

39, 1930

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APPELLANT'S CASE

In the Privy Council.

No. 56 of 1929.

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

BETWEEN

ELIZABETH BETHUNE CAMPBELL - - - - *Appellant*

AND

W. D. HOGG AND THE TORONTO GENERAL TRUSTS
CORPORATION - - - - - *Respondents.*

CASE FOR APPELLANT.

1. This is an appeal from a judgment dated the 29 Nov. 1928 of the First Appellate Division of the Supreme Court of Ontario (Mulock C. J. O., Magee, Hodgins, Ferguson and Grant), which allowed by a majority of three judges to one (Magee dissenting and Ferguson having died before judgment was given) the cross-appeal of the Respondent W. D. Hogg and offered the Appellant \$1,000 (one thousand) in addition to the sum found due the Estate by the Surrogate Court Judge providing, that the Appellant accept this sum in full of her claim against the Respondent, and as a settlement. One month was given the Appellant to accept or decline this offer, in the event of her declination her appeal was to be dismissed without costs and the judgment of Mr. Justice Masten J.A. affirmed. The Appellant declined their Lordship's offer at once.

RECORD.
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p. 215.
p. 219.
p. 226.
2. The question to be determined is one of Trusteeship. The Respondent W. D. Hogg is seeking a discharge from the Court as Trustee of the Estate of Lady Elizabeth M. Howland (deceased). The Respondent is passing his accounts under the "Trustee Act, Statutes of Ontario, 1926 Cap. 40. Sec. 24."

p. 196.
3. Lady Howland was formerly Mrs. Bethune widow of the late James Bethune Q.C. of Toronto, Canada. The Appellant is their youngest daughter. In 1895 Mrs. Bethune married Sir Wm. Howland who died in 1907. James Bethune died in Dec. 1884 leaving Mrs. Bethune sole devisee and legatee of his Estate. Immediately after Mr. Bethune's death, his wife

- RECORD. turned to the Respondent W. D. Hogg K.C. who was her brother-in-law
 — and in whom she had the most implicit confidence, placing her affairs in
 p. 1. his hands. He accepted the Trust and from 1885 to 1922 continued to act
 as her Trustee investing and reinvesting her money and managing in
 general her business affairs.
- pp. 231, 232. James Bethune left \$39,000 apart from valuable real Estate which in
 p. 85. Canada prior to 1892 was not listed with one's assets.
- pp. 48, 49. 4. In Oct. 1922 owing to Lady Howland's precarious mental condition
 an order was made by Mr. Justice Middleton under the Lunacy Act Ex. 15
 appointing the Toronto General Trusts Corporation Committee of her Estate. 10
- p. 321. The Respondent has been for many years on the Advisory Board of
 p. 51. the Toronto General Trusts Corporation, being Chairman of their Ottawa
 p. 247. Branch. Upon a request from the said Company in Oct. 1922 the
 pp. 247, 248. Respondent turned over \$8,200 in mortgages and \$215 in interest and
 closed his Trust account with Lady Howland's Estate. He made no
 p. 249. statement other than the short one setting out the names and amounts of
 these mortgages, and the Trust Co. accepted his letter and the mortgages
 together with the \$215 interest and did not ask him for an accounting.
- p. 31. 5. On 14 Aug. 1924 Lady Howland died and the Toronto General 20
 Trusts Corporation were appointed Administrators of her Estate. Lady
 Howland's Will could not be found and after some litigation the Appellant
 who, under the Will was Residuary Legatee agreed in April 1926, to
 accept one half of Lady Howland's Estate.
- p. 250. 6. In May of 1926 the Toronto General Trusts Corp. began to question
 the Respondent at the Appellant's instigation regarding Lady Howland's
 p. 53. Estate and the Respondent began making statements Ex. 20 & 21 and
 rendered for the first time a bill against the Estate for \$1,155 for com-
 p. 1. pensation in handling the Estate. The Appellant not being satisfied, the 30
 p. 66. said Company continued to question the Respondent, and as a result he
 made a Statutory Declaration in Nov. 1926, and sent \$581 to the Toronto
 General Trusts Corporation, together with a letter Ex. 24 page 256.
- p. 3. 7. On the 7th Jan. 1927 the Respondent presented his Petition to pass
 p. 5. his accounts under the Trustee Act 1927 c. 40. s. 24. He filed two accounts.
 p. 6. The Appellant upon being served with an Appointment by the Surrogate
 p. 18. Court Judge appeared to defend the Estate against the passing of these
 pp. 40-45. accounts. The Respondent though passing his accounts under the Trustee
 pp. 34, 35. Act, headed his papers, "in the Agency of," but when questioned by the
 Surrogate Judge and the Trust Co. said he was Trustee and desired, as did
 all parties to have "in the matter of the Trustee Act," added to the title 40
 pp. 195-198. of the proceedings. After six days hearing, the Surrogate Judge gave
 judgment on the 21st Oct. 1927, in favour of the Appellant, finding that
 the Respondent was indebted as Trustee to the Estate, for the sum of
 \$401.60. He refused to allow the Respondent any compensation for his
 services.

