

MURRAY V. MCKENZIE—SUTHERLAND, J.—NOV. 26.

Trust—Confidential Relationship—Gift of Jewellery—Release—Action to Set aside.—Action for an account, the return of certain jewellery, to set aside a transfer of certain bonds, and to set aside a release executed by the plaintiff and an order of a Surrogate Court Judge made upon the passing of the defendant's accounts as executrix of the will of Barbara Murray, deceased. The plaintiff was the adopted son of the testatrix, who died on the 8th June, 1904; and the defendant was a niece of the testatrix. The estate consisted of personal property only, worth about \$8,000. Under clauses 4 and 5 of the will, portions of the jewellery of the testatrix were bequeathed to the defendant and her children; under clauses 6, 7, 8, and 9, other portions to other legatees; and under clause 10, other portions to the plaintiff. Under clause 11, all the estate and effects not disposed of under the previous clauses were to be divided between the plaintiff and defendant, share and share alike. When the testatrix died the plaintiff was nineteen years old, and the defendant about fifty. The plaintiff and the testatrix had been living at the defendant's house, and the plaintiff continued to do so for about two years after the death. The plaintiff before he was of age gave the defendant the jewellery bequeathed to him, and released to her his interest in certain bonds. A few days after the plaintiff came of age, the defendant's accounts were passed by a Surrogate Court Judge, and an order allowing them was made, and the plaintiff executed in favour of the defendant, as executrix, a release of all his claims against the estate. At the trial the defendant offered to give up the jewellery, no matter what the result of the action. The plaintiff alleged that the defendant was in a position of a trustee and was his confidential adviser. SUTHERLAND, J., said that, while the principles that a trustee cannot bargain with the cestui que trust for his own benefit, and that trustees are not to profit by the trust, were well understood, he did not think that, in the circumstances of this case, he could strain them so far as to make them apply to the purchase by the defendant of the plaintiff's share in the bonds, so as to make the latter accountable. There could be no doubt that the bonds were considered by both parties and were in fact of small value; and the defendant, in the purchase of the plaintiff's share, acted in perfect good faith. The Court will not undo a trifling benefit conferred by one person on another standing in a confidential relation to him unless there be mala fides: