Privy Council Appeal No. 10 *of* 1950

William R. Glover - - - - - - - - - *Appellant*

v.

Albert Glover (Personal Representative of Evelyn Glover now deceased) - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1950

Present at the Hearing :

LORD PORTER
LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD)
LORD REID
LORD RADCLIFFE
LORD TUCKER

[*Delivered by* LORD TUCKER]

This is an appeal 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 reversed a judgment of the Court of Appeal for Ontario dated 27th May, 1948, which had reversed the judgment of the trial Judge (Mr. Justice Le Bel) dated 14th June, 1947, by which it was adjudged in favour of the plaintiff in the action, Evelyn Glover, that a quit claim deed dated 29th July, 1944, from her and her deceased husband, Albert Glover, to the appellant, William R. Glover, be set aside. Evelyn Glover died on 1st February, 1950, during the pendency of this appeal and Albert Glover her son and personal representative was duly substituted on the Record in place of her.

The facts leading up to the execution of the quit claim deed are fully set out in the judgments of the Courts below. It will accordingly suffice for present purposes to give an outline of such of the facts as are not in dispute.

The late Albert Glover, who was a brother of the defendant William Glover, the present appellant, died on 23rd December, 1945, aged 79. He was 78 years old at the time of the execution of the quit claim deed on 29th July, 1944, at which date his brother William was some eight years younger, and his wife was 72.

In July, 1907, the deceased acquired certain properties in Kingston, Ontario, being numbers 170, 172 and 174, Earl Street in that city. These houses were originally designed as single dwellings but were remodelled and converted into apartments by the deceased. He remained the sole owner subject to certain encumbrances until he conveyed them to his brother William on 29th July, 1944, by the quit claim deed which is now in question.

For some years prior to 1936 the deceased had carried on a grocery business. In that year it failed and the mortgagee of the property foreclosed. Some ten years before this he had converted 174, Earl Street into apartments. He was by trade a stonemason—the grocery business being in the nature of a side line—and he appears to have taken a great interest

in this property and to have devoted himself to remodelling it and later to managing it. However, he soon got into financial difficulty. In July, 1926, he borrowed $25,000 from the London Life Insurance Co. on the security of a first mortgage on the property.

In January, 1927, he gave a second mortgage to the defendant to secure the sum of $25,000 that amount representing various advances which had been made by the defendant to the deceased for the purpose of assisting him in the grocery business and later in financing the alterations to the Earl Street property. The defendant is a dentist who appears to have had a prosperous practice and to have been in a good financial position. In July, 1931, the deceased gave another mortgage to the defendant and his brother Robert securing $34,500, and the mortgage of January, 1927, was discharged.

By 1935 the deceased was again in financial difficulty. There were arrears of interest owing to the London Life Insurance Co. which was threatening foreclosure and the defendant accordingly advanced a sum of $3,000 to the Company.

In April, 1935, Robert Glover assigned his interest in the second mortgage to the defendant. By this date according to the evidence of the defendant there was owing to him $34,500 on the second mortgage apart from interest, the $3,000 which he had advanced to the London Life Insurance Co. and some $1,600 which he had paid in respect of taxes.

As was pointed out by Roach J. in the Court of Appeal for Ontario there is no suggestion that at this date the mental faculties of the deceased were in any way impaired and to quote from the judgment of that learned Judge, " with full ability to appraise his own financial position and to appreciate the position of his brother, the defendant, as his creditor, he then entered into an arrangement with the defendant whereby he agreed to turn over to him all the rentals received from the tenants, retaining only sufficient to cover the living expenses of himself and his wife. From the moneys thus received the defendant was to make all payments on account of mortgages, taxes, insurance and necessary maintenance ".

Thereafter this arrangement was carried out but the defendant had from time to time to make payments of his own money into the account which he had opened in order to make good deficiencies existing by reason of the insufficiency of the moneys received by him from the deceased. The defendant also from time to time borrowed money from the fund.

In July, 1938, the second mortgage for $34,500 was discharged and a new second mortgage given to the defendant by the deceased to secure $15,000 and interest. By this mortgage the principal was repayable in half-yearly instalments of $500 until July, 1943, when the balance became due.

The explanation of the reduction in the sum secured by this mortgage was a matter of controversy but there was no evidence that the deceased had repaid the difference to the defendant and indeed the evidence showed that he never was in a position to have done so. On 15th June, 1944, an extension agreement was entered into between the defendant and the deceased by which the time for payment of the sum then due under the second mortgage for principal and interest, which was stated to be $19,500, was extended so as to be repayable by two half-yearly instalments of $500 beginning on 1st January, 1945, and continuing until 1st July, 1949, when the remaining balance became due and payable.