8. The Respondent has failed to comply with the Trustee Act, he has not stated of what the original Estate consisted and he has given an erroneous and in part fictitious statement of disbursements. He admits losing his books and does not produce any proper Trust Account and admits wilfully destroying all his back cheques and even the stubbs in connection with this Trust. RECORD. pp. 85-87. p. 54. pp. 146-147. p. 252.
9. A. The evidence before the Surrogate Judge showed that the Respondent has mixed his own money with that of Lady Howland's.
- B. He seeks credit for large sums of money which he acknowledges as received from Lady Howland for investment but for the payment of which he produces no vouchers. pp. 85-95. pp. 192-195.
- C. The Respondent claims his books relating to this Trust are lost and destroyed to 1905, the books which have appeared are improperly kept and falsified in many instances. p. 146. pp. 81, 120, 101, 133, 238, 310.
- D. The evidence shows that the Respondent is guilty of fraud, retention and conversion, in holding a fictitious mortgage for Lady Howland, Ex. 25 and Ex. 34 (3) page 236, upon which he paid her interest every six months for many years, with his own cheque, together with a letter in his own hand-writing. There is no proof that the principal of this mortgage was ever paid to Lady Howland or to her Estate. The Respondent's own letters Ex. 35 (14) (15) page 245 show that he obtained money from Lady Howland for investment which he admitted before the Surrogate Judge he never invested, but retained to compensate himself for his services in handling the Estate. He still retains it. pp. 72, 76-82. p. 54. p. 170.
10. The Appellant felt that the Surrogate Court Judge had erred in finding the Respondent indebted to the Estate for the amount of \$401 only, and on the 4th Nov. 1927 appealed to a Judge of the Supreme Court of Ontario. The notice of appeal is found on page 198. The Respondent cross-appealed on the 14th Nov. 1927 for compensation in handling the Trust. The cross-appeal is found on page 200. On the 19th Dec. 1927 Mr. Justice Masten dismissed the Respondent's cross-appeal and gave judgment in favour of the Appellant, finding the Respondent indebted to the Estate as Trustee for the sum of \$1,155, otherwise affirming the Surrogate Judge's order. Mr. Justice Masten's judgment is found on page 203. p. 198. p. 200. p. 203.
11. From this judgment the Appellant appealed to the Appellate Division of the Supreme Court of Ontario on the 24th December, 1927. The notice of appeal is found on page 208. The Respondent cross-appealed to the aforesaid Court on the 9th January, 1928, withdrawing his plea for compensation and seeking to show that Lady Howland owed him this sum of \$1155. The notice of cross-appeal is found on page 211. The Appeal and cross-appeal were heard by the Chief Justice of Ontario, Mr. Justice Magee, Mr. Justice Hodgins, Mr. Justice Ferguson and Mr. Justice Grant. Mr. Justice Ferguson died a few weeks before judgment was rendered. p. 208. p. 211.

RECORD.

