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*Feb. 6, 7.
*April 30.

MICHAEL WILKINSON BRIGHOUSE (DEFENDANT) ..... } APPELLANT;

AND

FREDERICK C. MORTON, ADMINISTRATOR OF THE TRUST AND ONE OF THE EXECUTORS AND TRUSTEES OF THE ESTATE OF SAM BRIGHOUSE, DECEASED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trusts and trustees—Accounting—Accounting to deceased's estate as to receipts and expenditures in connection with deceased's affairs—Disputed items—Whether payments properly chargeable to estate—Findings on the evidence—Corroboration—Mingling of funds of trustee and cestui que trust—Presumption as to funds of unidentified origin—Mingling authorized by cestui que trust.

By the judgment of this Court, [1927] S.C.R. 118, defendant was held accountable for all moneys of the late S. B. received by him since February 6, 1907 (except as to gifts completed within S. B.'s lifetime) and was held entitled to all just and proper allowances for expenditures made, and for costs, charges and expenses incurred by him in or in relation to or in connection with S. B.'s affairs. On the accounting, disputes arose as to certain items, which, by the judgment now reported, were decided by this Court as follows:

(1) As to certain payments by defendant to discharge a liability of S. B. for money borrowed from a bank for which a demand note was given, it being contended that the money was used for a business given by S. B. to defendant, and that, as between defendant and S. B., the note was a liability of defendant rather than of S. B.; *held* that there was no evidence that the money was received by defendant after February 6, 1907, or at any time, and therefore it was not money for which defendant was accountable by the said former judgment of this Court, upon which the accounting must proceed; and, moreover, the payments were expenditures or charges incurred by defendant "in or in relation to or in connection with the affairs" of S. B.; and the items should be allowed to defendant.

(2) As to sums charged by defendant as paid to his brother W., deceased, for W.'s wages for work on S. B.'s farm, as to which it was contended that there was no proof or presumption that the services of W. (who was S. B.'s nephew and lived with him on his farm) were to be paid for, and that the payments were not really for wages but on account of the sale price of land which defendant and W. had sold and in which each had a half interest, and that there was no corroboration of defendant's evidence that he appropriated the payments to wages or that W. was entitled to wages; *held*, that the sums should be allowed to defendant; on the evidence, and with due regard to the rule requiring

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

corroboration in such cases (*Evidence Act*, B.C., s. 11) there was ample proof of the payments and of their imputation on account of wages, and there was no evidence to the contrary beyond an inference sought to be drawn from certain circumstances, but which was negatived by the evidence; as to W. having an enforceable claim against S. B. on a presumed or implied agreement, the circumstances possibly justified the inference of a legal demand, but, in any event, the payments to W. constituted expenditures by defendant in relation to S. B.'s affairs, there was no reason to doubt that they were made honestly and within the scope of defendant's authority as proved, and therefore they should not be disallowed on the ground that possibly W. could not have established his claim for wages by strict proof of a contract for payment; the situation, under the circumstances, was one as to which defendant was entitled to exercise his judgment in the administration of his authority with relation to S. B.'s affairs. (Lamont J. dissented as to this allowance, holding that, on a consideration of all the evidence, there was no corroboration of defendant's statement that S. B. told him to pay wages to W. or that the sums were paid as wages.)

(3) As to certain sums deposited by defendant in his bank account, the origin of which sums he was, after the long time elapsed, unable to identify, and as to which it was contended that, since defendant admittedly deposited moneys of S. B., along with his own, in his individual account, he was responsible for an unlawful mingling of funds, and moneys not shown to have belonged to defendant must be taken to have belonged to S. B.; *held*, that the reason underlying the principle invoked by such contention did not apply in this case, where it was found that S. B. himself had authorized and encouraged defendant to dispense with a separate account and to keep the entries in the manner in which the account appeared; it would be inequitable, and also inconsistent with the judgment which regulated the accounting, that defendant should be held accountable for deposits not admitted or identified as belonging to the estate; as to the contention that defendant could not plead the authority derived from S. B. because S. B. became insane, *held*, that, on the evidence in this regard, no revocation or suspension of authority at the material time was established.

Judgment of the Court of Appeal of British Columbia, 40 B.C. Rep. 278, reversed on the above questions.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) which decided in favour of the plaintiff upon the items of account in question in the present appeal. The disputes arose in connection with the accounting by the defendant pursuant to the judgment of the Supreme Court of Canada reported in [1927] S.C.R. 118. The material facts of the case appear in that judgment together with the judgment now reported. The appeal was allowed with costs, Lamont J. dissenting in part.

(1) (1928) 40 B.C. Rep. 278.

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Ghent Davis for the appellant.

W. D. Gillespie for the respondent.

The judgment of Duff, Newcombe, Rinfret and Smith JJ. was delivered by

NEWCOMBE J.—The writ was issued 13th June, 1924, and the action, which was for an account, has been productive of considerable litigation. The defendant, now appellant, disputed his liability to account, and succeeded at the trial, and, upon an equal division of judicial opinion, in the Court of Appeal in British Columbia (1). But a different view prevailed in this Court (2), and the defendant was ultimately held accountable, subject to the provisions of the judgment. The case is reported, *sub nomine Morton* v. *Brighouse,* in [1927] S.C.R., 118. The material clauses of the judgment, for present purposes, are these:

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the respondent, Brighouse, is accountable for all moneys of the late Sam Brighouse, received by him since the 6th day of February, 1907, excepting money in respect of which the intended gift mentioned in the pleading was completed within the lifetime of the said Sam Brighouse.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the respondent is entitled to all just and proper allowances for expenditures made by him, and for all costs, charges and expenses incurred by him in or in relation to or in connection with the affairs of the said Sam Brighouse.

Three classes of items, and interest, are in dispute.

First. These are payments amounting to $7,287.76, which were made by the defendant to the Bank of Montreal to discharge a liability of Sam Brighouse. The latter had borrowed $13,000 from the bank in June, 1906, for which he gave his demand note endorsed by his nephew, the defendant, and by the Royal Ice and Dairy Company, a concern which at that time belonged to Sam Brighouse, or in which he was interested, and he constructed upon the defendant's land the buildings and plant which were used for the purposes of that company. Subsequently Sam Brighouse gave the business to the defendant. It is satisfactorily proved, and is in fact not disputed, that the defendant made the payments, amounting to $7,287.76, on account of this loan. Sam Brighouse himself had made

(1) 36 B.C. Rep. 231; [1925] 3 W.W.R. 412.

(2) [1927] S.C.R. 118.

the preceding payments in reduction of his liability, and the amount in question was required to discharge the balance. It is in proof, however, that the defendant owned the ice business in 1909, although he did not own it in 1906 and 1907, and it is suggested, but not proved, that the money borrowed by Sam Brighouse in 1906 was used for that business, and that, as between the defendant and Sam Brighouse, the note was a liability of the defendant rather than of Sam Brighouse. There were differences of opinion in the provincial courts. The Deputy Registrar disallowed these charges, and the learned judge, before whom they came upon review, D. A. McDonald J., allowed them. In the Court of Appeal the majority upheld the Deputy Registrar. But it is certain that the proceeds of the loan were credited to Sam Brighouse's bank account, and were withdrawn by him in June, 1906; and, whether he used the money to construct the ice building or not, or whatever he used it for, there is no evidence that it was money received by the defendant after 6th February, 1907, or at any time, and therefore it is not money for which the defendant is accountable by the judgment of this Court, upon which the accounting must proceed; and, moreover, it cannot be successfully disputed that the payments were expenditures or charges incurred by the defendant "in or in relation to or in connection with the affairs of the said Sam Brighouse." Consequently these items aggregating $7,287.76 should be allowed.

