JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 41/83

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN	STANLEY LALOR	PLAINTIFF/APPELLANT
AND	AINSWORTH CAMPBELL	DEFENDANT/RESPONDENT

Hugh Small, Q.C. instructed by Miss Sonia Jones for the Appellant

W.B. Frankson, Q.C., instructed by Messrs. Gaynair & Fraser for the Respondent

May 12, 13, 14, 15, 16 July 21, 22, 1986 & April 7, 1987

CARBERRY J.A.

I have had the opportunity of reading in draft the judgments of Carey and White JJ.A. and I agree with the conclusion to which they have come, namely that the sale by the plaintiff to the defendant must be set aside and that there must be an order re-vesting the land sold to the plaintiff.

As we are differing from the learned judge I will add a few words of my own. As to the facts, these have been fully reviewed in the judgments of Carey and White JJ.A. and I say no more about them than is necessary to show on what I have based the views which I express.

In November, 1968 the appellant, hereafter called the plaintiff. "got into trouble", to use his own words; he killed his common law wife and was charged with murder. By January of 1969 the preliminary examination had been held, he had been committed to stand trial for that offence at the next circuit, and that circuit was about to commence. Up to that time no arrangements had been made for his defence. In point of fact he would not have been tried on a charge of this sort without the court having appointed or assigned some counsel for his defence, but neither he nor his friends would have appreciated that, and

doubtless - if it were possible, would prefer to make their own arrangements for his defence. As to this there was the problem that the plaintiff had no ready cash. He had however a ¼ acre of land in Porus with a house on it. The matter was urgent. It appears that a friend of the plaintiff, who visited him in jail and had known him from school days, approached the respondent Mr. Ainsworth Campbell, hereafter called the defendant, and asked him to defend the plaintiff. The friend, one Mr. Karram, evidently pointed out to the defendant the land owned by the plaintiff, and in due course the inevitable took place, the land was charged with the cost of the plaintiff's defence. What was not inevitable however, was that this transaction took the form of the defendant personally entering into a contract to purchase directly the land of his client, instead of leaving it to Mr. Karram or the plaintiff to find a purchaser elsewhere. The result was to involve the defendant in all the obligations which attend an attorney at law who buys property from his client.

The judgments of my brethren have several quotations which have explored the extent of these obligations in cases which span nearly 200 years. I will refer to only two or three such cases. In Moody v. Cox and Hatt (1917) 2 Ch. 71 (C.A.) at p. 88 Scrutton L.J. put the matter thus:

> "If a man who is in the position of solicitor to a client so that the client has presumably confidence in him, and the solicitor has presumably influence over the client, desires to contract with his client, he must make a full disclosure of every material fact that he knows, and must take upon himself the burden of satisfying the Court that the contract is one of full advantage to his client. Lord Eldon, in the passage which has been referred to in Gibson v. Jeyes (1801) 6 Ves Jr. 266; 31 E.R. 1044 citing p. 278 said:
>
> 'This clear duty results from the rule of this Court, and throws upon him the whole onus of the case; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found. I answer in that great rule of the Court,

> " 'that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys or anyone else'."

In Gibson v. Jeyes, Lord Eldon also observed:

> "An attorney buying from his client can never support it; unless he can prove, that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for the vendor with a stranger...."

In Allison v. Clayhills (1907) 97 L.T. 709 Parker J. usefully explored the ambit of the rule here involved and at page 712 he observed:

> "In considering whether in any particular transaction any duty (in equity) exists such as to bring the ordinary rule into operation all the circumstances of the individual case must be weighed and examined .....
> In every case of the nature I have been discussing the first question to be answered is whether in the particular matter complained of the defendant owed any duty to his client, and if it be determined that he owed such a duty as would throw upon him the onus of upholding the validity of the transaction the question will arise, secondly, whether he has discharged the onus. ....."

In the case before us the respondent attorney arranged to charge 400 guineas (£420 or $840) for defending the plaintiff, and arranged to buy the land for £500. As to this sum he drew a cheque for £300 in the name of the plaintiff being a down payment, and then had the plaintiff endorse the cheque back to him as being on account of his fees for the defence. In the event then, he was still owed £120 towards his fees, but had some £200 in hand to complete the sale. This transaction took place in the prison where the plaintiff was confined awaiting trial, and in the presence of Mr. Karram.

A great many valid objections were raised as to this transaction and the form of it, and as they are fully explored in their Lordship's judgments I pass them over, save to note that individually and cumulatively they told in favour of the plaintiff and against the fairness of the transaction.

The Plaintiff's trial duly took place soon after, on the 10th and 11th February, 1969 and Mr. Campbell succeeded in getting his client acquitted of the murder charge, and convicted of manslaughter only. For this he was sentenced to 15 years.

In the ensuing years, while the Plaintiff was engaged in serving his term, the respondent entered on the land so bought, and spent some money in completing the small house built by the plaintiff, and rented out the same and collected and kept the rents. All this without taking any steps to complete the sale by paying the balance and also getting out the registered title.

It must also be mentioned that the Court papers show that In fact the Court considered an application for legal aid on behalf of the Plaintiff, and went so far as to issue a legal aid certificate appointing Mr. Campbell to defend the plaintiff. It appears however that the appointment was never made, and the fees due for such a defence were never paid to Mr. Campbell, no doubt because he had undertaken the defence by virtue of his direct retainer by the plaintiff.

It is clear that during his period of incarceration the plaintiff learnt from other inmates that the courts usually appointed and paid counsel to defend poor persons charged with murder, and that he might have been able to enjoy Mr. Campbell's services under this scheme without sacrificing his house. This feeling was fanned when his legal advisers saw the appointment of Mr. Campbell on the Court file. It resulted eventually in the case being framed in the way indicated in the statement of claim which has been set out in full in the Judgment of White J.A. In short the respondent Mr. Campbell was in effect charged with fraud, it being alleged that he was appointed to defend the plaintiff under the legal aid scheme, that he received and pocketed the fees from that source, and yet had pretended to be defending the plaintiff by virtue of being privately retained and exacting further fees from the sale of the plaintiff's land. Alternatively, the plaintiff's claim relied on the rules affecting attorneys who purchase property from their client.

It seems clear that at the trial the allegation that the respondent had been collecting twice for the same work was strongly pressed, and failed when no evidence supporting Mr. Campbell's appointment or showing that he had been so paid was forthcoming. The learned trial judge regarded the action as exhibiting gross ingratitude to the attorney whose advocacy had saved the plaintiff's life and in dismissing this aspect of the claim he failed to deal with the alternative aspect, that which concerns the onus resting on an attorney to justify dealings with his client's property by way of purchase. It is this element which has been pressed on us in the appeal, and there has been no attempt to upset the findings and judgment of the learned trial judge as to what may be called the legal aid aspect of the matter.

It is clear that at the time the purchase of the plaintiff's land was made the respondent was in fact and law the plaintiff's attorney. As such he owed him the duty or duties indicated in the cases mentioned above. The plaintiff was under great pressure by reason of his circumstances at the time.

The courts have always been concerned with two aspects of the relationship between attorney and client, namely (a) control of the quantum of fees charged for work done: see for instance Walmesley v. Booth (1739) 2 Atk 25; 26 E.R. 412; Ward v. Hartpole (1776) 3 Bligh 470; 4 E.R. 671; and more recently, in this Court W. Bentley Brown v. R. Dillon and S. Vassell S.C. Civil Appeal 19/83 judgment on February 18, 1985, and secondly (b) as indicated in Allison v. Clayhills (supra) with weighing and examining the circumstances of dealings by an attorney with the property of his client. There has been no challenge in this case to the proposed charge of 400 guineas for the defence of the plaintiff on this murder charge. But what has been challenged is the sale of the plaintiff's land in these circumstances. In the view of all of us those circumstances imposed on the respondent the duty of satisfying this Court that he had given the client that reasonable advice against himself that he would or should have given if the sale had been to a stranger,

and that he has affirmatively established the fairness of the transaction. Regrettably, the respondent has not so succeeded. It appears from his own evidence that he was completely unaware of the duties lying on an attorney dealing with his client's property at the time of the transaction, and possibly even later at the trial. No evidence has been forthcoming to establish the true value of the land in question at the material time, nor has it been established that the plaintiff had any competent independent advice with regard to this transaction. It may be that the respondent and the court could have been assisted by the evidence of Mr. Karram, but he was called by neither side and it was the respondent who had most to gain from any evidence he might have given. It may perhaps be observed that the respondent was trained primarily as a barrister-at-law. In Bentley Brown's case supra the differences in the controls exercised by the courts over Barristers on the one hand and solicitors and attorneys on the other were discussed. It is sufficient to note that all are now attorneys, and that it is therefore necessary for those who were trained for the Bar to learn their new limits and disabilities.

In the result there must be an order that the contract of sale made between the Plaintiff and respondent on or about the 31st January, 1969 be set aside, and that the land in question be re-vested in the plaintiff.

The effect of this order will mean that the defendant will have lost that which he took by way of fees for defending the plaintiff. He had charged 400 guineas, or £420. Of this sum he had collected in effect £300, and was content to let the balance stay outstanding, while he kept the land and the balance he owed on it.

Now as I understand the cases, when the courts, of equity have set aside a transaction of this sort, they have nevertheless allowed the party against whom the decree has been made to recover actual out of pocket expenses, advances, or in the case of legal work done, to recover reasonable costs, usually ascertained after taxation. See for example

Walmesley v. Booth (1741) (supra); Carter v. Palmer (1841) 8 Cl. & Fin 657; 8 E.R. 256: Lawless v. Mansfield (1835-42) All E.R. 208; and see Fry v. Lane (1888) 40 Ch. D. 312 at 325. and Electrical Trades Union v. Tarlo (1964) Ch. 720, at 734 per Wilberforce J:

> "The court has inherent jurisdiction to secure that the solicitor, as an officer of the court, is remunerated properly, and no more, for work he does as a solicitor."

In the course of the argument before us, Mr. Small for the plaintiff conceded that if the contract of sale was set aside and re-conveyance ordered, the respondent would be entitled to have provision made for the recovery of his fees for defending the plaintiff at the murder trial, and possibly to refund any sum spent on improving the land.

The terms that ought to be attached to the order for reconveyance have occasioned much thought and discussion, ranging from the view that the respondent attorney not having counterclaimed for his fees should get none, to the view that any award of his fees should take note ~~that the~~ value of ~~money~~ had depreciated and was now worth barely a fifth of what it was worth in those days, whereas the value of land, and this land, had steadily appreciated.

Perfect justice is not capable of achievement in these circumstances, for after all the respondent enjoyed all the rents and profits of this land for some 8 to 10 years. Since the sale must be set aside, this would normally mean that the respondent should account for rents and profits of that land over that period. This would more than compensate for the fees charged. I would therefore make no order in respect ~~to~~ fees.

I would allow the appeal with costs to the appellant both here and below.

CAREY, J.A.:

This appeal is concerned with the perils of purchase by an attorney-at-law from his client and, accordingly, should not only be of some interest to the profession generally but could also, I hope, be instructive to those attorneys-at-law just now embarking upon their practice at the Bar. It is right moreover to observe that if our law reports constitute any reliable guide as to the range and nature of suits in which litigants are often involved in our Courts, then the occurrence of bargains such as gives rise to this appeal, must be something of a rarity and a matter of relief and perhaps for rejoicing.

