plaintiff was the sole heir of both. Letters of administration to their estates had issued to the first defendant in testamentary cases Nos. 1,421 and 1,602, respectively, and "final accounts" relating to periods terminating August 4, 1916/September 19, 1916, February 26, 1924, and March 23, 1925, respectively, had been filed in cases Nos. 1,102, 1,421, and 1,602.

It is necessary to examine the effect of these "final accounts", in particular to find out whether they preclude the plaintiff from questioning the accounts furnished by the first defendant, and if so to what extent. It is the duty of an administrator to wind up an estate as soon as possible and to distribute the assets. If he desires to have a conclusive settlement of the accounts and of the distribution of the assets he must take steps under Chapter LV of the Civil Procedure Code. Under that Chapter, after a proper scrutiny of the accounts, a Court will proceed to enter a decree under section 740, directing payment and distribution to persons entitled according to their respective rights. The effect of sections 739 and 740 is to make the settlement of the accounts and the distribution of the assets final and conclusive. The scheme submitted to the Court for scrutiny and adoption under Chapter LV would be comprehensive, and would make provision for all the property of a deceased person appearing in the inventory. It would show what has been done with the property during the period of administration. The final account which has been filed in case No. 1,102 in which Albanu's estate was administered is clearly not such a scheme as would have been necessary under Chapter LV. All that it purports to do is to set out the income and out-goings for the period to which it relates. It does not show what has happened to the debts due to Albanu nor does it show what has happened to his movable property. The official value of the estate is debited on one side and credited on the other but no distribution of the property is made. No decree under section 740 has been entered directing a distribution. It was held by Pereira J. and de Sampayo A.J. in the case of *Vallipillai v. Ponnusamy*[1], that there is no provision in the Civil Procedure Code for the filing of a "final account" in the administration of testamentary proceedings, and that where a "final account" was "passed" by the Court after notice to the parties interested and the estate declared closed, a party could still ask for a judicial settlement. What was held is that such steps as these do not constitute a judicial

[1] (1913) 17 N. L. R. 126.

settlement under Chapter LV of the Code and that they do not supersede the procedure by way of a judicial settlement. I venture respectfully to say that this is good law. If finality had been claimed for the accounts filed, the fact that Anathasia, the guardian *ad litem* and mother of the administrator, employed the same proctor as himself would have thrown grave doubt on the regularity of the "consent" given by her. Moreover the consent would never be regarded as anything more than an acquiescence in the actual matter of the accounts submitted, viz., the income and out-goings for the period in question, it could not have related to the movable property of Albanu, or to the debts due to him, or to the distribution of his estate which were all matters not dealt with by the account. In the case under consideration, as in the case of *Vallipillai v. Ponnusamy* (*supra*), the estate was in fact not closed. We see from the journal entries in case No. 1,102 that after the account was filed the administrator continued to act as administrator and asserted the right to deal with property on that basis. I am of opinion that there has been no binding final settlement of accounts between the plaintiff and the first defendant either in case No. 1,102 or in the other two cases.

The first defendant in this case as administrator of three estates has not obtained a judicial settlement of his accounts in any of them. He did not even transfer to the heirs such property of the deceased persons as belonged to them, according to his own showing, until March, 1926. The correct legal position is that he should have obtained judicial settlements, distributed the property and obtained letters of curatorship, under Chapter XL, to the property of the minors and administered such property in curatorship proceedings. Although he did not do this he admittedly was in possession of the property of the plaintiff till March, 1926, and I have no doubt that at that date the plaintiff had a right to call upon the defendant to file accounts in the testamentary cases and to have those accounts judicially settled under the close scrutiny of a Court which would have been watchful of the interests of a minor who had just become a major.

I next proceed to examine the basis of the settlement of the accounts between the plaintiff and the first defendants in March, 1926, as stated by the first defendant himself. In the first place he treated himself on that date as the absolute owner of the property conveyed to him on the document P6, subject only to certain obligations which I have dealt with and in this respect he was settling accounts with the plaintiff on a basis which was not warranted by law. On this basis it is his case, that Rs. 10,800 was due to him (page 316) with a corresponding obligation on him to convey to the plaintiff the property transferred to him by P6 The plaintiff, according to the defendant, was to get the property o Albanu and Maria and Macarius free from all debt and she was to find Rs. 10,800 in payment of outstanding liabilities. The defendant was to get also three lands which he alleged (*vide* paragraph 9 of his answer) were held by Albanu in trust for his parents in respect of which the first defendant had paid off a mortgage debt of Rs. 1,250.

