Privy Council Appeal No. 56 of 1929.

Elizabeth Bethune Campbell - - - - - - - *Appellant*

v.

William Drummond Hogg and others - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MAY, 1930.

Present at the Hearing:

LORD BLANESBURGH.
LORD TOMLIN.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD BLANESBURGH.]

On the 18th December, 1884, Mr. James Bethune, K.C., died at Toronto, leaving his wife, Elizabeth Mary Bethune, one son, Charles, and four daughters surviving him. The children were then in infancy. Two of them have since died—Charles in April, 1921, one of the daughters some years earlier. The three other daughters—who are now Mrs. Lindsay, Mrs. McDougald and Mrs. Campbell—are still living. Mrs. Campbell, the youngest of the three, is the present appellant.

By his will, Mr. Bethune, who was a member of the Toronto Bar, gave to his wife absolutely all his property real and personal, and he appointed her sole executrix and guardian of his infant children.

On the 13th January, 1885, Mrs. Bethune duly proved the will and in the inventory then exhibited of the estate she showed that the testator's property, exclusive of realty, amounted to

$39,850. The bulk of that sum—$30,000 to be exact—represented moneys secured by Life Insurance policies capable therefore of exact appraisement. The value of the testator's real estate was not then nor has it since been recorded.

The actual inheritance to which Mrs. Bethune succeeded at the testator's death has been regarded as a fact of importance in certain aspects of the present controversy. On the materials available it is not possible in their Lordships' judgment to make even an approximate estimate of its extent. But certain passages in the evidence of the respondent, Mr. Hogg, suggest that the best use of all of it had to be made if Mrs. Bethune's children were to be educated and she and they maintained.

Mrs. Bethune must in 1885 have been about 45 years of age. Such of her papers as are before their Lordships indicate that she then was, and that for many years she remained, a lady of clarity of thought and of business regularity and method. In 1895 she married, as her second husband, Sir William P. Howland. He died in 1907. Their marriage apparently did not affect in any way Lady Howland's proprietary rights which remained intact. Her mental powers, however, did not continue till the end. There are not obscure indications that by 1915 these had begun to fail. She was then 75. In that year she ceased to attend to the accounts which hitherto she had kept methodically and regularly. No voucher from her after 1918 is forthcoming. From the beginning of 1921 all payments by Mr. Hogg were made direct to her bank at St. Catharine's. Her serious mental condition in July, 1922, is dealt with in a letter of his to Mrs. Campbell on the 7th of that month, and a little later, on the 6th of October of the same year, by an Order of the Supreme Court of Ontario made on the application of Mrs. Lindsay and in the presence of Mrs. McDougald and Mrs. Campbell it was declared that Lady Howland, on account of her age and mental and physical infirmity, had become incapable of managing her own affairs and the respondents, the Toronto General Trusts Corporation, were appointed Committee of her estate and Mrs. Lindsay and Mrs. McDougald Committee of her person. In August, 1924, nearly 40 years after the death of her first husband, Lady Howland died at the age of 84 without having recovered her mental powers.

It was after her death that the present controversy began. It owed its origin mainly if not exclusively to the appellant, Mrs. Campbell. It has become very acute as it has proceeded, and it is concerned with the responsibility of the respondent Mr. Hogg in the circumstances now to be stated, for moneys from time to time handed to him by Lady Howland for investment.

Mr. Hogg was Lady Howland's brother-in-law. She and his wife were sisters. In 1885 he was, as he has since remained, a member of the Ottawa Bar. He is now one of His Majesty's Counsel and is the head of a law firm carrying on, as it appears,

an extensive business. Lady Howland apparently was his senior by about eight years. In 1928, when this case was before the Appellate Division of the Supreme Court of Ontario, Mr. Hogg is stated to have been 80 years of age.

The personal friendship between Mr. and Mrs. Hogg on the one side and Lady Howland and her family on the other seems to have been no less close than was their relationship, so close indeed that upon Mr. Bethune's death his widow turned to Mr. Hogg for assistance and advice in the realisation of the estate and with reference to her own enjoyment of it. It does not appear that at that time either he or his firm acted in any way professionally for Mrs. Bethune, whether in obtaining probate of the will or otherwise. But Mr. Hogg personally lent his active assistance to her in realizing the estate. He went, he says, to Toronto three or four times and remained there for several days, gratuitously engaged in obtaining payment of the policy moneys from the different Insurance Companies, in arranging for the disposal of the testator's law library, and in negotiating for the sale of his real estate. Mr. Hogg's recollection is that after these matters had been completed, Mrs. Bethune, as she still was, came on a visit to his wife and himself at Ottawa and it was then that at her urgent request he undertook to take charge of the investment of some of her moneys, under an arrangement which continued operative until, in 1922, the respondent corporation was appointed Committee of Lady Howland's estate as already stated.

In pursuance of that arrangement Lady Howland, from time to time beginning in 1885, handed to Mr. Hogg considerable sums for investment. The precise particulars of these will probably never now be accurately ascertained, for Mr. Hogg, strangely enough, is not in a position to supply them and apparently the materials do not exist from which they can be otherwise discovered. That the aggregate sums were much larger than the amount which at the end remained, and, as Mr. Hogg says, alone remained in his hands, is not disputable. Mr. Hogg himself does not suggest that they were less than $19,000 or $20,000. And they may have been very considerably in excess of that figure. But no capital account is available, showing either how much was received from or was returned to Lady Howland and the absence of such an account has occasioned in these proceedings difficulties of its own to which their Lordships must again recur. Mr. Hogg, however, it should at once be stated, disclaims sole responsibility for these difficulties. He explains that it was as a friend that Lady Howland sought his assistance. Transactions on her account and payments made to her were accordingly less formal than in the case of an ordinary client. In very many instances the only existing record of payments made is to be found in the receipts which she insisted upon giving and which fortunately have been preserved. No question with reference to accounts ever arose, he says, between Lady Howland and himself during her life, and he feels it to be a

hardship that he should have to deal particularly with these matters so long since the event, after the loss or destruction in 1911 of many of his books and papers, and after the death of Lady Howland herself. Their Lordships will not fail throughout their consideration of the case to bear these matters in mind and attach to them such weight and effect as in the circumstances they deserve. Their Lordships deem it sufficient for the moment to observe that while a Trustee may if he chooses renounce any of his privileges as such, a cestui que trust like Lady Howland is not without her own consent to be deprived of any protection to which the law entitles her and it does not lie in the mouth of a trustee to suggest that she should be.

Some of the outstanding characteristics of the business relationship between Lady Howland and Mr. Hogg, as these have been disclosed in the proceedings or are now accepted by Mr. Hogg, may conveniently here be collected.

The moneys handed to him for investment were, in fact, invested and re-invested in a large number of mortgages, those for which he accepts responsibility being with two exceptions mortgages on Ottawa properties carrying interest at from 5 to 7 per cent., and Mr. Hogg says (and the statement besides being some index of his receipts, is a tribute to his care and discrimination) that, except in a single instance, no loss of any kind was sustained in respect of any of these. The relation throughout was purely personal to Mr. Hogg. His firm were in no way concerned in it. At one time, as will be seen later, this was unfortunately not recognised by him. But he has now fully accepted the position. He retained no remuneration for his services during his association with Lady Howland; the only legal charges which appear in his rendered accounts are certain items of mortgagees' costs not provided by the mortgagors and to these no objection is taken. The selection of the securities and their entire management remained exclusively in Mr. Hogg's care. He collected the principal and interest. With two exceptions the mortgages were taken in the lady's name, but there is no trace that any communication ever took place direct between her and any mortgagor. All payments were made to Mr. Hogg; everything passed through his hands.

