

ANTOINETTE CAIRNS AND OTHERS } APPELLANTS;  
 (PLAINTIFFS) . . . . . }

AND

ROBERT MURRAY AND OTHERS (DE- } RESPONDENTS.  
 FENDANTS) . . . . . }

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 \*Dec. 4, 5, 6.  
 \*Dec. 22.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Breach of trust—Accounts—Evidence—Nova Scotia “Trustee Act,”*  
 2 Edw. VII. c. 13—*Liability of trustee—N.S. Order XXXII.,*  
 r. 3—*Judicial discretion—Statute of limitations.*

By his last will N. bequeathed shares of his estate to his daughters A. and C. and appointed A. executrix and trustee. C. was weak-minded and infirm and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicile, and applied their joint incomes to meet the general expenses. No detailed accounts were kept sufficient to comply with the terms of the trust nor to shew the amounts necessarily expended for the support, care and attendance of C., but A. kept books which shewed the general household expenses and consisted, principally, of admissions against her own interests. After the decease of both A. and C. the plaintiffs obtained a reference to a master to ascertain the amount of the residue of the estate coming to C. (who survived A.) and the receipts and expenditures by A. on account of C. On receiving the report the judge referred it back to be varied, with further instructions and a direction that the books kept by A. should be admitted as *prima facie* evidence of the matters therein contained. (See 37 N.S. Rep. pp. 452-464). This order was affirmed by the Supreme Court of Nova Scotia *in banco*.

*Held*, affirming the judgment appealed from (37 N.S. Rep. 451) that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended; that, under the Nova Scotia statute, 2 Edw. VII., ch. 13 and Order XXXII., rule 3, a judge may exercise judicial discretion towards relief-

\*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclellan JJ.

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ing a trustee from liability for technical breaches of trust and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) affirming the order of Mr. Justice Graham, which referred the master's report back to him for further inquiry and variation with directions as to how the accounts should be taken and as to the reception of certain books of account as *prima facie* evidence of matters therein contained.

The material facts of the case and the questions at issue on the present appeal are sufficiently stated in the head note and judgment now reported.

*Newcombe K.C.* and *Mellish K.C.* for the appellants.\*

*W. B. A. Ritchie K.C.* for the respondents.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs for the reasons given in the court below.

DAVIES J.—I concur for the reasons stated by my brother Maclellan.

IDINGTON J.—Four points: (a) the additional allowance of \$400.00 per annum for expenses out of income; (b) the commission allowances; (c) the statute of limitations and; (d) the admission of the account books as evidence, are taken on this appeal, which is from the Supreme Court of Nova Scotia, dismissing an appeal from Mr. Justice Graham's order referring back to the referee his report for amendment and reconsideration.

(1) 37 N.S. Rep. 451.

The order, as first made, was amended by the learned judge, and, as amended, is copied in full in the opinion judgment of Mr. Justice Townshend, who delivered the judgment of the court, and, hence, there cannot be any possible mistake in saying that this amended order was the order appealed from to the Supreme Court of Nova Scotia and fully considered by that court and upheld. And, as a result, the terms of that amended order thus adopted by the court below are all that is now before us to pass upon.

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The first of the four points is the only important one. The master allowed only \$500 a year for the support and maintenance by the late Antoinette Nordbeck of her late sister, Caroline Nordbeck, who had an income exceeding the amount of the \$900.00 a year that Mr. Justice Graham has allowed.

She was kept, though of feeble mind, in the condition of affluence and comfort that she was entitled to be kept in, having such income.

The sister who did all this was the executrix, was a capable person, and doubtless used the incomes of herself and sister as if both held in common. She did not keep such accounts as a banker might have done, but kept such accounts as do shew a general annual expenditure in this way of living, and as may fairly be said to have benefited the feeble sister to the extent the learned judge has allowed.

The contention is set up that because Antoinette did not keep and exhibit an account in detail, and hence was unable to prove, item by item, the actual expenses (specifically so to say applicable, and applied to the direct benefit of Caroline) she must not be allowed beyond what she can shew items for.

I know of no such rule of law as will require any court to restrict the allowances for expenditure in

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such cases within what can be shewn in that way to have been expended.

