Privy Council Appeal No. 16 of 1925.

Mary Scales - - - - - - - - - *Appellant*

v.

David Lindesay Aitken and another - - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 23RD APRIL, 1926.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD PARMOOR.
LORD WRENBURY.
LORD BLANESBURGH.
LORD DARLING.

[*Delivered by* LORD PARMOOR.]

The appellant married on the 2nd June, 1883, the testator George Scales, a stonemason, who had emigrated from England. She was unable to read or write, except to sign her own name.

About the year 1885 or 1886 the appellant and her husband went to live at Ashfield, Canterbury, first in a rough shed constructed by her husband, and then for a further ten years in a house constructed by him. Down to the year 1897 the appellant carried on a laundry business, in which business her husband assisted her, and also on rare occasions worked at his own trade. From 1897 to 1913 the appellant carried on, in the Arcade, Sydney, the business of a beauty specialist, and of clairvoyancy. As a result of the various businesses she carried on, the appellant, without doubt, made, and saved, considerable sums of money. The appellant claims that having become possessed of large sums of money during the life of her husband the testator, the result of her earnings,

she from time to time handed moneys to the testator to invest on her account, and that he invested such sums chiefly in purchasing real estate, and partly in effecting other investments, and that he similarly invested the income of the said investments, and the proceeds of realisation of the same, as and when the same were realised, and that all the said investments were effected by the testator for, and on behalf of the appellant, and as agent and trustee for her, and not otherwise. The learned Trial Judge dismissed the action on the ground that the respondents (who are the executors of her husband) had discharged the onus of proving that the moneys were handed over by the appellant to the testator as gifts. This decision was upheld in the Full Court of the Supreme Court on the 6th July, 1923.

Originally, three questions were raised for decision before the learned Trial Judge, but it is no longer in dispute that there were considerable sums of money earned and saved by the appellant, and handed by her to the testator, and that these moneys, or some of them, are traceable into the real estate which stood in the name of the testator, and of which he was in possession at the time of his death. The only question argued on the appeal is that which arises on the fifth paragraph of the statement of defence, in which the respondents say that to the best of their knowledge, information and belief, the estate vested in them as executors was property to which the testator alone was beneficially entitled, and that the moneys handed to him from time to time by the plaintiff were gifts to him for his sole use and benefit, and not subject to any equitable rights thereto in the appellant. In order to succeed in this defence it is incumbent on the respondents to prove, affirmatively, that the plaintiff intended to make, and did make, a gift to the testator from time to time of moneys handed over by her to him. Unless the respondents can establish this issue in their favour, the appellant is entitled to succeed. The case is a peculiar one. It does not seem possible to trace accurately in what way the sums handed over by the appellant to the testator were invested, but it is clear that the testator carried on the business of a land speculator with considerable success. At the date of his death there was property of the value of about £50,000 standing in his name, and property of the value of about £25,000 which he had invested in the name of and for the benefit of the appellant. In respect of this latter sum no question now arises. One of the difficulties which arises, in the consideration of the evidence adduced on both sides, is that the learned Trial Judge did not believe the testimony of the appellant, except so far as it was corroborated by other witnesses. The result is that the decision depends largely on inferences to be drawn from a large body of conflicting evidence. After a careful analysis of all this evidence, the learned Judge came to the conclusion that the respondents had established their case, and his judgment was confirmed by the Court of Appeal.

In answer to interrogatories the appellant stated that she handed to the testator the following sums of money to speculate

with on her behalf. In November, 1900, the sum of £1,010, in the year 1903 the sum of £12,000, and in the year 1907 the sum of £4,000. In reference to the sums of £1,010 and £12,000 there is no direct corroboration of the story of the appellant, as to what occurred at the time when the moneys were in fact handed over by her to the testator. In the case of the sum of £4,000 there is the important corroboration of Sergeant Whalan, the accuracy of which is not questioned. It will be convenient in the first instance to consider whether the respondents have proved their case in respect of the two sums, £1,010 and £12,000.

