Privy Council Appeals Nos. 68 *and* 69 *of* 1915.

John Livingston and others - - - *Appellants,*

v.

James Livingston - - - - - *Respondent.*

James Livingston - - - - - *Appellant,*

v.

John Livingston and others - - - - *Respondents*

(CONSOLIDATED APPEALS),

FROM

THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JANUARY, 1916.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD SUMNER.]

The death of Mr. John Livingston of Listowel, Ontario, on the 21st May, 1896, brought to an end a partnership with his younger brother James, which had lasted for some forty years. It was a remarkable example of mutual confidence and affection. The brothers came to Canada as quite young men, and agreed that for their earnings they would have a common purse and in all their enterprises a common venture. They never had any articles of partnership; they never had, even by parol, any more definite terms or arrangements. So whole-heartedly was this plan carried out that they built their houses and bought their furniture with funds taken by each at will from the common stock; they drew upon it, as they required, for their household expenses, and they never, to the last day of John Livingston's life, struck a balance or arranged for a division between themselves. Their concerns were many, but their principal business was in flax and flax seed, and in this, under the firm name of J. and J. Livingston, they prospered greatly. The leading spirit in everything was James. He was the younger, the abler, and the better educated of the two.

John managed the firm's mill at Listowel, where he lived, and there his active part in the business ended.

For a time John Livingston's representatives and his surviving brother attempted to wind up the affairs of the partnership amicably, but the attempt eventually broke down. An action was begun in 1901 and it has gone on ever since, but the end is not yet. So far the ground has been cleared that only four matters are now in dispute, namely: (1), a business carried on at Yale, Michigan, U.S.A.; (2), a business carried on in the name of Wuerth, Haist, and Co., at Crediton, Ontario; (3), the sale of the mills at Baden, Ontario; and (4), the claim of Mr. James Livingston for remuneration for his trouble in carrying on the business of J. and J. Livingston *de bene esse* after his brother's death. As to the first and third, the representatives of the estate of John Livingston are Appellants; as to the second and fourth, there is a Cross-Appeal by Mr. James Livingston.

The sequence of the proceedings is as follows. The action was brought for the purpose of having an account of the partnership taken under the direction of the Court and a decree, formally declaring that the partnership was dissolved by the death of John Livingston and directing certain accounts and enquiries, was made by Meredith J. on the 27th March, 1902. Evidence was then taken before the Local Master at Berlin, who made a report in 1904; but in 1906 an order was made, and confirmed on appeal in 1907, setting aside all proceedings before the Local Master at Berlin and transferring the whole reference to the County Judge of the County of Waterloo as Official Referee. Further accounts were brought in, and then, in 1909, the reference was transferred to the Official Referee at Toronto. By consent, portions of the evidence taken before the Local Master at Berlin were treated as having been taken before the Official Referee at Toronto, and further evidence was called before him. It is of some importance to observe that the witnesses, Edward Liersch, John R. Livingston, and Phillip Urbach (as the name is spelt when the evidence is taken), were examined only before the Local Master at Berlin, and that the Official Referee at Toronto had their evidence before him only as it appeared upon the shorthand note. The report of the Official Referee at Toronto was made on the 7th December, 1910. He decided against the Defendant, Mr. James Livingston, on the Yale business, the business of Wuerth, Haist, and Co., and the sale of the Baden Mills, and upon the question of remuneration he decided in his favour. Both parties appealed, and on the 16th April, 1912, Middleton J. gave judgment in favour of James Livingston as to the Yale business, the business of Wuerth, Haist, and Co., and the Baden Mills, and against him upon his claim for remuneration. Again both parties appealed, and on the 7th December, 1914, the Appellate Division of the Supreme Court of Ontario gave judgment affirming the decision of Middleton J., except as to the business

of Wuerth, Haist, and Co. From this judgment the representatives of the estate of John Livingston bring the present Appeal as to the business carried on at Yale and as to the sale of the Baden Mills, and Mr. James Livingston brings a Cross-Appeal as to the business carried on by Wuerth, Haist, and Co., and as to his claim for remuneration.