Second. There are payments amounting to $4,000, which the defendant charges as paid to his brother William A. Wilkinson, deceased, for the latter's wages for work done on the farm of Sam Brighouse, during the period from 1896 to 1913. The payments were made, and that is not disputed; but it is said that, although the services were rendered, there is no proof or presumption that they were to be paid for; that the payments were in reality not for wages, but on account of the sale price for Gulf lots, which the defendant and his brother had sold, and in which each of them had a half interest, and that there was no corroboration of the defendant's evidence that he appropriated the payments for wages or that his brother was entitled to wages. The items comprising this amount were disallowed by the Deputy Registrar for lack of corroboration, and they

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were allowed by D. A. McDonald J. upon the finding that "the evidence is sufficiently corroborated that these moneys were paid to W. A. Wilkinson on instructions from the deceased Sam Brighouse, and they were moneys properly payable to W. A. Wilkinson." The Court of Appeal, in turn, disallowed these items; the Chief Justice, "because there was no agreement by the deceased or by the defendant to pay wages to W. A. Wilkinson," and because "this was not a transaction with which Sam Brighouse had anything to do"; Martin J.A., considered that the Deputy Registrar was right. Galliher J.A., says that the defendant's evidence in connection with the payment of these items " is far from convincing or sufficient in my opinion. I would therefore restore the Registrar's finding." M. A. MacDonald J.A., did not consider that there was sufficient corroboration of defendant's testimony to show " that the brother was actually hired with the consent of the deceased to work in the farm."

Here again, I am disposed to think that the learned judges did not pay proper regard to the judgment of this Court of 4th January, 1927, by which the accounts are directed to be taken. The first payment made by the defendant to his brother, amounting to $2,000, was paid on 15th December, 1909, and on that day the defendant received the sum of $4,000 on account of the sale of the Gulf lots. The defendant testifies:

> December 15, 1909, I paid to my brother W. A. Wilkinson, $2,000. This $2,000 I paid on account of wages. He had been on the farm for close —since '96, that is for thirteen years at that time. He was on the farm until 1919, until Brighouse's death. Practically, he had received nothing, only a few dollars here and there. Sam Brighouse asked me many times —told me many a time to pay him as soon as I could give him something. I paid him this $2,000 on account.

The second payment of $2,000 was actually made in four payments of $500 each by Mr. Sauerberg, who was the book-keeper of the Royal Ice Company during the years from 1908 on, when the defendant owned the business, and he testifies to the making of these payments on defendant's account. The defendant, at that time had been paid only $6,000, net, from the sale of the Gulf lots, and so, if the whole sum of $4,000 which is claimed, was paid by the defendant to his brother on account of the Gulf lots, it was more by $1,000 than the brother's share of the receipts. The whole proceeds of the sale were ultimately received by

the defendant, and the total amount, with interest, was $52,462. This, with $30,000 more of the defendant's own money, was invested by the defendant in the Royal Mansions.

The defendant testifies that his brother was pressing him for money on account of wages and that he gave it to him, referring to the first payment of $2,000. He says: "Now in making the deal in putting up the Royal Mansions I split even with him. I paid him that on account of his wages, or I would have taken that much out of him." And it is shown by the consent judgment in the will case, by which the Royal Mansions were declared to belong to the testator's (Sam Brighouse's) residuary estate, that this property passed to the estate, subject to a mortgage to the defendant for $25,000, and to a mortgage for a like amount to William A. Wilkinson, the defendant's brother; thus accounting for the proceeds of the Gulf lots in full by equal division between the brothers, except, perhaps, as to a balance of $2,462 in which the estate of William A. Wilkinson may still retain a one-half interest; but that matter has not been brought into question, nor has it been explained. It is, however, sufficiently plain that, if the $4,000, represented by the payments now in controversy, be regarded as part of the proceeds to William A. Wilkinson of the Gulf lots, he has been, to that extent, paid twice, an event which is very unlikely to happen by the payer's consent. The settlement thus furnishes strong corroboration of the defendant's denial that the payments of $4,000, which his brother received, were appropriated to the reduction of the defendant's liability for proceeds of the Gulf lots, and it is not suggested that there is an alternative motive for these payments, except wages. There is independent proof of the services, at least during the period from 1907 to 1913, which comprises the last six years of Sam Brighouse's life. The first payment of $2,000 was made by defendant's cheque, which is in evidence, and which was paid and charged to the defendant in his bank account. The other four payments of $500 were made by Sauerberg, and charged against the defendant in the books of the Royal Ice Company.