The mutual relations of the appellant and her husband were throughout of an intimate and confidential character. The appellant in her evidence states that nothing that her husband did was not known to her, and that everything that was hers was his, and that everything that was his was hers, and that he would ask her advice upon everything. The appellant did not ask for or obtain any detailed statement of what her husband had done with the moneys handed over by her to him, although she was generally told by the testator in what property he intended to invest, and herself inspected some of the properties. She did not ask for or receive any account of the rents derived from any of the properties. Evidence, however, was called that the testator recognised his indebtedness to the appellant, and had stated that certain of the properties purchased in his name out of the moneys provided by her belonged to her, and not to him. Of these witnesses the one who gave evidence most favourable to the appellant's claim was Darnley. Darnley said that deceased said to him, "My wife gave me £16,000 to invest and I invested it in Manly—that some went to a Brick Company, and other to Dee Why," and that on another occasion deceased pointed out, "This is all my wife's, I call it mine, but it was her money which bought it." The effect of this evidence, and evidence of a similar character, was carefully considered by both Courts before coming to a decision. On behalf of the respondents evidence was given that, during the testator's life, the appellant knew that the deceased was making wills from time to time in which he was purporting to dispose, as owner, of some of the property which is now claimed. There was also evidence that the appellant must have known that the testator was purchasing property, some in her name and some in his own, and that the deceased had held himself out as a man of property, and that he was generally reported to be an honest and trustworthy man in whom his wife had great trust and confidence, and that the probabilities were that the appellant must have been aware that a considerable part of the moneys, which came from her, were being put into property in her husband's name. In favour of the contention put forward by the respondents is the evidence of Alfred Daniel Scales who said that the appellant complained of the will of the testator not on the ground that it purported to dispose of property which belonged to her, but that

it was unjust, and that every thing ought to have been left to her.

Their Lordships, however, do not consider it necessary to examine in detail all the evidence adduced at the hearing of the Trial, as to the conditions on which the two sums of £1,010 and £12,000 were handed over by the appellant to the testator. The evidence of the appellant was not corroborated and in the view of the Trial Judge, her evidence, in the absence of corroboration, cannot be accepted as trustworthy. Whether a witness is credible or not is eminently a matter for the Judge who presided at the Trial. Apart from the evidence of the appellant there was a conflict of evidence. Both the Trial Judge and all the Judges of the Full Court found that the respondents had proved the case which it was incumbent on them to prove, in order to succeed in the action. Consequently there is as to the two sums of £1,010 and £12,000 a concurrent finding by all the Judges in both Courts in favour of the respondents, and it would be contrary to an established rule of this Board to reverse such a finding. The established rule is that when the question to be determined on the appeal is whether the concurrent judgments of all the Judges below should be supported or reversed, and such judgments depend on a right appreciation of the evidence of facts, or the credibility of witnesses, this Board will not advise His Majesty that the judgments should be reversed, unless the clearest proof is adduced that the judgment appealed against is erroneous. No such proof was adduced before their Lordships as to the two sums of £1,010 and £12,000, and it would be contrary to the rule, as stated above, to advise His Majesty that the judgment appealed against so far as it refers to these two sums should be reversed.

In her answer to interrogatories the appellant says that at the time of handing over the amount of £4,000 to the testator, in cash, she was arrested for carrying on business as a clairvoyant and masseuse, in Sydney Arcade, George Street, Sydney, and thought that she was to be put in gaol immediately. In this instance the evidence of the appellant is corroborated by that of Thomas Whalan, Giles and Mrs. Adams. Thomas Whalan was formerly a police sergeant with 34 years of service in the police force, and it is not suggested that his evidence is not trustworthy. He says that, after making certain enquiries, and collecting evidence which might justify a prosecution, he went to see the appellant in February, 1907, and told her he was going to take proceedings against her, and that, in March, 1907, he went to serve a summons upon her when the testator was present. On this occasion the appellant became very uneasy, and lifted up her skirt, and took a canvas bag out of her pocket, and said to her husband, "This is all my money and take it," and told him to do something with it. The witness thought she said it was to buy something with, but he would not be certain. There were two rolls of notes in