I will examine first the last part of this arrangement. The deed P1 executed by the plaintiff in favour of the first defendant conveys eight lands and the consideration is set out as Rs. 3,000. The defendant's

position with regard to the consideration is set out thus in paragraph 9 of his answer: " Three out of the eight lands described in deed No. 3,481 of March 12, 1926, and inventorized in D. C. Chilaw, testamentary case No. 1,102, was transferred to the said Albanu Tissera in trust by his parents in order to raise a sum of Rs. 1,250 referred to in the inventory in case No. 1,102. The defendant paid the said sum of Rs. 1,250 and the interest thereon. In consideration of the said payment in view of the said trust the plaintiff transferred the said three lands to the defendant. The remaining five lands in the said deed No. 3,481 were transferred by the plaintiff to the defendant in payment of the sum of Rs. 3,000 due to this defendant from plaintiff on deed No. 3,480 of March 12, 1926, executed in pursuance of the agreement referred to in paragraph (2) of this answer ".

Mr. Hayley for the first defendant stated that the averments in this paragraph of the answer were incorrect and were due to a mistake. He said that all the eight lands (not merely five), were conveyed in payment of the sum of Rs. 3,000, and that reference was made to the three lands in respect of which the first defendant had redeemed the mortgage of Rs. 1,250, merely to indicate that those three lands among others had been selected to fall to the lot of the first defendant because the first defendant had paid the mortgage debt, the reference thus being of sentimental but not of financial interest. The language of paragraph 9 of the answer is too clear and definite to admit of this view. It says definitely that " in consideration of the payment (of Rs. 1,250) and in view of the trust, the plaintiff transferred three lands to the defendant. The remaining five lands . . . . were transferred by the plaintiff to the defendant in payment of the sum of Rs. 3,000 due to the defendant. . . . ." It is clear therefore that the first defendant induced the plaintiff to let him have three of Albanu's lands on the ground (*a*) that these lands were held in trust by Albanu for Albanu's father, Simon, (*b*) that the first defendant had paid up the amount of Rs. 1,250 for which they had been mortgaged.

I will now examine the allegation of a trust. . . . These transactions do not indicate to my mind in any way that Albanu held the lands in trust for his parents. They indicate what the first defendant admitted at one stage of the proceedings (page 419) that Albanu mortgaged the property together with other lands of his parents in order to raise Rs. 1,200 for the benefit of his parents. I think that the allegation of a trust is unfounded.

Assuming there was a trust there is no reason why the first defendant (who no doubt did pay a sum of Rs. 1,250 for which the lands were mortgaged by raising the money on D17) should keep the lands. I could see no reason why he should have got the sole benefit of the property of his parents even if he paid the mortgage. When questioned on this transaction he gave evidence, pages 418 to 424, which was inconsistent and unsatisfactory and which affords no adequate explanation.

It was argued by Mr. Perera for the plaintiff that the transaction with regard to this sum of Rs. 1,250 does not rest at this. He argued that the defendant not only prevailed upon the plaintiff to let him have the lands in question in satisfaction of the amount paid by him alleging a trust, but that he has also debited the plaintiff with half the amount by

including it among the debts of Albanu at the settlement of accounts. . . . . Although I think it very probable that Mr. Perera's argument is right, I do not feel inclined to accept it as established in the absence of cross-examination. It shows however the necessity for an ascertainment of the true position by proper accounting.

I next proceed to examine that part of the settlement under which according to the first defendant the plaintiff parted with Rs. 10,000, Rs. 3,000 worth of immovable property and Rs. 7,000 in cash, in settlement of a claim of Rs. 10,800, Rs. 800 having been waived by the defendant. The arrangement was, according to the defendant, that by parting with this consideration the plaintiff was to have the property of Albanu, Maria, and Macarius free of all charges. There is no question that the plaintiff did part with the consideration stipulated. Did she get what according to the first defendant she should have got ? The defendant stated at page 302, that there was a balance of Rs. 1,100 still due on the mortgage P26 of Maria's lands. At page 430 he said in cross-examination referring to P26 " I have paid off this debt except Rs. 1,100 which has still to be paid. Maria's heir is the debtor for the balance. The plaintiff is Maria's heir. I am liable to pay them as I undertook to pay it ". In the course of the argument certain items in encumbrance sheets that had been produced were pointed out by Mr. Hayley indicating that certain parcels of land mortgaged on P26 have since been released, but Mr. Hayley admittedly could not establish by this document that the debt referred to was not outstanding and that some at least of Maria's lands were liable for the payment of the debt. Even if there had been a subsequent release the fact that Margaret did not get what she was entitled to get when the impugned deeds were signed still remains. The position taken by the first defendant is that he is liable to obtain a release of Maria's lands and that it is his duty to keep the plaintiff indemnified in respect of the amount for which Maria's land is liable to the Chettiar. No deed of indemnity has been given by the first defendant and at the time the impugned deeds were signed no document of any sort was executed which contained a record of his undertaking. There is nothing more than the first defendants' mere word, and I doubt whether he even verbally gave this undertaking in March, 1926. However that may be, the settlement was grossly improvident from the point of view of the plaintiff to whom the undertaking by the first defendant, even if given, would have afforded no defence against the Chettiar.