There is thus, with due regard to the rule requiring corroboration in cases of this character, ample proof of the

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payments in question, and of their imputation on account of wages, and there is no evidence to the contrary beyond the inference which is sought to be drawn from the fact that there was a liability of the defendant to his brother in respect of proceeds of the Gulf lots as to which the defendant might, if so disposed, have appropriated a payment of $2,000; an inference which, I think, is negatived by the evidence.

There remains the contention that William A. Wilkinson, being nephew of Sam Brighouse, and living on his farm, had no enforceable claim against his uncle for wages by reason of a presumed or implied agreement. I am not sure that the circumstances do not justify the inference of a legal demand, but, in any event, the payments constituted expenditures by the defendant in relation to the affairs of Sam Brighouse, and there is no reason to doubt that the defendant made the payments honestly, within the scope of his authority as proved; and, if so, it does not appear to me that the court would be justified to disallow the claim on the ground that perhaps the nephew could not have established his claim for wages against his uncle by strict proof of a contract for the payment of wages. The situation was one as to which, in my view of the circumstances, the defendant was entitled to exercise his judgment in the administration of his authority with relation to his uncle's affairs.

Third. There are two other items, $992.80 and $668.30, aggregating $1,661.10, described as "surcharge," which were disallowed, both by the Deputy Registrar and by all the judges. These two sums were deposited in the defendant's account in the Bank of Montreal on 23rd August and 26th September, 1910; the account does not specify the origin of either deposit, and the defendant, after the long time elapsed, is unable to identify them, except as deposits which he made; but there is, on the other hand, no proof that they belonged to Sam Brighouse. The plaintiff accordingly invokes the principle that, since the defendant admittedly has deposited the moneys of Sam Brighouse, along with his own, in his individual account, he is responsible for an unlawful mingling of the funds, and the moneys must, he says, belong to the *cestui que trust*, which are not shewn to belong to the trustee. This principle, in its usual

application, the defendant does not dispute, but he answers the plaintiff's contention by the fact that, according to the proof, the account was kept in a manner authorized by Sam Brighouse, and that therefore neither he nor those claiming under him could, in the circumstances, equitably insist upon the surcharge, and the defendant cites par. 399 from Halsbury's Laws of England, Vol. 28, and *Fletcher* v. *Collis* (1). I think the answer is well founded; it would be not only inequitable, but also inconsistent with the judgment which regulates the accounting, that the defendant should be held accountable for deposits which are not admitted or identified as belonging to the estate.

In *Lupton* v. *White* (2), Lord Eldon ruled that the distinction lies upon the person who occasions the confusion of property, and he explained that although the principle did not produce strict justice, it was the only justice that could be done; and that no more could be done was the fault of the accounting party. It is well enough to hold that where a trustee has confused the fund, the whole is to be treated as belonging to the trust, except so much as the trustee can distinguish as his own, but the reason underlying the principle manifestly does not apply in the present case, where it is found that Sam Brighouse himself had authorized and encouraged the defendant to dispense with a separate account, and to keep the entries in the manner in which the account appears.

The plaintiff suggests, however, that the defendant cannot plead the authority which he derived from Sam Brighouse, because Sam Brighouse became insane; thereby, I suppose, intending to intimate that the defendant's authority was revoked. The contention is thus stated in the appellant's factum:

> The said Samuel Brighouse developed mental trouble after being at the hospital in December, 1908, which eventually led to insanity, so that he was not in a normal condition to acquiesce or concur in the acts of the appellant in mixing the trust funds of Samuel Brighouse with his own.

