39, 1930

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:

RESPONDENT'S CASE.
W. D. HOGG

CASE OF THE RESPONDENT W. D. HOGG:

1. This is an Appeal from a judgment of the First Appellate Division of The Supreme Court of Ontario, dated the 29th day of November, 1928..... Record P. 227
dismissing the Appellant's appeal from the judgment of the Honourable Mr. Justice Masten..... Record P. 203
dated the 19th day of December, 1927, on appeal from the judgment of His Honour Judge Mulligan, Judge of the Surrogate Court of the County of Carleton, dated the 21st day of October, 1927..... Record P. 195
and allowing the Respondent's cross-appeal from the said judgment of the Honourable Mr. Justice Masten.

2. The late James Bethune, Q.C., a member of the Toronto Bar, died on the 18th day of December, 1884, leaving him surviving, his widow, Elizabeth Mary Bethune, who, subsequently married Sir William P. Howland, and five children, two of whom have since died. For Probate of the Will of the late James Bethune, see..... Record P. 232

3. The Respondent, W. D. Hogg, who is a member of the Ottawa Bar, and the late James Bethune, married sisters, and, on her husband's death, Mrs. Bethune naturally turned to her brother-in-law, the Respondent, for advice and assistance in winding up her late husband's estate, and, thereafter, desired him to invest for her a portion of the estate.

4. The course pursued was that, when the Respondent, W. D. Hogg received an application for a Mortgage loan on good security,

he would submit the particulars to Mrs. Bethune, who would send him a cheque for the amount. The mortgage was taken in the name of Mrs. Bethune, and, after her marriage, in 1895 to Sir William P. Howland, in the name of Lady Elizabeth Mary Howland.

5. When the Respondent, W. D. Hogg, commenced to invest money for Mrs. Bethune, he prepared an account book for her in which she was to keep a record of investments and of receipts of income. Entries were made by Mrs. Bethune in this book, and a subsequent book up to December, 1916, and then discontinued.

6. The original account book and the subsequent one are printed in a separate volume containing Exhibits *44-A*[33] and *6*. This seems an appropriate place to point out that the entries on pages 6, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30 and 60, in Exhibit 44-A. relate to investments which were not made by the Respondent, W. D. Hogg, but were made by Lady Howland, at Toronto, and that the entry in Journal, page 96 of Exhibit [33] does not relate to any investment made by the Respondent, W. D. Hogg.

7. On the 6th of October, 1922, the Respondent, the Toronto General Trusts Corporation was appointed a Committee of the Estate of the late Lady Elizabeth Mary Howland, and her two daughters, Mrs. Lindsey and Mrs. McDougall, were appointed a Committee of her person.....

Record P. 321

On the 19th October, 1922, the Respondent Mr. Hogg, handed over to the Respondent Corporation, all the Mortgages then in his possession belonging to Lady Howland, amounting in value to $8,200.00, and a cheque for $215.00, representing interest then on hand.

Record PP. 246-249

8. After the death of Lady Howland on the Fourth day of August, 1924, the Respondent, the Toronto General Trusts Corporation were appointed Administrators of her estate.

9. No demand for an accounting was made until October, 1926, when, the Appellant not being satisfied with the statement set forth in the letter of the respondent, W. D. Hogg, to the Respondent Corporation, of the 19th October, 1922.....

Record PP. 248-249

pressed for a further accounting, and the respondent, W. D. Hogg, prepared and submitted the statement found on p. 275 of the record.. and this being unsatisfactory to the Appellant, a further statement, p. 272 of the record, starting in the year 1913, was prepared and submitted.

Record P. 275

Record P. 272

10. The Appellant still being dissatisfied, the Respondent W. D. Hogg, obtained an appointment for the passing of his accounts, on the 7th of January, 1927, and submitted an account commencing in 1886. Prior to the commencement of the taking of the account, some errors were discovered in the account fyled and an amended account, was filed, and the evidence taken before the Surrogate Judge was with respect to this amended account.

