

Privy Council Appeal No. 78 of 1916.

Mary Wood and Others - - - - *Appellants,*
v.
James Ebenezer Haines - - - - *Respondent,*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL DELIVERED THE 25TH JANUARY, 1917.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PARKER OF WADDINGTON.
LORD WRENBURY.

[*Delivered by* LORD WRENBURY.]

This is an appeal against the judgment of the Appellate Division of the Supreme Court of Ontario, which set aside the judgment of the trial judge and dismissed the action. The action was brought to recover a sum of 29,000 dollars paid by one Jas. Johnston to the respondent Haines under certain six transactions to be presently mentioned, and interest upon the amount. Johnston has died pending the action. The appellants are his executors. The transactions in question took place between the year 1906 and the summer of 1908. The action was commenced on the 4th December, 1914; but no question is raised upon the Statute of Limitation. Their Lordships hold, and the respondent does not dispute, that the defendant stood towards the plaintiff in the position of a fiduciary agent, so that no question upon the Statute arises.

The first transaction was one in which the plaintiff paid to the defendant a sum of 2,000 dollars as his subscription for stock in a company which the defendant represented to the plaintiff that he was organising to be known as The British-American Sign Company (Limited). The other five transactions had to do with a company called The Canadian Forty-mile

Gold Dredging Company, Limited, whose shares were 100 dollars each. This company was reorganised by the name of the Consolidated Gold Dredging Company of Alaska, whose shares were of 10 dollars each. The plaintiff's case is that in the second, third, fifth, and sixth transactions the defendant representing himself to be the agent of the company offered, as the local phrase is, to sell him the company's stock on behalf of the company, or as it would be expressed in this country, asked him to take an allotment of shares in the company and pay the company the subscription price. The plaintiff's case further is that in the fourth transaction the defendant represented that one, William John Smith, who was a large shareholder in the company, was in difficulties and wanted to dispose of his shares, and induced the plaintiff to buy from Smith (as he supposed) 1,000 shares of 10 dollars each at 6 dollars a share, paying a sum of 6,000 dollars.

As regards the first transaction the plaintiff says that the 2,000 dollars were paid to the defendant for a defined purpose, as above stated, that the defendant did not use the money for that purpose, but appropriated it to his own use and applied it towards the purchase of a bankrupt business which had been carried on by a firm theretofore trading as the British American Sign Company. As regards the other five transactions he says that the moneys paid by him to the defendant for the purchase from the company of the company's stock, or the purchase from Smith of Smith's stock, as the case may be, were not so applied, but were appropriated by the defendant to his own use, and shares of the defendant himself were transferred to the plaintiff in pretended performance of the obligation towards the plaintiff.

The trial judge found all the issues in favour of the plaintiff. There is a direct conflict of evidence between the plaintiff (who was then alive and gave evidence) and the defendant. The trial judge, who saw both witnesses, has believed the plaintiff, and as to the defendant, has said :—

“Concurrent documentary evidence is invaluable where it can have but one meaning, but, subject to this, I attach no value to the defendant's evidence. Unscrupulous, dishonest, and untruthful, is the opinion I have of him after listening to his evidence, carefully noting his demeanour, and asking two or three questions myself; and that he gave rein to his peculiar qualifications for bringing about the transactions complained of in these transactions, and substantially as the plaintiff alleges, I have no doubt whatever.”

In the Appellate Division, Meredith, C. J. O., in a long and careful judgment relies upon discrepancies between evidence given by the plaintiff in his examination on discovery and evidence he gave at the trial and upon documentary evidence found in the certificates and other documents relating to the matter as leading to the conclusion that the trial judge was wrong in his view of the evidence and in his opinion as to the credibility of the witnesses, and that the plaintiff failed to make out his case. Their Lordships have heard, with

immaterial short exceptions, the whole of the evidence in this case read, and are therefore in a position as favourable as was the Appellate Division for forming an opinion in this matter. They are not impressed by the discrepancies to which allusion is made. It is to their mind plain that the plaintiff, under the stress of cross-examination, was led to say, for instance, that he made this or that mistake, when in fact he had made no mistake at all. They see no reason to doubt that the plaintiff was telling a truthful story. In this they agree with the trial judge. As regards the defendant, if it were for their Lordships to form an original opinion as to whether he is to be believed or not, they would not hesitate after reading his cross-examination throughout, to say that the finding of the trial judge as to his credibility is right. But the above is not the right way to proceed in a case where the only question is one as to the credibility of witnesses. It must be an extraordinary case in which an appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial judge who has seen and watched them, whereas the appellate judge has had no such advantage.

In the case of documentary evidence no doubt the case is otherwise. Their Lordships, however, cannot find in the documents anything to throw doubt upon the story which the plaintiff tells. The documents are all consistent with it with the sole exception of the letter of the 15th May, 1913, if it be an exception. As regards that letter it was obviously obtained for a purpose. It is in the defendant's handwriting, and looking at the circumstances under which he procured the plaintiff to sign it, their Lordships regard it as evidence rather against than in favour of the defendant. An honest man does not commonly come and ask for a certificate of honesty. Their Lordships believe the story of the plaintiff and not that of the defendant.

The case then is one of payment by the plaintiff to the defendant, as his fiduciary agent, of a sum of 29,000 dollars, which the latter has misapplied. As a result, the plaintiff has received certain shares. These he must return, so far as he has not returned them already. The appeal must be allowed. The order will take the form of a declaration that the moneys paid by the plaintiff to the defendant were paid to him as the fiduciary agent of the plaintiff, and have been misapplied: a declaration that the defendant must account for such moneys with interest, and the plaintiff undertaking to return to the defendant the shares not already returned by him: judgment for the plaintiff for 39,600 dollars 17 cents, this being the aggregate of the 29,000 dollars and interest. The defendant must pay to the plaintiff the costs of the action in the Courts below and before this Board. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MARY WOOD AND OTHERS,

v.

JAMES EBENEZER HAINES.

DELIVERED BY LORD WRENBURY.

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