Now the following facts are narrated in the judgment of this Court upon the former appeal:

> In 1908, Brighouse had a serious operation, after which, according to the evidence of the respondent, his mental powers suffered a decline, and, as a result of which, he eventually became demented. In 1911, Brighouse executed a codicil to the will of 1906, making unimportant alterations in the particular legacies, but leaving the respondent still the beneficiary of

(1) [1905] 2 Ch. 24. (2) (1808) 15 Vesey Jr., 432.

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his residuary estate. In 1912, Brighouse left Vancouver for England, and in the same year he executed a new will, the effect of which will be fully stated. In 1913 he died.

The deposits which it is sought to surcharge were, as already shown, made in August and September, 1910. Sam Brighouse went to the hospital in December, 1908. The defendant, in his cross-examination, gave the following testimony:

Q. I think you told me also, on discovery, when your uncle went to the hospital, his trouble was all mental.

A. I couldn't tell you it was all mental, because it was enlargement of the prostate gland, but it led to mental trouble. His doctor told me that would be the effect of it.

He appears to have recovered from the operation, because he subsequently returned to his home, and, in 1911, executed a codicil. In the same year he went to England, and there he made a new will in 1912, of which the plaintiff is one of the executors, and he died in 1913. There is no evidence as to the precise time when his mind sank into the condition of dementia, but I cannot draw the inference that he was not responsible for instructions to which he adhered in 1910, and I am satisfied that the appellant fails to establish any revocation or suspension of authority at the material time, while, on the contrary, the deceased was executing testamentary instruments in 1911 and 1912, the latter of which was admitted to probate and constitutes the respondent's title.

In consequence the defendant succeeds upon all the material items in dispute, and it is not necessary to consider the question of interest.

The appeal should therefore be allowed upon all items, with costs throughout.

LAMONT J.—This is an appeal from the decision of the Court of Appeal of British Columbia (1), in which it was held that the defendant was indebted to the plaintiff as administrator of the trust and one of the trustees of the estate of Sam Brighouse, deceased, in the sum of $7,986.63, with interest thereon from July 31, 1913. The action was for an accounting by the defendant of the moneys and property of the late Sam Brighouse which came into his hands. The defendant's name originally was Michael Wilkinson; Sam Brighouse was his uncle and, in compliance with a

(1) (1928) 40 B.C. Rep. 278.

stipulation contained in his uncle's will, the defendant added the name of Brighouse to his own.

The defendant had been carrying on the business of Sam Brighouse under a power of attorney dated February 6, 1907. By a judgment of this Court (1), the defendant was ordered to account for all the moneys of the late Sam Brighouse received by him after February 6, 1907, except moneys which constituted a completed gift to him by Brighouse during his lifetime. The accounting was had, and, by the judgment appealed against, the plaintiff was held entitled to recover the sum above mentioned. From that judgment the defendant has appealed to this Court in respect of three classes of items.

The first class, aggregating $7,287.76, comprises sums of money paid into the Bank of Montreal from time to time by the defendant, or charged to his account by the bank, to pay off the balance due on a promissory note for $13,000, dated June 13, 1906, made in favour of the bank by Sam Brighouse and in which the defendant and the Royal Ice Company joined, either as makers or endorsers, which, it is not clear. This much, however, is beyond dispute, that the $13,000 was placed to the credit of the account of Sam Brighouse in the bank, and that Brighouse drew out the entire amount before the end of June, 1906. On the note Brighouse himself paid $3,000 on October 23, 1906, and a further sum of $3,000 on February 14, 1907. The balance with interest was paid by the defendant in instalments between April 23, 1907, and September 21, 1910; and it is these several instalments, amounting in all, as I have said, to $7,287.76, that the defendant seeks to charge against Brighouse's estate. In my opinion he is entitled to do so. He has shewn that he paid the above amount into Brighouse's account at the bank to square that account. *Prima facie*, therefore, he paid it for Brighouse, and the onus was on the plaintiff to shew that, notwithstanding this application of the money, the note was in reality a debt that should have been paid by the defendant himself, and not by Brighouse. This, in my opinion, the plaintiff has failed to do. Neither the defendant nor any other witness at the trial could say just what Sam Brighouse did with the $13,000. The defendant suggested that some of it may have been

(1) [1927] S.C.R. 118.

