

(1936) 04 PRI CK 0005

In the Privy Council

Case No : Privy Council Appeal No. 58 of 1935

Imperial Bank of Canada

APPELLANT

Vs

Mary Victoria Begley

RESPONDENT

Date of Decision : 28-04-1936

Acts Referred:

Citation : (1936) AIR(PC) 193

Hon'ble Judges : Sidney Rowlatt, George Lowndes, Maugham, Lords Thankerton, Lord Chancellor (Viscount Hailsham), JJ.

Advocate : H.J. Nolan, D.N. Pritt, W.N. Tilley, for the Appearing Parties.

Judgement

Lord Maugham

This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated 21st December 1934, reversing a judgment of the Appellate Division of the Supreme Court of Alberta, dated 24th March 1934, which allowed an appeal from the judgment of Boyle, J., the trial Judge. It may be mentioned here that there was a jury at the trial until the close of the evidence; but counsel for both parties agreed that the jury should be dispensed with and the decision of the case was left to the trial Judge who gave judgment in favour of the respondent for the full amount of her claim, viz., for \$13,356 with costs. The judgment was reversed and the action was dismissed by the Appellate Division (McGillivray, J. A., dissenting). The Supreme Court of Canada restored the judgment of the trial Judge in respect of the claim for \$8,500. The reasons for the judgment were delivered by Duff, C. J., Crockett, Hughes and Maclean, JJ., concurring; but there was a dissenting judgment by Cannon, J. The present appeal is concerned only with the claim for \$8,500 with interest from 29th June 1929, and it will be unnecessary to deal with anything but that claim.

The respondent is the widow of Robert Wilson Begley, a farmer who died on 26th December 1928, leaving a will under which she was sole executrix and sole beneficiary. She was in no sense a business woman and instead of taking out probate she gave a power of attorney to one, J.W. McElroy, also a farmer who

had been a neighbour and close friend of the respondent and her husband for many years. He was granted administration of the estate with the will annexed; and on 27th June 1929, having completed the administration of the estate he was discharged. The respondent had had for a considerable time a small savings account with the appellants, the Imperial Bank of Canada, at their Calgary branch, and on the completion of the administration of the estate the proceeds of the estate were deposited to the respondent's credit in the said account. They amounted to the sum of \$13,006. The total sum to her credit in the said account amounted after such deposit to the sum of \$13,081. McElroy had had for a considerable time an account in the same branch of the bank which had generally showed a debit balance; and at this period his debit balance exceeded \$8,000. The Bank for some years had been pressing him for payment. They held security by way of mortgage on McElroy's land, but shortly before the events to be stated this mortgage was postponed to enable McElroy to mortgage the same lands to raise money for the purpose of discharging a part of his indebtedness to the appellants which had amounted in December 1929, to \$18,690. The appellants were apparently not satisfied with their security, and the assistant general manager at Toronto continued to urge Mr. Weaver, the local manager of the bank at Calgary, to obtain payment from McElroy of his debt. In April 1929, Weaver learnt that a sale which had been in prospect of one of McElroy's farms to one Herron, from the proceeds of which McElroy had promised to discharge his debt to the Bank, might fall through, and at that time McElroy is said to have stated to Weaver that, if the sale did fall through, he could borrow from the respondent a sufficient sum to pay his debt.

The respondent at this time was in the United States; and on 7th June 1929, McElroy appears to have told Weaver that the respondent had not yet returned from the States and that he would make arrangements with her when she came back. The respondent returned to Calgary on 19th June 1929. She desired that McElroy should attend to the investment of her money, and on 24th June she executed a power of attorney in his favour, using for the purpose a printed form in very wide terms supplied by the appellants. This power of attorney, which in fact bears date 28th June 1929, was executed at the office of Mr. Moyer, a solicitor who had acted for some years for McElroy, and had acted as solicitor in the administration of Robert Wilson Begley's estate. The respondent visited the Bank on 21st June with McElroy and Moyer and had a short conversation with Weaver, and she also visited the Bank on 24th June and again on 25th June. She then arranged with the Assistant Manager, Chambers, for the transfer of some money for her use in Hamilton, Ontario where she was going to pay a visit. Nothing however, was said to her about the suggested discharge of McElroy's indebtedness to the Bank out of moneys standing to her credit. On 26th June she left for Hamilton, and three days after her departure, that is on 29th June 1929, McElroy, purporting to act under the power of attorney, transferred from the respondent's savings account to his own account a sum of \$ 8,500, which, together with a small sum of his own, was sufficient to discharge the whole of his

