Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of the Perpetual Executors and Trustees Association of Australia, Limited v. *Swan and Others, from the Supreme Court of Victoria; delivered 3rd August* 1898.

Present:

LORD MACNAGHTEN.
LORD MORRIS.
LORD JAMES OF HEREFORD.
SIR HENRY STRONG.

[*Delivered by Lord Macnaghten.*]

IN their Lordships' opinion this is a very plain case and a very bold Appeal.

The Appellants are a "trustee company;" that is to say, a company incorporated by statute and authorised by its Special Act to undertake the duties of executors, administrators, and trustees for pecuniary reward. The powers and obligations of trustee companies depend in each case on the Special Act, and on certain provisions of the Trustee Act, 1890.

The sole question for adjudication on this Appeal is whether, according to the law in force in the Colony of Victoria, the placing of trust moneys on deposit at interest with banks fulfilling certain conditions is or is not an authorised investment in the case of trustee companies. At the time when the events occurred which gave rise to this litigation investments on real or Government securities were the only authorised investments for trust moneys in the hands of ordinary trustees.

In December 1890 the Appellants were employed to administer the estate of one George

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Swan, who had died intestate in the previous October, leaving a widow and six children, some of whom were infants.

The personal estate to be got in was under 5,000*l*. It consisted of a policy of insurance, two sums due on promissory notes, which matured on the 3rd of December 1890 and the 3rd of March 1891, and moneys partly on deposit and partly on account current with the intestate's bankers, the English, Scottish, and Australian Chartered Bank. The debts due by the deceased were nine in all, and came to a trifle over 100*l*. Within four months from the grant of administration the Appellants had completed their labours, all but the distribution of the net assets among the persons entitled, and on the 14th of April 1891 they credited themselves with a commission of over 200*l*. by way of remuneration for their services.

Instead of paying the widow and the adult next of kin, and paying into Court or setting apart and investing the shares of the infants, as it was their duty to do, the Appellants kept in their own hands, undivided and uninvested, the clear balance of the estate. The widow, who does not seem to have been fully aware of her rights, begged the Appellants to invest, at their earliest convenience and to the best advantage, the moneys they had in hand, and to get them "securely placed." She wrote to that effect on the 16th of June, the 6th of July, the 13th of July, and the 3rd of August, 1891. She and her children, she said, had no other source of income. The letter of the 3rd of August produced a reply. The manager wrote that he was desired to state that the Directors were "exceedingly anxious" to get the money in her husband's estate "invested in suitable securities as early as possible," but he added, "securities of the character acceptable to "the Directors are very difficult to obtain at "present." From that letter it may perhaps be

inferred either that the Directors of the Appellant Company, two of whom were also on the board of the Melbourne Bank, considered investments on deposit receipts unsuitable, or else that they had not then discovered the extent of the powers of trustee companies for which they are now contending.

In his evidence at the trial the manager says, "On the 8th of September 1891 Mrs. Swan "told me that as we could not find securities "on mortgage, she wished the money placed "on deposit in the English, Scottish, and "Australian Chartered Bank." On the following day the manager wrote to Mrs. Swan to say that the board approved of carrying out her wish that the money "should be placed on deposit in a bank in lieu of investing it on mortgage," but that they thought it preferable to divide the interest between two banks, and they therefore proposed to place 2,100*l.* in the English, Scottish, and Australian Chartered Bank, and 2,000*l.* in the City of Melbourne Bank, at five per cent. for twelve months.

In accordance with the intimation contained in that letter, the Appellants placed a part of the moneys belonging to the Intestate's estate on deposit with each of the two banks. The deposits were renewed for further periods at different rates of interest. Ultimately both banks failed. The Chartered Bank was reconstructed. The Melbourne Bank was in course of liquidation at the time of the trial.

In the present action, in which the children of the Intestate alone were Plaintiffs, the Appellants were called upon to make good the loss occasioned by the failure of the two banks. At their instance the widow was added as Defendant, but she did not enter an appearance, nor was she apparently served with any notice raising an issue between her Co-defendants and herself.