On 29th July, 1944, the deceased executed the quit claim deed now in dispute whereby he conveyed to the defendant his interest in the properties in Earl Street for the nominal consideration of $1. His wife Evelyn joined in the deed to bar her dower in the lands.

On 2nd August, 1944, the deceased made his will by which he appointed the defendant his executor and left his whole estate in trust to pay the income to his wife for her life and on her death to pay the balance remaining after payment of her funeral and testamentary expenses to his son Albert Moore Glover.

The extension agreement, the quit claim deed and the will were all drawn by and executed in the office of the late Mr. W. Dwyer a lawyer practising in Kingston who died before the trial. He was a life-long friend of the deceased and had acted for some years as Solicitor for the defendant. The defendant swore that at the time of the execution of the quit claim deed he asked Mr. Dwyer to explain it to the deceased. There was no evidence that the defendant had anything to do with the execution or preparation of the will or had knowledge of its contents. He said in his evidence that he knew nothing about it.

The quit claim deed was not registered until 19th January, 1946.

The defendant swore at the trial that in addition to the advances which were secured by the mortgages referred to above he had from time to time made large advances to the deceased either directly or by payments into the trust fund without security.

It was the defendant's case that by July, 1944, the advances made with and without security amounted to some $67,000. On this appeal it was contended on behalf of the plaintiff that on the true view of the evidence no sum in excess of that secured by the mortgages was due and that the value of the property being between $75,000 and $85,000 the equity conveyed by the deceased was of considerable value.

With regard to the advances the evidence of the defendant was supported by that of a Chartered Accountant who had been through the books of account kept by the defendant and the bank account and found a sum of $59,000 due apart from a sum of $8,000 which the defendant stated he had advanced in 1926. This evidence was not seriously challenged at the trial. Moreover, the plaintiff had put in evidence and made part of his case the defendant's answers on discovery in which he had sworn that the sum of $19,500 mentioned in the mortgage of June, 1944, did not represent the balance owing at that time and that it should have been $50,000 or more. All the Judges who have dealt with the case were satisfied that the defendant throughout had acted with great generosity to the deceased for many years. Henderson J. in the Court of Appeal for Ontario arrived at a figure of over $75,000 for the total indebtedness. Whatever may be the exact figure their Lordships are satisfied as a result of the evidence and the findings below that a substantial sum in excess of $50,000 had been advanced leaving a considerable unsecured balance. As to value, there was a conflict of evidence. Experts were called who gave values varying from between $34,000 and $45,000 to between $75,000 and $85,000. The trial Judge made no finding as to value and his judgment gives no indication as to his views with regard to these witnesses. In these circumstances their Lordships find it impossible to express an opinion as to the true value of these properties in July, 1944, and must deal with the case on the basis that it has not been proved that the equity exceeded in value the balance of the unsecured indebtedness of the deceased to the defendant.

The case for the plaintiff was that the execution of the quit claim deed was obtained by the exercise of undue influence by the defendant who—it was said—was in a confidential relationship to the deceased of such a nature as to give rise to a presumption of undue influence which could only be rebutted by proof that the deceased acted as a result of the exercise of his own independent judgment with full knowledge of all the relevant facts. The trial Judge so found and his finding was approved by the majority of the Supreme Court (the Chief Justice and Kerwin, J., dissenting), while the Court of Appeal for Ontario were unanimous in holding that no such confidential relationship existed. Before dealing with this issue upon which the result of this appeal really turns it may be stated that the plaintiff put in the forefront of his case the allegations contained in paragraph 7 of his statement of claim which reads as follows:—"The said Albert Glover for some years prior to his death in December, 1945, was incapable of understanding or comprehending the most ordinary business

matters and the defendant's influence over him increased to such an extent that for the last three or four years the said Albert Glover had no independent will of his own and was wholly guided and controlled in everything by the said defendant." The evidence entirely failed to substantiate these allegations. The trial Judge stated that he was unable on the evidence to find that the deceased was mentally ill at the time he executed the deed but was satisfied that his mental powers had become impaired before the material date. This falls far short of a finding that he was " incapable of understanding or comprehending the most ordinary business matters " or of understanding the nature of the quit claim deed or the financial position as between the defendant and himself. In fact the evidence showed that he was throughout attending to the letting of the apartments and the collection of rents. The finding of the trial Judge that he signed the deed without understanding the import of the document must be based upon the inference that it had not been explained to him in fact and that such was his trust in his brother and Mr. Dwyer that he was content to sign without asking for any explanation or troubling to read the document. In the view of their Lordships the allegation of mental incapacity may be dismissed from further consideration. The evidence however disclosed that the brothers were and had been for many years on terms of intimate friendship and the closest mutual confidence, which had resulted over a period of years in the deceased obtaining the most generous assistance from the defendant. In fact throughout the years from 1926 to 1944 it would appear that if any weakness of will existed the conduct of the defendant would seem to indicate that such weakness might be attributable to him.