I do not know to what extent the learned Judge has appreciated the effect of the admission that P26 has not been completely discharged. At page 79 of his judgment he says : " I believe Liyanu when he says the debts on P21, P22, and P26 were taken over by him. Had this not been the case I would have expected some clear evidence to that effect. In terms of agreement D5 he shouldered the whole debt, and had he made default I am sure there would have been some definite evidence proving some protest at least from Maria, Pemiyanu, and Anathasia. I hold that the money raised by Maria by P21 and P26 was intended to be repaid by Liyanu and *that he did in fact repay the same* ". He has been influenced by the absence of positive evidence for the plaintiff but he seems to have overlooked the fact that the first defendant admitted that money raised

on P26 has not been repaid. The first defendant at some stage of the evidence swore that he repaid the principal and interest on P26 and this seems to have misled the learned Judge because he says at page 78 " Liyanu swears that he paid the principal and interest on this bond ". I say I am not sure whether the learned Judge has appreciated the question of non-payment because at the bottom of page 80 he says that the defendant admits that P26 is still in force and that if it is put in suit *he* will have to pay the sums due thereon. It appears to be inconsistent with the earlier finding that the first defendant " did in fact repay the same ". However that may be the learned Judge has not commented on the improvident nature of the transaction entered into by the plaintiff in parting with a consideration of Rs. 10,800 without at least obtaining a discharge of P26.

The settlement was improvident also for another reason, because the plaintiff was entitled as I have said before to have the accounts judicially settled by a competent Court of law which would have been particularly watchful over the interests of the plaintiff in an accounting rendered by the first defendant. By entering into the transaction of March, 1926, she deprived herself (at first defendant's instance) of this very salutary protection. The learned Judge has held that the plaintiff and those around her were not what they pretended to be. With regard to Anathasia, the first defendant's own mother who has thought it fit in these proceedings to give evidence against her son, the first defendant, the first defendant himself stated at page 433 that she " is a feeble old lady, she is capable of listening . . . . but is unable to write or make an account ". He immediately retracted this evidence and said " I do not admit she is a feeble old woman. She is well able to understand things ". Later at page 444 he was compelled to admit " my mother cannot read or write, she cannot even sign her name ". Pemiyanu now unfortunately dead was a cultivator as was admitted by the first defendant (page 487), Gracianu was an " unlearned man ". In 1923 Margaret was 23 years old. She had had an education of 2 years in a convent and was then living with the first defendant and had been so living under his care and protection for 11 years. Up to that time she was being treated as a minor because it was not known that she had attained majority, her exact age having been ascertained " in 1925 when a settlement was mooted " (page 483). She had in fact attained majority when Macarius died in 1924 but she was treated as a minor in testamentary proceedings 1,602 relating to Macarius' estate and Anathasia was appointed her guardian. Even if I accept the view which the learned Judge has formed of the capacity of these parties I still think it was prejudicial to the plaintiff to enter into a settlement of accounts which was not subject to the scrutiny of the Court.

The learned Judge has found, and I think quite properly, that at the time of the settlement of the accounts the plaintiff was living with the first defendant and had been so living for several years. He is of opinion on the authorities cited by him, *Hylton v. Hylton*[1], *Hatch v. Hatch*[2], that " the relationship of guardian and ward ceased *in law* on the ward attaining age, but in equity the influence continued till the accounts between them were settled ". The learned Judge discusses the law and proceeds

[1] *(1754) 2 Ves. Sen. 547.*

[2] *(1804) 9 Ves. 292.*

to state:—"Applying the above principles to the facts of this case we find that in March, 1926, Margaret and Liaynu were living in the same house, and that although Margaret was a major, probably everyone imagined until her baptismal certificate had been obtained by the Chettiar that she was still a minor. In such a case the Court should not take too narrow a view, and I think a presumption of undue influence would arise, and the onus is cast upon Liyanu to prove not merely that Margaret intended the transfer, but also that her intention was produced fairly by placing around her all the care and providence which he himself was bound to exert on his own behalf. In my view that onus has been fully discharged not only by the cross-examination of the plaintiff's witness, but also by the evidence called for the defence and from the circumstances of the case."