Record P. 5
Record P. 6
Record P. 18

11. Evidence was taken with respect to the amended account on the 27th and 28th days of January, 1927—the 17th, 18th, 19th days of March, 1927, and the 14th day of April, 1927. On the 21st day of October, 1927, the Surrogate Judge gave judgment, finding that the Respondent, W. D. Hogg, then had in his hands the sum of $201.61, for which he was accountable.

Record P. 195-196

12. The Appellant appealed from this judgment on the 4th day of November, 1927, and the respondent, W. D. Hogg, cross-appealed in respect of the disallowance by the Surrogate Judge of his claim for compensation for services. The Appeal and Cross-Appeal were heard by the Honourable Mr. Justice Masten on the 14th and 15th days of December, 1927, and judgment was given on the 19th day of December, 1927, in favor of the Appellant by amending the order of the Surrogate Judge by adding the sum of $1155.00 to the sum of $201.61 found due by the respondent, W. D. Hogg, and otherwise dsimissing the appeal and cross-appeal.

Record P. 198
Record P. 203

13. The Learned Appellate Judge held that there was general corroboration of the account submitted by the respondent W. D. Hogg, as required by Section (12) of the Evidence Act, R.S.O. (1914), Ch. 76, now—R.S.O. (1927), Ch. 107, sec. 11, because, as the Learned Judge says:—"First, this particular Trusteeship or "Agency is of such a character that as to the majority of the pay- "ments claimed by Mr. Hogg, they are established by proof additional "to his oath, and, secondly—because the payments complained of or "in controversy were made during the lifetime of Lady Howland "and the relationship of financial Agent or Trustee and client con- "tinued thereafter undisturbed, no complaint being made."

Record P. 205

"These circumstances afford in my opinion a general corrobora- "tion of his whole account sufficient to satisfy this Statute to the ex- "tent of shifting the onus to the complainant of establishing in regard "to any particular item claimed by Mr. Hogg that it was not made as "claimed. That ruling would have the effect of doing away with "the general claim of $27,546.46 as put in by the Accountant, but

"does not interfere with the Appellant establishing in regard to par-
"ticular items complained of that independently of this general rul-
"ing the Appellant may satisfy the onus cast upon her of establishing
"that Mr. Hogg is accountable for them."

"I refer, in support of the view which I have expressed, to the
"case of *Mushol v. Benjamin,* (1920), O.L.R. 426."

See also—Green v. McLeod, 23 A.R. 676, (1896.)

14. Under the foregoing ruling, the Appellant then proceeded to take exception to the following specific items allowed to the Respondent, W. D. Hogg by the Surrogate Judge, viz:— 10

(1)—The disposition of $2,000.00 received from the sale of Dominion Coal Company stock;

(2)—The McAmmond & Martin loan;

(3)—The O'Toole, Patterson & Douglas mortgages;

(4)—The Macdonald mortgage;

(5)—The Betts mortgage.

and the appeal as to each of the foregoing items, was dismissed. The Respondent, W. D. Hogg, relies on the reasons given by the Honourable Mr. Justice Masten.

Record PP. 205-208

15. The Appellant, thereupon, appealed to a Divisional Court 20 from the judgment of the learned Appellate Judge in respect to each of the foregoing findings, and the respondent, W. D. Hogg, cross-appealed from that portion of the said judgment finding the respondent, W. D. Hogg, accountable for the further sum of $1155.00.

Record PP. 208-212

16. The Appeal and cross-appeal were heard by the First Appellate Division of the Supreme Court of Ontario, composed of, The Right Honourable The Chief Justice of Ontario; The Honourable Mr. Justice Magee; The Honourable Mr. Justice Hodgins, and the Honourable Mr. Justice Grant, on the 2nd, 13th, 14th, and 15th days of February, 1928, and judgment was given on the 29th day 30 of November, 1928, dismissing the appeal and allowing the cross-appeal. From this latter judgment, the present Appeal is asserted.