The general principles of law to be applied to such a case as the present are well established and are to be found in such well known cases as *Allcard* v. *Skinner* (1887) 36 Ch.: Div.: 145 and *Tate* v. *Williamson* L.R. (1866) 2 Ch. Appeals 55. In the former case Cotton, L.J., at page 171 said " The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes: first, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."

In *Tate* v. *Williamson* (*supra*) Lord Chelmsford L.C. at page 61 said " The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise." In this connection it is useful to bear in mind the observations made in the Court of Appeal by Fletcher Moulton L.J. in the case of *In re Coomber* (1911) 1 Ch. at pages 728 and 729 where he said " It is said that the son was the manager of the stores and therefore in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relationships are of many different types; they extend from the relation of myself to an

errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between parties in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever, any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on these facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them."

Their Lordships are of opinion that in the present case the onus was on the plaintiff in the first instance to establish either the existence of one of the recognised relationships which give rise to the presumption or that there were special circumstances in which in the particular case the inference is that such influence existed and was abused. The existence of one of the recognised relationships was not established. It was contended that the defendant had undertaken the management of the properties in Earl Street on behalf of the deceased and that the relationship of principal and agent consequently existed with reference thereto. The evidence, however, fell short of this and disclosed only that the deceased retained to himself the management of the apartments and their improvement from time to time together with the collection of the rents, merely handing over to the defendant the balance out of which he was to make the payments due under the mortgages, pay the taxes and insurance and the cost of maintenance. This arrangement was not sufficient to alter the relationship between the parties which was in truth that of mortgagor and mortgagee and debtor and creditor. The crucial issue is whether the plaintiff has proved the existence of special circumstances sufficient to give rise to the presumption. In this connection numerous decisions of the Courts in this country and in Canada were cited during the argument showing the varying circumstances in which such inferences have been drawn. Not much assistance is to be derived from such cases each of which must depend upon its own special facts and circumstances, but they show that certain matters are always regarded as relevant and sometimes as conclusive, amongst which the following are worthy of special mention:— (1) that the transaction in question was a voluntary gift; (2) that the transaction, if amounting to a contract, was for a manifestly inadequate consideration; (3) the existence of a marked disparity in age and position between the parties to the transaction.

In the present case their Lordships are of opinion that it has not been proved that the quit claim deed was a voluntary gift. All the evidence and probabilities tend to support the defendant's case that he and his brother had determined to settle up all outstanding matters between them and that this was the real consideration for the deed. On this view of the case and having regard to the fact that the plaintiff failed to prove a sale for a manifestly indequate consideration there remain no other circumstances sufficient to give rise to a presumption of undue influence and so shift the onus on to the defendant. In the absence of such a confidential relationship the plaintiff could only succeed by adducing positive evidence that undue influence was in fact used and their Lordships—differing from the contrary view expressed by Locke J. in the Supreme Court—are clearly of opinion that he failed so to do. Their Lordships find themselves in agreement with the analysis of the evidence, the reasoning and conclusions in the judgment of Roach J. in the Court of Appeal for Ontario which was approved in the Supreme Court by the Chief Justice and Kerwin J., and whilst they, like Roach J., are unable to explain the giving of the

quit claim deed so soon after the extension agreement or the subsequent making of the will, they also are of opinion that these circumstances do not necessarily lead to the conclusion that the quit claim deed was obtained by misconduct on the part of the defendant.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of Appeal for Ontario should be restored, and further, no grounds for the admission of further evidence having been disclosed, that the appellant's Petition to adduce such evidence be dismissed.

The respondent must pay the defendant's costs in the Supreme Court and before their Lordships while the appellant must pay the respondent's costs of the Petition to adduce further evidence, the last mentioned costs to be set off against the costs payable by the respondent.

(10363) Wt. 8148—56 120 12/50 D.L. G. 332

In the Privy Council

WILLIAM R. GLOVER

v.

ALBERT GLOVER (PERSONAL REPRESENTATIVE OF EVELYN GLOVER NOW DECEASED)

DELIVERED BY LORD TUCKER

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