

DAME ANNE SHAW LOW (DEFENDANT) APPELLANT ;

1890

AND

\*May 13.

DAME ANNE JANE GEMLEY, *et al.* }  
*al.* (PLAINTIFFS)..... } RESPONDENTS.

\*Dec. 11.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

*Testamentary executor—Power to substitute—Liability for mis-appropriation by agent—Art. 1711 C. C.*

*Held*, affirming the judgments of the courts below, that when a testamentary executrix employs an agent as attorney, she is bound to supervise his management of the matters entrusted to him and to take all due precautions and cannot escape liability for the misappropriation of funds committed by such agent, although he was a notary public of excellent standing prior to the misappropriation.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) (1), confirming in part a judgment of the Superior Court (2), and ordering the reformation of certain accounts rendered by the defendant in her capacity as executrix of the will of the late Charles Adamson Low ; and also condemning the defendant, personally, to pay to the plaintiff, in her quality of tutrix to the minor children of her deceased husband Geo. H. Low, the sum of \$17,914.11, being made up of certain amounts misappropriated by one J. S. Hunter, who acted as notary and agent for the estate.

The action was brought by the respondent Dame A. J. Gemley in her quality of tutrix to the four minor children issue of her marriage with the late George Hamilton Low, against the appellant Dame A. S. Low

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Gwynne and Patterson JJ.

(1) M. L. R. 5 Q. B. 186.

(2) M. L. R. 4 S. C. 92.

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as executrix of the will of the late Charles Adamson Low, to obtain the reformation of the accounts rendered to her by the executrix, and the payment of the children's share of the testator's estate as established by the accounts and by the corrections which the tutrix sought to introduce therein.

The items in the accounts rendered alleged to have been misappropriated by Mr. J. S. Hunter, N. P. were as follows :—

|                                   |             |
|-----------------------------------|-------------|
| Loaned to Mrs. Emma Roussell..... | \$ 2,916.81 |
| “ “ Mrs. John Clark.....          | 1,000.00    |
| “ “ Joseph Bouchard.....          | 3,000.00    |
| “ “ Est. C. Phillips.....         | 10,997.30   |
|                                   | \$17,914.11 |

The judgment of the Superior Court ordered the rectification of the accounts according to the plaintiff's pretensions, and condemned the defendant in her quality of executrix to hand over to the tutrix the portion of the estate comprised in the accounts, and personally to pay the amounts which should have been placed to the credit of the minors in these accounts.

An appeal to the Court of Queen's Bench was taken by the executrix, and during the pendency of this appeal one of the minors whom the tutrix represented, Miss Maud H. Low, attained her majority and obtained leave to take up and continue the proceedings on her own behalf.

The executrix met the action brought by the tutrix by a two-fold defence. She contended that the accounts as rendered were correct, and she further urged that in any event the tutrix could not claim the possession or control the capital of her wards' estate until the attainment of the age of majority of one of the children, in view of the provisions of the will which were alleged to place the estate under the control of trustees until the fulfilment of this condition.

When Miss Maud Low came of age and obtained leave to continue the proceedings in her own behalf, this second defence became unavailing, and the executrix declared to the Court of Queen's Bench by her factum, that she had no objection to pay to Miss Maud Low such portion of the estate as might be found to be due to her as one of the legatees under the will.

The Court of Queen's Bench unanimously confirmed the judgment of the Superior Court as regards the correction ordered to be made in the accounts, and the payment of the children's revenues to the tutrix, but adopted the appellant's interpretation of the will as to the right of the trustees to retain the control of the capital against the tutrix until the majority of the children. In view of the fact that Miss Maud Low attained her majority during the proceedings, and of the declaration made by the appellant, the judgment of the Court of Queen's Bench ordered the executrix to pay to Miss Maud Low her share of the estate as established by the corrected accounts.

The respondents accepted this judgment *in toto* and the appellant has acquiesced in a portion of the judgment by filing a consent that it should be executed in so far as it orders the payment to Miss Maud Low of her share of the capital and revenue of the estate admitted by the executrix in her accounts as rendered.

The circumstances under which the moneys in question were misappropriated fully appear in the reports of the case in the courts below (1) and in the judgment hereinafter given.

*H. Abbott* Q.C. for appellant, and *Lafleur* for respondents.

The points of argument and cases and authorities relied on by counsel are given at length in the report of the case of the Court of Queen's Bench (2).

(1) M. L. R. 5 Q. B. 186 ; M. L. R. 4 S. C. 92. (2) M. L. R. 5 Q. B. 190 *et seq.*

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The judgment of the court was delivered by—

SIR W. J. RITCHIE C.J.—As to the merits we have to deal with the important question of the responsibility of executors for the funds in their hands under the circumstances of such a case as this.