The general principles relating to transactions between parent (or person placed in *loco parentis*) and child has been well established in England in a long series of cases, and are summed up in *Spencer Bower on Actionable Non-Disclosure, pp. 363 and 372, ss 405 and 409.* The law presumes in favour of the child against the parent (1) that the relation placed the parent in a position to exercise influence and dominion over the child, (2) that such influence and dominion operated upon, and procured, the transaction, and (3) that the influence was improper and unfair, or (to use the accepted phrase) an " undue influence ". In the case of a contract in order to rebut the presumption and to sustain the contract it is necessary for the parent to prove (1) that the child had full disclosure in the widest sense of the term of the position he was placed in from the parent, (2) that the child received honest and disinterested advice against himself as he would have given him against a stranger, and placed at his disposal for that purpose the whole of his natural or acquired skill, judgment, and discretion, and (3) that the child received not less or parted with not more than a fair and proper consideration (section 470). The parent must establish that before the transaction took place he placed the child " in possession of all the knowledge in both senses of the word which he then actually or presumptively himself possessed, that is to say he must be in a position to show not only that he had communicated to the child all material facts within his exclusive cognizance but also that he had placed at his disposal the whole of his knowledge in the sense of natural or acquired skill or judgment as to the wisest mode of dealing with those facts in the interests, not of himself, but of the child. In a word, he must make all such disclosure, and give all such advice, to the child as would or might put him back in that position of equality of which the relation has in contemplation of law deprived him ". (Section 471.) " The onus is on the parent to establish, and the plea fails at the outset unless he establishes, by evidence which must be ' clear and decisive ', that he made complete and exact disclosure to the child of all material facts within his exclusive cognizance relating to or affecting the subject-matter of the transaction; such as, where property other than money is in question, all facts relating to the title to the property, or the extent and particulars thereof, or its value ; or, where it is a question of a series of loans, or services rendered or other matter of account, all items and details required in order to explain the account, and show clearly how it is

made up. Further, the parent must be prepared to establish that he gave the fullest and most candid information as to the exact nature of the transaction, as well as of its subject-matter; accordingly, his plea falls to the ground whenever he is unable to prove that he clearly explained to the child the character of the instrument recording the transaction, or the purposes which it was designed to accomplish, or the child's rights, liabilities, and position at the moment immediately preceding it, with reference to the matters proposing to be dealt with thereby, or the effect which it was calculated to have on those pre-existing rights and liabilities or the right of the child both to reject it when *in fieri*, and to repudiate it after execution ". (Section 472.) " The parent must next establish, in order to make good a case of disclosure in the fullest comprehension of the word, that, before the transaction took place, he put at the disposal of the child the whole of his knowledge, in the sense of capacity, skill, and judgment; which means that he gave him ' all that reasonable advice against himself that he would have given him against a third person '. ' He must show to demonstration, for this must not be left in doubt, that no industry he was bound to exert would have got a better bargain ' for him. In all cases of failure to satisfy the Court on this point the plea has failed ". (Section 473.)

These principles have been established in a series of cases which I need not go into at length. In many of them it was difficult to apply the principles to the facts which had been elicited. In the case under consideration I find no difficulty at all in applying them. Far from the presumption being rebutted we find facts supporting the presumption. The first defendant has stated that Margaret and the other members of his family took part in the discussion which preceded the execution of the impugned deeds but nowhere does it appear that there was a complete and exact disclosure to the plaintiff of all the material facts within the cognizance of the first defendant. The advice which was given to the plaintiff and which she accepted resulted (even if the facts be as they were stated to be by the first defendant in a very improvident settlement. Moreover the basis of settlement was incorrect in law and it has not been shown that the plaintiff received a fair and proper consideration. I think therefore that it must be held that the impugned deeds were signed by the plaintiff under the exercise of undue influence and that they are liable to be set aside on this ground.