The whole purpose of the arrangement, as it is disclosed in Mr. Hogg's correspondence still extant, was plainly, as their Lordships think, to secure an income for Lady Howland. The moneys were to be invested at interest. Pending actual investment they would normally be earning interest on deposit; if no investment was in prospect they would naturally be returned to Lady Howland. All this is strikingly indicated by extracts from two of Mr. Hogg's letters to Lady Howland contained in Exhibit 35 which during the argument was handed to their Lordships for examination. On February 1st, 1908, Mr. Hogg writes "I am enclosing an express order for $1748 being the balance of interest paid by Mr. Douglas who paid off his

mortgage a few days ago. I have the amount of the principal in hand on a special account bearing only bank rate. I expect to get a loan for it some day early at 6 per cent." "I am enclosing a statement showing the balance of principal moneys in my hands and I am enclosing cheque for that amount $448.85," he writes again on the 2nd May, 1911. There is no suggestion of or room for uninvested balances remaining in Mr. Hogg's hands carrying no interest. Such a state of things would have been quite inconsistent with the real purpose of the arrangement. In his latest letter written to Lady Howland on the 2nd September, 1921, Mr. Hogg, referring to a mortgage which had just been paid off, says: "I will have a good investment for the amount . . . I am glad to get these small mortgages paid up. I will put the several sums together and get a larger mortgage." That statement, by no means standing alone and made almost at the close of their long association, is eloquent of the responsibilities assumed throughout, but not in this respect, as it now appears, always discharged.

And, in these proceedings at all events, initiated as they were by Mr. Hogg himself, and with ample warrant from the facts and course of business disclosed, it is as a trustee of the funds entrusted to him that he seeks to have taken the accounts of his receipts and payments rendered to the Court. And their Lordships have been unable to find any reason why in this respect Mr. Hogg should not be taken at his word, although they are fully conscious that not a few of his difficulties in the case flow from a certain inconsistency in the attitude at different times taken up by him in this regard.

To proceed.

On its appointment to be Committee of Lady Howland's estate, the respondent Corporation by its General Manager, wrote, on the 10th October, 1922, a letter to Mr. Hogg in which, after a statement to the effect that Mr. Hogg was according to information received familiar with the assets comprising the estate, he was asked to supply to the Corporation a detailed list of Lady Howland's investments, and to inform it whether the mortgage papers and other documents were in his hands.

The reply to that letter dated the 19th October, although written or dictated by him, came from Mr. Hogg's firm, and not from himself. "We beg to hand you," it says, "the several mortgages which have been in our possession as set out in the statement enclosed, amounting in all to $8,200." (The statement referred to particularised mortgages by six mortgagors: Beckerman, Kelly, Shenkman, Loughran, Irvine and Brown.)

The letter proceeds: "We are also enclosing our cheque for $215, covering the interest of Mrs. Beckerman to 30th June, $42; Wolf Shenkman to 20th June, $75; Mrs. Loughran to 30th May, $70, and Mrs. J. F. Irvine to 28th January, $28. There is an instalment of interest past due from Mrs. Irvine

which should have been paid on the 28th July. We will be glad to give you any explanations with reference to these mortgages."

Mr. Hogg, their Lordships feel, must now regret the form of that letter. It is not too much to say that it left him with regard to the whole matter in a thoroughly false position, not improved by his attempt, in the early part of his evidence in these proceedings to explain it away. The letter ignores altogether his own personal responsibility undertaken towards Lady Howland over a long term of years: it has no regard to the existence of unsettled accounts of his in that character upon which as must now be taken to be admitted a very substantial further balance was then owing to her estate. The letter, indeed, purports to treat Lady Howland as having been a mere client of Mr. Hogg's firm, who, in response to the request of her legally constituted representative are handing over her securities and money left in their custody as her solicitors. And that mistaken attitude was the more unfortunate for the reason that almost any statement of Mr. Hogg's who was a local Director of the Corporation would unreservedly be accepted by its manager. It behoved him therefore to be specially careful to see that his answer was both accurate and complete. As was only to be expected the letter was accepted without observations and for four years no further information with reference to Lady Howland's affairs was either asked from or volunteered by Mr. Hogg.

Their Lordships find it difficult to justify Mr. Hogg's silence during this long period. Consistently with his *bona fides*, which their Lordships would be slow to impugn, it presents one of many indications of a failure on his part to treat seriously his undoubted responsibilities in this matter.

At her death, on the 4th of August, 1924, it was supposed that Lady Howland had left a will under which the appellant Mrs. Campbell was residuary legatee. But the will could not be found and some litigation apparently took place between Mrs. Campbell and her sisters as to their respective rights in their mother's estate. Ultimately that question was settled by an agreement under which Lady Howland was to be treated as having died intestate: the respondent Corporation was to be constituted administrator in her intestacy, and the daughters were to be interested in her property in the proportions of one-half for Mrs. Campbell and one-fourth for each of her sisters.

These matters being thus settled, the appellant, Mrs. Campbell, proceeded to inquire into Mr. Hogg's association with her mother's affairs. She was apparently dissatisfied with the statements in the letter of the 19th October, 1922, and proceeded herself to investigate the position. At her instance the Trustee Corporation addressed to Mr. Hogg enquiries with reference to certain securities of Lady Howland's which the appellant ascertained had at some time been under his control. His answers with reference to three of these need alone here be referred to. They led to an admission for the first time made by

Mr. Hogg that there were moneys of Lady Howland's in his hands uninvested—the root source of all the difficulties which have since confronted him.

Asked as to a mortgage by Phillip Vaillancourt for $450, Mr. Hogg, in his written answer of the 14th June, 1926, said it was paid off in February, 1921, and the amount handed to Charles Bethune on his last visit to his mother. Asked as to a mortgage by Charles Dumas for $1,200 paid off in April, 1921, Mr. Hogg in his same written answer, after stating correctly that $800 was invested in a mortgage from Joseph and Margaret Irvine, went on: "The balance of $400 was sent to Lady Howland about the 10th April, 1921, according to the entry in a small ledger which I kept of mortgages." Asked as to a mortgage by one Donald Campbell for $800 paid off in September, 1921, in his same written answer, he said: "$824 was sent to Lady Howland by cheque on or about the 10th September, 1921." Now each of those statements was unfortunately entirely incorrect. Charles Bethune was dead before the Vaillancourt moneys were received; the note in Mr. Hogg's ledger was that the balance of the Dumas mortgage was "paid to Lady Howland by Charles," an impossibility, as the moneys were only received in July, 1921, three months after Charles's death: and no part of the $800 from the Campbell mortgage was ever paid to Lady Howland by cheque or otherwise. The facts were that all these three sums remained in Mr. Hogg's hands uninvested, and in cross-examination in these proceedings he found himself unable to explain how he came to make the statements just set forth. Their Lordships regret having to emphasize this slip, but Mr. Hogg's carelessness of assertion, of which this is a typical example, constitutes one of the great difficulties in the case. Moreover these particular statements have an importance of their own, because when himself satisfied that the moneys so stated to be paid over actually remained in his hands, Mr. Hogg seems to have realized that he could seek his discharge therefrom as the result of a general account and in no other way. Hence originated the series of accounts, each with differing contents and balances, culminating in that of the 17th January, 1927, under consideration on this appeal.

The first of the series was delivered to the Trustee Corporation with a letter of the 26th October, 1926, and although only partial was in form, at any rate, the kind of account Mr. Hogg would have been well advised to deliver in 1922. Treating the three sums just referred to as moneys in his hands uninvested from their respective dates of receipt and commencing with a balance item of $80.25 against him, brought forward from some earlier statement, the account purports to be a record of Mr. Hogg's receipts and disbursements from the 31st December, 1918 to the 19th October, 1922. Crediting him with the $215 paid in October, 1922, the account, omitting for the moment a sum claimed for compensation, shows $1,161.42 still in his hands. Mr. Hogg's method of discharging himself of this sum is striking.