The first thing will be to see what it was precisely that the defendant did. The evidence shows, first, that on 1st November, 1875, Mrs. Lawford handed over to Hunter \$2,916.81 to invest on mortgage from Emma Roussel. No mortgage was ever executed, and the money was appropriated by Hunter, who seems to have paid the interest on the supposed mortgage to Mrs. Lawford out of his own pocket.

On 1st December, 1880, a sum of \$3,000 which had been loaned to Mrs. Joseph Bouchard and secured by a mortgage on real estate became due. Mrs. Lawford signed a receipt and acquittance bearing that date, which is filed with the record.

No proof is offered to explain the disappearance of this money, but defendant can only suggest that when she signed the receipt she imagined that she was signing an extension of the mortgage.

On 6th July, 1877, Mrs. Lawford handed Hunter \$1,000 to invest on mortgage from Mrs. John Clarke. No such mortgage was ever executed or registered, and the money was appropriated by Hunter, who paid interest on the supposed investment out of his own pocket.

On 20th February, 1882, Mrs. Lawford handed Hunter \$20,576.60, to be used in payment of assessments due by the estate Philips, and held partly by Robert Hamilton and partly by the city, from whom subrogation was to be obtained. On 28th February, 1882, Mrs. Lawford signed a subrogation for \$9,579.30. Hunter appropriated the balance of 10,997.30, and

defendant can only suggest that when she signed the deed she imagined it was for the whole amount.

The question will be whether, all this money having been lost by the misconduct of Hunter, the defendant has any lawful excuse for not paying it to the plaintiff *és qual*.

It is abundantly clear that trust money ought not necessarily to be left with strangers.

In this case it is beyond question that the executrix placed herself completely in the hands of Hunter delegating to him the confidence reposed in herself, placing the most implicit confidence in him, acquiescing without question or investigation in all he proposed, accepting his statements without any inquiry as to their correctness, and generally without exercising any surveillance or control over the money to be invested, or without any inquiry as to whether the investments had been made or the security properly executed and registered before the money to be invested in the securities was paid over, but gave him the absolute control of such moneys by drawing checks payable to him personally when no necessity existed for such a course being adopted and when if such checks had been drawn in favor of the borrowers or their order it could not have been in his power to have perpetrated the gross frauds of which he appears to have been guilty in this case. It was, however, stated in the evidence that the plaintiff was a woman who professed to possess a certain knowledge of business; if she does it is quite clear that she failed to put any such knowledge in practice, but on the contrary, without any direction, supervision, inquiry or superintendence, in a blind confidence, she placed the moneys of this estate in the hands of this man who fraudulently appropriated the same to his own use.

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Now who should be the sufferers by this rascality? Should it be the executrix who by an entire abandonment of her control over these funds, and of her duties as executrix, and substituting in her stead the author of those wrongs and needlessly placing in his hands the moneys of the estate thereby enabling him to perpetrate them, and whose only answer practically is: "I had such confidence in him that I did not believe he could do wrong"; or the infant children of the testator, guilty of no improper conduct or wrong?

I think this executrix cannot be considered in any other light than as guilty of culpable negligence. I cannot conceive any system of law recognising the duties of executors that would throw such a loss as this case develops on the devisees and relieve the negligent executor from all liability. No doubt when Hunter was perpetrating these frauds and until his flight his reputation was unquestioned and he enjoyed public confidence and esteem. No doubt he was an ancient friend of the Low family, and appears to have been particularly so of the plaintiff, but this case is not to be decided on sentiment. What we have to do with are the business relations of the plaintiff as executrix with the notary Hunter, and in those relations did she exercise that due care and control over the interests of the estate, and that surveillance over the transactions in question, that her duty as executrix and her duty to the estate demanded?

I can discover no substantial difference between the French and English law on the question at issue in this case. I have not thought necessary to go into the authorities French or English, because I think the principle involved in the case is too clearly established to require that I should do so.

The law applicable to this case is clearly stated in *Clough v. Bond* (1). It was held by Lord Cottenham,

(1) 3 Mylne & C. 490.

affirming the decree of Sir L. Shadwell V.C., (reported 8 Sim. 594 nom. *Clough v. Dixon*), that the estate of John Bond was answerable for the loss.

It will be found, "said his lordship," to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive.

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So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if, without such necessity, he be instrumental in giving, to the person failing, possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator: *Langford v. Gascoyne* (1), *Lord Shipbrook v. Lord Hinchinbrook* (2), *Underwood v. Stevens* (3).

This case does not come at all within the case of *Speight v. Gaunt* (4), which, in my opinion, is entirely distinguishable from it.

Persons who accept the office of executors or trustees must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence. *Learoyd v. Whiteley* (5), per Lord Halsbury.

*Appeal dismissed with costs.*

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *Lafleur & Rielle.*

(1) 11 Ves. 333.

(4) 9 App. Cas. 1.

(2) 11 Ves. 252; 16 Ves. 477. (5) 58 L. T. 94.

(3) 1 Mer. 712.

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