Some considerable time ago, in 1969, when the respondent was in practice as a Barrister-at-Law, he represented the appellant who was to stand trial for the murder of his de facto wife and using his best skill and judgment as an advocate, was successful in obtaining a verdict of manslaughter on behalf of his client. In order to pay the respondent's fees of 400 guineas, however, the appellant was constrained to sell to his counsel, his only asset, a ¼ acre of land with an unfinished house thereon situated at Porus, Manchester for £500. In 1976 while the appellant was still serving his 15 year sentence, he filed a writ against his former counsel impugning their earlier agreement for the sale of the land, and claiming a declaration that the contract was voidable at his instance on the ground of undue influence and fraudulent mis-representation. I do not doubt that when the respondent was served with the writ challenging the transaction, he must have wryly observed:

> "How sharper than a serpent's tooth, it
> is to have a thankless (client)."

Nor would he have been mollified by his former client's assertion at the hearing of the action before Wright, J., that he had been well

satisfied with the results of his trial for murder in 1969. Indeed, the appellant must have been more than satisfied for he filed no application for leave to appeal either conviction or sentence. In his statement of claim he pleaded as follows:

> "1. In or about January 1969, the Plaintiff was remanded in custody at the General Penitentiary on a charge of murder.
>
> 2. The Defendant who is an Attorney-at-law, was assigned to conduct the Plaintiff's Defence.
>
> 3. In anticipation of and/or in pursuance of such assignment and the grant to the Plaintiff of a Legal Aid Certificate, the Defendant interviewed the Plaintiff, at the General Penitentiary.
>
> 4. The Defendant informed the Plaintiff that the fee which would be payable to him for conducting the defence of the Plaintiff would be 400 guineas ($840.00) and proposed that the Plaintiff sell to him his parcel of land consisting of approximately one acre and situate at Porus in the parish of Manchester in return for the Defendant conducting his defence and giving him a promissory note for £80.0.0 ($160.00).
>
> 5. The Plaintiff was induced to agree to the aforesaid proposal and to sign an agreement for sale of the said property, dated January 31, 1969, while acting under the influence of the Defendant.
>
> PARTICULARS OF UNDUE INFLUENCE
>
> 1. At the time of agreeing to the said sale, the Plaintiff was on a murder charge and the relationship between the Plaintiff and the Defendant was one of Attorney and client.
>
> 2. The Plaintiff was worried, distressed and distraught and was relying exclusively on the advice of the Defendant in whom he placed his trust and confidence.
>
> 3. The Plaintiff made the said agreement at the Defendant's request and on the Defendant's sole advice, and because the Defendant represented to him that it was necessary to do so in order to obtain legal representation in respect of his trial on the said murder charge, and/or that the Defendant would not otherwise be under a duty to conduct his defence.

6. Further or in the alternative, the Defendant represented to the Plaintiff that it was necessary and/or proper for him to enter into the transaction for the sale of the said property in order to obtain legal representation or for his defence, to be conducted by the Defendant. The Defendant made the said representation falsely and fraudulently well knowing the same to be untrue or alternatively not caring whether the same was true or false and with intent to induce the Plaintiff to agree to sell the said property to him.

PARTICULARS

a) The Defendant failed to explain the provisions of the relevant laws relating to legal aid assignments or that he would be eligible for or entitled to payment from public funds for conducting the Plaintiff's defence.

b) The Defendant represented to the Plaintiff that he was in the circumstances entitled to charge and could properly charge the Plaintiff a fee which would be payable by the Plaintiff.

c) The Plaintiff repeats the particulars set out in paragraph 5 hereof.

7. Relying on the Defendant's said representations the Plaintiff entered into the agreement for the sale of the said property.

8. In the premises, there was no binding or concluded agreement made between the parties, and/or the agreement is voidable at the instance of the Plaintiff."

With respect to those averments in the statement of claim alleging that the respondent had been assigned under the Poor Prisoner's Defence Act to defend the appellant, viz., para. 6, no evidence whatsoever was adduced in support, and that much was conceded on behalf of the appellant by his counsel who also appears in this Court. But counsel, properly, as I think, submitted to the learned judge that such evidence as remained, raised the question of constructive fraud. The respondent's counsel, on the other hand, took the stance that no evidence having been put forward to support the undue influence allegations grounded upon the legal-aid assignment (see para. 6), what remained was no more than a "hypothetical case" based on a

transaction between attorney and client. Despite the concession of learned counsel for the appellant in the Court below, the learned judge felt obliged to deal with the matter as if none had been made. He formed the view for reasons which he set out in his judgment and which, hereafter, must be examined, that "the gravamen of the charge against the respondent is that he acted dishonourably in not acting in conformity with the legal-aid assignment which brought him into contact with the appellant as his counsel." In the result, he found that the allegations had not been proven and, indeed, were altogether profoundly mischievous. Accordingly, he dismissed the appellant's claim with costs.

Before examining the principles of law which are applicable in the circumstances of this case, I think it would be helpful to detail what remained of the appellant's case, and would have required a response from the respondent.

The appellant had alleged in paragraphs 4 and 5 of his statement of claim that the respondent had induced him to agree that he would, in return for defending him for a fee of 400 guineas, sell him his land, and give him a promissory note for the balance of the purchase price. In that state, he had agreed to the proposal and signed an agreement for the sale of the land.

By his defence, the respondent admitted that he was an Attorney-at-Law and that the appellant retained him in his defence on a charge of murder, that there was an agreement for sale of the appellant's land which was executed at the General Penitentiary. He, of course, denied the particulars of undue influence averred in paragraph 5 of the statement of claim. By paragraph 13 of his defence, the respondent pleaded as follows:

> "13. In the premises the Defendant will contend that the agreement entered into between the Plaintiff and himself was consumated after negotiations between himself and the Plaintiff's

> "trusted agent conducted at arm's length and was freely ratified and adopted by the Plaintiff without any inducement or representation whatsoever moving from the Defendant."

As the pleadings stand, there was a plain admission that the relationship of attorney and client existed and that the client had sold property to his attorney. But in the event, evidence was adduced and the judge accepted that the relationship of attorney and client existed between the parties at the time of the transaction. The respondent had in evidence acknowledged this to be the fact. The learned judge stated that he accepted also the chronological sequence of events leading up to the execution of the agreement between vendor and purchaser and these I now propose to rehearse. On 30th January, 1969 the respondent attended on the appellant who was then on remand in the General Penitentiary awaiting his trial. Prior to this, one Karram had spoken with the respondent about the purchase of a piece of land belonging to the appellant. Having viewed the land, the respondent offered £500.0.0 in response to Karram's figure of £600.0.0. Karram also suggested that the respondent undertake the defence of the appellant. On the occasion of his visit to the General Penitentiary, the appellant signed a retainer and gave a statement to the respondent. The agreed fee was 400 guineas. On the following day, the latter, accompanied by Karram, and having in his possession a partially prepared agreement for sale, again attended upon the imprisoned client, who executed the agreement for sale and as well, the conveyance.

It is of note that with respect to the agreement for sale, the purchase price and the names of adjoining owners were in the respondent's handwriting while the rest of the document was typewritten. The respondent, whose words the learned trial judge accepted, was quite uncertain when it was that he wrote the particulars which now appear on the document. He did not accept the

suggestion put to him under cross-examination that it occurred at the time of execution. It may well have been the case that the common form portions and obvious particulars were typewritten, and then the names of adjoining owners were inserted when these would have been obtained from Karram, and in so far as the price went, that could only have been inserted at the General Penitentiary when confirmed by the appellant before execution of the agreement. No discussion as to the sale of land transaction took place between the client and his Attorney; this was categorically asserted by the respondent. He then prepared his personal cheque for £300.0.0. in favour of the appellant who duly endorsed and returned it to him.

I must now advert to certain admissions of the respondent which will be of importance in any proper consideration of the issues raised on this appeal. The learned judge who plainly considered this evidence of no little significance, recorded it in question and answer form at page 39:

> "Q. Did you consider that any special rules applied to the sale of land by a client to his attorney-at-law when you executed the agreement on 31/1/69?
>
> A. Can't say now what my state of mind was then. Knew then that in all dealings I should be fair to everyone.
>
> Q. At time agreement executed was Stanley Lalor your client?
>
> A. Yes, I'd say he was.
>
> Q. Were you then aware that the law had certain rules as to how fairness in an agreement between an attorney and his client should be ensured?
>
> A. At that time I was not aware there were specific rules requiring that steps have to be taken to make it abundantly clear that fairness had been maintained."

In that state of the evidence, one must examine how the learned judge proceeded. Having, as I said, focussed his attention largely

on the admittedly unproven allegations made against the attorney, he then referred to Halsbury's Laws of England (3rd Edition) Volume 3, paragraph 67 under the sub head "Duty of counsel not to disclose or misuse information" and cited the following extract:

> "The employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel and not to use either such information or his position as counsel to his client's detriment.
>
> The courts will interfere by injunction to prevent counsel from disclosing the secrets of the client, and will set aside any deed or transaction by which a barrister has, through making use of the confidence reposed in him, gained an advantage to himself to the detriment of his client.
>
> If a client, being under the influence of counsel, executes a deed in favour of counsel, the deed is liable to be set aside on the ground of undue influence. If there is such undue influence existing when the deed is executed, it is immaterial that the relation of counsel and client had then ceased. Where there is no undue influence, a deed executed by a client in favour of his counsel may stand as a voluntary instrument, and is not void on grounds of public policy."

and then concluded - "I find that the defendant's conduct has not transgressed the principles herein stated." But with all respect to the learned judge, I do not find the reference apposite in the circumstances of this case, for reasons which hereafter appear in this judgment. Regrettably, he did not direct his attention to the presumption of undue influence which arises in transactions such as occurred in this case between an Attorney and his client. We have thus been deprived of his views, which would have been invaluable in resolving this matter.

As long ago as the time of Lord Eldon it was accepted that there was no absolute rule precluding an attorney from purchasing from his client, but if the bargain were subsequently to be

challenged, then, a heavy burden was cast upon the attorney and a Court of Equity would interfere to set aside the transaction. In Gibson v. Jeyes (1801) 6 Ves. Jr. 266 at p. 271; [31 E.R. 1044 at 1046] that learned and distinguished judge affirmed the principle in these words:

> "An attorney buying from his client can never support it; unless he can prove, that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for that vendor with a stranger. That must be the rule. If it appears, that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage with due diligence he would have prevented another person from getting a contract under such circumstances shall not stand. The principle so stated, may bear hard in a particular case; but I must lay down a general principle that will apply to all cases."

At page 277, [31 E.R. 1050] of the same judgment, the Lord Chancellor identified the basis of the rule, when he stated:

> "It is asked, where is that rule to be found? I answer, in that great rule of the Court, that he who bargains in matter of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence, a rule applying to trustees, attorneys or any one else."

More than a century later, Lord Parmoor in Demerara Bauxite Co. Ltd. v. Hubbard & Ors. [1923] A.C. 673 at pages 681-682 asserted the continued vigour of the rule in these words:

> "The principle has long been established that, in the absence of competent independent advice, a transaction of the character involved in this appeal, between persons in the relationship of solicitor and client, or in a confidential relationship of a similar character, cannot be upheld, unless the person claiming to enforce the contract can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession, and can further show that the transaction was, in itself, a

> "fair one, having regard to all the circumstances. In order that these conditions may be fulfilled it is incumbent to prove that the person who holds the confidential relationship advised his client as diligently as he should have done had the transaction been one between his client and a stranger, and that the transaction was as advantageous to the client, as it would have been, if he had been endeavouring to sell the property to a stranger."