He does so to the extent of $1,155 by a final entry on the credit side of the account which reads as follows:—"My fee for investing and reinvesting the money of Lady Howland, for collecting principal and interest and paying over the same to her extending over a period of 38½ years under arrangement with her at $30 a year—$1,155."

Now Mr. Hogg doubtless believed himself entitled to, and may quite well have thought himself justified in retaining some remuneration—even this remuneration for his services. He had, however, never before hinted at any such claim, and it can hardly be doubted that the chief merit of this particular assessment of it was that it balanced the account to within a margin of $6.41 and thus relieved him of the imputation that a large sum had for years remained undisclosed in his hands. The basis of the claim, however, was exaggerated. The trust had not lasted 38½ years; indeed, in a corresponding entry of his own in Mr. Hogg's ledger, in which this claim to remuneration somewhat smaller in amount is based upon a percentage of takings, 35 years is taken as its duration. This claim to remuneration has now disappeared. Mr. Hogg renewed it in these proceedings. It was rejected in the Canadian Courts, and was not revived before the Board; but the manner of its appearance in the first account is not without some significance.

Upon delivery of this account it was pointed out to Mr. Hogg by the Trust Corporation that there was omitted therefrom as an item of charge a further $800 received by him on the repayment of a mortgage so that really on the basis of the account, again excluding remuneration, the true balance in his hands was $1,961.42. This omission Mr. Hogg acknowledged at once and on the 16th November, 1926, as the result of an elaborate calculation which has ceased to be relevant, he sent to the Trust Company a cheque for $581, as being due from him on the footing, of course, that his claim to remuneration stood unreduced. Even this, however, was not the end. On the 7th January, 1927, Mr. Hogg presented to the Surrogate Court to be examined, audited and passed, a further account verified by affidavit. This account commenced in June, 1886; it showed total receipts of $39,972.86, and a total discharge of $39,486.86 leaving a further $486 due from him. But it was, in turn, on the 17th January, 1927, displaced and superseded by another verified account showing total receipts of $46,567.61, and a total discharge of $45,994.64, leaving $573 due from him. In these two accounts the balances were shown with no item for remuneration claimed by way of discharge; but on each occasion the Court was asked by Mr. Hogg to fix his reasonable compensation for his services. This last account of the 17th January, 1927, was the account taken by the Surrogate Judge, and it is out of the proceedings before him, and the order thereon made by him, that the present appeal arises.

It is, of course, an elementary proposition that a trustee must keep an accurate account of the trust property, and must

always be ready to render it when required. This history, apart altogether from any question as to the completeness or correctness of the final account, is a striking commentary on Mr. Hogg's neglect of this elementary duty. He has surely only himself to thank if a final account preceded by such a record is critically dealt with by any Court.

The application by Mr. Hogg to have his account taken invoked a jurisdiction which is somewhat special. It will be convenient to ascertain at once its nature and its limits as applied to the present case.

The jurisdiction is conferred by The Trustee Act (R.S.O. 1927 C. 150, S. 23).

That section in subsection 1 provides that a trustee desiring to pass an account of his dealings with the trust estate may file his accounts in the office of the appropriate Surrogate Court and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of, amongst others, executors' accounts in the Surrogate Court. Where compensation payable to the trustee has not been otherwise fixed, subsection 2 enables the Surrogate Judge, upon the passing of the accounts of the trustee, to fix its amount.

The Surrogate Courts Act (R.S.O. 1927 C. 94, S. 65 (1)) provides that where an executor has filed in the proper Surrogate Court an account of the estate and the Judge has approved thereof in whole or in part, such approval, if the executor is subsequently required to pass his accounts in the Supreme Court, shall, except so far as mistake or fraud is shown, be binding upon any person . . . who was present at the proceedings. That the accounts when so taken are binding on the executor seems to be assumed in the subsection.

Subsection (3) provides that the Judge on passing the accounts of, *inter alios*, an executor, shall have jurisdiction to enter into and make full inquiry and accounting of and concerning the deceased's whole property, and the administration and disbursement thereof in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to appeal.

The Evidence Act (R.S.O. 1927 C. 107, S. 11) provides that in an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person an opposite or interested party shall not obtain a judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person unless such evidence is corroborated by some other material evidence.

These appear to be the immediately relevant statutory provisions applicable to the case. Upon them it was held in all the Courts in Canada that Section 11 of the Evidence Act applied here, and this point was not, as their Lordships understood, contested before them. The proceedings, which had originally

been intituled "In the matter of the agency of W. D. Hogg, K.C., and in the Estate of Lady Howland," were at the hearing in the Surrogate Court, by consent amended by being intituled "In the matter of the Trustee Act." "It is a matter of trusteeship," Mr. Hogg said. "The money came into my hands and was invested." And at a later stage in answer to a suggestion by Mrs. Campbell's Counsel, that the party who, like him, invoked the Court for a discharge or clean sheet bore the onus, he added, and as their Lordships think, he rightly added, "Certainly there is no doubt about that."

But having said so much, their Lordships, while expressing no opinion upon the extent of the jurisdiction or range of topics that may be included in Section 65 (3) of the Surrogate Court Act, are clear that in the present proceedings no sums ought to be charged against Mr. Hogg beyond those which it was admitted or proved that he had received. Except upon admission he may not, for instance, in these proceedings be charged with interest on uninvested balances or with any sum in the nature of damages.

It is not however every account of a trustee or executor that is entitled to the protection of the Act. In Section 38 of the Surrogate Court Rules very stringent regulations are made as to the requisite contents of accounts presented to the Court for passing. Accounts are to contain a true and perfect inventory of the whole property in question, and are to include, normally,

1. An account showing of what the original estate consisted.
2. An account of all moneys received.
3. An account of all moneys disbursed.
4. An account of all property remaining in hand.

A reference to Mr. Hogg's duties in relation to his investment of Lady Howland's moneys, as above set forth, will show how easy it should have been for him to comply with all these requirements if he had kept, even in the simplest form, a complete and separate record of his transactions on her account. Unfortunately, professional man though he was he did not do so, and the account filed having been prepared, as was contended, without reference to or attempt to comply with Rule 38 it was objected by the appellant that it should not be accepted at all.

And the examination to which the account was subjected disclosed the seriousness of this objection. Mr. Justice Magee's analysis of it in his judgment in the Appellate Division shows how great in the result may be the margin of possible error due to its incompleteness, and while the attempt of Mr. Martin, the appellant's accountant, to quantify that margin at $27546 is, as it stands, not to be regarded as more than a bare possibility, it is, in itself disturbing when it is remembered that for the most part the account is based entirely upon Lady Howland's vouchers; that the entries on its right hand side representing his own receipts are, as Mr. Hogg admitted in evidence, constructed exclusively from

the record of his payments when evidenced by these vouchers, and that he is quite unable to say whether the vouchers represent his entire receipts, because, as he very frankly admitted, the vouchers where their amounts appear on the left hand side of the account are his only data for the corresponding entries on the right.

It is to say the least unusual for a trustee to limit the sum of his receipts by the amount of his proved discharges. The system in practice may be tested by referring to the entries in the account relating to the Armstrong and Lyon mortgages discussed in the sequel.

The learned Surrogate Judge, however, crediting the loss of Mr. Hogg's books as hampering a full accounting was, as he said, disposed to be indulgent in enabling him to clear the account. Accordingly he accepted it. To their Lordships it would not have been surprising had he, however reluctantly, felt compelled to reject it altogether, as indeed Mr. Justice Magee later on in effect did. But their Lordships need not pursue this matter further, because the appellant before the Board no longer asked that the account should be thrown out. She was content to accept the position to which in the Canadian Courts she had been relegated and she confined her appeal to the discussion of detailed objections to particular items therein or omissions therefrom.

And their Lordships have acquiesced in that course being taken before them. But their acquiescence must not be supposed to indicate any sympathy on their part with the view, if such a view be anywhere entertained, that the Rule of the Surrogate Court on this matter is one that need only be lightly observed. On the contrary their conviction is that the strict enforcement of the Rule is essential for the protection of trust property throughout Ontario.