the bag and also gold. He says, "She (the appellant) threw it on the table and said there you can see what is in it. I looked and saw that it was gold, the bag was pretty weighty with gold." The witness further states that there were hundreds of notes there, rolled up into two big bundles, with a string round each bundle, and that her husband said to him "what do you think of a woman like that." So far as the witness can remember, the testator did not say anything in response to the appellant's statement to him that he was to buy something. If this evidence is accepted as trustworthy, it would negative the contention of the respondents that the sum of £4,000 was handed over to him as a gift with the intention that it should remain his, and be disposed of by him as his own. The evidence of another witness Giles is that the testator mentioned that, on an occasion, the appellant drew from her pocket that she had concealed under her skirt the sum of £4,000, telling him that detectives were about to arrest her on that occasion, and that she drew the money from her pocket and handed it to him, and that he said to the detective "What do you think of a woman like that?" Mrs. Adams gives evidence to the same effect.

The learned Trial Judge, in commenting on the evidence which relates to the sum of £4,000, says :—

> "There is one matter which I ought not to pass over, in fairness to the plaintiff. There was no doubt a large sum, something like £4,000 according to her story—which she had in her possession at the time when she was arrested for fortune telling, and her story is that fearing what might happen to this money, when she was arrested she took it out of the pocket of her petticoat and handed it to her husband to take care of. That story appeared at first to be rather a doubtful one, but there is no doubt that she is corroborated on that by the evidence of Whalan, and Giles and Mrs. Adams, and, I think, having regard to the large sums which were obviously at her disposal, that probably that story with regard to the £4,000 is substantially true. Whether it was so large a sum as £4,000 or whether it was a smaller sum, as is suggested by Mr. Innes, seems to me immaterial, but undoubtedly according to Sergt. Whalan, a very large sum in gold and notes was taken out of this pocket in her petticoat when she was arrested, and handed by her to her husband—though she is corroborated on that part of her case, on the other matters I find no corroboration at all of the very extraordinary story which she has put forward."

It appears, therefore, that the learned Trial Judge accepted the evidence of the appellant, so corroborated, as to what passed at the time of handing over of this sum of £4,000. If this evidence is accepted it would appear to their Lordships to be inconsistent with the case put forward by the respondents that this sum, as well as the sums already mentioned, were handed over by the appellant to the testator as a gift to him. In the Court of Appeal, as well as in the case of the appellant presented to their Lordships, there does not appear to have been any case made that the conditions attached to the handing over of the sum of £4,000 should be differentiated from those attached to the handing over

of the other two sums. In the last paragraph of the case submitted to their Lordships the appellant submits

> "that from this course of dealings two conclusions (if any) alone are possible: That all the properties were the deceased's—which was never even contended, or that, as the appellant does contend, all were hers."

In the course of the argument before their Lordships it was argued that the fact that there was trustworthy corroboration of the evidence of the appellant, as regards the handing over to the testator of the sum of £4,000, differentiated the evidence applicable to the handing over of that sum from the evidence applicable to the handing over of the two sums of £1,010 and £12,000. After hearing the argument their Lordships are of opinion that the appellant is not precluded from raising this question in the appeal, and that the corroboration of Thomas Whalan, and the other two witnesses, accepted as trustworthy by the Trial Judge, is sufficient to prove that, as regards the sum of £4,000 the notes and money were handed over to the testator under the conditions stated by the appellant, and were not handed over by her as a gift to him and that in respect of this sum the respondents have not displaced the presumption of trust in favour of the appellant.

Their Lordships will, therefore, humbly advise His Majesty that there should be a declaration that the sum of £4,000 handed over by the appellant to the testator in the year 1907 was handed over to him to invest for and on behalf of the appellant, and that an inqury be directed whether any of the properties standing in the name of the testator at his death represented investments of the said sum of £4,000, or any part thereof, with liberty for the appellant to apply for a transfer to her of the said investments, and for the payment to her of the balance up to £4,000 with interest from the testator's death.

In other respects the Judgments of the Courts below will stand. There will be no costs to the appellant either here or below, but so far as any costs have been paid to the respondents by the appellant they are to be refunded to her. The respondents will have their costs as between solicitor and client out of the estate.

In the Privy Council.

MARY SCALES

v.

DAVID LINDESAY AITKEN AND ANOTHER.

DELIVERED BY LORD PARMOOR.

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