I would observe, en passant, that one striking similarity between the circumstances in that appeal and the present is that there the solicitor admitted in cross-examination that he was not conscious of the law relating to solicitor and client, nor did he bring his mind to bear on the fact that he was dealing with a client. As in this appeal, the respondent's response which appears earlier in this judgment, where it is set out verbatim, amounts to a like confession of ignorance. In that case, an action was brought by the appellants against the respondents, Louisa Hubbard, H.E. Humphreys and L.T. Emory. The respondent Louisa Hubbard for a consideration of $25.00 had granted the respondent Humphreys an option to purchase land in what is now Guyana for $5,500.00. The appellants agreed to buy and Humphreys agreed to sell the land for $11,200.00 and Humphreys purported to exercise his option to purchase form Hubbard. Subsequently Hubbard being advised that the sale to Humphreys was unenforceable, agreed to sell the property to another respondent Emory for $12,000.00. The appellants in their action sought to set aside the sale to Emory and to enforce the sale to Humphreys and by her to themselves. Humphreys was a solicitor and had acted for Mrs. Hubbard in obtaining probate of the will of Mrs. Hubbard's husband to whom the land in question had belonged. The trial court as did the West Indian Court of Appeal found that the realtionship of solicitor and client, existed and consequently, dismissed the appellants' action, holding that the transaction could not be upheld.

Their Lordships in the Privy Council affirmed the decision of both courts.

In Ward v. Hartpole (1776) 3 Bligh 470; 4 E.R. 671 which was decided as long ago as 1776, (I do not think a recital in detail of the particular facts is really useful, except to point out that there the relationship of solicitor and client existed), the latter was in serious financial straits and involved in litigation when he granted a lease for life to his solicitor at undervalue. Lord Mansfield at page 681 of the judgment (in the English Reports) observed -

> "And if an attorney, knowing his client to be in such circumstances, takes from him any reward or any security by way of gratuity or reward pending the suits or business in which he is concerned, though no particular express act of fraud is proved, yet it shall not stand, it would be attended with dangerous consequences and therefore it shall not be allowed."

This case illustrates the factors of distress or inequality of bargaining and that of purchase at an under value, factors which must exist if a Court of Equity is to avoid the transaction. It was there decreed that the lease be set aside upon terms.

In order to emphasize the scrupulous care with which these transactions are examined by the court, Lord Mansfield in Ward v. Hartpole (supra) adverted to an earlier case, Walmesley v. Booth (1739) 2 Atk. 25 and stated his recollection of it, in these words at page 681 -

> "I remember the case of one Japhet Crook, a most vile miscreant, who had been engaged in various suits and scrapes, indicted for perjuries, forgeries and other crimes, and promised his attorney, who had been useful in procuring bail for him, and otherwise, as a compensation above his bill, to leave him £1000 by his will; and he gave the attorney instructions for preparing his will, with such a legacy, which he executed. The attorney afterwards, lest

> "Crook should change his mind, got a bond from Crook to oblige him to leave the £1000 by his will. They afterwards quarrelled, and Crook made a new will, in which he omitted the legacy, stating as his reason that he had been imposed upon by his attorney; and he soon afterwards died possessed of a considerable fortune. The attorney sued the representative, who filed a bill to set aside the bond. The attorney put in his answer, and the cause came on to be heard before Lord Hardwicke. At first it did not stand a minute; no fraud was proved to have been made use of by the attorney, and the bill was dismissed. I, however, advised a re-hearing, and the cause came on again; and though there was no proof of fraud having been practised in obtaining the bond, yet from the general danger of establishing a precedent of an attorney taking such a security from a client in ~~distress~~, as well as from the particular circumstances under which the bond was given, Lord Hardwicke reversed his own decree, and referred it to the Master to consider whether the attorney was entitled to any and what allowance."

Even from those times, the absence of fraud in the sense of deceit or some dishonesty, did not inhibit the Court from declaring the bargain between attorney and client to be void. The Court did not, however, interfere if it held that the attorney was not the attorney 'in hac Re', which was one of Mr. Frankson's points before us. In Montesquieu v. Sandys (1811) 18 Ves. 302, Lord Eldon at page 312 had said -

> "On the other hand, there is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client what was not in any degree the object of his concern as attorney; the client making the proposal, himself proposing the price, no confidence asked or received in that article, and both ignorant of the value. Under such circumstances, he is not the attorney in hac Re; and therefore, not being under any duty as attorney to advise against the act, he may be the purchaser."

But later cases positively indicate that the Latin tag 'in hac Re' ought not to be literally translated. The clearest illustration of this approach is to be found in Allison v. Clayhills [1908]

97 L.T. 709. And see also Edwards v. Meyrick (1842) 2 Hare 60; 67 E.R. 25. Parker, J., in the former case expressed the view that even where the relationship had ceased to exist, nonetheless, so long as the confidence which arose from the relationship could be held to remain in being, the Court's power to intervene was exerciseable. I quote his words from pages 711-712:

> "It is, I think, equally clear that, although the relationship of solicitor and client in its strict sense has been discontinued, the same principle applies as long as the confidence naturally arising from such a relationship is proved or may be presumed to continue. There are cases in which it is laid down that this principle only applies when the solicitor is the solicitor of his client in the particular transaction the validity of which is in dispute; but, in my opinion, that only means that when the relationship is of such a nature that it does not impose on the solicitor any duty towards his client in the particular transaction, then the principle has no application. It does not mean, in my opinion, that the principle has no application in any case in which the solicitor is not in the particular transaction actually retained by or actually acting for his client under such circumstances that if he neglected his professional duty he would be liable to an action at law for negligence. Of course, if he be so retained and is so acting, there can be no question that the principle does apply, but, even if he be no longer so retained or acting, his duties in the contemplation of a court of equity may still be such as to throw upon him the onus of upholding the validity of a purchase or a lease from his client." [emphasis supplied]

The presumption does apply, it is clear (i) where the attorney is retained in the very transaction that it is sought to challenge or (ii) even where the relationship in its strict sense has been terminated, but the circumstances show that confidence still continues to be reposed in the attorney or (iii) where he although not retained in respect of the matter in dispute, is nevertheless acting as an attorney or retained on behalf of the client in some other matter. The reason for the rule is that the parties are not contracting on terms of equality. This is, I think,

what is discernible in Edwards v. Meyrick (supra) where (at 67 E.R. p. 29) Sir James Wigram V.C. observes:

> "It appears to me, however, that the question whether Meyrick was the solicitor in hac re is one rather of words than of substance. The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand."

Although, in the result, the court upheld the purchase by the solicitor from the client, it nevertheless held that the relationship existed and the presumption which arose therefrom enabled the court to examine the entire transaction.

It is, I think, established from the cases that the basis of the court's jurisdiction is the prevention of gain as a result of inequality in bargaining power or the prevention of undue advantage being taken by a person in whom confidence is reposed. It is, then said that, in these circumstances, there arises this presumption of fraud. Thus In re Fry, Whittet v. Bush 39 Ch.D.312, the solicitor there was dealing with a poor and ignorant man at a considerable under-value, and the vendor had no independent advice. Kay, J., at page 322, summed up the position in these words:

> "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of Equity will set aside the transaction."

The fraud which would prompt a Court of Equity to action, was clearly defined by Lord Selbourne in Earl of Aylesford v. Morris (1871) L.R. 8 Ch. App. 484 at pages 490-491, as:

> "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these

> "circumstances and conditions; and when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable."

Again in Wood v. Abrey (1818) 3 Mad. 417 at p. 423 where the transaction involved a vendor in poor and distressed circumstances, selling without the benefit of independent advice, and at an undervalue, Sir John Leech V.C. indicated that these circumstances called forth the intervention of a Court of Equity -

> "But a Court of Equity will inquire whether the parties really did meet on equal terms, and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."

I would affirm then, that the common theme which runs through all the cases, is that the presumption of fraud will arise where there is clearly an inequality in bargaining positions indicated by circumstances such as where the vendor is impoverished or ignorant or in distress or where independent advice is lacking and the consideration is at an undervalue.

This analysis of the cases must now be applied to the particular circumstances of the instant case. First, there is abundant evidence that the relationship of attorney and client existed between the parties. The appellant admitted it, the judge so found. Secondly, the client was poor; he had no funds to retain a lawyer and his only asset was a $\frac{1}{4}$ acre of land. Thirdly, he was in distressed condition for he was facing a charge of murder for which he thought there was no defence. He retained the respondent who became a saviour; he brought hope. The respondent entered into a transaction with his client and purchased the client's land. I

have not the least doubt that on the basis of this factual situation and in the light of the authorities, the presumption arose and constrained Wright J., sitting in a Court of Equity to inquire into this transaction to see whether it was fair, just and reasonable. The respondent was required to rebut the presumption: the onus was on him.

Now, once it can be said that the circumstances which raise the presumption exist, then there is a duty on the attorney -

> "He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which if he had been engaged in a transaction with a third party he could possibly have afforded."

per Lord O'Hagan in McPherson v. Watt (1877) 3 App. Cas. (Sc.) 254 at page 266. Lord Eldon in Gibson v. Jeyes (1801) 6 Ves. Jr. 266 at page 270; (31 E.R. 1044 at 1046):

> "An attorney buying from his client can never support it; unless he can prove, that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for that vendor with a stranger."

Parker, J., in Allison v. Clayhills (1907) (supra) at page 712 -

> "In cases where the onus of up-holding the validity of a transaction lies upon the solicitor, I think the solicitor must prove that his client was fully informed of all the material facts, understood the transaction and that the transaction itself, both as to price and otherwise, was a fair one."

In Pisani v. Attorney General for Gibraltar (1874) L.R. 5 P.C. 516 at page 536 Sir Montague E. Smith delivering the judgment of the Board, stated -

> "..... the Court does not hold that an attorney is incapable of purchasing from his client, but watches such a transaction with jealousy, and throws on the attorney the onus of shewing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser."

then
The onus/is on the respondent to show that having regard to all the circumstances, the transaction is in point of fact, fair, just and reasonable. In the present case the respondent having admitted his ignorance of any special principles governing the purchase by an attorney of his client's property, did say, however that he considered that he had to be fair. But by what tests is the standard to be met?

In some cases, it may be necessary to show that the vendor had independent advice. But there is no invariable rule that the client must have had independent advice. See Allison v. Clayhills (supra) at page 712 per Parker J. In Pisani v. Attorney General for Gibraltar (supra) the Privy Council thought that in that case, it would have been a prudent course for Pisani, a barrister, to have insisted on the intervention of another professional man. There, Mr. Pisani had at least suggested that independent advice be had by the client. It could be said that he had gone some way in discharging the onus on him. The decision in that case, it would seem to me, did not rest on any view that the obtaining of independent advice was a fundamental requirement.

The onus on the attorney involves a demonstration that he has used the same diligence which he would have used, on behalf of the client, in relation to a stranger -

> "The nature of the proof, therefore which the Court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or

> "may have given him a knowledge which his client did not possess or some influence or ascendancy or other advantage over his client."
>
> per Wigram V.C. in Edwards v. Meyrick (1842) (supra) 67 E.R. at page 29.

Lord Eldon in Gibson v. Jeyes (1801) (supra) indicated the standard of proof which the case for the attorney must achieve, if he is successfully to rebut the presumption. At page 271 he asserted:

> "But from the general danger the Court must hold that if the attorney does mix himself with the character of vendor he must show to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain."

Proof to demonstration must, I suggest, connote much more than proof on a balance of probabilities. Lord Cramworth L.C., in Holman v. Loynes (1854) 4 De G.M. & G 270 at page 274:

> "That being so, the next question is, did he duly discharge his duty? Has he shown to demonstration, for that is what Lord Eldon says is necessary (though that must be taken with some qualification - demonstration, literally meaning mathematical certainty, is impossible in such cases), but has he shown what for want of a better expression we call moral certainty, ..."

Not even criminal cases require proof to demonstration in the sense of certainty and in civil cases, allegations of fraud or a criminal offence never required certainty. I think we would understand - "to demonstration" or "to moral certainty" as meaning such cogent evidence as the particular seriousness or gravity of the circumstances should warrant. What is clear is that the attorney must adduce evidence to prove that the absence of victimization which as Lord Brightman felicitously pointed out in Hart v. O'Connor [1985] 2 All E.R. 880 at page 892:

> "..... can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances."