No question of law is now raised except upon the last head; the other three matters involve only disputes upon questions of fact. The business at Yale, Michigan, carried on in the name of James Livingston and Co., and the business of Wuerth, Haist, and Co. were both of the same character as that of J. and J. Livingston. In the first, James Livingston had a one-third share; in the latter his share was two-sevenths. It is not necessary to examine these businesses in detail. Their Lordships are satisfied upon the evidence, as was the Appellate Division of the Supreme Court of Ontario, that in each case the business was such that the Respondent is under an obligation to account for his share in it, as for an asset of the firm of J. and J. Livingston, unless he can show that his deceased partner consented to his participating therein for his own account alone. Such an answer is only made in the case of the business at Yale.

The Respondent does not contend that he made any arrangement at all with his brother about the Yale business. His evidence is that the matter was never mentioned between them; but he says that his brother knew all the mills in the flax trade and could not have been ignorant of this business at Yale, and contends that, as he never claimed to share in it, he must be taken to have assented to James Livingston's participating in it on his own account. Obviously this contention involves proof that John Livingston knew not merely that there was a flax business at Yale, but that his brother James was sharing in it. As to this, it is true that the style of the firm carrying on the business at Yale was James Livingston and Co., but there is no direct evidence that John Livingston knew of that style. On the only occasion when it is shown to have been brought to his attention as a going concern it is called Brockway Centre, which was the name of the place in Michigan where it was carried on before it was changed to Yale, nor was it until the last year of John Livingston's life that the firm carrying on this business was referred to in the books of J. and J. Livingston as James Livingston and Co., although J. and J. Livingston were in continuous relations with it. Again, it is true that statements of the assets of J. and J. Livingston were submitted to John Livingston on two or three occasions, and that, although they did not bring in any interest in James Livingston and Co., of Yale, he made no complaint; but here, again, this is only significant if, firstly, he was aware that his brother James had a share in that business, which is in doubt, and, secondly, if he was competent to appreciate the effect of these statements, which, in view of his admittedly inferior education, is by no means clear.

The Respondent's argument tries to clinch the inference from this alleged tacit acquiescence of John Livingstone by the evidence of Mr. James McColl, who was the Respondent's son-in-law and his partner in the business at Yale. Mr. McColl was accepted by the Official Referee at Toronto as a credible person. He testified, giving his evidence in 1910, that twenty-two years before, namely, before the business of James Livingston and Co. was started in 1887, he, in the presence of the third intended partner, Mr. Peter Livingston, told John Livingston that "James and Peter and I was going over there," that is to Brockway Centre, Michigan, and "asked if he would like to join us," and that "he says No! I don't want nothing to do with it, Peter." This evidence was elicited in a friendly cross-examination and, for whatever reason, was not touched in re-examination by the Appellant's Counsel, who had called Mr. McColl for other purposes.

Their Lordships are unable to attach the same importance to this evidence as was given to it by the Appellate Division of the Supreme Court of Ontario. Peter Livingston was not called to confirm it, nor was his absence accounted for. The Respondent, James Livingston, who had been called before Mr. McColl was examined and was recalled afterwards, had evidently never heard of the conversation. On his own showing he had been giving to his own firm at Yale support from the firm of J. and J. Livingston, which he directed, to an extent which was quite improper, if he regarded his share in the Yale firm as his own and not as a partnership asset of J. and J. Livingston. When the conversation is scrutinised, it is by no means clear that it amounts to more than this, that John Livingston, taught by earlier painful experience, refused to have anything to do with any business in which others were concerned beside his brother. It does not even purport in any clear manner to give assent to his partner's entering on his own account into another business which was within the scope of the objects of the partnership firm of J. and J. Livingston. When the purpose of the evidence is to prove something in the nature of an admission against his own interest on the part of a dead man, in relation to a matter that is not otherwise shown to have been brought to his notice, it is clearly imprudent to place reliance on the evidence of a single witness, especially when it depends on his sole recollection after an interval of so many years of a conversation of this kind, to which in itself little importance seems to have attached at the time. Their Lordships think that on this part of the case the Appellants must succeed.

