31, 1934

In the Privy Council.

No. 84 of 1933

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

BETWEEN:

JEAN MACKENZIE - - - - - - - - *(Plaintiff) Appellant;*

AND

THE ROYAL BANK OF CANADA - - - *(Defendant) Respondent.*

CASE FOR THE APPELLANT

1. This is an appeal in forma pauperis by special leave from the judgment of the Appellate Division of the Supreme Court of Ontario given on p. 156
the 23rd June 1932. By the said judgment the Court reversed the judgment p. 152
of Mr. Justice McEvoy given on the 21st September 1931 and dismissed the Appellant's action and cross-appeal. Mr. Justice McEvoy had declared that the Respondent had no lien or claim upon the Appellant's shares in Borden Company Inc. and had ordered the Respondent to re-transfer and deliver the said shares to the Appellant. The Appellant's cross-appeal prayed for an p. 155
amendment of the Judgment by a declaration that the Appellant was entitled
40 to the market value of the said shares at the date when return demanded and demand refused and that the Appellant was entitled to accrued dividends and interest on the same.

2. The Statement of Claim was in substance for declarations that a letter of hypothecation of the said shares and a letter of guarantee were signed p. 4, l. 30
without independent advice and induced by misrepresentation and were not

binding on the Appellant and that the Appellant was entitled to the return of the said shares.

3. The Appellant's case at the trial was that the Appellant's husband and the Respondent by their manager and through the Appellant's husband exercised undue influence upon the Appellant and thereby caused her against her will to hypothecate the said shares and also to enter into continuing guarantees for the past present and future indebtedness, first of MacKenzie Limited and then of MacKenzie Manufacturing Company Limited in an amount not exceeding $200,000. with interest thereon at 6% per annum, and alternatively that assuming that the Appellant's shares were legally hypothecated under a letter of hypothecation and a letter of guarantee dated respectively the 31st December 1920, the liability was discharged on or about the 14th November 1921 and that the letters of hypothecation and guarantee dated respectively the 21st November 1921 were not binding. The defence was a denial of the alleged undue influence and also that the Appellant had had the benefit of competent independent legal advice and that the hypothecation and guarantee subsisted.

4. The Appellant's shares consisted of one hundred (100) common shares and eighty-seven (87)preferred shares of Ottawa Dairy Company Limited which, by amalgamation while in the possession of the Respondent, became shares in Borden Company Incorporated.

5. The Appellant is the wife of John Angus MacKenzie whom she married in 1901 when she was twenty years of age. In the year 1913 the Appellant's husband organized MacKenzie Limited to carry on the business of the manufacture and sale of lumbermen's and railway contractors' supplies. The banking business of MacKenzie Limited and of the Appellant's husband and of the Appellant was done with the Respondent Bank. At all material times the relations of the Appellant, her husband, and Mr. Charles A. Gray, the Manager of the Ottawa Branch of the Respondent Bank, were on a friendly, social basis, and the Appellant trusted Mr. Gray and relied upon him as to what might be best for her to do.

p. 25, l. 4
p. 121, l. 18
p. 49, l. 42
p. 91, l. 20

6. MacKenzie Limited carried on a successful business from the outbreak of the War in 1914. The execution of Government contracts had been the chief backbone of the business for five years and the Company accordingly enjoyed great prosperity until such contracts ceased in or before 1920.

p. 92, l. 18

7. In the later months of the year 1920, the business of MacKenzie Limited rapidly shrank. Its indebtedness grew and additional collateral security was required by the Respondent; the Respondent through its Manager, Mr. Gray, who knew that the Appellant had the said shares told the Appellant's husband to obtain the Appellant's securities as part of the additional collateral security required; the Respondent's Manager at that time also interviewed the Appellant for the purpose of obtaining additional security for

p. 118, l. 6
p. 118, l. 35
p. 127, l. 17
p. 84, l. 12
p. 84, l. 24

further advances which were then needed to carry on the business. At that time she had no independent advice in regard to hypothecating the said securities for the business of MacKenzie Limited and the Respondent's Manager then told her in his own words that the business of MacKenzie Limited was "not improving but a very excellent prospect", although as he stated in his evidence the business had during the year 1920 undergone a tremendous shrinkage and that the downhill grade of this business which it had been travelling at for six or eight months—the last half of 1920—continued right on downhill. The business in fact went into bankruptcy in June 1921. p. 28, l. 8 p. 84, l. 20 p. 84, l. 20 p. 93, l. 20 et seq.