Besides urging that if they had done anything amiss they ought to be indemnified by the widow who had so led them astray, the Appellants contended that their action was justified by section 384 of the Companies Act, 1890. They insisted that under the provisions of that section the deposits complained of were authorised investments. Mr. Justice Holroyd, before whom the action came on for trial, reserved that point for the full Court. It was determined adversely to the Appellants' contention, and thereupon the learned Judge declared that the deposits in question were breaches of trust on the part of the Appellants, which they were liable to make good. He rejected their claim to indemnity, but he held that the widow could not complain of the deposit with the Chartered Bank which she had herself recommended. He determined, accordingly, that she must look to the reconstructed bank for her share of the moneys deposited with the Chartered Bank before its failure.

The Appellants have appealed from the Judgment of the full Court and the Judgment of Mr. Justice Holroyd.

The argument on their behalf was rested on the provisions of the Trustee Act, 1890, relating to Trustee Companies.

Section 383 of that Act imposes on trustee companies the same duties and obligations as those to which any individual acting in a similar capacity would be subject.

Section 384, after requiring a trustee company to keep separate accounts of the estates under its control, enacts that any director, member, or officer of a trustee company who knowingly and wilfully appropriates or deals with any property of which such company has control, or knowingly and wilfully lends or otherwise deals with any moneys received by such company otherwise than in accordance with that part of the Act of

1890, the instrument creating the trust and the law for the time being in force, shall be guilty of a misdemeanour. Then follows this proviso, that, "notwithstanding anything in this section contained," any trustee company may deposit any moneys of which it has control with any banking company or corporation fulfilling certain conditions (which, admittedly, were fulfilled in the case of the Chartered Bank and the Melbourne Bank), but no deposit was to be made of more than 20,000*l.* on behalf of any one estate.

The terms of the proviso seem to show that it was apprehended that the thing which the proviso authorises might, if done without authority, have brought directors or officers of trustee companies under the operation of the earlier part of the section, and exposed them to a criminal charge. What is it, then, that the proviso authorises? There is not a word about investment in the section from beginning to end. There is nothing pointing in that direction. There is nothing said about interest. The section, in their Lordships' opinion, does not enlarge the powers of investment possessed by trustee companies in common with other trustees. It does not authorise them to deposit trust moneys with a bank in any case in which an individual acting in a similar capacity would not be justified in employing a banker. It is a restrictive as well as an enabling clause. While it relieves directors and officers of a trustee company from the apprehension of criminal liability if the deposit is properly made, it requires that deposits shall only be made with banks of a certain class, and that no deposit in the case of any one estate shall exceed a certain limit. The framers of the Act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security. The very next section draws the distinction. Section 385 authorises

trustee companies to deposit their own funds with a bank of deposit or to invest them on certain specified securities.

The learned Counsel for the Appellants were asked why trustee companies should have conferred upon them larger powers of investment than ordinary trustees. The answer was, that it was the policy of the Legislature to favour trustee companies. No doubt, if these companies had wider powers of investment than other trustees the privilege might serve to attract custom. But it would be a singular way of showing them special favour to allow them to do with impunity that which would be a breach of trust if done by ordinary trustees. If such had been the intention of the Legislature one would certainly have expected to find the intention declared in plain and unambiguous language.

Section 384 of the Act of 1890 is not happily expressed. But in their Lordships' opinion it does not afford any grounds for the contention of the Appellants.

Under ordinary circumstances it would not be necessary or proper to say anything more. But, inasmuch as a judgment unsuccessfully challenged on appeal may possibly be taken as a precedent in other cases, their Lordships think it right to add that in their opinion the judgment under review fell short of what the justice of the case required. Their Lordships are unable to see what jurisdiction the learned Judge had, under the circumstances, to make a decree between the Co-defendants. Assuming such a jurisdiction to exist, their Lordships are unable to discover any ground for depriving the widow of her full rights.

Their Lordships will humbly advise Her Majesty that the Appeal must be dismissed. The Appellants will pay the costs of the Appeal.