The hearing before the learned Judge occupied six days in all. It was concluded on the 14th April, 1927. The judgment reserved was delivered on the 21st October. Unfortunately, all the evidence was given without reference being available to what has now become perhaps the most important document in the case, as an exhibit, marked 44A. This was not forthcoming until after the hearing—viz., on the 23rd May, 1927. It was then produced by Mr. Hogg, and, by consent was filed in the proceedings and was "to avail as evidence on behalf of all parties interested therein." It was handed to the learned Judge. But there is no indication in his judgment that its significance was thereby conveyed to his mind.

The exhibit is an account book, its title in Mr. Hogg's handwriting being "Record of Mrs. E. A. Bethune's Mortgages, March, 1890." It contains, on separate consecutive pages, the headings and particulars of securities from 1885 onwards, the headings and particulars of these up to March, 1890—twenty in all—being in Mr. Hogg's handwriting. The rest of the book is in Lady Howland's. So far as these twenty mortgages are concerned the book

purports to be a record under Mr. Hogg's own hand of early investments of Lady Howland's money. These investments were in his evidence little more than matters of surmise, for Mr. Hogg did not profess to remember them accurately, and his evidence could not in several respects have been what it was if this detailed book had then been before the Court. Its production since has helped to clear up not a few matters left in doubt, but its admission without qualification or explanation from Mr. Hogg as to the extent of his responsibility for the transactions entered therein by himself has remained something of an embarrassment as will later appear.

The learned Judge, in his judgment, in effect accepted the account of the 17th January, 1927, as it stood. As a result of mutual admissions before him he made certain additions to both sides of it, with interest, as to which hereafter. For the rest he rejected all the appellant's specific objections. With regard to Mr. Hogg's evidence he said that the witness had reached an age approximating eighty years and his memory endeavouring to recall acts extending over forty years was more dangerous than he suspected, but the learned Judge had confidence in his disposition to be just.

Upon Mr. Hogg's claim for compensation he allowed nothing, believing that it was not the intention of either party that he should receive compensation for his services.

Upon specific items, he rejected the appellant's claim in respect of the O'Toole, Patterson, Betts and Douglas mortgages—of which later—on the ground that it had been disposed of in a statement accepted by Lady Howland in 1911, which showed the balance of capital then in hand. Here, unfortunately, the learned Judge was under a complete misapprehension. The statement in question enclosed in the letter of the 2nd May, 1911, already quoted is exhibit 11 and is concerned only with the investments of the year 1910 and the sources from which they came. It has no relevance whatever to the O'Toole, Patterson and Douglas mortgages. So far from displacing, it confirms, as will later appear, the claim made with regard to the Betts' mortgage.

As to the other contested items the learned Judge compendiously disposed of them all in the following words :—

> " On the question of the necessity of corroboration of the statement of the trustee required by R.S.O. 1914, cap. 76, I hold that there has 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."

As to the rejection of the claim with reference to the four mortgages it is not now contended that it can be justified on the ground assigned. Are the Judge's grounds for rejecting the appellant's other claims less open to objection ? It is convenient to consider that question at once.

Although he cites no authority, his decision is clearly enough based upon the case of *Mushol* v. *Benjamin*, 47 O.L.R. 426, the result of which is thus stated in the headnote :—

> " Where there are in issue a large number of items so distinct, separate, and independent that they might form distinct, separate, and independent causes of action, corroborative evidence directed specifically to each is *prima facie* essential to meet the requirements of the provision of the Evidence Act; yet, where an underlying connection between several items is testified to by the interested party, and his evidence is corroborated with respect to some of the items so as to satisfy the mind of the Court not only of the truthfulness and correctness of his testimony with regard to the latter items, but of his general credibility, his evidence is thereby corroborated as to the residue of the items."

But in their Lordships' opinion *Mushol* v. *Benjamin* is to be distinguished from the present case on several grounds. First of all they are not prepared without much further consideration to subscribe to the doctrine that each of the substantive items in Mr. Hogg's account is not an independent transaction standing upon its own merits. As at present advised they think that the decision of the Chancellor in *re Ross*, 29 Grant 385, is much nearer this case than is that under notice. Secondly the conditions required for the application of the rule in *Mushol* v. *Benjamin* are not here present. The connected items in this case, if any such there be, have not been proved by the evidence of Mr. Hogg, corroborated by Lady Howland's vouchers. They have been established on Lady Howland's vouchers alone without any supporting evidence to speak of from Mr. Hogg. Lastly, their Lordships feel bound to add, although they greatly regret having to do so, that Mr. Hogg's evidence, even as described by the learned Judge, did not reach the class of testimony which is required for the rule to apply. Their Lordships would be slow to conclude that any statement on oath by Mr. Hogg in this or in any other case could be a statement he knew to be untrue. But they are much affected by his tampering with business books and his shifting statements on that subject, while in his evidence at the hearing, just as in his correspondence before it, he repeatedly made statements, in fact quite incorrect, with an assurance no less positive than that displayed when his statements were accurate. Without imputing any moral blame to Mr. Hogg, for they remember his years and his prepossessions, their Lordships are unable to profess themselves satisfied either with regard to the correctness of his testimony on any disputed item or generally in relation to this case.

In their Lordships' judgment therefore the learned Judge's decision cannot with regard to any disputed item be supported on the ground assigned.

From his judgment and report the appellant appealed to a Judge of the Supreme Court, sitting at Toronto, and Mr. Hogg cross-appealed against the refusal to allow him compensation. The appeal and cross-appeal came

before Mr. Justice Masten who by his order dated the 19th December, 1927, amended the order of the Surrogate Court Judge by adding the sum of $1,155 to the balance thereby found in favour of the estate, and, for the rest, dismissed both the appeal and cross-appeal. That amendment of the order of the Surrogate Court was due to a misapprehension on the part of the learned Judge. He mistakenly supposed that Mr. Hogg had entered in his account of the 17th January, 1927, $1,155 for his compensation and his order was intended to make his disallowance of any sum for compensation effective. *Quoad ultra* Mr. Justice Masten held, as had the learned Surrogate Judge, that the principle of *Mushol* v. *Benjamin* applied to the account: that the circumstances, including therein the fact that the payments complained of or in controversy were made during Lady Howland's life and that the relationship of financial agent or trustee and client continued thereafter undisturbed without complaint, afforded a general corroboration of the whole account sufficient to satisfy the Evidence Act to the extent 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. Applying these principles to their determination he rejected all the appellant's claims. In so doing the learned Judge as their Lordships think, for reasons already sufficiently indicated, went wrong. His findings were arrived at under what amounted to a misdirection, and it is accordingly unnecessary to canvass them in detail.

From his order there was a further appeal and cross-appeal to the Appellate Division of the Supreme Court, Mr. Hogg's cross-appeal being directed to the allowance against him by the learned Judge of the above sum of $1,155. At the hearing of the appeal all the learned Judges of the Appellate Division were of opinion that the mistake as to the $1,155 should be corrected. For the rest three of them accepting the views of the Surrogate Judge and Mr. Justice Masten, were for dismissing the appeal, increasing however by $1,000 the amount allowed by the Surrogate Judge provided the appellant was willing to accept the total sum in full of her claim against the respondent and as a settlement of the matter. If that additional amount was not accepted within a month the appeal was to be dismissed. The refusal by the appellant of the additional sum mentioned makes it unnecessary for their Lordships to consider whether the Appellate Division had in that matter jurisdiction to act as it proposed to do. The remaining learned Judge, Mr. Justice Magee, was of opinion, for reasons which he gave at length, that Mr. Hogg's account should be referred back to the Surrogate Court for further and full investigation on the lines indicated by the learned Judge. In the result the appeal was by a majority judgment dismissed and from the order of dismissal dated the 29th November, 1928, the present appeal is brought.