If the law be so then we might go further, and say the very cheapest mode of living ought to be adopted in all such cases because the quasi ward is unable to have and express an opinion, and entitled to have all her money saved except what is needed for bare subsistence, and she is to be presumed as not having been capable of enjoying life better, by reason of the surrounding comforts that a spacious, well kept house and grounds might afford, and the corresponding equipment of such a house, and all that can be implied therein.

The lot of such trustees as this Antoinette Nordbeck had by fate given her, is always hard enough, without adding a new terror to the lives of those who have to bear such burthens.

She spent for the living of herself and her sister. She did not make money out of the incomes of both or either.

Her father, by his will, clearly indicated she was trusted by him to do almost as she pleased, and not to be charged in the way sought to charge her here.

I have not the slightest doubt she did in regard to the manner of expending the incomes just what her father would have approved of.

The court below used the evidence in the account books, kept by the executrix, and by that means was able to make an allowance that possibly the referee could not have made.

Unless and until the court or a judge directs a referee to make use of such account book he cannot, as in Ontario, for example, where the master has the power given him, which in Nova Scotia is only reposed in the court, or a judge.

The learned judge went further, and by use of that, with other evidence, fixed, as the learned judge had a right to fix, what he found all that evidence enabled him to find and fix.

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I see no reason to interfere with that finding.

In all these cases the judge, who has had a chance of knowing the local conditions, is better able to appreciate properly such evidence as we have before us than we possibly can.

The learned judge may have allowed more even than I, if on the spot and acquainted with the local conditions, might have allowed on this evidence.

Even so, I would not reverse, unless satisfied that by no reasonable inference from the evidence, could the expenditure challenged have been imputed to the support and maintenance of the weak one, in such ways as would minister to her comfort and enjoyment of life; or that the income had been improperly exceeded or misapplied.

The use of the books as evidence was purely a matter of discretion and what I have written disposes of all that need be said in relation to its exercise.

Some commission seems clearly allowable and is so as far as directed; but the measure of it may on the facts be affected by what the evidence shews, and will, when fixed, be subject to review by the judge or court below.

The statute of limitations, of which we heard so much, is as yet not in this appeal. The referee may or may not find such facts as may render the statute operative.

When he does the judge and court below will no doubt deal properly in regard to it, for it was pleaded, but not passed upon, by the record of judgment, and

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would seem open in law for future disposition if need be.

The appellants have failed on all four points taken and the appeal must be dismissed with costs.

MACLENNAN J.—This is an appeal by the plaintiffs in an administration suit, from a judgment of the Supreme Court of Nova Scotia, dismissing an appeal from a judgment of Graham J. referring the case back to the referee to review and vary his report.

The action respects the estate of Peter Nordbeck, who died in January or February, 1861, having first made his will bearing date the 9th of October, 1860, of which he appointed his daughter Antoinette executrix. The testator left an estate estimated at about £15,000, Nova Scotia currency. He left him surviving besides Antoinette, two other daughters, Eleonora and Caroline, and these were his own children. Eleonora was then the wife of one Harley, and she and her husband are now dead. Four children and three grandchildren of Mrs. Harley are plaintiffs; and the defendants are the executors of Antoinette, who died in 1898, aged 84 years. One of the plaintiffs is administratrix of Mrs. Harley, and another is administratrix of Caroline, who died in January, 1902, aged 80 years.

After providing for his daughter, Mrs. Harley, the testator devised his dwelling house on Brunswick Street, with all the furniture and effects contained therein, to Antoinette for her own absolute use, but subject to the free and unrestricted use and occupation of the same by Caroline for life. He then gave his residue to Antoinette and Caroline equally, share and share alike, with a direction that Caroline's share should be invested by Antoinette, and that the income should be paid half-yearly to her for life, and at her

death to her children, if any, and if she died unmarried her share should be divided equally between Antoinette and Mrs. Harley. The will provides for the case of Antoinette or Caroline marrying and leaving children surviving them, but they both died without having been married. The judgment at the hearing determined that Mrs. Harley's children became entitled between them to one-fourth of the testator's residue upon the death of Caroline, and that determination is now acquiesced in. The judgment then directed certain accounts and inquiries to be taken and made. But, except as to the proportions or shares of the residue to which the plaintiffs were declared to be entitled, the judgment decided nothing whatever as to the rights or liabilities of the parties, nor was any authority given to the referee to decide or declare any such rights or liabilities.