8. Through the influence and the importunities of the Appellant's husband, in and prior to December 1920, the Appellant alleged that while ill in bed, after many refusals to her husband extending over some weeks and without independent advice and without any consideration therefor, she on December 31st 1920 signed an hypothecation of her shares and also a continuing guarantee; that at some later hour on the same day, namely the 31st of December 1920, a lawyer by the name of Mr. H. P. Hill was brought to the Appellant's bedside by her husband and the said lawyer signed a letter having no reference to the hypothecation but stating that he had given the Appellant independent advice with reference to a letter of guarantee, and the Appellant without receiving any independent advice, but under her husband's influence, signed a note on the said letter acknowledging the contents of the said letter as true. The said document so signed by Mr. Hill and the Appellant was prepared by or for the Respondent, and neither Mr. Hill nor any of the other lawyers, hereinafter to be referred to, were called at the trial to speak about that document or other documents, to be hereinafter mentioned, or to state whether or not they actually gave any advice to the Appellant concerning the transaction. p. 66, l. 30 pp. 26-28 p. 27, l. 30 p. 28, l. 20 p. 123, l. 4 p. 124, l. 10 p. 200 p. 30, l. 14 p. 82, l. 13 p. 61, l. 20 p. 143, l. 7

9. The Appellant in her evidence denied receiving any independent advice and the learned Judge of first instance accepted her evidence as convincing and as the evidence of an honest woman, and it, in his opinion, rendered Mr. Hill, the lawyer's certificate and her acknowledgment useless. p. 150, l. 16

10. Despite the fact that the Appellant's securities were given to the Respondent as collateral security on the 31st of December 1920, the Respondent failed to render any additional financial assistance to the said MacKenzie Limited, although, according to Mr. Gray, additional money was needed to carry on the business, and that it was for that purpose the additional security was required. p. 109, l. 34 p. 117, l. 39 p. 84, l. 24

11. On the 14th June 1921, MacKenzie Limited executed an authorized assignment in bankruptcy.

12. On the 22nd of June 1921, the Respondent filed an Affidavit in the Bankruptcy setting forth the indebtedness of MacKenzie Limited as being $168,400.00 and valuing the securities it held at $265,500 without specifying and entirely exclusive of any securities it held belonging to the Appellant. p. 175

p. 176

13. On the 13th of September 1921, the Respondent filed another Affidavit in the Bankruptcy setting forth the indebtedness of MacKenzie Limited as being $121,372.94 and valued the securities it held at $125,000.00, without mentioning and exclusive of any securities it held belonging to the Appellant. This last Affidavit sets a lower valuation on the securities than the former Affidavit referred to in paragraph 12. The former Affidavit included a mortgaged property which (although none of the said securities had been sold or released by the Respondent since making the said former Affidavit) was omitted from the second Affidavit. Mr. Gray's explanations of the reduced valuations were diverse, one being a fall in value between the making of the two Affidavits, another being the omission of one of the said properties, a third being a contemplated foreclosure, a fourth being that the mortgage was made within the Statutory period of sixty days of the authorized assignment and a fifth being that the valuation was put at a figure corresponding with the indebtedness.

p. 98, l. 20

p. 98, l. 38

p. 114, l. 31

14. On the same day, namely the 13th of September 1921, the Appellant, according to her evidence, without having been advised as to her rights or any of them, was induced by her husband to go to the office of her husband's lawyer, Mr. T. A. Beament, who was not her lawyer, and there, without any advice, without its object being explained to her, without consideration, and under her husband's influence, to sign a letter already prepared addressed to the Respondent in the terms following:

p. 34, l. 32

p. 173

"Dear Sirs,

"We understand that you are filing with the Authorized Assignee "of MacKenzie Limited an Affidavit valuing certain securities held by "you at the sum of $125,000.00 and that the Authorized Assignee will "be at liberty to accept your valuation in which case as and between "the Authorized Assignee and theBank, the Bank's claim would be "considered paid in full.