In her printed case the appellant indicated that she desired Mr. Justice Magee's reasoning to be adopted, such adoption to be

followed presumably by the order he had proposed to make. But at the hearing of the appeal the appellant, as has already been said, rather than have the whole matter litigated afresh, preferred to accept Mr. Hogg's account subject to the amendments she sought to introduce into it. And the arguments as already indicated proceeded on that footing.

To the appellant's contentions the general answer of the respondent, Mr. Hogg, was that the findings of the Courts below upon all the questions in debate amounted to concurrent findings of fact which their Lordships, following their usual practice, would not disturb. In reply to this it is enough to repeat that in their Lordships' judgment the so-called findings were based on an erroneous proposition of law to such an extent that with that proposition corrected they disappear. Within the Board's rule there has here been no finding at all. The complaints made by the appellant must therefore be investigated by their Lordships afresh. *Robins* v. *National Trust Company*, 1927, A.C. 515, 518.

Accordingly, they now proceed to deal *seriatim* with the items in respect of which the appellant claimed that Mr. Hogg's account should be corrected for the benefit of the estate.

AND FIRST, AS TO THOSE ITEMS WITH RESPECT TO WHICH THE APPELLANT HAS IN THEIR LORDSHIPS' JUDGMENT FAILED IN HER CONTENTION.

1. *Ten Mortgages on properties in or near Toronto, of* $12,750 *in amount, entered by Mr. Hogg in Lady Howland's Book* 44a *with the receipt also in his handwriting for the first payment of interest.*

The appellant's case with reference to these mortgages is put thus. In the book in question there are entered by Mr. Hogg six Ottawa mortgages and two mortgages (McAmmand and Martin) not charged on real estate, for all of which he accepts full responsibility. There is in the form of entry no difference in the book between what may be called the Toronto mortgages and these others. The first mortgage entered is a Toronto mortgage. Mr. Hogg stated in evidence that he did not know what Lady Howland did with the money which she did not entrust to him. Clearly, he was not ignorant of these Toronto mortgages. Again the book 44A is to avail as evidence on behalf of all parties interested: he must therefore be charged with the same responsibility in regard to the moneys secured by these Toronto mortgages that he has accepted with regard to the others. The general answer made on behalf of Mr. Hogg to all this—there may be further answers in respect of individual securities—is that he had no concern in or responsibility for any Toronto mortgages of Lady Howland. Other advisers acted for her in Toronto. He did not. These mortgages were no concern of his. Now, as an answer, this does not strike their Lordships as completely satisfactory. It is not Mr. Hogg's personal response, and it is unfortunate that he did

not himself make it either by a reservation to that effect when tendering 44A in evidence or on affidavit. The Trustee Corporation on behalf of the Estate presumably inquired into the matter at Toronto. It would have been satisfactory if they had stated the result of their inquiry. They have not done so. The whole question therefore remains in some obscurity. In these proceedings, however, that obscurity is fatal to the appellant. The entry of these mortgages in the book by Mr. Hogg cannot of itself be treated as an admission by him that he received in respect of them any moneys for which he has not accounted: and his receipt of these moneys is not otherwise proved. Accordingly in view of the limited scope of the present procedure the appellant's claim on this head fails.

2. *Capital Real Estate Company, $1000 not invested.*

This claim has been the subject of prolonged controversy. Its investigation has brought into full prominence the question of uninvested balances, the existence of which in Lady Howland's lifetime was never it would seem suspected. The facts relating to the claim are as follows. In May of 1905 $2,000 was received by Mr. Hogg on a sale of some Coal Stock belonging to Lady Howland. Of that sum, $200 was paid by him to Lady Howland. The entry of payment appears in his account under date May 23rd, 1905. The balance of $1,800 was retained for investment. As to the investment stated to have been effected by him he wrote to Lady Howland on the 3rd November, 1905: "The $1,800 balance of coal stock I put on a mortgage with the Capital Real Estate Co. and it is well invested. I will send you particulars of it when I write to-morrow or next day." Apparently he did not write again on the subject until the 16th January, 1906. He returns to the matter in a letter of that date: "The coal stock when sold produced $2,000. Of this I sent you $200. The balance $1,800 was lent on a mortgage to the Capital Real Estate Company which is as good as gold". It is strange in face of these statements that Mr. Hogg in evidence was able to say: "I never said there was an $1,800 mortgage in my life, never in my life," p. 120. Now Lady Howland had already a mortgage of $1,700 from this Company. In her Book 44A p. 58 she enters this new mortgage as "Second Mortgage $1,800 at 5 per cent."; the record is continued at p. 29 of her succeeding book Ex. 33, and on these two pages are recorded the payments half-yearly of full interest down to the 17th December, 1913, and in one at least of her vouchers for interest—that of 1st December, 1909—she gives a full description of the security: "Received from W. D. Hogg, K.C., $49.50, half-year's interest on *$1,800 mortgage Capital Real Estate.*" Upon this it was not disputed before the Board by Mr. Hogg's Counsel that Lady Howland plainly regarded herself as being the holder of an $1,800 mortgage. It is indeed difficult to conceive how she could have thought anything else in view of Mr. Hogg's two written statements to that effect and the constant

payment of interest on that footing. Yet there never was a mortgage of $1,800. There was one of $800 only. Mr. Hogg's view is that it was all a mistake; that not until 1917 did he realise that these half-yearly payments of interest on $1800 were being made to Lady Howland when interest on $800 only was being received from the Company; and that in March, 1917, at an interview with Lady Howland he informed her, so he recalls, of the mistake. She was, he says, upset about it but she took his statement and he told her that of course the interest could not continue any longer because it was an absolute mistake. It may be doubted whether Mr. Hogg's memory has not here again betrayed him. For, as appears from a voucher of Lady Howland's, full interest was paid her on the 9th July, 1917, and not until the 4th February, 1918, was the reduction of interest first made. And that was very near the end.

Moreover, if the conversation had taken place, as Mr. Hogg now thinks he recollects, it seems obvious that he must then have done one of two things: he must either at once have invested the $1,000 or returned it forthwith to Lady Howland. But he did neither. For although in evidence he asserted that in February, 1910, he had advanced $900 of it on mortgage to one Kelly, that statement had later in his evidence to be withdrawn, and the sum now stands as an uninvested balance carrying no interest since July, 1917, and to be liquidated only in balance of account. In these proceedings almost until the last moment Mr. Hogg and his advisers were putting forward a claim to have what they called the overpaid interest allowed him. Their Lordships have difficulty in understanding the mentality of such a claim. The payment of that interest was merely the fulfilment, so far as it went, of Mr. Hogg's representation that this $1,000 of Lady Howland's was duly invested. It was the price he paid for the use of her money; it was the one thing which made the transaction tolerable. There is here no place for any allowance of overpaid interest.

In the result however no case for any rectification of Mr. Hogg's account in respect of this item has been established. Interest on uninvested balances is not chargeable in these proceedings. Mr. Hogg will in the result remain accountable for the net amount of principal and that only.

3. *The Dumais, Vaillancourt and Campbell mortgage moneys.*

These have already been referred to. As uninvested balances they are all three brought into charge in the account. No claim for interest upon them as such, is, as has been observed, competent in these proceedings. They stand, in short, in the same position as the Capital Real Estate Company item.

4. *Douglas Mortgage.*

Mr. Hogg's account is completely defective in regard to this mortgage. It was of date 30th August, 1900; it was paid off

on 24th January, 1908 ; it was for $1,000 at 5 per cent. ; it was in Lady Howland's name ; it was duly registered at Ottawa ; but, as in the case of the Patterson and O'Toole mortgages, later to be dealt with, it is not to be found in Mr. Sinclair's list of registered mortgages forming Exhibit 43. The particulars of it were proved by Mr. Moxley, the Deputy Registrar called by the appellant. There are vouchers for interest from Lady Howland from October, 1900, till June, 1907. In her book (44), p. 54, after a receipt of interest on February 4th, 1908, she writes with reference to it and another mortgage, " discharged." After this discharge had been proved as above, Mr. Hogg was asked what had happened to the principal. " It either went to her or was invested in some other amount. You see it was in 1900," he said. " I don't know, your Honour, who received it," he said, a little later. " You see, I am at a considerable loss as to things prior to 1900 and 1906."