debt to the appellants. The cheque was signed "Victoria Begley, per J. W. McElroy, Atty."; it was drawn in favour of "J. W. McElroy or Order," and was endorsed "Deposited to the credit of J. W. McElroy." McElroy was not called as a witness and the only direct evidence as to what occurred on 29th June 1929 is that of the assistant manager Chambers. According to his account McElroy, had stated that he was going to borrow sufficient money from Mrs. Begley's account to pay off his liability to the bank and was going to give her a promissory note payable on demand with interest at 7 per cent per annum. Chambers made out the note which McElroy signed and he also made out the cheque in favour of McElroy for \$8,500; and the indebtedness of McElroy to the appellants was in this way apparently discharged. Chambers took the promissory note, but did not ask, on the respondent's behalf, for security (although the appellants had had a third mortgage as security for their debt), nor did they communicate in any way with the respondent or her Solicitor Moyer, who was in Calgary. The respondent had never authorised such a use of the power of attorney, and it was clearly a fraudulent act on the part of McElroy. The object of the power of attorney was explained at the meeting at Moyer's office between the respondent McElroy and Moyer on 24th June, and it is not in dispute that the object was to make arrangement for the investment of the money in her savings account and that McElroy was to try to get, subject to Moyer's approval, investments at a higher rate of interest than the ordinary bank rate on deposits. It is unnecessary for their Lordships to comment upon the participation of the officers of the bank in this curious transaction, carried through without the smallest endeavour to verify from the respondent herself, who, it may be mentioned incidentally, was in very bad health at the time, that she was lending so large a proportion of her property without security to a man whose financial position was known to the bank to be of an unsatisfactory character. Mr. Tilley, as counsel for the appellants, did not seek to question the view entertained by all the Judges who have dealt with the case, including those in the Supreme Court that the bank came under a fiduciary obligation towards the respondent as regards the whole of the sum of \$8,500. There can indeed be no question that in the circumstances of the case McElroy, when he signed the cheque in his own favour on the authority of the power of attorney, apart from any liability at common law, became a constructive trustee of the sum of \$8,500 *Burdick v. Garrick*, (1870) 5 Ch 233=39 LJ Ch 369=18 WR 387, *Gray v. Johnston*, (1868) 3 HL 1=16 WR 842 and *John v. Dodwell*, (1918) AC 563=87 LJ PC 92=118 LT 661=34 TLR 261 at p. 569. Nor can it be doubted that the appellants who for their own benefit concurred in the transaction without any inquiry became subject to a fiduciary obligation similar to that by which McElroy was bound *Bridgman v. Gill*, (1857) 24 Beav 302, *Coleman v. Bucks. and Oxon. Union Bank*, (1897) 2 Ch 243=66 LJ Ch 564=76 LT 684 =45 WR 616 and *B.A. Elevator Co. v. Bank B.N.A.*, (1919) AC 658=88 LJPC 118=121 LT 100.

The argument presented to the Board for the appellants was rested entirely upon the subsequent conduct of the respondent during a period exceeding two years. Their Lordships take the same view of those facts as that presented in the

elaborate judgment of Duff, C. J., and it will therefore be necessary to give only such an outline of these facts as will serve to explain their view as to the points of law upon which there has been so considerable a difference of judicial opinion.

The respondent remained at Hamilton, Ontario, on a visit for nearly six months, and returned to Calgary about the middle of December, 1929; and it may be mentioned that the appellants did not during her absence inform her of the fact that her money had been used to pay McElroy's debt to the bank, nor that the bank held his promissory note in her favour for the amount of \$8,500. The respondent after her return from Hamilton tried without success to obtain information from McElroy as to the investments of her money. She was in the Calgary office of the appellants on several occasions.