"It is our desire that you should file the Affidavit in question and "we hereby agree that your so doing shall not in any way release us "from our obligation under guarantees to the Bank nor shall our per-"sonal securities be in any way affected until the amount due to the "Bank by MacKenzie Limited has been actually paid.

Yours truly,

JOHN A. MACKENZIE,
JEAN MACKENZIE."

Years later the Appellant discovered for the first time that this document purported to impose a legal liability upon her and upon her securities, and to express her consent to the Respondent's actions and intentions, to be referred to hereafter, of which she was then ignorant.

15. On the 14th of November 1921, by an Order of the Court in the matter of the Authorized Assignment of MacKenzie Limited it was declared that the Trustee did elect not to exercise his power to redeem any of the said scurities, and that the Trustee and Inspectors had by two several Indentures of Release released all the realty and personalty set out in the Declaration of Value filed as aforesaid and confirmed and ratified the release. p. 174

16. The Appellant at the trial contended and still contends that her securities were never legally hypothecated to the Respondent and, that even assuming that they were ever legally hypothecated to the Respondent, that the effect of the said Order of the 14th of November 1921, was to satisfy the Respondent's claim against MacKenzie Limited and to release any claim under the said hypothecation and letter of guarantee whereupon the Appellant became entitled to a return of her securities.

17. The Appellant at no time received information or advice as to the said order and was given no opportunity of exercising her right to recover possession of her said securities which the Appellant contends the Respondent was then no longer entitled to hold.

18. One week after the said Order was made, namely on the 21st of November 1921, the Appellant's husband pressed the Appellant to hypothecate her securities to the Respondent in connection with a new Company then proposed to be formed. The Appellant refused to do so, whereupon the Appellant's husband again pressed the Appellant to hypothecate her securities on the ground that she "hadn't a chance in the world of recovering them unless she put them up for this new Company" and that she "simply had to sign these things as they were gone anyway." p. 37, l. 23 p. 38 p. 19, l. 3

19. On the same day, namely the 21st of November 1921, the Appellant went with her husband to the office of Mr. Gray, the Respondent's Manager, where papers for the purpose of securing the indebtedness of the said proposed new Company, called the MacKenzie Manufacturing Company Limited were all ready on Mr. Gray's desk waiting to be signed by the Appellant. The Appellant again objected to sign any documents, whereupon Mr. Gray said these securities "were never free; they were always the Bank's property from the time of the failure;" and the Appellant's husband said that she stood a chance of recovering them if she signed for the new Company, whereupon the Appellant signed the said guarantee and hypothecation as to the said proposed new Company on the said representations and under the influence of her husband and Mr. Gray and without any independent advice. p. 38, l. 20 p. 90, l. 31

20. On the same day, namely the 21st of November 1921, after the Appellant had signed the said documents referred to in the preceding paragraph, Mr. Gray, the Respondent's Manager handed the Appellant a form of certificate to be signed by a lawyer and she took it to the office of Messrs. p. 39, l. 3 p. 68, l 25

p. 101, l. 17 Fripp & Burritt where she saw Mr. Burritt and told him that she had already signed the hypothecation and guarantee. Mr. Burritt then, according to the
p. 68, l. 16 Appellant's evidence, told her that he was not advising her, that he knew
p. 40, l. 9 nothing about the conditions of the new Company, what its status was or anything else. The said Mr. Burritt thereupon signed the form of certificate as relating to a guarantee securing the indebtedness of the Appellant's hus-
p. 85, l. 28 band, John Angus MacKenzie. The said guarantee given by the Appellant to the Respondent being in fact one relating not to any indebtedness of her husband the said John Angus MacKenzie but to the indebtedness of MacKenzie Manufacturing Company Limited. The said certificate is set out on page 182 of the record and the copy guarantee at page 180. At the end of the Certificate the following statement was affixed which the Appellant signed:

> "I hereby admit and declare that the above letter is true and "correct, and that Mr. E. F. Burritt the writer of the above letter, in "advising me of the legal effect of the above mentioned transaction "was consulted by me as my Solicitor separately and distinctly from "any legal advice which was given to my husband in connection with "the matter and in my interests only."