Further directions were reserved, and also liberty to apply.

The referee made his report, with statements of the several accounts directed by the judgment, and finding the half of the residue, with interest computed thereon from the testator's death, including the value of existing securities, and the dividends paid thereon to amount to \$49,653. He also found that a proper allowance for the maintenance of Caroline from the death of her father until her own death was the sum of \$20,500. He also computed income and interest subsequent to her death at \$1,092.

The plaintiffs moved before Mr. Justice Graham to confirm this report, and the defendants moved to vary it, and the learned judge delivered a very extended opinion in which he referred it back, with directions to vary it. An order to that effect was drawn up bearing date the 17th of December, 1904.

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The plaintiffs immediately appealed against this order to the Supreme Court, and while the appeal was pending Mr. Justice Graham re-cast the order of the 17th of December, varying it a good deal in form, and this amended order was duly drawn up and issued, bearing date the 27th of January, 1905.

A very earnest contention was made before us that the amended order was void, and that the learned judge had no power to make an alteration in his order after it had been issued.

I have carefully perused and considered the learned judge's written opinion, on which the orders were founded, and have also compared the substance of the two orders, and I am clearly of opinion that the second order more fully and completely follows and carries out the learned judge's written opinion than the first. The main difference is in the form. It is hard to say there is any difference of substance, except the direction, in the second order, of an inquiry whether the trustee acted honestly and reasonably within the Trustee Act and ought to be excused. But that is something to which, in his written opinion, the learned judge had made distinct reference and the omission of which from the first order drawn up was a good reason for having it re-drawn. Another difference may be noted, that while the first order enables the referee to determine whether to apply the Statute of Limitations, the amended order reserves that power to the court.

It was also argued that there was some inconsistency between the order under appeal and the order made by the learned judge at the trial. I do not think this is so. It was said that the order or judgment at the trial expressly excluded the application of the Statute of Limitations. It is true that in his written



opinion the learned judge had expressed himself so; but that is omitted from the order as issued, and in such cases the order as drawn up and issued must govern, unless and until corrected or amended. Besides, the judgments at the trial, as I have pointed out, did no more than direct certain accounts to be taken, without in any way deciding the rights or liabilities of the parties in respect to them, and reserved further directions and liberty to apply.

I am, therefore, of opinion that there is nothing in any of these objections.

The question then remains, whether on the merits the order was rightly affirmed by the Supreme Court, and I think it was.

I cannot imagine a case in which the modern remedial legislation with respect to the onerous, and often thankless, duties of trustees ought with more propriety to be applied, if that can fairly and justly be done. Here were two daughters, spinsters, the one thirty-eight and the other forty-six years old. Their father dying gives his dwelling and all its furniture and contents to the elder, absolutely, subject to the free and unrestricted use thereof by the younger for life. The father evidently contemplated and provided for just what has taken place, for they lived together for thirty-eight years afterwards until the elder died, aged eighty-four, the younger being then seventy-six. According to the evidence the younger sister was not a person of strong mind, and evidently required the care and protection of her sister, but she was by no means lunatic or *non compos*. That is manifest from her father's will in which he provided that the interest of her share should be paid to her, and also contemplated the possibility of her marriage. It is not suggested, nor is it possible to believe, that these sisters

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lived together, for those many years, otherwise than in mutual confidence and affection, and yet it is sought, without the means of knowing all that passed between them in relation to their business affairs, to settle accounts between their estates as if the elder had been defrauding her younger sister every day of her life.

A point which was strongly argued was the increase directed by the order of the learned judge of the annual allowance to be made for Caroline's maintenance from \$500 to \$900 a year. I think there is evidence which warrants that increase, and that the judgment on that point should not be disturbed.

I think there is nothing else in the judgments appealed from to which objection can be successfully urged and the judgment should, therefore, in my opinion, be maintained, and the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *W. H. Fulton.*

Solicitor for the respondents: *John A. McKinnon.*

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