Record P. 215

17. The reasons for judgment given by the First Appellate Division: Hodgins, J. A., concurred in by Mulock, C. J., and Grant, J. A., are printed in the Record at P. 215, et seq. At page 216, the Court says:—

"On the question of the necessity of corroboration of the state- Record P. 216
"ment of the Trustee required by R.S.O. 1914, Cap. 76, I hold that
"there had been an underlying connection between several disputed
"items sworn to by the Trustee, and his evidence is corroborated with
"respect to some of these, so as to satisfy me as to the accuracy of
"his testimony and his general credibility, thus satisfying the Statute
"as to the rest of the items."

At Page *218*, the Court says:—.....

"The relation between Lady Howland and Mr. Hogg, who Record P. 218
"was her brother-in-law, was that of principal and agent, and how-
"ever convenient it may be that to facilitate the taking of accounts in
"this Surrogate Court an individual should constitute himself a
"trustee for that purpose, I am unable to see that his mere *ipse dixit*
"makes him a Trustee. No one can make substantive laws for him-
"self and unless the circumstances in which he stands warrant the
"conclusion which he desired, he has no right to invest himself with
"it."

and further—

"I have had the advantage of reading the judgment of my Broth-
"er, Magee, who has made a meticulous examination of the accounts.
"His view is that the transactions partook largely of the character
"of Agency and that Mr. Hogg is entitled to the benefit of those
"presumptions arising from lapse of time and acquiescence. I agree
"in this latter view. See—*Banks v. Cartwright, 15 W.R.* 417. I
"would go further and say that they appear to be entirely Agency
"transactions."—

and further—

"It is to be observed that the members of the family, other than
"the Appellant, are satisfied with the judgment of the learned Surro-
"gate Court Judge. I think that this is a case for applying the prin-
"ciple that the report of the Master who has seen and heard the
"witnesses and gone into the accounts should not be disturbed unless
"the Court can clearly say that his conclusions are erroneous. It has
"been affirmed by Mr. Justice Masten. His judgment, it is true,
"appears to increase the amount found due by the Surrogate Court
"Judge by the sum of $1155.00 That was due to a misapprehension.
"The Surrogate Judge allowed no compensation, and, therefore, the

"disallowance of compensation by Mr. Justice Masten makes no "change in the account and the addition of it to the amount found by "the Surrogate Court Judge was an error."

18. The questions involved in this proceeding are questions of fact only—viz:—

(1)—Has the Respondent, W. D. Hogg, been charged in the account with all the money received by him for Lady Howland:

(2)—Did the Respondent, W. D. Hogg, make all the payments set forth in the account:

As to the foregoing facts, the Respondent, W. D. Hogg, has in his favor the concurrent findings of three Courts below, and submits that in accordance with the decisions of this tribunal in the case of *Allen vs. Quebec Warehouse Co. (1886) 56 L.J.P.C., 6,* and in the case of Whitney v. Joyce, (1906), 75 L.J.P.C., 89, judgments on questions of fact in the Courts below should not be reversed unless the Appellant adduces the clearest proof of error and points to the source of that error.

In Archambault vs. Archambault, 71 L.J.P.C., (1902), P. 131, it is said, at P. 135:—

> "It is not the practice of this Board to disturb a judgment "on a question of fact, where the Courts below have unanimous-"ly agreed in their conclusion on the evidence, except where it "is made plain that there has been a miscarriage of justice, or at "least that the evidence has not been adequately weighed, or "considered."

It was held in *The Dominion Radiator Company, Limited v. The Steel Company of Canada, Limited,* 48 D.L.R., 350, that it is against the practice of the Judicial Committee of the Privy Council to disturb the conclusion reached by all the Courts below on a question of fact, affecting the amount of damages.