21. On or about the 25th of November 1921, the Appellant's husband procured the incorporation of the new Company under the name of MacKenzie Manufacturing Company Limited for the purpose of carrying on the business formerly carried on by MacKenzie Limited.

22. By Agreement in writing, dated the 25th of November 1921, and
p. 184 made between the Respondent of the First Part and the Appellant's husband of the Second Part, the Appellant's husband agreed to purchase from the Respondent for the sum of $117,150.12 certain of the assets acquired from the Trustees and Inspectors aforesaid (supra para. 15). Payment to be made within 30 days with interest at 7% until actual payment. Clause 2 provided that upon a transfer being made by the Purchaser—John A. MacKenzie—to the MacKenzie Manufacturing Company Limited of all the goods, chattels, book debts mentioned and described in the schedules A & B the Vendor (the Respondent) agreed to give to MacKenzie Manufacturing Company Limited, a line of credit not exceeding $125,000.00 and to advance to the said Company upon the therein following securities in all the sum of $125,000.00 repayable
p. 185 on demand and to pay the said sum to the said Company upon the proper execution of the securities thereinafter mentioned in which were included by
p. 187, l. 10 Schedule D amongst other securities the shares of the Appellant. Clause 3 provided that in the event of the purchase being carried out and the said assets transferred to MacKenzie Manufacturing Company Limited in pursuance of the agreement, the Respondent agreed to cause the owner for the time being of the property described in Schedule C—the Queen Street property where MacKenzie Limited had carried on business—to enter into an agreement with MacKenzie Manufacturing Company Limited in the form set forth in Schedule E thereto. The latter agreement provided in substance

that in consideration of the purchaser John A. MacKenzie entering into the agreement of the 25th November 1921—the agreement to purchase—and of one dollar and as and when payment in full should be made to the Respondent of all moneys payable to it in respect of the indebtedness of MacKenzie Limited and of all moneys which might be or become payable to the Respondent by MacKenzie Manufacturing Company Limited under the terms of the said agreement of the 25th November 1921 the Vendors—the Canada Realty Company Limited—would assign and convey to the purchaser or his nominee the Queen Street property subject to a mortgage in favour of one E. A. Pearson and to all other incumbrances and that until default should be made in the performance of the said agreement—(that is the agreement of the 25th November between the Respondent and J. A. MacKenzie) the purchaser John A. MacKenzie should be at liberty to occupy and enjoy the said lands and premises subject to the payment of the mortgage interest to the said Pearson and all taxes and other charges which might accrue.

23. On the same day, namely the 25th of November 1921, the Appellant went with her husband to Mr. Gray's office and the Appellant was then and there induced, without advice and without consideration, to sign a document (page 183 record) addressed to the Respondent referring to the said agreement of the 25th of November 1921, which she had then never seen (page 184 of the record). According to this said document (page 183) the Appellant and her husband are stated to have requested the Respondent to enter into the said agreement of November 25th 1921, and by it the Appellant binds herself to leave her securities hypothecated with the Respondent until the moneys advanced by the Respondent under the Agreement of November 25th 1921, are fully paid.

p. 42, l. 22
p. 42, ll. 2-42

24. It was not until shortly before the commencement on the 9th of February 1928 of the present action that the Appellant became aware of the facts that

p. 130, l. 32, supra

(a) the assets of MacKenzie Limited were in fact released to the Respondent by the Official Assignee on the 14th November 1921.

(b) the said release satisfied the Respondent's claim against the principal debtor MacKenzie Limited and that in consequence the Appellant's securities were thereby freed.