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used to erect buildings on Lots 18 and 20, Block 1 D.L. 185, for the Royal Ice Company, a company which Brighouse at that time controlled and whose business he carried on. In 1908 Brighouse gave the property and business of the company to the defendant.

For the plaintiff it was contended that it should be held that this $13,000 had been used to erect buildings for the Ice Company or to assist in carrying on the company's actual business operations; and that, as Brighouse gave the business to the defendant before the note was fully paid, the defendant was under an obligation to pay the balance thereof as a liability of the business. In my opinion this contention cannot prevail: In the first place there is no evidence whatever that Brighouse used the money for the business operations of the company, and in the second place, if he used it for the erection of buildings on the above mentioned lots, he knew, when he did so, that these lots were the property of the defendant and had been since 1890. In view of that fact and the relationship existing between them, if the money did go into the buildings, the proper inference to be drawn, under all the circumstances, would be that Brighouse intended the buildings to be a gift to the defendant. As to the suggestion that the $13,000 was a loan to the defendant, all that needs to be said is that there is absolutely no evidence to justify such a conclusion, and the defendant has testified that when Brighouse gave him the business of the Royal Ice Company no obligation was imposed on him to pay off the note in question. The defendant was, therefore, entitled, in the accounting, to charge the $7,287.76 against the estate.

The second class consists of a payment of $2,000 made by the defendant to his brother, W. A. Wilkinson, on December 15, 1909, and four payments of $500 each, made in 1911 by the Royal Ice Company to W. A. Wilkinson on the following dates: March 24, April 10, April 28, and May 12. The defendant claims that all these sums were paid as wages due to his brother from Sam Brighouse; while the plaintiff contends they were moneys belonging to W. A. Wilkinson in the hands of the defendant. The circumstances under which the first sum of $2,000 was paid, were as follows: The defendant and his brother jointly owned lands known as the Gulf lots. These lands they sold under

an agreement of sale on November 29, 1909, for $46,400, payable, $500 on the execution of the agreement; $5,500 on December 15, 1909; $8,400 on November 29, 1910, and $8,000 on November 29 in each of the following four years, with interest at 6%. The $500 and the $5,500 were paid, and the defendant endorsed on the agreement, under date of December 14, 1909, the receipt of this $6,000, and also the payment thereout of a commission of $2,000. On December 15 he deposited the balance ($4,000) to his credit in the bank and, on the same day, issued a cheque to his brother for $2,000, the exact amount of his brother's share of the purchase money then in the defendant's hands. As the defendant had, just before issuing the cheque to his brother, deposited in his own account in the bank $2,000 belonging to his brother, it is important to note the reason he gives for issuing the cheque on account of wages rather than as a payment of purchase money. His explanation is that his brother had worked for Sam Brighouse from 1896, a period of thirteen years, and had received therefor " only a few dollars here and there "; that Sam Brighouse had told him many times to pay his brother " as soon as he could give him anything "; that his brother had been pressing him the whole time for payment and that when he got the money from the Gulf lots he was in a position to pay him. His testimony on this point is as follows:—

Q. Now, let us clear up the facts. It was because you had received money from the sale of the Gulf lots on the 15th of December that put you in funds to enable you to pay your brother $2,000?

A. Exactly.

The whole tenor of his evidence was calculated to lead the court to the conclusion that Sam Brighouse recognized an obligation on his part to pay wages to W. A. Wilkinson; that he did not have the money to pay him and that he requested the defendant to pay these wages as soon as he could collect sufficient to do so. Sam Brighouse was a very wealthy man, which is attested by the fact that he left an estate of $700,000. Had he been under an obligation to pay wages to W. A. Wilkinson, it seems highly improbable that he would not have made a payment on account in the ten years from 1896 to 1906 that W. A. Wilkinson lived with him, and prior to the time when the defendant took over the management of Brighouse's business. The fact is that the mother of the defendant and W. A. Wilkinson was a sister

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of Sam Brighouse, and went to live with him at the ranch on Lulu Island in 1896, and she and her boys continued to live there until Brighouse's death. There was absolutely no evidence of any agreement on the part of Brighouse to pay wages to W A. Wilkinson, or any evidence that W. A. Wilkinson had ever asked him for wages. It is not, in my opinion, unworthy of note that although the defendant was receiving considerable sums of money on Brighouse's account from time to time, including $1,515 on November 19, and $2,500 on December 11, 1909, he did not pay anything to his brother until he had on hand money to which his brother was entitled, and then paid him the exact sum due.