If instead of giving this off-hand and irrelevant reply, Mr. Hogg had seriously inquired into the destination of these moneys, he would have found the answer in his letter of 1st February, 1908, already quoted in another connection. " I have the amount of the principal in hand on a special account, bearing only bank rate. I expect to get a loan for it some day early at 6 per cent." Did he get such a loan ? Their Lordships, with no assistance from Mr. Hogg to lead them to that conclusion, think it should be taken in his favour that he did. It appears from Exhibit 44A, p. 59, that Mr. Hogg in February, 1908, made a loan to one W. Higman of $3,000 at 6 per cent. From Mr. Sinclair's Exhibit 43, where the Douglas mortgage is not mentioned, it appears that just before two mortgages had been paid off, McDougall's for $2,250 and O'Reilly's for $1,400 ; in other words, $650 more than enough to provide the $3,000 for Mr. Hyland was available. But apparently the O'Reilly money was not then received by Mr. Hogg. In his letter of February 1st 1908, already quoted from, Mr. Hogg states that he is getting a new mortgage from O'Reilly for the same amount, $1,400, at 6 per cent., and Lady Howland notes this in her book (Exhibit 33, p. 17). There is no record of any such mortgage having ever been registered. But Lady Howland in her book says it was paid off in July, 1910, and Mr. Hogg in his account under date July 25th, 1910, charges himself with this $1,400. As no part of the O'Reilly moneys were thus available or made available for the purpose, it seems almost to follow that either all or at least $750 of the Douglas principal was required to provide the loan for Mr. Higman, and to the extent to which it was so applied Mr. Hogg is discharged. In view of his intention expressed in his letter of February 1st, 1908, their Lordships are willing to assume in his favour that it was all so applied.

But it is without any assistance from Mr. Hogg that they reach this conclusion in his favour.

5. *The Alexander Macdonald Mortgage.*

There is evidence that Lady Howland received interest on a mortgage by some mortgagor of this name. Such evidence is of itself insufficient to charge Mr. Hogg with the receipt of any moneys in respect of it. This claim was in effect abandoned during the argument.

SECONDLY, CLAIMS WHICH THE APPELLANT HAS IN THEIR LORDSHIPS' JUDGMENT ESTABLISHED.

A.—*The Armstrong Loan.*

This was a mortgage for $1,000 effected in October, 1899. It was paid off in October, 1902, and the proceeds were received by Mr. Hogg. On the 3rd November, 1902, in a letter in Ex. 34 handed to their Lordships for inspection, he writes Lady Howland : " I have on special account Mrs. Armstrong's principal moneys which she paid $1,000. I am in hopes of getting a mortgage for this." Thereupon Lady Howland makes this entry in her book (44A, p.50) : " Paid Nov. 3, 1902. Principal paid. Mortgage discharged." On the 26th February, 1903, Mr. Hogg writes again : " I received your letter and I enclose cheque for $400 which is the balance of moneys in my hands coming from Mrs. Armstrong's loan." Next day there is a voucher from Lady Howland in these words : " Received from W. D. Hogg, K.C., $400, the balance of the Armstrong Loan," following in substance the wording of Mr. Hogg's letter. In his account this transaction is thus recorded :—

On the debit side :

1903. Feb. 27. Balance of Armstrong Loan, $400

On credit side :

1903. Feb. 27. Paid Lady Howland, $400.

This is obviously wrong. The item of charge should be not $400, but $1,000, and should be entered under date the 3rd November, 1902. The balance of $600 is not accounted for. It is represented by no mortgage ; no attempt is made by Mr. Hogg otherwise to discharge himself of it, indeed, in his own statement of repayments (Ex. 38) he does not claim to have made any return on the Armstrong Loan beyond the $400. For these reasons it appears to their Lordships that the account must be corrected.

The correction will be most conveniently made by inserting on the debit side of the account the following item :—

Nov. 3rd, 1902. *Balance Armstrong Mortgage*, $600.00.

B.—*Lyon's Mortgage.*

This mortgage for $1,500 at 7 per cent. was effected in July, 1888, and was paid off in January, 1895. Mr. Hogg received the moneys. On the 2nd February, 1895, he wrote Lady Howland : " I have settled the Lyon matter at last, and I now enclose you my cheque for $405, being the balance over a thousand of the amount coming to you. $1,000 will stand in a special account

subject to your call as we arranged." Lady Howland's entry of this in her book is (44A, p.17) :—

> "This mortgage settled in full and discharged Feb. 2, 1895."

In Mr. Hogg's account the transaction is thus recorded :—

On the debit side :

1895. Feb. 3. On account Lyon Mortgage principal, $405.

On credit side :

1895. Feb. 3. Paid Mrs. Bethune, $405.

There is no trace anywhere of the special account referred to in Mr. Hogg's letter ; and no attempt by him to discharge himself of the $1,000 placed to its credit. The account as it stands is in the same respect, as in Mrs. Armstrong's case, obviously wrong. It must in their Lordships' judgment be corrected by, in effect, substituting for the sum $405 on its debit side the sum of $1,405.

The most convenient form for the new entry will be :—

1895, *Feb. 3rd. Balance Lyon Mortgage*, $1,000.00.

C.—*Patterson Mortgage.*

This mortgage, like the O'Toole mortgage later to be referred to, was taken by Mr. Hogg in his own name. It was effected on the 16th July 1897 : it was paid off on the 9th May 1903. It was for $1,000 at 6 per cent. There is a voucher from Lady Howland dated July 14, 1899 for $30 : there are further vouchers for interest, for $30 on each occasion, on April 8, 1900, and on November 4, 1902.

The existence of the mortgage was suggested to the Appellant by the entries of the interest in Mr. Hogg's account, and the facts with reference to the security as they appear upon the Register were proved by Mr. Moxley, the Deputy Registrar. Neither this mortgage nor the O'Toole mortgage was included in Mr. Sinclair's list forming Ex. 43. After Mr. Moxley had given his evidence, Mr. Hogg in answer to his Counsel, Mr. Sinclair, said that he had loaned Mrs. Patterson the money to help her along : and that the money was his own money. This position was not however sought to be maintained before the Board in view of the payments of interest made to and acknowledged by Lady Howland. In their Lordships' judgment it must be taken to have been hers. The principal money was received by Mr. Hogg on the 9th of May 1903, and it remains still unaccounted for. The account must be rectified by inserting in it on the debit side under that date the following item :—

Mrs. Patterson's principal $1,000.

D.—*The O'Toole Mortgage.*

This mortgage for $1,300 at 6 per cent. was registered on the 16th April, 1902, and discharged on the 1st May, 1903. It was taken in the name of William Drummond Hogg "in trust."

That it was held in trust by Mr. Hogg for Lady Howland was not, at least before the Board, contested. It would have been difficult to do so successfully in view of her book, 44A, p. 49, where under her entry of Mrs. Brophy's mortgage, Lady Howland has written "$1,300 used in the O'Toole mortgage, 6 per cent., May 1, 1902."

There is a voucher from her for interest on this mortgage dated the 7th May, 1903, and in his letter of the 6th May, 1903, sending this interest, Mr. Hogg quite clearly indicates that he is retaining the principal to help in making up a sum of $2,300 which he will have on hand in a few days. "I will try and get a loan for that amount if possible, and if I can get one for $2,500 perhaps you will, as you say, be able to make up the difference." There is no mortgage effected in 1903. On the 20th October, 1903, there is a voucher from Lady Howland for $100 received from Mr. Hogg, "part principal money from the O'Toole mortgage." There is no proof before their Lordships of the repayment or other application for Lady Howland's benefit of any further part of the O'Toole principal, and Mr. Hogg does not in his account charge himself with its receipt. In these circumstances the account must be rectified by inserting on the debit side under date the 1st May, 1903, the following item :—

"*On account O'Toole mortgage, principal*, $1,200."