25. On the 8th of April 1923, the Appellant at the request of the Respondent executed a renewal of the guarantee and the same was witnessed by a lawyer named Walter Gilhooly, who, as your Appellant deposed in evidence, said: "You have already signed. This is a renewal. You have already signed everything over to the Bank. This is not advice." Nevertheless, the said Walter Gilhooly signed a certificate in the common form used by the Respondent and the Appellant signed an acknowledgment, both of which appear on page 194 of the record.

p. 45, l. 12
p. 86, l. 40

26. In or about the month of October 1924 the Respondent requested that the Appellant should renew her guarantee but the Appellant being desirous of not so doing consulted her lawyer, Mr. Code, whereupon Mr. Code
p. 195 wrote to the Respondent informing them that the Appellant refused to continue the guarantee after the 1st October 1925.

27. Immediately upon the receipt of the letter referred to in the last
p. 47 paragraph, Mr. Gray, the Respondent's Manager, had an interview with the
p. 47, l. 40 Appellant, at which he said: "Of course, you know the Bank are not going to wait a year to start operations to close out this company, MacKenzie Manu-
p. 87, l. 3 to p. 89 facturing Company Limited, if this letter goes forward." And also "I feel it would be a grave mistake to let this letter go forward at the present time" and Mr. Gray persuaded the Appellant to withdraw the letter and the letter was
p. 196 withdrawn by Mr. Code on the 17th of December 1924.

p. 94, l. 8
p. 85, l. 28 28. The Appellant submits in relation to the Respondent's contention that on each occasion the Appellant had the benefit of competent legal advice, that the evidence establishes that the certificates given by the lawyers were
p. 86, l. 40 given without any knowledge of the relevant circumstances relating to the transactions.

29. In or about the month of April 1926, the Appellant was again re-
p. 4, l. 24 quested to renew her guarantee for the indebtedness of MacKenzie Manufacturing Company Limited with the Respondent, but she refused and has refused ever since.

p. 103, l. 16 30. MacKenzie Manufacturing Company Limited went into liquidation on the 20th of October 1926.

31. The Appellant will submit that she is entitled to judgment for the value of the shares the subject matter of this action at a time when they should have been in her possession. By the Notice of Cross Appeal in the Appellate Division the Appellant sought a declaration that she was entitled to the market value of the securities in question at the date when she demanded and the Respondent refused to deliver same to her and for accrued dividends thereon. Evidence as to the value of the said shares was given at the trial.

32. On the 21st of September 1931, the learned Trial Judge delivered Judgment in favour of the Appellant and declared that the Respondent had no lien or claim upon the Appellant's shares and ordered the Respondent to deliver the same to the Appellant.

33. In his reasons for judgment Mr. Justice McEvoy stated, inter alia—
p. 147, l. 9 "The substance of the Plaintiff's complaint is: that her securities have been gotten away from her; and gotten away from her in such a way that she did not in reality understand and that she did not appreciate

what was being done, nor in what position she was being placed; that those who got them away from her stood in a relationship towards her that in law cast upon them a duty to see to it, before they could take away her securities and be entitled in law to keep them, that she really did understand what was involved in the various transactions whereby her securities were gotten away from her, that she was in law one of that class of persons who is "protected" unless it is made to appear that she did understand the true nature and effect of what was being done whereby the alienation of her securities was effected and is sought to be retained.

That she was one of the "protected class" under the authorities was not very strenuously denied at the trial and argument. The whole body of evidence and circumstances developed upon the trial would seem to indicate strongly that she was one of the class. Particularly, many of the documents filed show almost irresistibly that the Defendant itself considered her one of the protected class and I hold that she was one of the protected class.

In that case the Court must enquire into the question, as to what was the state of knowledge and understanding of the Plaintiff from time to time concerning the various transactions involved. The Defence in the case at bar is that the Plaintiff was adequately and sufficiently informed and advised. Obviously the manner in which one approaches the task of coming to a conclusion upon the evidence adduced at the trial as to what are the facts in this case is of the gravest importance. I have read all the authorities cited by counsel and some others."

