

In the Privy Council

UNIVERSITY OF LONDON
W.C.1.

28MAR1951

INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE SUPREME COURT OF CANADA

BETWEEN

WILLIAM R. GLOVER (Defendant) - - - *Appellant*

and

ALBERT GLOVER, personal representative of
EVELYN GLOVER, now deceased (Plaintiff) - - *Respondent.*

Case

FOR THE APPELLANT WILLIAM R. GLOVER.

RECORD.

1. This appeal is by special leave from a Judgment of the Supreme Court of Canada dated 24th June, 1949, which by a majority of three Judges to two (The Honourable Mr. Justice Taschereau, The Honourable Mr. Justice Kellock and The Honourable Mr. Justice Locke ; The Right Honourable The Chief Justice of Canada and The Honourable Mr. Justice Kerwin dissenting) reversed a unanimous Judgment of the Court of Appeal for Ontario dated 27th May, 1948 (The Honourable Mr. Justice Henderson, The Honourable Mr. Justice Roach and The Honourable Mr. Justice Aylesworth), by which it was adjudged that the Respondent's action be dismissed and restored the Judgment of The Honourable Mr. Justice LeBel dated 14th June, 1947, by which it was adjudged that a Quit Claim Deed from Albert Glover and Evelyn Glover to the Appellant dated 29th July, 1944, be set aside.

p. 291.
p. 273.

p. 261.
p. 252.

2. The action was originally instituted by Evelyn Glover, the widow of Albert Glover, and her son Albert Moore Glover as Plaintiffs as sole heirs at law of Albert Glover, for a declaration that a Quit Claim Deed dated 29th July, 1944, executed by Albert Glover (Evelyn Glover joining therein to bar her dower) was fraudulent and void and should be set aside, and for consequential relief. The action insofar as it was brought by Albert Moore Glover was dismissed because of his failure to submit to discovery before trial. Evelyn Glover died on 1st February, 1950, while the appeal was pending, and Albert Glover her lawful son and personal representative being the proper person to be substituted on the Record in the place of Evelyn Glover, an Order of Revivor was accordingly made by His Majesty in Council.

p. I.

3. The Statement of Claim alleged that Albert Glover at material times was incapable of understanding the most ordinary business matters, that the Appellant exercised fraud and undue influence over him and that Albert Glover had no independent advice.

p. VI.

4. The Statement of Defence was a denial of mental incapacity, fraud and undue influence and an assertion that Albert Glover was indebted to the Appellant at the time the Quit Claim Deed was given and that there was consideration for the Deed.

5. The deceased Albert Glover and the Appellant were brothers and in 1944 were 78 and 72 years of age respectively. Insofar as it is material to this action, the financial relations between Albert Glover and the Appellant, who is a dentist practising his profession in Kingston, Ontario, began in 1920. There is no dispute upon the evidence that the Appellant, since that time, advanced large sums much of it without security to his brother Albert which were never repaid. The following are in brief the major transactions between them :—

p. 92, l. 31.

p. 94, ll. 1-23.

p. 240.

(A) In 1920, the Appellant purchased a grocery store and business for Albert Glover at a cost of \$12,150.00. No security was given at that time by Albert Glover.

p. 148, ll. 32-45.

p. 94, l. 25 to

p. 96, l. 10.

p. 201.

(B) In 1926, Albert Glover began reconverting 174 Earl Street at Kingston into apartments and for this purpose borrowed, by way of mortgage, \$25,000.00 from the London Life Insurance Company. This sum was not sufficient to finish the work and the Appellant, in 1926, advanced Albert Glover the sum of \$8,000.00 without security. Later, Albert Glover gave the Appellant a second mortgage on this property for \$25,000.00, which secured all the interest and advances to January 1st, 1927.

p. 96, ll. 15-26.

p. 99, ll. 5-28.

p. 182.

(C) Albert Glover, in 1931, reconverted 170 and 172 Earl Street into apartments and for this purpose the Appellant advanced him \$3,000.00. This sum, together with the money owing on the \$25,000.00, were incorporated into a new second mortgage in 1931 for \$34,500.00.

p. 97, ll. 5-28.

p. 147, ll. 20-26.

p. 240.

(D) Between 1931 and 1934, the Appellant borrowed \$8,502.48 from the Bank of Toronto and loaned it to Albert Glover which was spent on the apartment buildings.

p. 100, ll. 1-35.