Now in this case, the respondent testified that he said not a word to the client about the transaction apart from asking him to sign the agreement for sale and the conveyance. So that neither document was explained to him nor was he asked if he understood the effect of any of the clauses therein contained. It was not the case that the respondent had suggested that the appellant should have obtained independent advice. From his evidence, he regarded Karram who had first consulted him in the matter, as the agent of the appellant, and knowledgeable in matters of real estate, but Karram was not a lawyer. There were matters in the agreement which called for explanation. There was no evidence that Karram proffered any advice. Neither of the parties choose to call him to give evidence at the trial. Seeing that the respondent was unaware of any particular rules governing the purchase by an attorney from his client, learned counsel who appeared on his behalf before us, was acutely aware that he faced a formidable hurdle. I would pay tribute to his courage and pertinacity for he said everything that could possibly be said. There was the question of the unpaid balance, but that was not discussed. The question of the costs of the conveyance, the requirement that the purchaser was to be provided with a registered title. Who would bear the cost of the survey for a diagram? How or to whom the balance of purchase price would be paid? Would the respondent have drafted an agreement in the form of the present agreement if he were acting for the appellant, is the obvious question which presents itself for answer. I would incline to think that this failure on the part of the respondent falls far short of - proof to demonstration, of due diligence.

I must now say something about the price paid by the respondent. It must be inferred from what the respondent stated that the appellant ratified the price agreed between the respondent and Karram. The respondent did not seek to adduce evidence of the value of the land by calling a real estate agent. He relied on the fact that Karram apparently knew something about land values, and that he would be acting rather on behalf of the appellant and would, therefore, be alert to defend his rights. The learned judge accepted the respondent's evidence that the price was a fair one. With all respect to the learned judge, the onus was on the respondent to prove that the price was a fair one and he could not discharge the high burden on him by a mere assertion. There was no evidence that he had any expertise in the area of real estate values. The judge found that there was no acceptable evidence to the contrary. In those circumstances, it would mean that the respondent had not discharge the onus which, undoubtedly, lay on him to prove that the value was fair.

It must be stressed that the respondent was a poor and ignorant man in distress and, consequently, there was an imbalance in the relative bargaining power of the parties. The land was not sold by Karram; it was sold by the appellant; it is his signature which appears as vendor. Yet his role in the entire transaction was passive. The respondent offered him no advice nor did he suggest to him that he needed any. It may be that the words of Sir Montague Smith in Pisani at page 540 are apposite and the respondent should have had regard to his position as a barrister. It would not have been difficult to ask a colleague to deal with this aspect of the transaction. It would avoid any cloud of suspicion that everything was not above board, and provide an answer, in case there was a subsequent enquiry into the transaction.

Fairness then, cannot be held to mean not doing evil, but

being positively good. The sin of the respondent was that he left undone the things which he should have done. That care and diligence which is expected of an attorney acting on behalf of a client was not evident. His conduct however, is not to be seen as a reflection on his integrity, rather upon his knowledge or, regrettably, the lack of it, in this particular aspect of the law. But Equity will not countenance such conduct. There was an obligation on the respondent to prove that the appellant, his client, was fully informed of all the material facts such as I have rehearsed above and understood the transaction.

I am driven to conclude, and I do so with regret, that the onus on the respondent was not discharged. In the result, I would set aside the judgment of Wright J., and enter judgment in favour of the appellant. The transaction should therefore be declared void, and an order made re-vesting the land to the appellant.

The appeal should, in my view, be allowed with costs both here and below to the appellant.

WHITE, J.A.:

In or about January 1969, Stanley Lalor, the appellant, was charged with the criminal offence of murder, in answer to which charge, he was defended at his trial by the respondent, Ainsworth Campbell, an attorney-at-law who was called to the Bar in England in November 1963, and admitted to the practice of law before the Courts of Jamaica in January 1964. The trial lasted two days and resulted in the acquittal of the appellant of the charge of murder, but he was found guilty of manslaughter. He was sentenced to 15 years imprisonment, of which he served a period of 9 years and 2 months.

This appeal arises from the judgment of Wright, J., (as he then was) in an action by the appellant against the Respondent in his character of attorney-at-law in a lawyer-client relationship Wright, J., after hearing evidence both from the appellant and the respondent, rejected the plaintiff's case in toto. "I find", he said, "that the plaintiff displays a peculiar penchant for prevarification and deceit such as disentitles him to be believed even on non-crucial matters. And this has nothing to do with his literacy. The acceptable evidence does not favour the resolution of any of the seven (7) issues proposed by Mr. Small in the plaintiff's favour." The learned trial judge, therefore, accepted the version of the Respondent as to how the admitted relationship of lawyer and client arose, and by force of that acceptance, exonerated the respondent of any misconduct complained of.

At this point I will recite the actual complaint as stated in the Statement of Claim:

"STATEMENT OF CLAIM

1. In or about January 1969, the Plaintiff was remanded in custody at the General Penitentiary on a charge of murder.

2. The Defendant who is an Attorney-at-law, was assigned to conduct the Plaintiff's Defence.

3. In anticipation of and/or in pursuance of such assignment and the grant to the Plaintiff of a Legal Aid Certificate, the Defendant interviewed the Plaintiff, at the General Penitentiary.

"4. The Defendant informed the Plaintiff that the fee which would be payable to him for conducting the defence of the Plaintiff would be 400 guineas ($840.00) and proposed that the Plaintiff sell to him his parcel of land consisting of approximately one acre and situate at Porus in the parish of Manchester in return for the Defendant conducting his defence and giving him a promissory note for £80.0.0 ($160.00).

5. The Plaintiff was induced to agree to the aforesaid proposal and to sign an agreement for sale of the said property, dated January 31, 1969, while acting under the influence of the Defendant.

PARTICULARS OF UNDUE INFLUENCE

1. At the time of agreeing to the said sale, the Plaintiff was on a murder charge and the relationship between the Plaintiff and the Defendant was one of Attorney and client.

2. The Plaintiff was worried, distressed and distraught and was relying exclusively on the advice of the Defendant in whom he placed his trust and confidence.

3. The Plaintiff made the said agreement at the Defendant's request and on the Defendant's sole advice, and because the Defendant represented to him that it was necessary to do so in order to obtain legal representation in respect of his trial on the said murder charge, and/or that the Defendant would not otherwise be under a duty to conduct his defence.

6. Further, or in the alternative, the Defendant represented to the Plaintiff that it was necessary and/or proper for him to enter into the transaction for the sale of the said property in order to obtain legal representation or for his defence to be conducted by the Defendant. The Defendant made the said representation falsely and fraudulently well knowing the same to be untrue or alternatively not caring whether the same was true or false and with intent to induce the Plaintiff to agree to sell the said property to him.

PARTICULARS

a) The Defendant failed to explain the provisions of the relevant laws relating to legal aid assignments or that he would be eligible for or entitled to payment from public funds for conducting the Plaintiff's defence.

b) The Defendant represented to the Plaintiff that he was in the circumstances entitled to charge and could properly charge the Plaintiff a fee which would be payable by the Plaintiff.

"c) The Plaintiff repeats the particulars set out in paragraph 5 hereof.

7. Relying on the Defendant's said representation the Plaintiff entered into the agreement for the sale of the said property.

8. In the premises, there was no binding or concluded agreement made between the parties, and/or the agreement is voidable at the instance of the Plaintiff.

AND the Plaintiff claims:

a) A Declaration that the Contract and/or Conveyance and/or Transfer entered into between the Plaintiff and the Defendant is voidable at the instance of the Plaintiff on the ground that undue influence was exercised at the time of the transaction in or about January of 1969, in relation to property at Porus in the Parish of Manchester.

b) Further or in this alternative the Plaintiff's claim is for an order that the Defendant herein reconvey or retransfer the said property to the Plaintiff.

c) Further or in the alternative that the Defendant refund the value of fees paid to him by the Defendant being money had and received by the Defendant to his use and benefit in circumstances where there was no consideration.

d) Damages for fraud.

e) An injunction to restrain the Defendant from selling, leasing, conveying, mortgaging or transferring the said land or any part thereof.

f) Further or other relief.

AND the Plaintiff claims damages."

The respondent on the other hand, both in his defence as filed, and in his evidence, did not deny the relationship of lawyer and client which was engendered by the predicament in which the appellant was placed, considering his need to obtain the services of counsel in his defence on the charge of murder. There was also the admission that the appellant was interviewed by the respondent while the former was in the General Penitentiary awaiting trial, and that the agreement for the sale of the appellant's land to the respondent was made under those circumstances of the appellant's remand. The

respondent always maintained that he was not specifically assigned to conduct the appellant's defence. He had no knowledge of any Certificate of Assignment being issued to him, nor did he receive the same when he undertook and conducted the defence of the appellant. His pleaded defence should be quoted verbatim from paragraphs 4 to 14:

> "4. Save that the Defendant admits that on divers occasions he visited and interviewed the Plaintiff at the General Penitentiary, paragraph 3 of the Statement of Claim is expressly denied. The Defendant will say that his first visit to the Plaintiff was undertaken at the express invitation of the Plaintiff, communicated to the Defendant by the Plaintiff's agent authorised in that behalf and all subsequent visit or visits (save as hereinafter appears) were undertaken as the Defendant found it necessary to take proper instructions from the Plaintiff, and were not undertaken in anticipation of and/or in pursuance of any assignment made under a Legal Aid Certificate granted to the Plaintiff or anticipated as alleged or at all.
>
> 5. The Defendant will say further that on or about the 30th day of January, 1969, on the occasion of his first visit to the Plaintiff, the Plaintiff retained the Defendant to appear in the Manchester Circuit and conduct his defence to a charge of Murder then pending against the Plaintiff and agreed in writing to pay the Defendant the sum of Four Hundred Guineas for his services in his behalf.
>
> 6. On or about the 31st day of January 1969, the Plaintiff's agent one Mr. Faris Karram offered to sell to the Defendant, and the Defendant agreed to purchase one quarter acre of land situate at Porus in the parish of Manchester, then owned by the Plaintiff for the price of FIVE HUNDRED POUNDS, whereupon the Defendant prepared an Agreement for Sale, and together with the said Faris Karram attended upon the Plaintiff at the General Penitentiary where the Plaintiff and the Defendant executed the said Agreement in the presence of the aforesaid Faris Karram who subscribed his name as witness. (The Defendant will at the trial of this action refer to the said Agreement more fully for its terms and effect.)
>
> 7. It was a condition of the said Agreement that the Defendant would pay to the Plaintiff the sum of THREE HUNDRED POUNDS on the execution of a Common Law Conveyance, and the balance when a Registered Title in respect of the said land was obtained.
>
> 8. The Defendant on the 31st day of January 1969, paid to the Plaintiff the aforesaid sum of THREE HUNDRED POUNDS and holds the Plaintiff's receipt in acknowledgment of the said payment, and duly entered into possession of the said land.

"9. In the premises, save where the foregoing consists of admissions, paragraph 4 of the Statement of Claim is denied and the Defendant expressly denies that he promised or gave to the Plaintiff a promissory note in the circumstances as alleged or at all.

10. As to paragraph 5 of the Statement of Claim, the Defendant repeats paragraph 6 hereof, and specifically denies that he induced the Plaintiff to enter into the alleged or any proposal, and denies that the Plaintiff was acting under his influence in or about the making of the alleged Agreement or any Agreement as alleged or at all. Further the Defendant denies that he influenced the Plaintiff by any threat or coercion, or that in entering into the Agreement with the Plaintiff, he prevented the Plaintiff from obtaining or enjoying any advantage the Plaintiff then possessed or would otherwise have obtained, and the particulars of undue influence as set out in paragraph 5 of the Statement of Claim are expressly denied.