E.—*Betts Mortgage.*

This mortgage for $1,100 with interest at 6 per cent. was effected on the 1st September, 1904, and was discharged in March. 1910. The $1,100 principal with $38.50 interest was received by Mr. Hogg. In his account under date the 4th April, 1910, there is on the debit side this entry :—

"*Amount Betts Mortgage*, $1,138.50."

and on the credit side under the same date :—

"*Paid Lady Howland*, $1,138.50."

And in Mr. Hogg's cash book there is a corresponding entry, with the addition of the number of the cheque, by which presumably the payment was made.

But of that credit of $1,138.50, $1,100, if it was ever sent, was returned by Lady Howland to enable Mr. Hogg, with a further sum, to effect a fresh mortgage. In Lady Howland's book 44A, p. 39, under her record of this mortgage, are these words :—

"*Betts principal* $1,100 *and* $1,900 *cheque making* $3,000 *for a new mortgage.*"

And Mr. Hogg, in his letter to her of the 5th April, 1910, writes :—

"I received your letter of the 20th March enclosing cheque for $1,900. This with the $1,100 of the Betts mortgage makes $3,000. The Betts mortgage was paid yesterday. The interest due amounted to $38.35 and I am enclosing an express order for that amount."

Further, in the statement Ex. 11 sent by Mr. Hogg in his letter of the 2nd May, 1911, already mentioned showing the investments made in 1910, amongst the sources from which the moneys came, there is included:—

"*Amount of Betts mortgage returned*, $1,100."

On these entries it may be uncertain whether there was a cheque for $1,138 with $1,100 returned: or whether the $1,100 was throughout retained by Mr. Hogg with, as would appear from his letter of the 5th April, only $38.35, representing interest actually sent to Lady Howland. But the doubt is of no consequence. What is certain is that the Betts mortgage money was not received *and retained* by Lady Howland, as Mr. Hogg's account represents. It was in fact reinvested in the mortgages which appear lower down on the credit side, so that as the account now stands Mr. Hogg takes credit for this $1,100 twice over. The simplest and perhaps most accurate rectification will be to insert on the debit side below date 1910. April 10:—

"*Amount Betts mortgage returned* $1,100."

F.—*Larocque Mortgage.*

It was not disputed, and it had been agreed on behalf of Mr. Hogg in the Surrogate Court (Record pp. 105–106), that having received $200 in respect of principal from this mortgagor, he had charged himself in his account under date the 3rd June, 1913, with $164.75 only. The account must be rectified by inserting under that item this further sum—

"*Balance of Larocque, principal* $35.25."

G.—*McAmmond and Martin.*

The claim of the appellant to have struck out as being a payment never made to Lady Howland the $1,600 entered on the credit side of Mr. Hogg's account on the 19th March, 1917, under the words "Paid Martin and McAmmond" has raised a conflict between the parties exceeding all the others in intensity and seriousness. Upon the issue so raised in its broadest aspect their Lordships are not required to pronounce. The question for them, however, arises out of it, and can only be defined after a survey of the position as a whole. In that survey, Lady Howland's book 44A supplies once again an assured starting point, making it necessary to regard all the subsequent happenings in the light of this debt of $1,600 having originated in two loans of $1,100 and $500 separately made in 1885 and not, as seems to have been vaguely assumed at the hearing, in a joint loan made somewhere about 1895.

In book 44A, by one of Mr. Hogg's own entries, there is recorded as on May 1st, 1885, a loan of $1,100 at 6 per cent. to James McAmmond, for 6 years from that date, with interest payable on the 1st May and 1st November in each year.

As on the 15th November, 1885, there is in like manner recorded a loan of $500 at 8 per cent., to Thomas Martin for

6 years from 15th November, 1885, interest being payable on the 15th May and 15th November.

No security for either loan is specified, but there is no obvious connection between the two. The term in each case is six years, but the rate of interest, and the dates for payment are both different. The security for each loan was, it is said, bonds only. Thus it was that neither of the mortgages was registered.

It is recorded in her book by Lady Howland that in June, 1897, interest on the Martin mortgage was reduced to 6 per cent. Something with reference to each mortgage seems to have happened in 1903. There is an entry first made and then struck out in relation to the Martin mortgage. "Paid in full: mortgage discharged." There is an entry in relation to both mortgages that the interest for November, 1903, and May, 1904, was paid in one sum in June, 1904. It is notable that thereafter payments are made in each case on the same day, and in each case payment for November, 1915, is said to have been missed.

Now the appellant's allegation is that never—certainly not for very many years—has there existed any mortgage at all either from McAmmond or Martin, or both. It is even questioned whether there ever were any such persons. Mr. Hogg, it is asserted, has himself had the $1,600 either all the time or since the original advances were paid off, and he has himself accounted for the interest as if the loans remained on foot. In other words, in the view of the appellant, this is merely another Capital Real Estate Company case, except that here the statement that the principal money has been repaid, is persisted in, and the money no longer remains to be accounted for. And in support of her allegation the appellant can point to the following facts: Mr. Hogg's ledger for 1905–1906 with Lady Howland's account, then carefully kept, is extant. Ex. 2. During that period there are three vouchers of Lady Howland's also extant, showing payment of this interest to her: the 26th June, 1905, the 17th January, 1906, the 29th April, 1906. There is no entry at all in the ledger either of the receipt from McAmmond or Martin of any interest, or of the payment to Lady Howland of any sum whatever on that account. Lady Howland's account in Mr. Hogg's ledger from the 1st January, 1910, to the 21st February, 1911, is also extant, Ex. 3. During that period there is one voucher from Lady Howland for payment of this interest. Again there is no entry in the ledger either of receipt or payment. Lastly in the ledger of 1913–19, Ex. 13, where there are six entries of payments of this interest to Lady Howland and six of its receipt by Mr. Hogg, no entry of payment, save possibly one of July, 1915, has any relation whatever in point of date to Lady Howland's vouchers during the same period, and no entry whether of receipt or payment is supported by any cash book reference. Moreover, every entry—nearly everyone of them undated—has the same appearance of interpola-

tion by another hand which is admitted now to have been the case with regard to the entry of $1,600 principal on the 19th March, 1917. Further, it is pointed out that Mr. Hogg's evidence with regard both to McAmmond and Martin and their loan is very extraordinary. On his case it must be taken that they had been paying him interest regularly for 32 years ; and he had held their bonds throughout as security. Yet he did not know the address of either (p. 86). All he could say of them was that they were engaged in some kind of market business, and they looked like respectable men. Nor could he recall what the charged bonds were, although these were Lady Howland's only security. He thought they were municipal bonds. Nor did he explain whether he or the mortgagors collected the interest on the bonds ; nor how if they did, they were able to do so if he held the bonds, or why if they did not, they also paid him the half-yearly interest as, his evidence was, they did regularly. Then it is pointed out as a strange thing that as late as the 26th October, 1926, Mr. Hogg apparently thought that—the loan—a joint loan, had been one for $1,700 and not $1,600. He said so in his letter of that date. It is strange, too, that in his account (Ex. 20), 1913–1918, the sum received and paid in 1917 is entered at $1,700 and not $1,600, and in the corresponding interpolated ledger entry the figure first entered and then erased is $1,700 also.