Their Lordships on the 19th November, 1928, gave judgment in favour of the Appellant, \$1000 (one thousand) dollars without costs. On the 29th November, 1928, they superseded this judgment by a second judgment, allowing the cross-appeal of the Respondent, and offering the Appellant \$1000 providing that she accept this sum as a settlement in full of her claim against the Respondent, giving her thirty days in which to accept or decline this offer. In the event of her declination her appeal to be dismissed without costs, and Mr. Justice Masten's judgment to be affirmed with a variation.

pp. 226, 227. The Appellant declined at once, and her appeal was dismissed by a majority of three Judges to one, Mr. Justice Magee dissenting. 10

Their Lordships' reasons for judgment will be found on pages 215 and 219.

On the 18th March, 1929, their Lordships gave instructions that a memorandum be attached to their reasons for judgment. This memorandum is found on page 230.

pp. 224, 225. 12. In his dissenting judgment Mr. Justice Magee says amongst other things, "it would seem manifest that the learned Surrogate Court Judge did not take into consideration Mr. Hogg's evidence showing that large sums had come into his hands, and that investments had been made both before and after the commencement of the account and that no mention was made of these and no means afforded to the Court to ascertain really how much capital the Trustee had received. Without having a proper basis the accounts could not be taken or passed and the whole enquiry was nugatory and the finding really contrary to the evidence." 20

Mr. Justice Magee points out that the Respondent was unable to state of what the original Estate consisted, but that upon search through the Registry Office and under cross-examination the Respondent admitted over \$23,500 and his Lordship points out that Mr. Hogg must have had additional money in his hands to the extent of \$5,000 at least to have made the investments which his account shows. Mr. Justice Magee also points out that according to the evidence large sums of interest are owing to the Estate by the Respondent. 30

p. 221. The Appellant humbly submits that the Respondent was Trustee of Lady Howland's Estate and that he is answerable for large sums of money even according to his own evidence, both in principal and interest and that the judgment appealed from is erroneous, and ought to be reversed for the following among other

REASONS.

1. Because manifest error and irregularity has occurred in this case, two judgments having been rendered by their Lordships of the Appellate Division, and four months later a memorandum appended by their instruction to their second judgment. 40

2. Because their Lordships of the Appellate Division erred in affirming Mr. Justice Masten's decision and that of the Surrogate Court Judge, who found that under the circumstances of this case there was a general corroboration of the whole account, notwithstanding that no proper Trust Account had been kept by the Trustee and that the funds of the Cestui que trust had been mixed with the Trustee's. No separate bank account having been kept.
- 10 3. Because the evidence shows clearly that the Trustee received large sums for investment from Lady Howland for which he has entirely failed to account, and because the Trustee's own testimony and accounts show that he owes the Estate a large amount of interest also.
4. Because the evidence shows that the Trustee is guilty of fraud, retention and conversion and cannot therefore plead the lapse of time.
5. Because the Surrogate Court rules, in regard to a Trustee passing his accounts have not been complied with.
- 20 6. Because on the whole evidence taking into account the contradictory statements made by the Trustee in his evidence, the fact that his evidence does not agree with the accounts, the obviously altered state of the accounts, the fact that no account was kept of the Trust Funds and that the Trust Funds were mixed up with the Trustee's own personal funds, he should be compelled to corroborate each item and to account for all the monies which came into his hands during his Trusteeship.
- 30 7. Because before the Surrogate Judge and before Mr. Justice Masten on appeal both Courts refused to allow Mr. Hogg compensation for his services, thereby disbelieving his statement to the effect that Lady Howland had intended to remunerate him and because Mr. Justice Masten found that the Trustee had retained for six years \$1155 of Trust money which he ordered him to pay over.
8. Because the decisions of the Courts below are, with the exception of the above decision, paragraph 7, erroneous and ought to be reversed.
- 40 9. Because the reasoning of Mr. Justice Magee in his dissenting Judgment is to be preferred to that of the Chief Justice of Ontario and Mr. Justice Hodgins and Mr. Justice Grant.

ELIZABETH BETHUNE CAMPBELL

Appellant in person.

In the Privy Council.

No. 56 of 1929.

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