11. The Defendant denies that he represented to the Plaintiff that it was necessary and/or proper for him to enter into the transaction for the sale of the property, in order to obtain legal representation or for his defence to be conducted by the Defendant as alleged or at all, or that he made the alleged or any representation falsely and fraudulently or with intent to induce the Plaintiff to agree to sell the property to him as alleged or at all, and each and every allegation of false and fraudulent representation alleged against him in paragraph 6 of the Statement of Claim and the particulars thereof are specifically denied.

12. The Defendant specifically denies that the Plaintiff entered into the Agreement for the sale of the property upon reliance on any representation made by him to the Plaintiff as alleged or at all and says that the circumstances surrounding the making of the said Agreement are as hereinbefore set out and not otherwise.

13. In the premises the Defendant will contend that the Agreement entered into between the Plaintiff and himself was consumated/after [sic] negotiations between himself and the Plaintiff's trusted agent conducted at arm's length and was freely ratified and adopted by the Plaintiff without any inducement or representation whatsoever moving from the Defendant.

14. The Defendant will further contend that in the premises the Plaintiff is not entitled to the relief claimed or to any relief."

It appears that the appellant at the time he was awaiting trial, did not know that given his impecunious circumstances he was entitled to Legal-Aid, although he said that while he was in the

lockups at Mandeville, a Probation Officer had come to see him. He was then questioned as to the size of his family, his means and his ability to employ a lawyer. Produced to the appellant was his admitted application for Legal-Aid, which was dated February 4, 1969. By this time he had already, on January 30, 1969, engaged the services of the Respondent for his defence. The Legal-Aid Certificate was granted by the late Parnell, J., (who did not preside at the trial) on the 11th February, 1969 when the trial had already concluded. So that it is quite clear that the question of assignment of counsel by way of a Legal-Aid Certificate did not arise when the respondent undertook the defence of the appellant. Let me repeat that in his evidence the respondent deponed 'that question of Legal-Aid never arose in respect of any relationship with Lalor at any time. I was not assigned to defend him and no one at any time of trial mentioned Legal-Aid or assignment to me. On first visit, January 31, 1969, the question of his qualification for Legal-Aid did not arise. I did not visit him in contemplation of assignment or having been assigned.'

On this aspect of the case the learned trial judge said:

> "It is plain beyond peradventure that the very bedrock of the plaintiff's case embodying such gross charges of impropriety against the defendant is the assumed validity and relevance of the assignment. The statement of claim says so very strongly and Mr. Small in presenting the plaintiff's case was no less clamant. However, Mr. Samll in his closing address to the Court agreed that there was no evidence that the Legal-Aid Certificate had been issued to the Respondent at the time when he contacted the appellant and that, accordingly, the Respondent had not visited the applicant pursuant to the obligations owed by virtue of the assignment under the Legal-Aid Certificate. In the result there was nothing improper for the respondent to have demanded the fee of 400 guineas. He would not have used and he did not use the Legal-Aid Certificate to obtain the interview with the appellant and there was clearly no impropriety which would have existed in his receiving payment under the Legal-Aid assignment as well as by private retainer. To do so would have been to breach the high level of professional ethics which subsumes the defence of poor persons as provided for by the Poor Prisoners' Defence Act."

Unfortunately, by his dismissal of this aspect of the appellant's claim, the learned trial judge appears to have limited his evaluation of the evidence in so far as the complaint before us is that he failed to treat the essence of the plaintiff's claim, which was that the respondent at the time he was acting as the appellant's lawyer, entered into an agreement to buy the appellant's land. Therefore, since the lawyer-client relationship existed at the time the agreement was entered into, the agreement was subject to the special rules of law applicable to lawyers dealing personally with their clients' property. Consequently, the contract of sale of the plaintiff's land to the respondent being voidable at the instance of the appellant, the latter was entitled to have this issue dealt with. This was so especially on the overall view of the admission by the respondent that the lawyer-client relationship did exist, although on his behalf it was argued that the agreement was at arm's length and was without undue influence. Acceptance of the respondent's position would inescapably preclude the appellant succeeding on his Claim for the relief sought.

Before this Court and within the limits of the evidence, Mr. Small suggested the following questions:

> "1. Was the defendant in a position to exercise undue influence?
>
> 2. Did the plaintiff have independent legal advice?
>
> 3. Did the defendant give the plaintiff such advice that would entitle him to obtain the sanction of a Court of Equity to the agreement between himself and his client?
>
> 4. Was the price of £500. a fair one?
>
> 5. Did the defendant satisfy the burden of proof of establishing that the plaintiff obtained as good a bargain from the defendant as he could have obtained otherwise?

The answers to the questions must perforce be provided by looking more closely at the factual matrix within which the

relationship between the parties developed. In this regard, I state first the version of the appellant. According to him, when Mr. Campbell first interviewed him, he had not sent for Mr. Campbell who, on that occasion, enquired of the appellant if he had any cow or land. He said he informed Mr. Campbell that he had a piece of land. Mr. Campbell offered to buy the land and, if he would sell it, talk on behalf of the appellant. Mr. Campbell asked him if there was anyone in Porus who could show him the land. The appellant told him to go to Mr. Victor Karram, who was a friend of his. Mr. Campbell came to see him again one week later. He was accompanied by Mr. Karram. Then the discussion was about the price of the land, as Mr. Campbell intimated that he would not pay £700. for purchasing the land, which was the amount the applicant had asked when Mr. Campbell first visited him. It was also agreed that the appellant would pay counsel's fee of 400 guineas for his defence. During this discussion, Mr. Karram was present. The transaction for defending at the trial and the concomitant agreement for sale were concluded by the appellant signing an agreement for sale which document was admitted in evidence.

Be it noted that the appellant swore that the respondent did not read this document to him. He received no money from the respondent when the agreement was signed. They had no discussion regarding the occupation of the land. According to him there was no discussion as regards the costs of the sale, although they discussed the nature of his title. The respondent signed a promissory note for £80 owed to the appellant. These two documents - the agreement for sale, and the promissory note - were handed to Mr. Karram for safe-keeping. He has not seen the promissory note again. He denied that Mr. Karram was his agent for the sale of the land, and he did not authorise Mr. Karram to offer his land for sale to Mr. Campbell.

Cognizance should also be taken of the state of mind of the appellant at the time. "My greatest wish was to get a Barrister and to save my life ..... I felt glad I had somebody come to my rescue. That's how I felt towards Mr. Campbell. I gave him a statement the very day. I was in trouble and so happy I just sign."

The account of the respondent is as follows:
He was introduced to the matter and the appellant by Mr. F. Karram who he knew before January 30, 1969 and who told him of the appellant's land at Porus, Manchester, for which the respondent offered £500. Mr. Karram accepted the offer. As a result of information given by Mr. Karram, the respondent said he visited the appellant who was awaiting trial in the General Penitentiary. His visit was on January 30, 1969. He spoke with the appellant about being retained by him for an agreed fee of 400 guineas. He denied that he ever enquired from Lalor about cattle or land. He collected a statement from the appellant.

He returned to the General Penitentiary on the 31st January, 1969 accompanied by Mr. Karram. He had with him the prepared documents pursuant to the oral agreement with Karram to purchase the land. On this second occasion, the respondent said Mr. Karram spoke to the appellant as to the purpose of the visit. In his words as noted by the learned trial judge; "Lalor was delighted that Karram and myself had come. He raised no objection about the price. He said nothing at all about it." The respondent further said "I had no discussion with Lalor about the sale of the land. All discussions and agreements reached with Karram who I was very confident was acting on Lalor's behalf. Lalor said or did nothing to indicate Karram was not his agent." The respondent said he had spoken to Karram about the sale of the land some 10-14 days before the agreement was executed. He saw the land some five or six days before the signing of the agreement.

A significant aspect of the respondent's evidence is his constant assertion that at no time did he ever discuss the price of the land with the appellant. He himself had no conversation with Mr. Lalor about the sale of the land apart from asking him to sign the papers. Mr. Karram was there and explained what it was all about and presented him with the papers. It was not necessary for him to do any explanation. He made no representation to Lalor re the sale of the land nor did he read over the documents to the appellant before he signed. His retainer was completed at the same time as the sale of the land was concluded. The Agreement for sale and the Conveyance were signed by both parties on the 31st January, 1969.

The learned trial judge accepted the respondent's evidence as to the various stages in the transaction concerning Mr. Karram's agency (p. 76):

> "Concerning Mr. Karram's agency in response to Mr. Small's denial thereof, the defendant replied that that was the capacity in which he understood Mr. Karram to have been acting from the time he made the initial approach to him and nothing was ever said or done to the contrary. Indeed, the plaintiff had ratified what Mr. Karram had done. I find as a fact that Mr. Karram so acted and there is nothing to cast any doubt on that conclusion."

Again on the point of agency the learned trial judge said (p. 79):

> "I accept the defendant's version as to how the relationship came about as well as the role played by Mr. Karram before and up to 31.1.69. It seemed more probable that Mr. Karram acted under the due authorisation of the plaintiff from the commencement of his involvement but even if that were not so and Mr. Karram had involved himself on the basis of the long-standing friendship with the plaintiff and out of concern for him, yet he acted in the best interests of the plaintiff and protected his interest. What he did was unconditionally ratified by the plaintiff. It is not known for how long Mr. Karram had been trying to sell the land but what is certain is that the land was not sold to the defendant because he was on the market seeking land to purchase. On the contrary the sale conducted through Mr. Karram was for the sole benefit of the plaintiff. I accept the defendant's evidence that the price of £500 was a fair one - there is no acceptable evidence to the contrary."

trial judge,
In so finding, the/no doubt, took into account the evidence of the respondent that the appellant said or did nothing to indicate that Mr. Karram was not his agent. This was despite the appellant's denial that Mr. Karram was his agent, and his evidence that "I did not authorise Mr. Karram to offer my land for sale to the defendant." This denial must be heavily discounted by the fact that in his own words the appellant sent the respondent to Mr. Victor Karram 'a friend of mine' who would show the appellant the land in Porus. Mr. Karram was the only person he could trust to show the respondent the land. Nevertheless, the appellant was adamant that he had not discussed with Mr. Karram the sale of the land to enable him to get a lawyer. 'I did not ask Mr. Karram to sell the land.' It is clear too that on the day when the agreement for sale and the conveyance were signed by both parties, Mr. Karram was present. According to the appellant "I did not want Mr. Karram to offer any advice. If Mr. Campbell really wanted, I would sell Mr. Campbell, because I was in trouble. My concerns then were that Mr. Campbell should want the place and the price was right. I had made up my mind quite independently to sell Mr. Campbell the place."

In developing his appeal, Mr. Small contended that the
Mr.
finding of Wright, J., that/Karram was the agent of the plaintiff did not dispose of the obligation on the respondent as it has been developed in the cases on the subject of an attorney-at-law purchasing the property of his client, during the existence of this relationship. In this case, the respondent admitted under cross-examination that at the time the agreement was executed, Stanley Lalor was his client. The respondent was not then aware that the law had certain rules as to how fairness in an agreement between an attorney and his client should be ensured. Mr. Small argued further that the relationship of lawyer and client was established before the signing of the documents

on the 31st January, 1969.

Mr. Frankson argued to the contrary that in the chronicle of events which took place, the relationship of attorney and client had not crystallized at the time when the sale of the property was concluded; the plaintiff and the defendant were strangers at that time. As far as the sale of the land was concerned, the defendant did not fall within the rules which obliged him to get the best bargain he could for his client in the circumstances. The negotiations, he urged, were conducted at arm's length; without fraud or without misrepresentation. Although he recognised and acknowledged the principle that where the attorney-at-law purchases from his client he must use his best endeavours for the client as if he were acting for him in a transaction involving a third party, he nevertheless, qualified that by saying that there is no rule preventing an attorney from purchasing property from his client; and, secondly, he said it was questionable whether the relationship of attorney-at-law and client in relation to the questioned transaction can arise in a singular transaction contemporaneous with the creation of the relationship, so as to lead to the inference that the attorney had exercised undue influence upon his client. In any event, he argued, careful note must be taken of the meeting of the appellant, the respondent, and Karram on the 31st January by which date the land had already been the subject of an agreement for sale between the respondent and Karram, who the learned trial judge had found was the agent of the appellant.