On 24th December 1929 she attended there and had her bank-book written up. There is a conflict of evidence as to what took place. According to Chambers he then produced the promissory note for \$8,500 and showed it to her. She appeared, he said, to be puzzled and said she had not expected McElroy to borrow so much. According to her it was not till June 1930 that she had a conversation of this kind with Chambers and first understood that McElroy had taken the \$8,500, though she thought then (no doubt by her own mistake) that the amount was only \$4,500. It seems to their Lordships evident, and indeed it is admitted, that no bank-official ever told the respondent that her money had been used by McElroy to pay his debt to the bank; and if it is to be assumed that she knew in December 1929, that McElroy had withdrawn \$8,500 it would also be reasonable to assume that she thought the withdrawal was or might be for a proper purpose. On 2nd January 1930 she made an unsecured loan of \$1,400 to McElroy, a fact which goes to support her evidence, and it is plain that the trial Judge believed that the respondent was giving truthful evidence, and that he regarded the evidence of Chambers with distrust.

In June 1930 the respondent went to a Calgary hospital to undergo an operation for a serious complaint which had been affecting her health for a long time.

Before going to the Hospital she went to the bank and ascertained, as she asserts for the first time that her balance was very much less than she thought it ought to be and according to her recollection it was then that Chambers produced the promissory note and informed her that McElroy had drawn the money and left the note for her. In view of their Lordships nothing of substance turns upon the question whether she was told of the withdrawal and of the note in December 1929, or in June 1930, since it is not suggested that she was told on either occasion that McElroy had used the money for discharging his own debt to the bank. While the respondent was in hospital McElroy told her that he "had taken her money to pay the bank," and he also asserted that Weaver had told him to take it adding that the respondent was a widow and would want to marry McElroy. Weaver who was called as a witness denied the statements so far as he was concerned. The respondent returned to Calgary in August 1930. She saw McElroy in September when he repaid the balance of the \$1,400 loan. She

transferred her account to the Bank of Montreal, on 10th September 1930, and on 31st December 1930, she removed her papers from the safety deposit box in the appellant's office, and at a later date she took away McElroy's promissory note for \$8,500.

On 1st August 1931, McElroy at the respondent's request gave her a new promissory note for \$9,419, being principal and accrued interest to that date. The interest rate was reduced to 6 per cent on the understanding that McElroy would pay off the note in September 1931. In September 1931, the respondent instructed Moyer to endeavour to obtain from McElroy either security or payment. She had a number of interviews with both McElroy and Moyer during the next year without getting any satisfaction from them, and in September 1932, she agreed to renew the note for two years with interest at 6 per cent. There were negotiations for security to be given for her but they never were completed. About this time she changed her solicitor and took away her papers. Her new solicitors demanded payment from the appellants of the amount of \$8,500 and of certain other cheques drawn by McElroy under the power of attorney. The appellants refused to pay and this action was commenced in December 1932. At the hearing before the Board the appellants relied on two points; first that the respondent was estopped from maintaining the action, and secondly that the respondent though entitled to repudiate the action by McElroy in fact had elected to affirm and to ratify it. The point of estoppel can be briefly dealt with. As pointed out in the reasons for the judgment of the Supreme Court of Canada, there is no evidence to support the view that the respondent's silence, that is, her delay in complaining to the bank that McElroy had used the money drawn from her account improperly and without her authority, had caused the appellants to alter their position in any way. Nor, on the other hand, is there any reason whatever for contending that the silence upon which the estoppel is sought to be based was, to quote the words of Lord Tomlin in his speech in *Greenwood v. Martin's Bank*, 1933 AC 51= 101 LJ KB 623=147 LT 441=38 Com Cas 54=76 SJ 544=48 TLR 601 at p. 58, deliberate and intended to produce the effect which it in fact produced, namely the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against a third party.