Now, if their Lordships had to determine whether there ever were loans to these individuals they would find in these facts no sufficient justification for saying that there were not. But whether these loans continued as loans after 1903 or whether they subsisted in 1905 their Lordships would hesitate to affirm. The vagueness of Mr. Hogg's knowledge of the men and of their security is natural enough if he had ceased to have anything to do with either for over 20 years : it is more difficult to understand if he had been on close terms with them continuously for 32 years up to 1917.

This, however, is not the question which the Board is now called upon to answer. All it is required to decide is whether Mr. Hogg has discharged himself of this sum of $1,600 by a payment of $1,600 which he claims to have made to Lady Howland in March, 1917. That he had then that sum in hand must be taken against him. He asserts it. Has he shown that he paid it over ? His statement that he did is, it must be agreed, very circumstantial. He made the payment, he says, by handing to Lady Howland (apparently at the same interview at which he recalls the conversation on the subject of the Capital Estate Company mortgage) two bank drafts obtained from Messrs. McAmmond & Martin, one for $1,100 and one for $500.

But no corroboration of this statement is forthcoming from any quarter. It has been impossible to find the Bank which issued the drafts although the Supreme Court directed inquiry to that end. There is no contemporaneous record in any book of Mr. Hogg's of payment of this sum having been either received

or made by him. It must now be taken to be admitted that the entries now appearing in his firm's ledger were interpolated by himself after the question of payment was in 1926 raised at the appellant's instance. Again, the sum said to have been received and paid over was not the proper sum. There was some arrear of interest, payment of which by the mortgagors is not said to have been either asked for or made. There is no voucher from Lady Howland for the receipt of so much money, although a voucher from her for interest on the loan as recent as the 24th February, 1917, is in evidence. Her bank account has been examined, and a copy is produced. There is no trace of any payment into it, of either of the drafts or of any sum remotely representing them. It was suggested to the Board that corroboration of Mr. Hogg's statement might be found in two directions : first, in ledger entries already referred to of receipt of interest from the borrowers, all prior to the payment of principal ; secondly, in the cessation of all further interest payments to Lady Howland. As to the first, their Lordships who have examined the entries in question have already commented upon their appearance. They pass that by to point out again that the entries are not supported by any cash book reference. Without such support they do not amount even to an assertion of any cash receipt from McAmmond & Martin or either of them. As to the cessation of interest to Lady Howland. By 1917 she had long ceased to keep any accounts. Their Lordships are more than doubtful whether any non-payment of interest then or thereafter would even have attracted her attention.

In these circumstances, and rigidly confining themselves to this one question, their Lordships are of opinion that Mr. Hogg cannot be treated as having discharged himself of this sum of $1,600, and that the entry of payment referred to must be struck out and the account amended accordingly.

Their Lordships have now dealt with all the points raised by the appellant which were not abandoned or disposed of during the hearing. They say now nothing of her charge that on the capital which, it is said, appears on his account to have been in his hands, Mr. Hogg is short on an average of $700 a year in his interest. This remains a mere allegation, not worked out by reference to the account. Even however if to any extent a *primâ facie* case with reference to that interest or to any part of it could be made, no relief in these proceedings could on the evidence be given for the reason explained in an earlier part of this judgment.

Much was said to their Lordships of the difficulties in which Mr. Hogg found himself by reason of the destruction of so many of his books in 1911. Their Lordships have had full regard to this plea. In their considered judgment however loss of books is not the prime cause of Mr. Hogg's difficulties. These are mainly attributable to his neglect at any time to keep a separate record and account of his transactions as Lady Howland's trustee : and to his practice, increasing in the later years, of leaving her

balances in his own hands or in those of his firm uninvested and carrying no interest for periods of indefinite duration. Their Lordships cannot doubt that the learned Judges in the Appellate Division would have been vigilant to animadvert upon these irregularities on the part of a trustee had it not been for the view taken by them—a mistaken view as their Lordships think—that Mr. Hogg's relation to Lady Howland was one of agency without fiduciary responsibility.

It is to the irregularities just alluded to that is attributable nearly all the expense of these proceedings, a circumstance to which their Lordships must have regard when they come to deal with the subject of costs.

In the result, upon the whole case, and for the reasons given by them, their Lordships are of opinion that the account of Mr. Hogg annexed to his affidavit sworn and filed on the 17th January 1927 should be treated as amended in the following respects, but with no allowance of interest in regard to any item.

1. As a credit to the estate by the addition of the items following to the right hand side of the account, all as directed by His Honour Judge Mulligan :—

January 21st, 1913	0·50
June 8th, 1914 (shortage of voucher)	35·00
December 17th, 1914 (shortage of voucher) ..	22·00
June 20th, 1919	100·00
	157·50

2. As a credit to the Respondent, Mr. Hogg, by the following additions to the left hand side of the account also as directed by his Honour Judge Mulligan :—

July 15th, 1892	25·00
August 2nd, 1902	18·00
December 28th, 1904	61·88
July 7th, 1913	27·50
January 17th, 1919	28·00
June 13th, 1916 (1)	2·00
June 13th, 1916 (2)	28·00
June 13th, 1916 (3)	28·00
June 29th, 1918	20·00
	238·38

3. As a further credit to the Estate—

(*a*) By the additions following to the right hand side of the account :—

February 3rd, 1895. Balance, Lyon mortgage ..	1,000·00
November 3rd, 1902. Balance, Armstrong mortgage	600·00
May 1st, 1903. On account O'Toole mortgage, principal	1,200·00
May 9th, 1903. Mrs. Patterson's principal ..	1,000·00
April 10th, 1910. Amount Bett's mortgage returned	1,100·00
June 3rd, 1913. Balance, Larocque principal ..	35·25
	4,935·25

(*b*) By the cancellation of the following item on the left hand side of the account :—

March 19, 1917. Paid Martin and McAmmond 1,600·00

The property of Lady Howland shown to have come to the hands of the respondent by his account as filed was $46,567.61, with the above additions of $157.50 and $4,935.25, that amount should now be taken to be $51,660.36.

The amount shown by the respondent in his same account to have been disbursed by him was $45,994.64. With the above addition to those disbursements of $238.38, and the above disallowance therefrom of $1,600, the total amount of disbursements should now stand at $44,633.02.

In their Lordships' judgment it would accordingly be right:

1. That this appeal be allowed.

2. That the order of the Appellate Division of the Supreme Court of Ontario, dated the 29th November, 1928, and the order of the Honourable Mr. Justice Masten dated the 19th December, 1927, be both discharged.

3. That the order of His Honour Judge Mulligan, dated the 21st October, 1927, be also discharged except in so far as it disallows Mr. Hogg any compensation in the premises.

4. That it be now found and declared (*a*) that the total estate and effects of the deceased Lady Howland which came into the hands of her trustee, the respondent, Mr. Hogg, amount to $51,660.36, apart from mortgage securities handed over by him, and (*b*) that the said respondent has properly paid out and disbursed in the due course of administration of the said estate the sum of $44,633.02.

5. That it be found that there remains at this date in the hands of the said respondent the sum of $7,027.34.

And their Lordships will humbly advise His Majesty accordingly.

For the heavy costs of these proceedings throughout Mr. Hogg is, in their Lordships' judgment, responsible. It would be wrong that any of these costs should fall upon the Trust Estate. The respondent, Mr. Hogg, must therefore pay the costs of the respondent Corporation incurred in all Courts of Ontario and of this appeal. The appellant, Mrs. Campbell, has succeeded in many of her contentions, but she has failed in others. So far as her costs are concerned in a question between herself and Mr. Hogg, their Lordships think the proper order will be that Mr. Hogg do pay to her three-fourths of her costs in all Courts and of this appeal.

The question whether the balance of the appellant's costs, in whole or in part should, before division, be paid out of the fund recovered as the result of these proceedings, is one beyond the jurisdiction of their Lordships. Its solution must and can only be matter of agreement between the appellant and her sisters.

In the Privy Council.

ELIZABETH BETHUNE CAMPBELL

v.

WILLIAM DRUMMOND HOGG AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.