Mr. Frankson

This agreement for sale / described as an executory contract for the purchase of the land. All that remained after Karram, Campbell and the appellant met, was for the contract to be formalised, which I take to mean, executed by the payment of money upon the signing of the Conveyance. Of course, the question arises to what purpose and with what intent was the executory contract, even accepting the argument that Karram was the agent for the appellant?

According to the respondent when Mr. Karram spoke to him in January 1969 he spoke about the appellant's land at Porus. "He said he was acting on behalf of Lalor who was a friend on a charge of murder. "I said I was willing to purchase the land .... I undertook to prepare the documents .... Mr. Karram mentioned that the land was Lalor's and the sale was essentially to facilitate the defence of Lalor. He introduced the defence of Lalor. He explained he was the only person Lalor had out there. He asked me to visit Lalor to take a statement to defend Lalor. I visited Lalor at General Penitentiary on 30th January, 1969 .... I spoke to Lalor about being retained by him for an agreed price of 400 guineas. I collected a statement from him." By the time the parties met again on the 31st January, 1969 in the presence of Karram, the documents had been prepared, and the purpose of the visit to the General Penitentiary was to have Mr. Lalor execute the documents. The respondent admitted that at the time the agreement was executed, Stanley Lalor was his client. In my view, therefore, it was beside the point that, according to the judgment, "But the negotiations concerning the land had already been in progress with Mr. Karram. Indeed, had those negotiations fallen through the plaintiff and the defendant may never have met." Beside the point, considering that the raison dêtre for the meeting of the parties was to create a lawyer-client relationship, which depended upon the land not merely being sold, but sold to the respondent. He was frank enough to say "If the land had not been sold, I might have determined the retainer - unless he had money otherwise or somebody paid for him."

This being the relationship, the further enquiry must be whether there is any rule of law by which the transaction could be assailed. It is perfectly true that it is not every transaction between the parties in a lawyer-client relationship which can be successfully questioned, and that much / must depend on the circumstances of each case.

So that a safe rule is to ascertain from the particular facts whether the circumstances of the case imposed upon the lawyer the duty of acting towards his client-vendor as he would if the client-vendor were a third party. Further, has the lawyer demonstrably shown that in those particular circumstances he did what is requisite to see that his opposite, the client-vendor, was properly assisted to understand the significance of the transaction in that it will be regarded as having been carried through at arm's length? It was Lord Eldon in Gibson v. Jeyes [1801] 6 Ves. Jr. 266; 31 E.R. 1044, who established the obligation on an attorney-at-law, where there is a contract between him and his client, to use his diligence to do the best for his client as if he were acting against a stranger. In addition, such an attorney-at-law is under an obligation to advise his client as if he were such a stranger, and moreso, that he advise the client of the advisability of getting independent advice in the particular transaction. Lord Eldon, L.C., at pages 270-271 expressed the strong view that -

> "An attorney buying from his client can never support it; unless he can prove, that his diligence to do the best for the vendor has been as great, as if he was only an attorney, dealing for that vendor with a stranger. That must be the rule. If it appears, that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage with due diligence he would have prevented another person from getting, a contract under such circumstances shall not stand."

The impact of the rule flows from the relationship of the parties in that "inasmuch as the parties stand in a relation which gives, or may give, the Solicitor an advantage over the client, the onus lies on the Solicitor to prove that the transaction was fair." This formulation by Sir James Wigram, V.C., in his judgment in Edwards v. Meyrick [1842] 2 Hare 60; 67 E.R. 25. In that case it was pointed out in argument that the proceeding was instituted

thirteen years after the mortgage and eleven years after the purchase, the impugned transactions between solicitor and client. By then the relation of solicitor and client had ceased to exist for seven years. As to that the Vice Chancellor remarked (at/page 29 E.R.):

> "It was argued that the rule I have referred to has no application, unless the Defendant was the Plaintiff's solicitor in hac re, and this argument is no doubt well founded. Jones v. Thomas (2 Y.& Coll. 498); Gibson v. Jeyes (6 Ves. 266, 278). It appears to me, however, that the question whether Meyrick was the solicitor in hac re is one rather of words than of substance."

The underlying principle is the rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions. Whereas, he said, as between trustee and cestui que trust, the rule goes to the extent of creating a positive incapacity, the case of solicitor and client is, however, different. He expatiated upon the obligations attendant on the lawyer-client relationship by adverting to certain factors in the case of Gibson v. Jeyes (/p. 29 E.R.):

> "In the case of Gibson v. Jeyes there was no evidence that the client was of advanced age, and of much infirmity, both in mind and body, that the consideration was inadequate—and of various other circumstances. Lord Eldon there shews that each of those circumstances gave rise to its appropriate duty on the part of the attorney. In other cases where an attorney has been employed to manage an estate he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made for his own advantage. Cane v. Lord Allen (2 Dow, 294). But, as the communication of such knowledge by the attorney will place the parties upon an equality, when it is proved that the communication was made, the difficulty of supporting the transaction is quoad hoc removed. If, on the other hand, the attorney has not had any concern with the estate respecting which the question arises the particular duties to which any given situation of confidence might give rise cannot of course attach upon him, whatever may be the other duties which the mere office of attorney may impose. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult—and without the clearest evidence that no advantage was taken

> "by the attorney of his position, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible—to support the transaction. In other cases the relation between the parties may simply produce a degree of influence and ascendancy, placing the client in circumstances of disadvantage; as where he is indebted to the attorney, and is unable to discharge the debt. The relative position of the parties in such/case must at least impose upon the attorney the duty of giving the full value for the estate, and the onus of proving that he did so. If he proves the full value to have been given the ground for any unfavourable inference is removed. The case may be traced through every possible variation until we reach the simple case where, though the relation of solicitor and client exists in one transaction, and, therefore, personal influence or ascendancy may operate in another, yet the relation not existing in hac re, the rule of equity to which I am now adverting may no longer apply."

As to the nature of the proof:

> "The nature of the proof, therefore, which the Court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendancy or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing: this seems deducible from the cases. Gibson v. Jeyes: Hatch v. Hatch (9 Ves. 292); Welles v. Middleton (1 Cox, 112; S.C. cited 18 Ves. 127); Wood v. Downes (18 Ves. 120); Bellew v. Russell (1 Ba. & Be. 96); Montesquieu v. Sandys: Cane v. Lord Allen: Hunter v. Atkins (3 Myl. & K. 113)."

This case was an attempt to set aside a mortgage and conveyance of property by a client to his solicitor, on the ground that the defendant solicitor had acted for the plaintiff who was involved in suits and actions in respect of the litigated property, the defendant being his sole solicitor and attorney. The mortgage and conveyance arose on the indebtedness of the plaintiff to the defendant for money advanced and costs in the proceedings. The lands in question were not connected with the original proceedings which created the relationship between the parties. In answer to the

allegation of fraudulent dealing, the defendant denied all pressure or improper influence, and insisted that the plaintiff was perfectly competent to act for himself in the matters in which he had been engaged. He said it was only upon the solicitation of the plaintiff that he had consented to become the purchaser of the two farms concerned. When Wigram, V.C., came to consider the position in which the parties actually stood to each other, he observed at E.R. pages 29-30:

> ".... , it does not appear that the Defendant had any peculiar or exclusive knowledge of these particular farms or the value of them, or that he had undertaken any particular duties respecting them which were opposed to his becoming a purchaser. No equity appears to me to arise, except that which might arise from the mere possibility of the relation of attorney and client, giving the attorney some influence or ascendancy over the client, and the circumstance that the Plaintiff was pressed by him to pay his bill of costs. On the evidence in the cause I am satisfied that the only ground upon which I can proceed is this bare relation between the parties. Taking the obligations of the Defendant to stand as high as the relative position of the parties enable me to place them— admitting the Defendant to be the attorney in hac re—I cannot consider that he is bound to do more than prove that he gave the full value for the estate."

Upon this point, the Vice-Chancellor did not see any evidence to make him accede to the argument that the present worth of the property was much more than what it was bought for. Indeed, at page idem 31 he was moved to the following opinion:

> "Considering, as I do, that the Court is bound to watch strictly transactions between attorney and client, I do not think that the Court is bound to allow a contingent advantage, which may or may not have been in the contemplation of the parties at the time, to afford ground for imputing fraud or improper concealment to the attorney; because he does not prove that he communicated it to his client."

When Lord Chancellor Eldon gave his judgment in Gibson v. Jeyes (supra) he did not proceed upon the mere inadequacy of the price because there was no relation whatsoever subsisting between the parties inducing one to repose confidence, and putting

the other under the obligation of all the duty that situation requires. He adopted the opinion of Lord Thurlow in earlier cases, "that you cannot affect the bargain upon mere inadequacy; unless it is so gross as to shock the conscience of any man, who heard the terms." (P. 273) So that in that case the adequacy or inadequacy of the value was not an obstacle which would prevent the Court upholding the transaction. There were, nevertheless, other factors in that case which induced the Court to find that the attorney did not exercise that reasonable diligence to advise the client taking into account the circumstances of her age, and her condition i.e., her state of health.

Holman v. Loynes [1850] 4 DeG.M.& G.270; 43 E.R. 510, was an appeal by the defendant, a solicitor, from the decree of the Vice-Chancellor Stuart, setting aside, at the suit of the heir-at-law of the vendor, two purchases by the defendant of real estate, on the ground that the relation of attorney and client subsisted at the time of the sale, and that the defendant had not duly protected the interests of the plaintiff's ancestor. Having found that, as a fact, proof of the relation of solicitor and client had been established by the plaintiff, Lord Chancellor Cranworth, found that the defendant wholly failed to show that by no industry he was bound to exert could he have got a better bargain for the plaintiff's ancestor. He identified the neglect of duty as the not endeavouring to get, as in all probability the defendant might have got, a considerably higher annuity for the ancestor. It was not a question of moral fraud but the transaction could not stand within the principles applied by the Court.

The significance of the phrase that the attorney-at-law caught by the rule is considered to have been acting in hac re is amply illustrated by Holman v. Loynes (supra) at page 515 where Turner, L.J., examined the several cases which, it was suggested, dealt with the attorney dealing with a client and was to be considered as not having

been attorney in hac re, and was, therefore, entitled to deal with the client as a stranger. He returned to the view of "Lord Eldon in (1811) E.R. 331
Montesquieu v. Sandys/18 Ves,Jr,302/which confines those cases within very narrow limits. The case he puts, is of an attorney purchasing what was not in any degree the object of his concern as attorney. The client making the proposal, himself proposing the price, no confidence asked or received in that article and both ignorant of the value." Under such circumstances, he says, the attorney is not the "attorney in hac re" as applied in that case; and therefore, not being under any duty to advise his client against the act (meaning of course the purchase by himself), he may be the purchaser.