The learned Judge has been influenced very largely by the view which he has taken that the transaction of March, 1926, was the result of a family arrangement. He has cited a passage from *Westby v. Westby*[1], to the following effect " from the case of *Stapleton v. Stapleton*[2] to the present day, the current of authority has been uniform and wherever doubts and disputes have arisen with regard to the rights of different members of the family, and fair compromises have been entered into to preserve harmony and affection, or to save the family honour, these arrangements have been sustained by the Court, albeit resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers ". Now I cannot see in the

[1] *2 Dr. & War. 502.* [2] *1 Atk. 2.*

settlement of accounts of March, 1926, " a fair compromise " or any compromise at all. It is not the case of the first defendant that the plaintiff gifted any portion of her rights or entered into any form of compromise. It is his case that accounts were stated and settled on a comparatively exact basis. The position taken up by the first defendant and accepted by the plaintiff was however materially different from the position he was entitled to take up in law with regard to his rights and liabilities, and the element of fairness has not been established. I would hesitate without a proper accounting to state with any degree of accuracy how the accounts between the plaintiff and the first defendant should have stood in March, 1926, but it is sufficient to state that the basis on which accounts have been looked into is very different from the basis that should have obtained. The question of a family arrangement has been pressed before us on appeal and Mr. Hayley has cited a number of authorities. In all of them schemes involving figures were no doubt adopted but in none of them have I been able to find a liability on the part of one party to account to the other, previous to the adoption of the arrangement. In this country, and no doubt in England, a member of a family is frequently appointed administrator, executor or curator. Where a person so appointed is liable to render accounts and where the transaction which takes place is essentially one of accounting, I do not think there is much room for the plea of a family arrangement. In the year following Albanu's death, efforts were no doubt made by the family, and made successfully, to win back for the family the share of the property that would have gone to Isabella. The arrangements made up to that date partook more of the nature of an arrangement to raise money than of a family arrangement. If Isabella is to be regarded as not being one of the family, there was no redistribution of the family property among the members of the family although there is an acquisition of property for the family from parties outside it. I fail to see either in the purpose or in the scope of the transactions of March, 1926, a family arrangement. According to the first defendant neither he nor the plaintiff was to forego any part of what was due to either of them. It was a pure matter of accounting. The family property was not freed from debt or protected even temporarily from the pressure which creditors could have placed upon it. It was not intended to, and could not have afforded any means of preservation of the family property. It has been suggested that the transactions were entered into to facilitate marriage for the plaintiff by deceiving suitors into the belief that the plaintiff was an heiress. I do not see how this result was or could have been achieved by the transactions in question. Admittedly all the bonds and deeds were registered and the registers which were open to the inspection of the public would have revealed a heavy debt for which all the property of the plaintiff was hypothecated. Assuming that the position before the execution of the documents of March, 1926, was unsatisfactory, I do not see how the position after their execution could be said to have been better from the point of view of a would-be suitor. Even if it was I doubt very much whether an arrangement, the object of which was purely and solely to deceive a suitor, and could in no way be said to preserve the family property, would come within the category of " family

arrangement" in respect of which a counter presumption arises. Such a settlement would not be a settlement of the doubts and disputes with regard to the rights of different members of the same family, I doubt whether such an arrangement could be said to preserve "harmony or affection in the family or save the family honour".

I think for these reasons that the plea of family arrangement fails. It was also argued by Mr. Hayley that the doctrine of undue influence is entirely a doctrine of the English law and he doubted whether the English principles were applicable to Ceylon. In the case of *Soysa v. Soysa*[1], it was observed by Chief Justice Wood Renton that under the Roman-Dutch law the doctrine of undue influence did not appear to be recognized "except in the form of duress or what the authorities describe as fear". He proceeded however to say that the case before him was argued with special reference to the rule of English law and that it was immaterial for the purpose of the view which he took whether the evidence was considered from the stand point of Roman-Dutch law or the English law. It was not held in that case that the English principles relating to undue influence were not applicable in Ceylon. The English principles of undue influence have been applied in our Courts for a very long period of time in a long series of cases among which I need only mention *Peries v. Peries*[2] and the cases referred to therein, *Croos v. Croos*[3], and the more recent case of *Udalagama v. Banda*[4]. I am of opinion that the English law of Undue Influence has been assimilated and become part of our law. Lee on *Roman-Dutch Law* states at p. 204:—"The topic of undue influence, as distinct from metus, is not developed in the Roman-Dutch countries. However the books contain hints which might have been worked out by judicial decisions without the aid of English precedents" indicating that there is nothing in the Roman-Dutch law inconsistent with or contrary to the doctrine of undue influence. It is probable that if the Roman-Dutch texts are examined one would find principles from which the modern principles of the English law can be developed. I do not propose to pursue this point further because I find that the doctrine has in fact been adopted in Ceylon during a very long period and I am consequently of opinion that it is now without doubt a part of our law.