34. The learned Judge then referred to several authorities, and in particular to (1) Bank of Montreal v. Stuart (1911) A.C. p. 137. "Their Lordships accept the law as laid down by Parker V.C. in Nedby v. Nedby 1 DeG & S. p. 377 to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it." (2) Inche Noriah v. Shaik Allie Bin Omar (1929) A.C. p. 127. p. 148, l. 44 p. 149, l. 10

35. The learned Judge then proceeded—

"The Plaintiff in the case at bar is met with an array of documentary evidence as I have indicated which, at first blush at any rate, is almost overwhelming in its force and weight. p. 150, l. 5

The Plaintiff is a woman of above average intelligence but on account of her position as she was placed she was a person entitled under the authorities and upon the evidence to what has been called "the protection". The Defendant Bank in its defence says she had that protection as to the signing of Exhibit 1 on December 31st 1920, (the first guarantee para. 8 supra) in paragraph 2 of the defence and they point to Exhibit 19, the certificate of Mr. Hill and her own letter of that date, p. 155

appended thereto; and they point to every other document indicating independent advice. She swears she had no independent advice. I was favourably impressed with the Plaintiff as a witness. Her evidence to me was convincing and I accept her evidence as being the evidence of an honest woman. No one has sworn that he had given her independent advice or any advice at all. She admits she had advice of a kind. But the kind of advice the law says she must have to work a defence for the Bank in this case she utterly denies having received. There is no evidence that any advice she received was given with a knowledge of all the relevant circumstances and is such as a competent and honest adviser would give if acting solely in the interests of the Plaintiff and having in mind all the relevant circumstances. Assuming that the Plaintiff's shares were once properly hypothecated for the support of the MacKenzie Company Limited account, there was a time when that hypothecation was exhausted. There is no evidence to satify the Court that any adviser with a full knowledge of all the circumstances ever advised the plaintiff of the results of further hypothecating her shares upon the basis that the shares were then freed from any claim of the bank and that she was again risking her property upon the belief that the husband's business was in a condition that afforded any sane or sound ground for expecting anything else than that the husband was bound to lose all, indeed had lost all and that anything she could do meant anything more than throwing her property into a vortex."

36. The learned Judge then proceeded—

p. 150, l. 37 "This case is of very great imporance. If those whom the Bank say advised the Plaintiff did advise her with a full and adequate knowledge of all the circumstances necessary to know in order to advise the Plaintiff effectively, they ought to have been called to swear to that. Most of them were easily available. To file as an exhibit a letter from a solicitor or solicitors stating that he or they advised the Plaintiff, and using therein the language used in the exhibits filed in this case, even when a letter is obtained from the Plaintiff saying that the solicitor's letter is true, is not enough to establish that the transaction was had after the nature and effect of the transaction had been fully explained to the Plaintiff by some independent and qualified person so completely as to satisfy the Court that the Plaintiff was acting independently of any influence from the defendant and her husband with the full appreciation of what she was doing. Every case of this kind is a case by itself to be dealt with upon its own facts and circumstances."

37. The learned Judge then proceeded:—

p. 151, l. 4. "In this case I find as a fact upon the evidence that the relationship between the Plaintiff and her husband and the Bank have been such as to raise a presumption and that they do raise a presumption that the hus-

band and the bank, through her husband, influenced the Plaintiff to alienate her shares—practically all she had left, and I find as a fact upon the evidence that there is no evidence fit to establish that the Plaintiff in alienating her shares did so with a proper understanding of the effect of her acts or of what her rights were either by the independent advice of a lawyer or by any other advice or knowledge at her command. Had she understood her rights one cannot conceive of her ever shouldering the liabilities of the MacKenzie Manufacturing Company Limited. But be that as it may, she never did understand her rights nor the effect of the transaction by which it is sought to establish that her shares became liable for the debts of the new company."