There was thus on the one hand no evidence of any detriment to the appellants as a consequence of the silence of the respondent, and on the other hand no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants. It is therefore unnecessary to deal with any other ground for rejecting the argument based on estoppel. Before their Lordships the main argument for the appellants was that the respondents though entitled to repudiate the act of McElroy had chosen with full knowledge to ratify it. In other words she had treated the transaction as a loan by her to McElroy and had accepted and retained the promissory notes given to her by McElroy. This ratification it was urged must date back according to the well-known maxim to the moment when McElroy endorsed the cheque for \$8,500, with the result that

the money was lent to McElroy and properly used by him to discharge his debt to the appellants. This is a somewhat surprising conclusion, for it is difficult to see how a contract between the respondent and McElroy entered into some time after the appellants had become constructive trustees for her of the \$8,500 could operate to release them from their equitable liability. If the facts would permit it, the appellants might no doubt argue that they had been released in equity from their liability to the respondent : but to such a contention there are some obvious and conclusive objections. In the first place there is no evidence to suggest that the respondent had any intention whatever of releasing the appellants. In the second place there was no consideration for such a release, and since there was no deed, this alone would be fatal. In the third place, the respondent could not be held in equity to have released the appellants unless she had full knowledge of her rights, and it seems to be clear that until shortly before the commencement of her action against the appellants she had no such knowledge. She doubtless knew in June 1930 that McElroy had used her money to pay off his debt to the appellants, but this fact alone would not have informed a competent man of affairs, still less a woman without business experience, that there was a right of action against the appellants.

She did not know and could not be expected to surmise that the appellants had, without explanation and without the smallest inquiry been parties to the strange transaction with McElroy which their Lordships have thought it sufficient to describe in the moderate terms used above. She thus was without such knowledge of the facts, to say nothing of knowledge of her rights against the appellants, as would be necessary before a Court of Equity could hold her bound by an implied release.

These considerations alone would be sufficient to dispose of the appeal; but their Lordships are unwilling to leave unanswered the argument based on the alleged ratification by the respondent. It must be remembered that it is not the drawing of the cheque by McElroy, but the use of the proceeds of the cheque which the respondent could properly complain of. What act of McElroy is it which the respondent is said to have ratified ? The appellants must say that it was either the lending of the proceeds to McElroy or the paying of the proceeds to the appellants to discharge McElroy's debt. Both of these suggestions must fail for the simple reason that neither act was done or professed to be done by McElroy acting as agent for the respondent. The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal Halsbury's Laws of England, Edn. 2, p. 231; *Heath v. Chilton*, (1844) 12 M and W 632 at p. 638 and *Eastern Construction Co. v. National Trust Co.*, (1914) AC 197=83 LJPC 122=110 LT 321 at p. 213. If the suggestion of ratification in this case is analysed it comes to this, that the agent having put some of the principal's money in his pocket, the latter "ratifies" the act. For the reason given this is not possible as a legal conception, since the agent did not take, and could not be deemed to have taken, the money for

himself as agent for the principal. If the act had been authorized, the contract between the principal and the agent would have been the ordinary contract of loan. That indeed seems to have been what McElroy suggested to Chambers, if he suggested anything honest at all. There can be no room here for the application of the doctrine of ratification. The point was clearly put in the judgment of the Chief Justice:

McElroy was not professing to act as her (Mrs. Begley's) agent in paying the bank, and the bank was not receiving the money from anybody acting as the appellant's agent. This is a most important consideration because it follows that, as McElroy did not profess to represent the appellant (Mrs. Begley) in paying the bank, his act in doing so was not one which the appellant could validly make her own by ratification.

It may be added that the contention that the respondent "adopted" the transaction ab initio means nothing in law except that after discovering the fraud she made a contract with McElroy which changed his liability into one of debt, instead of one of damages for breach of duty or for breach of trust. The appellants of course cannot set up or rely on such a contract since they are not parties to it. It is clear that in the circumstances the respondent was not put to her election to sue either McElroy or the appellants: she could sue both or either, subject of course to this that she could not recover more than the total sum due to her. She could indeed have released McElroy and yet have pursued her remedies against the appellants, for there is no question here either of joint liability or of the liability of principal and surety. For these reasons, their Lordships have come to the same conclusion as the Supreme Court of Canada, and they must humbly advise His Majesty that the appeal must be dismissed with costs.