The English doctrine of undue influence is recognized also by section 114 of our Evidence Ordinance which, while laying down no substantial law on the subject, provides a rule of evidence which is necessary for the proper application of the doctrine.

As I have referred to the case of *Soysa v. Soysa* (*supra*) I would like to make another observation. In *Soysa v. Soysa* a proctor notary who attested a deed of gift was regarded as the independent adviser of the donor. The learned Judge thinks that by expansion that finding can be made applicable to the circumstances of the present case and that the non-proctor notary who attested the impugned deeds can be regarded as an independent adviser of the plaintiff. He has looked upon the matter simply from the point of view as to whether something which is true of a proctor

[1] *9 N. L. R. 314.*
[2] *(1906) 9 N. L. R. 14.*
[3] *(1919) 21 N. L. R. 208.*
[4] *(1930) 32 N. L. R. 74.*

notary may not be true of a non-proctor notary. In the case of *Soysa v. Soysa* (*supra*) it appears from the reported judgment of Mr. Justice Shaw (*1916, 19 N. L. R.*) that the deeds " were prepared by the family solicitor of the de Soysa family, *who was not in any way acting for the first defendant in the matter,* at the sole instance, and even insistence of the plaintiff ". A large portion of the judgment of Chief Justice Wood Renton is omitted from the report, but I have referred to the original and I find that in setting out the facts His Lordship stated that, according to the proctor, the plaintiff (who was the disputing party) gave the proctor *minute* and rational instructions in regard to each of the instruments and that each of them was in fact his voluntary act. In the case under consideration the notary received all his instructions from the first defendant who employed him and he cannot be regarded in any way as the adviser of the plaintiff. The mere fact that he explained the purport of the documents to the plaintiff does not make him an independent adviser for the purpose of rebutting the presumption of undue influence.

I come now to examine the position of the second and third defendants whose position is the same and to whom I shall hereafter refer as the second defendant. The second defendant has been found correctly by the learned Judge (page 98) to be the "family money lender". The learned Judge has found on the evidence of the notary that Rs. 7,000 was paid by the second defendant to the plaintiff on bond P2. I think this finding must be accepted. I have already taken the view that the documents P1 and P2 were executed as a result of undue influence exercised by the first defendant on the plaintiff. The question arises to what extent the second defendant Chettiar is affected by this fact. I think the position in law is that if the second defendant knew of the facts, which in law gave rise to the presumption of undue influence in the execution of the document P22, then he took the document at his peril and the presumption attaches to it against him to the same extent that it attaches against the first defendant. To hold otherwise would make it possible for a money lender, with knowledge of the facts giving rise to a presumption of undue influence, to lend money with impunity and by this means it would be quite a simple matter for a person in *loco parentis* acting in concert with a money lender to defeat the law.

I find that the reported cases support the view which I have taken. In *Kempson v. Ashbee*[1], the transaction was set aside on the ground of undue influence, and James L.J. said " the first question is whether the bond was obtained by the undue exercise of influence of the step-father, and was it obtained under such exercise as that the knowledge of it can be imputed to the creditor "? This question was answered in the affirmative. Justic Fry in the case of *Bainbrigge v. Browne*[2] following the decision referred to said : "I must inquire whether they (creditors) had notice or knowledge of the circumstances upon which the equity which is alleged against them arose ". Commenting upon those passages Rahim in his book on the *Law of Undue Influence at page 258 says*: " What then are those circumstances? The answer would depend on the nature of the relation. Where the relation by itself would give rise to the presumption,

[1] *(1874-5) 10 Ch. App. 15.* [2] *(1881) 18 Ch. D. 188.*

notice of that relation would suffice". I venture to agree with the learned writer. In the case of *Espey v. Lake*[1], a step-father gave the security of his step-daughter, who was then in her twenty-second year and living with the step-father, to his creditor Lake. Turner V.C. said: "Lake knowing these circumstances nevertheless took the note. I impute no moral fraud to Lake in the course of the transaction. I do not believe there was any moral fraud on his part, nor might he have been aware of the principles which guide the Court with regard to securities taken from a person in the situation of Miss Espey at the time . . . . In the application of the principles of this Court I see no distinction between the case of one who exercises a direct influence, or of another who makes himself a party with the guardian who obtains such a security from his ward . . . . Such a security cannot be maintained in this Court".