It *is said in Bellingham v. Frcer,* (1837) 1 Moo. P.C.C. 342, that where two Courts below have concurred on a matter of fact as on a matter of foreign law, the Privy Council would require a very strong case of mischief to reverse them.

In *Grant Smith & Company vs. The Seattle Construction Company,* 89 L.J.P.C., 17, it is said at page 19, dealing with the question of fraud:—

"The main answer of the appellants was based upon a charge of fraud against Mr. Patterson. They said that he had falsely and fraudulently represented the capacity of the dock and the use to which it had formerly been put, and further that, with a dishonest purpose, he concealed from them material facts which, in the circumstances, it was his duty to disclose. This charge was expressly negatived by the learned Judge who heard the evidence, and who stated his opinion in these words:—"I have no hesitation in saying that Mr. Patterson's statement about the dock's capacity and the likelihood of her doing the proposed work were the honest statement of belief actually entertained by him at the time, and in fact strongly adhered to at the trial." This question was again investigated by the Court of Appeal, who supported the finding in this respect of Clement J. Galliher, J., said: "I am unable to find fraud. The evidence to establish fraud should be clear and convincing, and I cannot say that this is so," and with his judgment Martin J., agreed. McPhillips, J., took the same view, and expressed his conclusion, as follows:—"The Appellants laid fraud in the case, and evidence was laid to support this; but it was not found by the learned Trial Judge, and I entirely agree with the learned Judge." These opinions were not merely an echo of the judgment of Clements, J. They depended upon the complete review of the evidence and a careful and new investigation of all the circumstances. It would be contrary to the established practice of this Board------a practice based upon principles designed to secure finality in litigation and to promote the ends of justice------to re-investigate a question of this description, when a man has successfully defended his honour and character before his own Courts."

19. If the Respondent were a Trustee, he is entitled to the benefit of the provisions of Section (46) of the Limitation Act, R.S.O., (1927), Ch. 106, unless the Appellant establishes—(a). fraud; (b). retention of trust property, or—(c). conversion of estate funds by the trustee. No evidence was given by the Appellant which would establish any of the foregoing grounds for denying the Trustee the benefit of the Statute.

20. The Respondent, W. D. Hogg, respectfully submits that the judgment of the First Appellate Division, affirming, except as varied by the allowance of the cross-appeal, the judgment of the Honourable Mr. Justice Masten, and affirming the judgment of His Honour the Surrogate Judge is right, and should be affirmed, and that this Appeal should be dismissed with costs for the following, among other—

REASONS

1. Because, the Respondent, W. D. Hogg, was not a Trustee, but was an Agent, entitled to those presumptions arising from lapse of time and acquiescence.

R.S.O. (1927), Ch. 106 S. Ch. 48 (2).

2. Because, the questions involved are questions of fact only, namely:—

(1) Has the Respondent been charged with all the money received by him as such Agent?

(2). Did the Respondent make the payments set forth in the account?

3. Because, as to all the foregoing facts, the Respondent has in his favor the concurrent findings of three Courts.

4. Because, the Appellant has not submitted any evidence to surcharge or falsify the account.

5. Because, no demand for an accounting having been made until October, 1926, the Respondent, as Agent, was not bound to account further back than for six years—that is, from October, 1920, and, since that date, there are no questions in controversy between the Appellant and the Respondent.

6. Because, if the Respondent were a Trustee, he is entitled to the benefit of the provisions of Section 46 of the Limitations Act, R.S.O., (1927) Ch. 106.

~~R. V. SINCLAIR,~~ Ronald Smith

Counsel for the Respondent, W. D. Hogg.

No. 56 of 1929.

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THE SUPREME COURT OF ONTARIO.

BETWEEN:

ELIZABETH BETHUNE CAMPBELL
Appellant:

and

W.D. HOGG and THE TORONTO GENERAL TRUSTS CORPORATION Respondents:

C A S E

of

THE RESPONDENT, W.D. HOGG.

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