LAWRENCE G. POWER (PLAINTIFF).....APPELLANT.

AND

NICHOLAS H. MEAGHER (DEFENDANT)..... } RESPONDENT.

1890

*Feby. 22.

*June 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trustees—Commission to—Rule of law.

In the Province of Nova Scotia prior to the passing of 51 V. c. 11 s. 69 the rule of English law relating to commission to trustees was in force, and no such commission could be allowed unless provided by the trust.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favor of the defendant.

The only question raised in this case is: Has a trustee under a will in the Province of Nova Scotia a right

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

(1) 21 N. S. Rep. 184.

1890

POWER v. MEAGHER.

to a commission on the funds of the estate for his services when no provision is made therefor in the will? The court below, affirming the decision of the trial judge, held that the English practice refusing such commission is not in force in Nova Scotia, and gave judgment for the defendant who claimed a commission as such a trustee. The plaintiff, an executor and legatee under the will, appealed from that decision to the Supreme Court of Canada.

The appellant in person. The rule in England refusing such a commission as is claimed in this case is well established; *Robinson* v. *Pett* (1); Williams on Executors (2); Lewin on Trusts (3); *Barrett* v. *Hartley* (4).

In all the cases cited in the judgments delivered in the court below, as forming exceptions to the general rule, the circumstances were peculiar and they cannot be regarded as shaking the rule.

In none of the cases cited from the East Indies was a commission allowed to trustees, though it was allowed to executors. The West India cases were all decided under a local act.

Then in the absence of any legislative provision governing it in Nova Scotia this case must be decided under the rule of the Chancery Court in England.

The application of English law to these colonies has been dealt with in *Uniacke* v. *Dickson* (5); *Doe d. Anderson* v. *Todd* (6); *Kerr* v. *Burns* (7); see also *Kelly* v. *Jones* (8); *Deedes* v. *Graham* (9).

It is contended that the practice has always been to allow these commissions but the law cannot be changed by a mere practice; *Hamilton* v. *Baker* (10). Moreover

(1) 3 P. Wms. 249; 2 White & Tudor's L.C. 6 ed. p. 214.
(2) 8 ed. p. 1860.
(3) 8 ed. c. 24 p. 627 *et seq.*
(4) L. R. 2 Eq. 789.
(5) James 287.
(6) 2 U.C.Q.B. 82.
(7) 4 Allen (N.B.) 604.
(8) 2 Allen (N.B.) 473.
(9) 20 Gr. 258.
(10) 14 App. Cas. 209.

the practice has not been proved. See *Freeman* v. *Fairlie* (1).

Before the passing of the present statute in Ontario these commissions were not allowed; *Wilson* v. *Proudfoot* (2); *Deedes* v. *Graham* (3). And the same has been held in the State of New York; *Green* v *Winter* (4); *Manning* v. *Manning* (5).

Executors and trustees do not stand in the same position in respect to commissions and an executor is not a trustee until he passes his accounts; Perry on Trusts (6); Walker on Executors (7); *Conkey* v. *Dickinson* (8); *Miller* v. *Congdon* (9); *Prior* v. *Talbot* (10).

The will provided a sum as compensation to the trustees and if it was not considered sufficient the defendant should have refused to accept the trust. By accepting it he does so subject to all the provisions of the instrument creating it and the law governing the same.

Henry Q.C. for the respondent. There are numerous exceptions to the English rule; *Brown* v. *Litton* (11); *Forster* v. *Riddley* (12); and the court in England has made a distinction in respect to the colonies, assigning as a reason that it would be difficult to get suitable persons to act as trustees without compensation. See *Chambers* v. *Goldwin* (13); *Denton* v. *Davy* (14); *Chetham* v. *Lord Audley* (15).

The case of *Uniacke* v. *Dickson* (16) is a leading case in Nova Scotia and lays down a rule for the application

(1) 3 Mer. 24.
(2) 15 Gr. 103.
(3) 20 Gr. 258.
(4) 1 Johns. Ch. 26 at p. 36.
(5) 1 Johns. Ch. 527.
(6) 4 Ed. sec. 12, 263.
(7) P. 246.
(8) 13 Met. (Mass.) 51.
(9) 14 Gray 114.
(10) 10 Cush. 1.
(11) 1 P. Wms. 140.
(12) 4 DeG.J. & S. 452.
(13) 9 Ves. 254.
(14) 1 Moo. P.C. 15.
(15) 4 Ves. 72.
(16) James 287.

1890

MEAGHER. v. POWER

of English law to the colonies. See also *Collins* v. *Story* (1); *Caldwell* v. *Kinsman* (2).

The English rule has been held inapplicable in Massachusetts; *Barrell* v. *Joy* (3); *Gibson's Case* (4).

The allowance in the will was to the executors and had no relation to the trusts created. See *Ex parte Dover* (5); *Dix* v. *Burford* (6).

SIR W. J. RITCHIE C. J.—I agree with Mr. Justice Weatherbee that the principle of the law of England that trustees were not allowed for their services when remuneration was not expressly provided for, but that the same should be gratuitous, is clearly established by the authorities, and I think the same principle is as applicable to Nova Scotia as to England, and as there does not appear to be any legislative authority or judicial decision to the contrary it must be held to be the law of Nova Scotia until the same shall be changed by the legislature. The legislature appears, prior to this case, to have dealt with the office of both executors and trustees and to have allowed a commission for his services to the former but only the costs and expenses to the latter; this is a strong confirmation of what the law was, and an equally strong intimation that the legislature did not intend to alter it; that having changed the policy of the law in respect to executors the legislature left the case of trustees untouched until 51 Vic. ch. 11 sec 69, passed in 1888, where compensation was for the first time provided for trustees, and the provision was made applicable to trusts constituted or created either before or after the commencement of the act but not to affect any suit or other legal proceeding pending at the time of its commencement. It is difficult to conceive how the legislature could more

(1) James 141.
(2) James 405.
(3) 16 Mass. 221.
(4) 17 Am. Dec. 266.
(5) 5 Sim. 500.
(6) 19 Beav. 409.

1890

MEAGHER. v. POWER

Ritchie C.J.

clearly have expressed its intention to change the law in relation to the remuneration to trustees.

Under these circumstances I am clearly of opinion that this appeal should be allowed, the judgment of the Supreme Court of Nova Scotia reversed, and the judgment of Mr. Justice Ritchie set aside and judgment entered for the appellant for the amount claimed with costs of the trial and of both appeals.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff for the reasons given by Weatherbee and Townshend JJ. in the court below.

GWYNNE J.—In my opinion it is apparent upon the will of the testator that the devise of the $700 given to each of the executors therein named for his services was intended to be given to them, and if the trusts of the will should be accepted it was to be taken by them, in full compensation for all the duties of every description imposed upon them by the will in the execution of the trust purposes thereof, including that of paying over to the appellant the whole of the income to arise from the sum directed by the will to be invested for his benefit. The defendant, in my opinion, can make no claim for any sum beyond the seven hundred dollars which it is admitted he has received. This appeal, therefore, should be allowed with costs, and judgment be ordered to be entered in the court below in favor of the plaintiff for the full amount claimed by him, with costs of suit.

PATTERSON J. concurred.

Appeal allowed with costs.

Solicitor for appellant: *C. S. Harrington.*

Solicitor for respondent: *H. McD. Henry.*