Then as to the four $500 payments in 1911, made also, the defendant claims, for wages: These sums were paid by the Royal Ice Company and charged to the defendant's account. The defendant was asked if, on March 24, 1911, when the Royal Ice Company paid the first $500 to his brother, he (defendant) had received the payment of $8,400 due November 29, 1910, under the agreement of sale. His answer was " I don't know I am not sure of that." Then he gave this testimony:

Q. * * * It is true, is it not, that at the time you paid your brother these four items of $500 you had received moneys from the sale of the Gulf lots, out of which your brother would be entitled to more than $2,000.?

A. Not at that time he would not be entitled to it from the Gulf lots.

Q. You received $5,500 on the 15th December, 1909?

A. Yes.

Q. And you received $8,400 in November, 1910?

A. I don't know whether I received the second one at that time, Mr. Craig.

Now if the defendant did not know whether or not he had received the $8,400 payment before directing the Ice Company to make these $500 payments to his brother, he was scarcely in a position to state, as he did, that when the payments were made his brother was not entitled to them out of the moneys from the Gulf lots. The defendant did know, however, that he had received a part, at least, of the $8,400 due November 29, 1910, for, on December 20, 1910, he made a deposit in the bank of $2,674, and the deposit slip shews that $2,424 of this amount came from one Wakely, and $250 from one Esmond. In reference to the deposit slip he was asked:

Q. * * * Take the next item, 45, Mr. Brighouse, marked "Wakely" and the item 46 marked "Esmond"?

A. That is part of the same payment for the sale of the Gulf lots.

So that when the first $500 was paid to his brother by the Ice Company the defendant had on hand over $1,300 of his brother's money, apart altogether from the moneys received in 1909.

Before the Registrar the defendant was asked:

Q. Why should the Royal Ice Company pay him $2,000?

A. It was out of my account at the Royal Ice Company. I was charged with it. I put the money from the Royal Ice Company into a mortgage in his name.

From this answer it appears that these payments, for whatever purpose they were made, came back to the defendant for investment on his brother's account. At a later stage of the examination the defendant testified that he put the money which he and his brother received from the Gulf lots into the Royal Mansions Apartment Block. These apartments were erected by the defendant in 1912, at a cost of over $80,000, on land of which Sam Brighouse was the registered owner, but which the defendant stated Brighouse had verbally given to him. After Brighouse's death, by a judgment of the courts of British Columbia, the Royal Mansions were adjudged to form part of Brighouse's estate and the defendant and his brother were each given a mortgage thereon of $25,000, evidently for the reason that the defendant had established that he had put into the block $50,000 that did not belong to Sam Brighouse, and that such a sum had been received by himself and his brother from the sale of the Gulf lots. It was argued that the fact that the defendant's brother received a mortgage in his own name for $25,000 corroborated the defendant's statement that none of the $4,000 paid to W. A. Wilkinson could have been paid on account of the purchase money of the Gulf lots, otherwise he would have been overpaid. The fact that W. A. Wilkinson obtained a mortgage for $25,000 must be considered in the light of the further fact that he never had a dollar invested in the Gulf lots. Brighouse bought these lots under an agreement of sale and afterwards turned the agreement over to the defendant who obtained title and then made his brother a gift of a half interest. The defendant's conduct towards his brother, in reference to the Gulf lots and also to the Royal Mansions Apartments, would really indicate that he was making pro-

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vision for him. He gave him his entire interest in the lots and, with regard to the Royal Mansions he, in one place, gave the following evidence:

Q. But the Royal Mansions—you considered you owned the Royal Mansions?

A. No, no, he had a half interest in it.

In another place he says:

Now in making the deal in putting up the Royal Mansions, I split even with him.

