CLUTE, J. DECEMBER 11TH, 1909.

TRUSTS AND GUARANTEE CO. v. COOK.

Deed—Conveyance of Land—Gift—Action by Administrators of Donor to Set aside—Lack of Independent Advice—Failure of Evidence to Establish Execution by Marksman—Absence of Fraud—Costs.

Action by the administrators with the will annexed of the estate of John Malloy to set aside a deed of conveyance of 50 acres of land from John Malloy to the defendant Andrew Cook, as fraudulent and void, the principal grounds being that the deed was prepared at the instance of the defendant and executed by Malloy without independent advice and without full and proper explanation; that it was not in fact his act and deed; and was procured by undue influence and fraud.

The deed was dated the 28th January, 1909, and was registered on the 16th February, 1909. John Malloy was an old man, 84 at least; neither he nor the defendant could read or write. Malloy made a will on the 5th May, 1909, and died on the 17th May, 1909. The original instructions given by the defendant to a conveyancer were to prepare a will in his (defendant's) favour for Malloy to sign, but the conveyancer suggested a deed, and prepared the deed in question.

F. Stone and R. S. Brackin, for the plaintiffs.

O. L. Lewis, K.C., for the defendant.

CLUTE, J. (after stating the facts):—The testator was of sound mind and memory at the time he is said to have made the deed and up to the time that the will was executed, although weak in body and his hearing somewhat affected from age.

I find that there was no evidence of direct undue influence on the part of the defendant, i.e., beyong what may be inferred. . . .

I am in grave doubt whether Malloy ever instructed the defendant to have the will prepared as he alleges, or whether the change from the will to the deed was ever communicated to Malloy or not, or whether the deed was ever read over or explained to him or not.

I am of opinion that the onus was clearly upon the defendant to satisfy the Court of the fairness of the transaction and that Malloy fully understood what he was doing. . . . In such a case I do not think it is sufficient, where the validity of the deed itself is in question, to produce a registered copy and supplement that by alleged conversations from which the Court is asked to