I proceed to examine whether in this case the second defendant had knowledge of the facts which would have given rise to a presumption of undue influence . . . . I think that the documentary and oral evidence establish that all the facts upon which the presumption arises were known to the second defendant and that his position with regard to the plaintiff can be no higher than that of the first defendant. The attestation to the bond P2 shows that part of the consideration was set off against a promissory note, presumably a promissory note granted by the first defendant. I am therefore of opinion that the bond P2 is also liable to be set aside on the ground of undue influence, although consideration has in fact passed upon it.

This action has been brought within the period required by the Statute of Limitations but the question has been considered by the learned Judge and pressed upon us in appeal that there has been delay on the part of the plaintiff in seeking a remedy and that she has been guilty of laches which disentitle her to relief. It has also been argued that by reason of certain acts she "ratified" the transactions of March, 1926.

The learned Judge after referring to certain authorities states that the law regarding laches is summarized in the 13th Volume of Halsbury's *Laws of England, p. 169 para 204,* in the following words:—"The Legislature in enacting a Statute of Limitation specified fixed periods after which claims are barred; equity does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been such delay as to amount to laches, the chief points to be considered are: (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while a violation of a right is in progress, but assent after the plaintiff has become aware of the violation. It is unjust to give the plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect, he had, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material; under these considerations rests the doctrine of laches".

[1] 10 *Harc* 260.

It appears from this passage that in order to constitute acquiescence or "ratification" by acquiescence there must not only be assent but assent after the plaintiff became aware of the violation of her rights. Knowledge of the violation of her rights does not mean mere knowledge of the facts of the transaction which she has entered into, but knowledge that that transaction was in violation of her rights, in short that it was invalid. In the case of *Kempson v. Ashbee* referred to above, the plaintiff signed a bond as surety at the age of 22 at the instance of her step-father. In 1886 more than six years later, on pressure being put upon her by the creditor she signed a second bond as surety and it was held by Cairns L. C. that as there was no proof that the plaintiff was aware of the invalidity of the first bond the execution of the second bond was not a confirmation of the first. Both bonds were set aside and it was further held that the plaintiff was not barred by laches notwithstanding the time which had elapsed before which she asserted her right to relief. The second bond was given in the words of Cairns L.C., " under clear pressure. Here was a creditor saying he would insist on his rights against her and her step-father unless there was a new bond for the sum already due with arrears of interest and she was ignorant of the fact that she had only to apply to this Court to get the previous bond declared mere waste paper. Is it possible that this can be held to be a confirmation of the first bond? To constitute a confirmation there must be knowledge of the invalidity of the document but here there was no knowledge of invalidity ". In the case before me the pressure placed upon a person in the position of the plaintiff by the production by the first defendant of a notarially executed document and a birth certificate must have been overwhelming. I do not think she was aware of her rights to have set aside a deed which she as a major had signed before a notary until she was advised by counsel in the case. I do not think that the payment of interest by her can be regarded in any way as an act which precludes her from seeking relief. In this connection it is to be remarked that the receipt D9 taken by the second defendant is a curious document. On July 25, 1926, the plaintiff paid a sum of Rs. 280 to the second defendant as interest. In the normal course of things the second defendant would have signed a receipt and handed it to the plaintiff. Instead of this we find that the second defendant causes the plaintiff to sign a receipt and to hand it to him. There was no receipt of money by the plaintiff and the object of this so-called receipt was without doubt to serve as an acknowledgment of the payments of interest by the plaintiff on the date in question. This tends to show that the mind of the second defendant was uneasy with regard to the transaction and that he sought to obtain evidence of its confirmation. There is no evidence and it was not contended that second defendant's position had changed in any way before the date of action.

I have arrived at the conclusions which I have set out on the evidence of the first defendant, accepting largely his version of what happened. For instance I have proceeded on the basis of his assertion of fact that the Rs. 3,000 paid for P6 was to be regarded as his money and his money alone although other members of the family helped materially to raise it and although the property belonging to him which was hypothecated for the purpose of raising it was not of a large extent . . . . On this

and on several other matters I do not think it is necessary or right that I should come to a definite finding. They indicate to my mind that the accounts should be reopened to the fullest extent and that an opportunity should be created to test the veracity of the accounts which are furnished. In particular I think that the first defendant's assertion that the sum of Rs. 3,000 paid on P6 was to be regarded as his own has to be subjected to closer scrutiny.

. . . .