Finding themselves in accord with the conclusion of the Appellate Division of the Supreme Court of Ontario as to the Baden Mills question, though not necessarily with all the reasons on which that conclusion was based, their Lordships think it needless to examine this matter in great detail, though, having had the advantage of searching and vigorous criticism by counsel on both sides, they have passed the

evidence somewhat closely in review. In order to succeed, the Appellants must show that the agreement for the sale of the Baden Mills by J. and J. Livingston in Liquidation to Phillip Urbach (or Erbach, as the name is there also spelt), Peter Livingston, John Livingston, William Henry Urbach, and Edward Liersch was in truth an agreement for its sale to them as nominees of and for the Respondent James Livingston. These persons, Phillip Urbach, John Livingston, and Edward Liersch, who alone were examined, were called on behalf of the Appellants and did not show themselves hostile witnesses. Being examined on the only issue originally raised, namely, that the sale was at an undervalue, on which issue the Appellants failed, and no issue as to a colourable purchase having then been raised, formally at least, they all stated that they were purchasing solely on their own behalf. The Appellants' argument is that, nevertheless, they ought to be treated as untruthful witnesses, in view of the surrounding circumstances. The burden thus assumed by the Appellants is heavy. On examining these circumstances, their Lordships think that they are matters of surmise and perhaps of suspicion, but that they do not amount to satisfactory proof. No doubt the Respondent had strong reasons for wishing the Baden Mills to fall into friendly hands, but they were bought for a very full price. It is doubtful if any sale could have been effected at all, unless persons such as Mr. Urbach and his associates had come forward, and their connection with the Respondent was such as to make his support of them in their enterprise not unnatural, apart from his own interest in securing that a sale should take place, and that a sale to friendly buyers. Mr. Urbach and his associates turned their bargain over to a company called the Livingston Linseed Oil Company, in which they held all the shares. The Respondent, no doubt, gave great financial support to this Company, and in some respects assumed a proprietary air. Eventually he acquired the great bulk of the shares. If the Appellants had proved that the holders of these shares, being original purchasers of the mills, transferred them to the Respondent for nothing, they would have gone far to prove their case, but of the three, who were called, two swore that they were paid considerable sums for the transfer, and the third swore that he confidently expected that he would be paid too. The only explanation vouchsafed for this by the Appellants was that one of the shareholders, Liersch, must have had some hold over the Respondent, and that what he received was the price of his silence. No such suggestion was made to him, nor had he the opportunity of denying it, and, in their Lordships' opinion, such a suggestion should not now be made. So far, accordingly, the appeal must fail.

The Respondent's alleged right to remuneration is rested on the Trustee Act, R.S.O., 129, § 40, which speaks of "any trustee

under a deed, settlement, or will . . . . or any other trustee, howsoever the trust is created," and it is contended that when the Respondent managed the partnership business after his brother's death he did so as a trustee within this section, and is therefore entitled to the benefit given by it. The short answer is that, as is well settled, in so acting he was not a trustee at all (see Knox *v.* Gye, L.R., 5 H.L. at 675). His obligations may have been similar to and not less onerous than the obligations of a trustee. Persons in such a position have sometimes been spoken of loosely as being trustees, but, in any correct sense of the term, a trustee he was not, and therefore the section had no application to his case. There is nothing in the language of the Trustee Acts to justify the contention that they were intended to apply to persons who ought not to be described as trustees at all. Since, however, his claim, in the first instance, was not rested exclusively on this section, but asked generally "to be allowed out of the partnership assets such sum as the Court may deem to be fair and reasonable as compensation for his services," and since also, after the Official Referee at Toronto decided in his favour on the ground of the Trustee Act, the Respondent does not appear to have elected to rely on that Act exclusively, their Lordships think that he should be allowed to apply to the Court for such compensation, if any, as in its discretion it may see fit to grant to him, as a surviving partner who has carried on the business for the benefit of the partnership pending proceedings being taken for its winding up by the Court.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed so far as the Yale business is concerned, and that the Respondent must account therefor, and that the case should be remitted in order that accounts may be taken (in addition to the account of the Wuerth, Haist, and Co. matter) on the footing that the Respondent's one-third share in James Livingston and Co., of Yale, Michigan, U.S.A., was an asset of the late firm of J. and J. Livingston, but that otherwise the Appeal should be dismissed, and further that the Cross-Appeal should be dismissed, with liberty to the Respondent to apply to the Court for the allowance out of the partnership assets of such compensation, if any, as in its discretion it may see fit to grant to him for his services in carrying on the business of the late firm of J. and J. Livingston from the death of John Livingston, and lastly, that each party should bear their and his own costs of the Appeal and of the Cross-Appeal.

In the Privy Council.

LIVINGSTON AND OTHERS

v.

LIVINGSTON AND CROSS-APPEAL.

DELIVERED BY LORD SUMNER.

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