E.R. 515
At pages 280-281/ he continued his judgment by saying:

> "Lord Abinger again, in Jones v. Thomas (a case, the circumstances of which are so remote from the present that it is unnecessary to state them), deals with the expression 'attorney in hac re,' and he treats it as referring to cases in which the transactions are entirely unconnected with the duty of an attorney. The cases, therefore, in which it has hitherto been held that an attorney may deal with a client, as a stranger might do, are not cases, in any degree, resembling the present. They are not cases in which the attorney has been concerned in any previous attempted sale, or in which any confidence as to sale has been reposed in him as attorney; or cases in which the attorney has acquired, or has had the means of acquiring, any peculiar knowledge as to the property the subject of the sale to him. The result of them, stated most favourably to the Defendant and without reference to the important observations upon the subject of influence made by Sir James Wigram in Edwards v. Meyrick, cannot be put higher than this—that an attorney may deal with a client as a stranger where the circumstances are not such as to put him under the duty of advising the client. This is the position with which Lord Eldon has summed up his observations upon the subject in Montesquieu v. Sandys; and this case may, I think, well be tried by that test."

(1739)
The case of Walmsley v. Booth,/2 Atk. 25;26 E.R. 412, is an interesting case in the similarity of its circumstances to this instant case. In that case the Lord Chancellor decided upon the general nature of the bond which was obtained from his client by the

attorney who was employed to get bail, while the client was under criminal prosecutions. Said the Lord Chancellor:

> "... even if a client has given an attorney a bond or mortgage to secure the payment of what was charged to be due to him on account of a law-suit, the Courts of Equity have relieved the client, and ordered the bill to be taxed." ..... and, "Upon the whole, I am of opinion that the court ought to pay no regard to such a bond, as it might be attended with bad consequences, by encouraging attornies, after they have got into the secrets of their clients, to extort from them unreasonable rewards to themselves."

It is the possibility of the solicitor holding the client at a disadvantage because of the relationship of lawyer and client which is important. In most of the cases, the influence or ascendancy has developed because of previous transactions in relation to the property purchased by the solicitor. The solicitor in Holman v. Loynes (supra) was engaged in the sale of his client's property by auction on which occasion a small portion only of the property was sold. He subsequently bought a portion of the unsold property, the consideration for which was in fact composed partly of a previous debt for costs and partly of such annuity as the balance of the purchase money would, according to the Government Tables, obtain for a healthy life.

When the plaintiff in Edwards v. Meyrick (supra) gave a mortgage to secure costs incurred on the two farms which were not part of the estate, then subject of the existing suits, it is clear that the solicitor had been acting on behalf of the plaintiff in other matters. In this, no equity arose except from the mere possibility of the relation of attorney and client, giving the attorney some influence or ascendancy over the client, and the circumstance that he had pressed the plaintiff to pay the bill of costs.

(1907)

In Allison v. Clayhills/97 L.T. 709; [1904-7] All E.R. Rep. 500, the defendant on various occasions, down to the date of the transaction,

had acted as solicitor for Allison. On these previous occasions, the plaintiff had made certain arrangements without the hel of the defendant, who was really employed to complete some of those transactions. The actions of the plaintiff indicated that he relied on his own judgment and not on the judgment or advice of the defendant. Parker, J., observed: "I think the amount of work done by a solicitor for a client is immaterial in a matter of this sort, and the amount of work done by the defendant for Allison, having regard to the time was extremely small" (p. 505 D). Looking a little more closely at the relationship between the parties, Parker, J., at page 505, added L.T. 714; A.E. Rep. that Clayhills -

> "..... had really no opportunity of getting into such intimate relations with Allison as would give rise to any presumption of ascendancy or personal influence. The nature of the things upon which he was employed is not without its importance. He was not employed in any of them to negotiate the terms of any bargain; he was merely employed, as far as one can gather from the evidence which has been given, to carry out isolated transactions which required the preparation of some documents which could be better prepared by a lawyer than by anybody else in order to give effect to transactions already entered into by his client. The only exception to that, I think, is the case of the borrowing of money or the case where he acted as against the tenant in order to recover rent. It is also observable, merely to show the amount of work which was done, that as a matter of fact the fees of the solicitor during all this period amounted to a very small sum--not more, I think, than £30 at the most. Under these circumstances I have come to the conclusion that the defendant was never in a position to acquire, and did not acquire, any personal influence or ascendancy over Allison. .....
>
> If, therefore, the relationship of solicitor and client existed between those two gentlemen in the particular matter which is complained of--that is to say, if the defendant can in any way be considered to have been a solicitor of Allison in hac re--it seems to me that can only be because of the mere possibility, as it was put in Edwards v. Meyrick, of the personal influence arising out of previous transactions. On the whole, I come to the conclusion, especially having regard to the evidence as to the bargaining which took place, as to the nature and character of Allison, and as to the way he evidently knew how to look after his own interests, that there was no such personal influence possible at the time of this bargain, and that, therefore, in this bargain the defendant was not acting as solicitor in hac re."

Again at page 506A:

> "I do not think in this case the leasing of the property in question can be considered to be in any way the concern of the attorney. He was not employed on any occasion to negotiate a lease or to negotiate a sale."

He concluded that -

> "..... under these circumstances, the solicitor owes no duty to his client and, therefore, not being under any duty to advise him against the act or to advise as to the act at all he may be the purchaser without having to undertake the onus which rests upon a solicitor in other cases."

Looking at the authorities and the claim in this case, it is clear that there may be cases in which undue influence is proved as a fact, but/where the client is an independent man of business and would not have looked to the lawyer for any advice on the propriety of the impugned transaction,/the lawyer cannot be liable for purchasing from his client. The relationship between lawyer and client is described as a fiduciary relationship which imposes on the lawyer the obligation of not only observing "the utmost good faith in dealing with his client, but of giving to the client such advice and such information as he would have given if he had not been personally, in his other capacity, interested in the matters arising between them." Per Warrington, L.J., in Moody v. Cox/[1917] 2 Ch. 71; [1916-17] All E.R. Rep. 548 at page 552. The presumption of confidence by the client in the solicitor corresponds with the presumption of influence over the client. Accordingly, in the words of Scrutton, L.J., in Moody v. Cox (supra) at pages 89-90 (All E.R. 557):

> "Where the relation of solicitor and client is in the very transaction attacked, it will, in my view, be almost, if not quite, impossible to avoid the obligation, and an independent solicitor should be employed by the client. It is called 'putting him at arm's length'. ..... More difficult questions arise when the employment as solicitor is in

> "other matters more or less numerous or recent, and the transaction in question is a separate transaction, in which the solicitor does not act as such. ..... The relation may then be an actual relation of solicitor and client in the transaction impugned, or such an antecedent relation as gives rise to the influence by the solicitor and confidence by the client, the effect of which has not ceased at the time of the transaction impugned. It usually arises where the relation of solicitor precedes that of vendor."
>
> In Pisani v. Attorney General for Gibraltar [1874] L.R. 5P.C. 516, the Privy Council thought that there were grounds for holding that the advice and investigation which it was contended the attorney should have undertaken were not called for in the peculiar circumstances of the sale in that case. Sir Montague E. Smith pointed out that first of all, the attorney Mr. Pisani was not the general or confidential adviser of the client from whom he purchased in consideration of an annuity. He was called in as a stranger, for the first time, to advise her on the sufficiency of the deeds upon the sales to Larios, all the conditions of which had been before settled under other advice. From the circumstances of his employment it was, the Privy Council found, that/"there was no reason to suppose that in this case, a high degree of confidence existed, or much influence had been acquired." Although the Privy Council found that Pisani acted with good faith in giving his advice to the annuitant, that alone would not be sufficient, for Pisani, having taken Bergel's bargain, (referring to negotiations with a previous prospective buyer) is bound to show that it was in fact, a fair one, and that he had not lost, for want of due diligence, better terms for his client. In this case, the judgment pointed out "Undoubtedly, if the sale for an annuity had been a new matter, it would have been his duty to suggest inquiries as to the value of Miss Porro's life, and the state and value of the property." Their Lordships, however, opined that although the case for setting aside the conveyance was not proven --

At p. 540 their Lordships observed:

> ".....,, they feel constrained to say that there is much in the transaction which cannot be approved of. They think Mr. Pisani would have better consulted his position as a barrister if he had been less precipitate in taking up the bargain, and if, instead of only suggesting, he had insisted on the intervention of another professional man."

Their Lordships went further and ordered that he bear his own costs in the suit and the appeal.

The cited cases do show that the principle to be applied to the facts of the instant case is more usually applicable to a situation where the solicitor and client have had a course of relationship between them. However, there is nothing in them which would support the argument that it should be applied only to those cases where the attorney is acting in hac re. If it is based on the criterion that the client should not be put at disadvantage vis-a-vis the attorney-at-law, I can conceive of no more apt instance than the circumstances of the present case to apply the principle.

I now continue to deal with the facts of this case within the purview of the principles above set out. At the same time adding that one way of the attorney discharging the onus which rests upon him, of his holding the validity of the transaction is for him to show that he advised the client of the necessity to obtain competent independent advice. Lord Parmoor in Demerara Bauxite Co. Ltd. v. Hubbard [1923] A.C. 673 restated the principle at page 682 in the light of whether the transaction was, in itself, a fair one, having regard to all the circumstances. "In order that these conditions may be fulfilled it is incumbent to prove that the person who holds the confidential relationship advised his client as diligently as he should have done had the transaction been one between his client and a stranger, and the transaction was advantageous to the client, as it would have been if he had been endeavouring to sell the property to a stranger. This principle is one of wide application, and must not be regarded as a technical rule of English Law."

Mr. Frankson submitted that there was clear evidence that in this case, the negotiation was effected between the respondent and an independent person who the judge found was the agent of the them prospective client. He argued that one cannot influence a party through an agent. The undue influence arises because of the inequality between the client and the lawyer. There was the absence of personal contact between the client and his attorney in which the influence flowing from the confidential relationship would arise. He further described the prevailing circumstances as unique which determined the necessity for speed. The incarceration and imminent trial of the appellant demanded the expeditious decision regarding representation. Therefore, according to counsel, it was inappropriate for Mr. Campbell to take time out to advise Mr. Lalor of the need for competent independent legal advice. Indeed, he urged, the inference to be drawn from the evidence is that Mr. Lalor had selected a person (Mr. Karram) who by qualification and experience was in a better position than any attorney-at-law to advise him on the disposition of the property, and in particular to advise him, e.g., as to the purchase price and the conditions of sale.

Two things must be said about these submissions. First, that in the peculiar circumstances of the case, the appellant was in a state of distress. This is of primary and basic consideration, though it must be looked at in the context of the incidents of the relationship. Vice Chancellor Sir John Leach in Wood v. Abrey [1818] 3 Madd. 417 pointed out that while the inadequacy of price is of no more weight in equity than in law, yet the Court of Equity in considering whether the parties were on equal terms, will take into account the lack of professional assistance, and he held that the plaintiff was entitled to relief because the purchase was made at an inadequate price from vendors, who were in distress without the intervention of any other professional

assistance from the purchaser's attorney, and because the circumstances are evidence that in that purchase advantage was taken of the distress of the vendors.