38. The Respondent appealed to the Appellate Division of the Supreme Court of Ontario on the 25th day of September 1931. The grounds of appeal are at p. 153 of the record. In substance the grounds of appeal stated that the learned trial Judge erred in law and also in fact as to his findings on the evidence. The appeal was heard by Mulock C.J.O., Latchford C.J., Magee, Orde and Fisher J.J.A. Fisher J.A. on the 23rd June 1932 gave the reasons for judgment allowing the appeal and the other judges concurred therein.

Fisher J.A. after reviewing the evidence stated—

"My conclusions are, and I find: p. 164, l. 40

(a) That the Plaintiff understood the transaction and in support of that finding I refer to Bischoff's Trustee v. Frank (1903), 89 L.T. 188 and on appeal, cited in Talbot v. Von Boris (1911) 1 K.B. 863.

(b) That the onus is on the Plaintiff to prove knowledge of duress and even assuming that there was duress—and I find there was not—that is no defence unless there is proof by the Plaintiff that the Defendants had knowledge of the duress and this I find the Plaintiff did not do. See Talbot v. Von Boris (1911) 1 K.B. at 864; Bank of Montreal v. Stuart (1911) A.C. 120 at 137, approving Nedby v. Nedby (1852) 5 DeG & S. 377; Bradley v. Imperial Bank (1926), 58 O.L.R. 651.

(c) That the Plaintiff did receive independent advice from Mr. Burritt, but even assuming that she was not fully advised, she was given that opportunity by the bank and when she brought back the letter signed by Mr. Burritt as against the Plaintiff that letter was

(1) notice to the bank that she had obtained advice;

(2) that there was no duress or undue influence, and

(3) that she understood the transaction and the bank, having acted on that letter and altered its position, the Plaintiff is

estopped, and I refer to the very recent case of Greenwood v. Martins Bank (1932) 1 K.B. 371.

(d) It having been proved that the Plaintiff had extensive knowledge of previous like transactions in hypothecations and receiving independent advice thereon and particularly of the transactions attacked, and in view of Plaintiff's counsel's admission that the Plaintiff understood the nature and effect of hypothecation, she was when this transaction was entered into, out of the protection class."

39. It is respectfully submitted that none of the findings against the Appellant made by the Appellate Division are warranted by the evidence and that there was ample evidence of undue influence and of the Respondent's knowledge thereof and that the Judgment of the Appellate Division is erroneous.

40. The Appellant humbly submits that the said Judgment of the Appellate Division of the Supreme Court of Ontario is wrong and should be reversed and that the Judgment of the learned Trial Judge, McEvoy J., should be restored with the variations submitted in paragraph 31 (supra) for the following among other

R E A S O N S

1. Because the evidence was amply sufficient to raise the presumption of undue influence by both the husband and the Respondent's Manager over the Appellant and to render it incumbent upon the Respondent to prove that the hypothecations, guarantees and other documents signed by the Appellant in relation thereto were the result of her spontaneous acts in circumstances which enabled the Appellant to exercise an independent and free will and the Respondent failed so to prove.

2. Because the evidence establishes that both the husband and the Respondent's Manager exercised undue influence or duress.

3. Because the Respondent through its Manager was aware of the duress and undue influence exercised upon the Appellant.

4. Because the so-called Certificates of independent advice were given without the necessary knowledge of material facts and circumstances.

5. Because material relevant facts within the knowledge of the husband and the Respondent's Manager were not disclosed to the Appellant.

6. Because of the misrepresentations of the Appellant's husband and the Respondent's Manager in obtaining the execution of the hypothecation

and guarantee of 21st November 1921 that the Appellant's securities were already under pledge to the Respondent for the debts of MacKenzie Limited.

7. Because in the circumstances the letter of the 25th November 1921 was not binding on the Appellant.

8. Because the Appellant was discharged from all liability to the Respondent on the 14th November 1921.

9. Because on the facts of the case and the law applicable thereto the Judgment of Mr. Justice McEvoy was right and that of the Judges of the Appellate Division was wrong.

ARTHUR G. SLAGHT,
HECTOR HUGHES.
ARTHUR E. CLUFFE.
HORACE DOUGLAS.

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