(E) In 1935, the London Life threatened foreclosure of its mortgage. The Appellant then paid arrears of taxes amounting to \$1,600.00 and paid the London Life on account of their mortgage \$3,098.00.

p. 100, l. 1 to

p. 102, l. 25.

p. 105, l. 35 to

p. 108, l. 2.

(F) After the last-mentioned transaction, Albert Glover personally turned over to the Appellant certain of the rent cheques from the apartments, above the amount Albert Glover decided he needed, and the Appellant opened a separate bank account in his own name into which he paid such moneys and out of which he paid taxes, interest and principal on the London Life mortgage and other expenses. From time to time the Appellant put into this account additional moneys of his own when required.

p. 133, ll. 1-44.

pp. 241-251.

(G) Although Albert Glover had not repaid any moneys owing on the second mortgage for \$34,500.00 in 1938 this mortgage was discharged, and Albert Glover gave the Appellant a new second mortgage for \$15,000.00. This transaction was carried out upon the advice of T. J. Glover, a solicitor and brother of Albert Glover and the Appellant, with a view to saving succession duties, as the equity in the property after the first mortgage held by the London Life was apparently not worth more than that at that time. T. J. Glover who was 83 at the time was too ill to attend trial, and has since died. On 15th June, 1944, an agreement extending this mortgage was entered into between Albert Glover and the Appellant and in this agreement the principal amount owing is stated to be \$19,500.00.

p. 118, l. 2-36.
pp. 128-129.
p. 186.

p. 231.

6. The facts established at the trial with respect to Albert Glover's financial position were (A) that Albert Glover owed the Appellant \$67,941.70 together with interest on the sum of \$8,000.00 advanced in 1926; (B) that Albert Glover never at any time repaid any advances made by the Appellant; (C) Albert Glover in 1936 failed in the grocery business and had been foreclosed; (D) that Albert Glover had no assets in 1944 except the apartment house other than certain chattels such as refrigerators and stoves in the apartment house; (E) the apartment house in 1944 with its encumbrances and the rents frozen was not an attractive investment.

p. 240.
p. 148, ll. 30-45.
p. 128, l. 14.
p. 111, l. 37 to
p. 112, l. 13.
p. 49, ll. 10-31.
p. 141, ll. 20-34.
p. 271, ll. 20-24.

7. The solicitor who prepared the Quit Claim Deed, W. O. Dwyer, died before the trial of the action. The undisputed evidence at the trial was :—

(A) W. O. Dwyer was a life-long friend of Albert Glover and Albert Glover suggested to the Appellant that the latter should consult him.

p. 16, ll. 18-29.
p. 78, ll. 5-36.
p. 114, l. 17 to
p. 115, l. 4.

(B) Albert Glover knew he owed the Appellant around \$50,000.00 and said "it is your property."

p. 77, ll. 29-36.
p. 111, ll. 5-36.

(C) W. O. Dwyer advised a Quit Claim Deed and the Appellant asked him to explain it to Albert Glover.

p. 115, ll. 8-16.

(D) Mr. and Mrs. Albert Glover were in the office of W. O. Dwyer for about an hour the day the Quit Claim Deed was signed.

p. 84, l. 46 to
p. 85, l. 7.

8. At the date of the Quit Claim Deed the apartment house was subject to a first mortgage in favour of the London Life for \$13,500.00 and a second mortgage in favour of the Appellant for \$19,500.00 and the Appellant had advanced on balance during the period from 1935 to 1944 by way of payments off principal on the first mortgage the sum of \$11,843.01 for which he was entitled to security on the property.

p. 240.
p. 231.

9. The total advances, both secured and unsecured by the Appellant to Albert Glover at the date of the Quit Claim Deed was \$67,941.70 and interest on the sum of \$8,000.00 advanced in 1926.

p. 148, ll. 40-45.
p. 240.

10. The Respondent's Statement of Claim places a value on the property of between \$50,000.00 and \$60,000.00. The only witness called by the Respondent on the question valued the property as of the date of

p. II.
p. 27, l. 26 to
p. 29, l. 41.

pp. 154-155.
p. 161, l. 24 to
p. 162, l. 47.

trial in 1947 between \$75,000.00 and \$85,000.00. Two witnesses were called by the Appellant on the same question, one of whom placed a value on the property in 1944 on a replacement basis at between \$50,000.00 and \$60,000.00, and the other witness placed a value in 1947 at between \$35,000.00 and \$45,000.00 and stated this value was higher than it would have been in 1944.

p. 101, ll. 7-12.