Was the presence of Mr. Karram sufficiently a discharge of the onus to show that competent / independent advice was given? It was the plaintiff's evidence that he never understood that Mr. Karram was instrumental in selling the house nor that he was any way involved in the sale of the house and land. He said this although he added that the attendance of Mr. Karram with Mr. Campbell at the General Penitentiary was in connection with the sale of the land. Recalling here that the plaintiff had said in evidence that he had made up his mind quite independently to sell the place to Mr. Campbell, he kept insisting, nevertheless, that he never authorised Mr. Karram to sell the land on his behalf. At the same time Mr. Campbell reiterated that he never at any time, while at General Penitentiary, discussed the terms and conditions of sale with the plaintiff. The fact of the matter is, that I would have thought that even if the respondent and Karram had agreed to the sale of the land, the respondent would have enquired of the plaintiff as to the material facts and for one thing would have informed the appellant of the discussions which he had had with Mr. Karram. Mr. Campbell categorically said he did not discuss the question of sale price with the appellant. He did not, it must be accepted, seek confirmation of payment terms with Lalor. But said he, "Karram was there and explained what it was all about and presented him (Lalor) with the papers; not necessary for him to do any explanation; yet I don't know if Karram verified the price of £500 with him." It seems to me that this was falling far short of what was expected of the respondent, who did not even read over the documents to Lalor before he signed them at the invitation of the respondent. It would have been helpful if there was some evidence of what in fact Mr. Karram had

said to the appellant when they were all together at the General Penitentiary. Better still, it would have been instructive if Mr. Karram had been called. The judge noted that the promise by Mr. Small to call him as a witness was not kept. But, in my view, since the onus of upholding the validity of the transaction rested upon the respondent; he could have derived much benefit had he called Mr. Karram. Without evidence of that sort, I am not able to say that he has discharged that onus. Even though the judge found that the appellant had ratified what Mr. Karram had done, I am still of the opinion that consonant with the principles which I have earlier set out, Mr. Karram's role was not of that high standard as could lead the judge to say that the respondent had not breached the confidential relationship of attorney and client. In the particular circumstances of this case, I am not satisfied that Mr. Karram could effectively be described as independent advice. An attempt was made to characterise him as well-known to the appellant as a real estate agent and valuator acting on the appellant's behalf. This assertion lost its impact when the respondent himself "was unable to say (if he) Karram introduced himself as a real estate agent, but somehow one got the impression he knew what he was doing and that the sale was to facilitate the defence of his friend." The respondent had got the impression that Karram had been trying to sell the land to secure the defence of Lalor, but he had not succeeded. I hold that just as the co-executor was not, in Demerara Bauxite Co Ltd. v. Hubbard (supra) in a position to give independent legal advice to the plaintiff so in this case, the agent was not so qualified.

Let me mention other concerns which Mr. Small articulated. These centred mainly on the form of the Agreement for sale and the terms of the Conveyance. It was common ground that the contract was not as full as it should have been. Mr. Small described it as being

untidy. He pointed out that the sum of £500 appears written in ink in the first line of the habendum whereas in the declaration of value "£500" is typed in ..... Yet there was no discussion of the price nor other terms of the agreement, especially when Mr. Campbell spoke about the uncertainty of the price when he and Mr. Karram discussed the matter. He could not say when the uncertainty came to an end. But the matter was crystallised about the 31st January, 1969.

Further, there is provision that a common law title is what is being conveyed, and upon that immediate possession is being given on payment of £300 as deposit. He pointed out that there was no provision for the costs of obtaining the common law title, and none regarding the interest payable on the outstanding balance; but this balance is to be paid when a certificate of registered title is obtained. Considering the precarious position of the appellant, there was the matter of the documents of title to the land, as well as the fact that some of the purchase money was to be paid and was paid toward the fees for defending counsel.

For his part, Mr. Frankson alluded to "the little niceties of details to be explained in the agreement." And although the consuming interest of all parties was the defence of the appellant, he argued that any possible breach of the agreed rules in such circumstances should not be considered to have the effect of avoiding the transaction. He, first of all, underscored the judge's finding that in the special circumstances of the case, the price paid was reasonable and fair. He submitted that none of the terms of agreement for sale required any explanation because they are clear and fair. He denied that there is any conveyancing practice that interest is to be paid on the balance of the purchase price where the purchaser is put in immediate possession. Yet he agreed with the observation of Carey, J.A., that if the vendor is deprived of interest it will be disadvantageous to him. Having regard to the circumstances, the purchaser let into possession was put

in a position of great advantage. The argument above was that the with-holding of the balance of £200 was off-set in large measure by the £120 owed by Lalor on account of fees as set out in the retainer, dated 30th January, 1969. Having regard to the peculiar circumstances of this case, it was not obligatory to advise the plaintiff about the registered title. His submission that the retention of £80 by the purchaser was merely to cover the costs of the conveyance, did not take into account that it was not provided who had the carriage of sale. Nor is there anything to show that the respondent had explained to Lalor the importance and significance of the colourable transaction, whereby he paid the $300 part-payment on the purchase price by his personal cheque made payable to Stanley Lalor, which (cheque) he endorsed and returned to me as part of the fees for his defence." At the time the retainer was signed, the respondent said he knew the money would be coming from the proceeds of sale. "I knew I would receive at least £300." He did not communicate with Lalor about preparation of the documents requisite to the effectuation of the conveyance. Add to all this that he did not read over the documents to Lalor before he signed. "I must have showed Lalor where to sign and he signed." Which underlines what the appellant said on this.

To argue that the conduct of the respondent was a mere technical breach and therefore the Court should not set aside the conveyance is to ignore the words of Sir Edward Sugden, L.C., in the decision in the suit of Lawless v. Mansfield & Others (1841) 4 I. Eq.R113; [1835-42] All E.R. Rep. 208/ at 212. "The court must examine the transaction with great jealousy in order that the court may be satisfied that the client had the same protection as he would have had, if he had been represented by a regular solicitor of his own acting only for the advantage of his client."

In that frame of mind I have examined the relationship between them. From that relationship in which the parties stood, I am of the view that the respondent did not discharge the onus of dispelling the undue influence which the Court presumes the respondent would exercise over the appellant. The facts which are noted on the Record were not sufficiently considered by the learned trial judge so that he could determine whether the client was fully informed of all the material facts, understood the transaction considering the dire straits in which he was then, and that the transaction itself both as to price and otherwise was a fair one. Can it be said that the appellant, given his mental condition at the time, was able to appreciate the implications of the agreement for sale and the conveyance without some careful explaining to him of all that was involved? In his then condition, undoubtedly, he was not able to see the future beyond the immediacy of obtaining legal representation for his trial. On the other hand, the agreement was more favourable to the respondent in its long term results and the unsettled terms. Otherwise, were the parties on equal ground, particularly with regard to independent advice, the conclusion would have been that the respondent was not in a position of ascendancy or personal influence detrimental to the appellant. While the fact of the price is not the over-riding factor in this context, the other facts of the relationship project the possibility of influence, albeit there were no previous transactions between the parties. I am not prepared to accept/that the defects pointed out are of form and not substance. I do not/agree with Mr. Frankson that the agreement is overwhelmingly fair and reasonable to the appellant in so far as the amount of £300 paid on deposit was more than what is usually paid to create an enforceable contract. This was to facilitate, not the appellant, but the respondent, enabling him by what I have described as a colourable device to appear at the trial as

defence counsel. Mr. Frankson's arguing that the presence of Mr. Karram indicated the tender of independent advice is not in my view tenable. Even treating Mr. Karram as an experienced land valuator and that he acted on behalf of the appellant in contacting Mr. Campbell, it is not the proper inference therefrom that he had ostensible authority to conclude the contract of sale without consulting the appellant, especially, considering that on two occasions the appellant and the respondent were in personal face to face contact. The impression is left that at no time did Mr. Campbell think it necessary and protective of himself to discuss the terms of the transaction with the appellant. To discharge the onus which rested upon him, I would have thought that it was the responsibility of the respondent to have called Mr. Karram whose evidence on the disputed point of independent advice could have been adequately assessed by the trial judge.

Accordingly on the evidence in this case, I conclude that Wright, J., regrettably failed to consider the special rules of law applicable to the facts of the case. To this extent he failed to consider the importance of the relationship of lawyer and client, and even though he rightly scored the sedulous attempts to give centre stage to the alleged misconduct of the respondent on the basis of his having been assigned by legal aid in defence of the appellant, I am of the considered view that he failed to adjudicate upon the agreement which he recognised was voidable. This being my conclusion, I would set aside the conveyance, and avoid the contract. I would grant a declaration to that effect. Concommittant with that declaration is the order that the defendant reconvey to the plaintiff the land which is the subject of the documents dated 31st January, 1969.

As to whether any other relief should be given, I recall that Mr. Small indicated to the Court that if his arguments were

accepted and the appeal allowed, since the appellant seeks equity, the reconveyance of the said land be contingent on the plaintiff paying to the defendant the sum of $840. for legal fees and with interest at such rate per annum as the Court may think just as from 31st January, 1969 to the date of the order by this Court. It must be noted that the appellant owes the respondent £120 ($240) on account of those fees. In addition, the appellant should further pay the sum of £500 to the defendant for the improvements which he effected. Mr. Frankson on the other hand submitted that the value of the improvements should be ascertained on an enquiry, and whatever this is found to be, it is to be converted to today's value. He expressed the view that had Mr. Campbell not improved the land and house, none of it would have been left.

Frankly, I have some difficulty with either approach. In the first place, it cannot be over-looked that the respondent still owes the appellant £200 ($400.) on account of the purchase price for the land. In his evidence the respondent said he was "owed money on the retainer which was a sort of undertaking the balance of fees would come from the balance of purchase price." Though he did not think he had discussed this with the appellant, he described the importance of the balance of the purchase money in those words. There was nothing to indicate when this £200 ($400) would be paid or in fact, when the balance of fees should be paid. What the conveyance dated the 31st January, 1969 stipulates is "Payment: Three Hundred on signing of conveyance and balance when a registered title is obtained." The retainer itself is an agreement to pay 400 guineas, on the case. Apparently, although the documentary evidence indicates the payment of £300 ($600), the method of which payment is explained by the oral evidence, there is still the absence of any note of how the financial arrangements could be properly effectuated. It may be

that the result was not envisioned; in the possible ultimate situation matters would have stood as arranged; may-be without any questioning. Even on the result of the original murder trial the respondent entered into possession of the land, and exercised acts of ownership, to the extent of repairing the house, and collecting rent therefor. It is worthy of comment, that the respondent, well knowing the result of the original murder trial, over the intervening years between the conviction in 1969 and the year 1980, when the appellant took possession of the land, did not make any attempt to pay the money owing to the appellant, nor seek to collect the money owed to him on the retainer. He did not register the transfer, because, as he put it, there was no hurry to register. He had been in possession for over nine years and collected rent over a part of the period. The rent paid at one time was said to be $26 per month. There is no evidence relating to the period over which this rent had been collected, nor for that matter how much in sum was collected. In fact, he was not able to say for how long this was done. He has no bills to substantiate his assertion that he repaired the house in the extent of £560. Of course there is no evidence to refute this claim, so that this could be accepted as true. Nevertheless, he has benefited from the land during the period he has been in possession.

It must be of significance that the sum of £200 ($400) which is owing on the purchase price, under normal circumstances of a land transaction would have been paid long ago, especially bearing in mind that the respondent was let into possession. Failing payment thereof, in the end, interest would have been payable thereon. On the other hand, I cannot accept that it is equity to order the appellant at this distance of time from the original murder trial and its conclusion, to pay the balance of £120 ($240) owing on the retainer. I cannot agree that the respondent is so entitled, because I am certain that, given the result of the trial, he never thought that he should ask for this

balance. I think I am right in suggesting that that is not how criminal practice was conducted at a time when a barrister-at-law (which the respondent then was) could not sue for his fees. Indeed, I make bold to say that no lawyer engaged in criminal practice, having asked 400 guineas as his fees, having received £300 ($600) on account thereof, having been successful to the extent as in this case, would ever have thought of going to the General Penitentiary to demand the balance of the fee from his erstwhile client who was then serving a sentence of 15 years imprisonment. Indubitably, there is no evidence to show that the respondent did anything about the fees owed to him over those 9 years. For him it was sufficient that he had bought the land and he was in possession.

These reflections lead me to conclude my judgment by denying any need for the parties to account to each other for any moneys owing, the one to the other.

In the result, I repeat, I would allow the appeal, set aside the judgment in the Court below; the conveyance of the land at Porus in the parish of Manchester entered into by the appellant and the respondent should be set aside, and the respondent ordered to reconvey the land to the appellant. With the entering of judgment for the appellant, he is entitled to the costs of this appeal as well as the costs of the trial in the Court below.