From these answers I take it that had it been adjudged that the Royal Mansions belonged to the defendant, his brother would have had a half interest therein. When it was adjudged to belong to the estate and the only interest the defendant had therein was the money he could shew he had put into the block, other than the money of Sam Brighouse, it was to his interest to make this sum as large as possible. Under these circumstances the fact that W. A. Wilkinson got a mortgage on the Royal Mansions of $25,000 is not, in my opinion, corroborative of defendant's statement that had the $4,000 not been paid as wages he would have deducted it from his brother's mortgage. His brother's whole interest in the Royal Mansions was a gift from the defendant and the inference to be drawn from the dealings between them is not that which might be drawn from transactions between strangers carried out in accordance with business principles.

Section 11 of the *Evidence Act* of British Columbia reads:

11. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

In the evidence before us I am unable to find any corroboration of the defendant's statement that Sam Brighouse told him to pay his brother wages, or that the $4,000 was paid as wages. An agreement to pay will not, as between near relatives living together, be implied from the fact that service is rendered by one to another. In my opinion, therefore, the defendant is not entitled to charge against the estate the items of this class.

The third class comprises two items, one for $992.80 and the other for $668.30, charged against the defendant in the surcharge. These items appear as credits in the defendant's

bank book, and the defendant is now unable to say whether they are trust funds or his own money. He kept the trust funds and his own money in one bank account. The plaintiff relies upon the rule that where a trustee mixes trust funds with his own, whether in his account at the bank or elsewhere, the *cestui que trust* has a claim to have it restored out of the mixed fund in priority to any right of the trustee to the fund, and can claim the whole fund, if the amount which is trust money cannot be ascertained. Generally speaking, therefore, a trustee mixes trust funds with his own at his peril. It is, however, justifiable if done with the consent of the *cestui que trust,* and that is the ground upon which the defendant justifies his action. He says that on more than one occasion Sam Brighouse told him to use his (Brighouse's) money as his own and not to keep any account of it as that was not necessary. If Sam Brighouse made these statements to the defendant the mixing of the defendant's money with the trust money was with the consent and acquiescence of Brighouse, in which case the plaintiff would not be entitled to succeed in respect of these two items, for they have not been proved to be trust funds and it is established law that a *cestui que trust* who actively concurs, or passively acquiesces, in a breach of trust can obtain no relief against the trustees in respect of it if, at the time of this concurrence or acquiescence, he was of full age and *sui juris* and had full knowledge of the circumstances. A person claiming under a *cestui que trust* stands in the same position as the *cestui que trust* himself. (*Fletcher* v. *Collis* (1)).

The important question therefore is: Did Sam Brighouse acquiesce in the defendant's keeping the trust funds in his own bank account? To corroborate his statement that he did, the defendant called a number of witnesses. R. M. Currie testified that in November, 1908, Sam Brighouse had stated to him that "everything he had was Michael's (defendant's) to use and do with as he liked, that he (defendant) had kept the estate together and it was his." W. R. Burdes testified that Brighouse had great confidence in the defendant and spoke of the property as "ours" and said that "Michael had authority to do what he liked." J. H. Cocking, another witness, testified to a

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conversation he had with Sam Brighouse when he took him to the hospital. He says that on that occasion Brighouse told him that everything he had was Michael's and "that Michael could use anything he had as though it were his own."

The evidence of these witnesses, in my opinion, corroborates the testimony of the defendant and justifies its acceptance. As against the defendant, therefore, the rule as to mixing trust moneys with the trustee's own money has no application. The defendant cannot, therefore, be called upon to account for these two sums.

I would allow the appeal as to classes one and three, and dismiss it as to class two. Costs to be paid out of the estate.

Appeal allowed with costs.

Solicitors for the appellant: *E. P. Davis & Co.*

Solicitor for the respondent: *W. D. Gillespie.*