It has been pointed out by Mr. Hayley for the respondent that the plaintiff seeks to have the deed P1 and the bond P2 set aside without asking for a declaration at the same time that the deeds P3 and P4 in her favour should also be set aside. The answer of the plaintiff is that the document P3 was rightly executed as it was an administrator's deed and that the document P4 was rightly executed because it was a conveyance to the plaintiff of property held in trust for her. Mr. Perera contends that there is no reason why they should be set aside if the grounds urged by the plaintiff are accepted. I think it was for the defendants, if they desired that deeds P3 and P4 should be set aside in the event of P1 and P2 being set aside, to have prayed in the alternative for such relief. They have claimed in re-convention but have omitted to ask for any such relief. If it transpires at an accounting that money is in fact due by the plaintiff to the first defendant, there would be some difficulty in setting aside the deeds P1 and P2 until the claims if any of first defendant in March, 1926, are settled. Mr. Perera stated that he would be content if we directed that an accounting should be taken and made it a condition to the setting aside of deed P1 and bond P2 that any money found on such accounting to be due from the plaintiff to the first defendant was brought into Court. The position taken by him in this respect is entirely reasonable and I propose to give effect to it.

I set aside the order of the learned District Judge and I direct the following inquiries to be made and accounts to be taken:—

1. Within six weeks of the time of the reaching of this record in the lower Court the plaintiff will ask for a judicial settlement of the administrator's accounts in testamentary cases Nos. 1,102, 1,421, and 1,602 of the District Court, Chilaw, up to the date of execution of the documents P1 and P2, viz., March 12, 1926. If she fails so to do this action will be dismissed.

2. (*a*) In accounting in case No. 1,102 the first defendant will credit the plaintiff with all income and other monies received from the whole of the estate possessed by Albanu at the time of his death.

(*b*) He will account for the movable property and for debts shown in the inventory as having been payable to Albanu. If he urges that he has failed to recover any of them the Court will inquire whether failure to recover was due to his wilful default and in such case it will debit him with the amount of such debt.

(*c*) The first defendant will be debited on January 1 and June 1 of each year during the period in question with interest at 9 per centum per

annum on such residual sums as appear to have been, or should have been, in his hands and which have not been deposited in Court.

(*d*) He will be entitled to credit in respect of all debts paid by him and of all the testamentary and other expenses with which Albanu's estate could properly have been debited.

(*e*) If it is found that any of the payments made by him could not have been met with moneys which were or should have been in his possession, and that in fact they were met with moneys of his own, he will be entitled to payment of interest at 9 per centum per annum on such sums paid in excess till such time as he did reimburse, or could have reimbursed himself with funds of the estate.

(*f*) The question as to how much of the Rs. 3,200 paid to Isabella was provided by the first defendant will be gone into and first defendant will be credited with the amount found to have been paid by him and interest thereon at 9 per centum per annum.

(*g*) Accounts in testamentary cases Nos. 1,421 and 1,602 will be settled on the same basis.

3. The District Judge will then on a day fixed by him consider in this case the nett result of the settlement of the accounts in the three cases.

(*a*) If it is found that no money was due and owing from the plaintiff to the first defendant on March 12, 1926, the deed P1 and the bond P2 will be set aside. The second and third defendants will be directed to return to the plaintiff the amount of interest already paid by her. First defendant will also pay to plaintiff the profits derived from the lands transferred by P1 from the date of its execution.

(*b*) If it is found that a sum of less than Rs. 7,000 was due and owing from the plaintiff to the first defendant on the date given, the deed P1 will be set aside and the bond P2 will be declared good and valid to the extent of the amount found to be owing. The plaintiff will be credited with the amount of interest paid by her against interest payable by her. First defendant will pay to the plaintiff the profits derived from the lands transferred by P1 from the date of its execution.

(*c*) If it is found that a sum of over Rs. 7,000 was due and owing on the date given, the bond P2 will be held to be good and the deed P1 will be set aside on the bringing into Court by the plaintiff of the difference between the sums so found and Rs. 7,000 with interest thereon at 9 per cent. less the amount found by the District Judge to have been derived as profits by the first defendant from the lands transferred by P1 from the date of execution. The District Judge will fix a day for the deposit of such money and in default of such a deposit the deed P1 will stand.

4. The District Judge will award costs of the fresh proceedings ordered in such manner as he thinks fit.

5. The appellant will be entitled to the costs of appeal and of the proceedings in the lower Court up to date in all the cases.

I have looked at the original and I find that the valuation report of the Mudaliyar in case No. 1,102 has been incorrectly copied in the certified copy P18 and I direct the plaintiff to file a correct copy.

Appeal allowed.