11. Albert Glover not only lived rent free in the apartment house from 1935 on, but retained out of the rental moneys such sums as he required for living expenses, and his widow continued to live there rent free until her death on 1st February, 1950.

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pp. 252-259.

12. The learned Trial Judge was of opinion that Albert Glover's mental powers had become somewhat impaired before the execution of the Quit Claim Deed although he was not mentally ill. He further found that a confidential relationship existed between Albert Glover and the Appellant and that Albert Glover had not been independently advised. The Trial Judge declared that the Quit Claim Deed was fraudulent and void and should be set aside and reserved the question of accounting which could not be dealt with as the Estate of Albert Glover was not before the Court.

pp. 262-272.

13. The Court of Appeal for Ontario unanimously found upon the 20 evidence that there was no fiduciary relationship but rather that the relationship was that of debtor and creditor, that no undue influence had been exerted by the Appellant and that the consideration passing to Albert Glover was not out of proportion to the value of his equity in the property.

pp. 274-281.

pp. 281-290.

p. 274.

14. The Supreme Court of Canada by a majority restored the Judgment of the Trial Judge. The Honourable Mr. Justice Kellock agreed with the findings and conclusions of the Trial Judge. The Honourable Mr. Justice Locke found that a fiduciary relationship existed, that undue influence had been exercised and that the transaction was an improvident 30 one and therefore could not stand. The Honourable Mr. Justice Taschereau concurred with the reasons of The Honourable Mr. Justice Kellock. The Right Honourable The Chief Justice of Canada and The Honourable Mr. Justice Kerwin dissented. The latter found that no fiduciary relationship existed and that there was in the circumstances no undue influence. The Chief Justice agreed with The Honourable Mr. Justice Kerwin.

15. The issues in these proceedings are : (A) whether at material times a fiduciary relationship existed between Albert Glover and the Appellant or whether the relationship was that of debtor and creditor ; 40 (B) whether the Appellant exercised undue influence ; and (C) whether if a fiduciary relationship existed (i) Albert Glover received independent advice, or (ii) the transaction which was for value was not manifestly unfair.

16. The Appellant contends :—

(A) that no fiduciary relationship existed between the Appellant and Albert Glover. Upon the facts disclosed in the evidence the relationship was that of debtor and creditor. The onus of justifying the acceptance of the Quit Claim Deed is not on the mortgagee.

(B) that if no fiduciary relationship existed then the onus is upon the Respondent to prove undue influence or fraud.

(c) that if a fiduciary relationship did exist between the Appellant and Albert Glover the onus resting upon the Appellant to justify the transaction has been discharged by—

- (i) proof of independent advice, or
- (ii) proof that the transaction was not manifestly unfair.

17. The Appellant therefore accordingly submits that the Judgment of the Supreme Court of Canada be set aside, and that the Order of the
10 Court of Appeal for Ontario be restored for the following amongst other

REASONS

- (1) BECAUSE there was no fiduciary relationship between the Appellant and Albert Glover.
- (2) BECAUSE there was no undue influence.
- (3) BECAUSE the transaction was for value.
- (4) BECAUSE the Trial Judge erred in assimilating and failing to distinguish the cases of gift or immoderate benefit and cases of transactions for value.
- 20 (5) BECAUSE there is no evidence to justify a finding that the Quit Claim Deed was not explained to Albert and Evelyn Glover.
- (6) BECAUSE there is no evidence that Mr. Dwyer in the circumstances failed in his duty as a solicitor, and the maxim *omnia praesumuntur rite esse acta* is applicable.
- (7) BECAUSE The Honourable Mr. Justice Kellock erred in finding the properties carried themselves during the material period.
- 30 (8) BECAUSE the Respondent in these proceedings is asking for equitable relief but at the same time has taken the position throughout as set out in the Respondent's Factum in the Supreme Court of Canada "that even if there had been a debt other than the mortgage, it was statute barred and again even if it had not been statute barred it could not have furnished consideration for the deed."
- (9) BECAUSE the majority of the Judges in the Courts below rightly based their Judgments on a consideration of the whole relationship and dealings between the brothers rather than on the form of the transaction.
- 40 (10) BECAUSE the Judgments of the Judges of the Court of Appeal for Ontario and of the dissenting Judges in the Supreme Court of Canada were right for the reasons stated therein.

R. F. WILSON

H. F. GIBSON

Of Counsel for the (Defendant) Appellant.

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GLOVER, now deceased

(Plaintiff)

Respondent.

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FOR THE APPELLANT WILLIAM R. GLOVER

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