1893

*Mar. 21.

*June 24.

THOMAS CUMMING AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE LANDED BANKING AND LOAN COMPANY (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trustee—Will—Executors and trustees under—Breach of trust by one—Notice—Inquiry.

After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof. *Ewart* v. *Gordon* (13 Gr. 40) discussed.

W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator.) In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same.

Held, reversing the judgment of the Court of Appeal, that in taking and assigning said mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of the Queen's Bench

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 19 Ont. App. R. 447.

Division(1), which affirmed the judgment of the Chancellor (2).

The plaintiffs are the trustees of the estate of James Cumming, and the action was brought to recover from defendants the proceeds of certain mortgages assigned to them by Thomas B. Wragg, formerly an executor and trustee of the estate.

Wragg and Robert Cumming were executors and trustees under the will of James Cumming, the management being almost entirely left to Wragg, his co-executor being only eighteen years old at his father's death. Wragg lent money of the estate and took mortgages in his own name, being described in the instrument as "Thomas Busby Wragg, of the city of Belleville, Esquire, trustee of the estate and effects of the late James Cumming, deceased." Two of these mortgages were assigned to a building society and in the assignment Wragg was described as in the mortgages.

Negotiations were subsequently made by one Bell, solicitor of the estate, with the defendants for a loan to pay off the money borrowed from the building society, which was agreed to and a new assignment was made by Wragg to the defendants, in which Wragg was also described as in the former instruments. Except this description the defendants had no knowledge of Wragg's position or of the affairs of the estate.

An action on behalf of the estate was brought against Wragg to make him account for his dealings with the estate money and judgment was recovered against him for a large amount, and he was removed from the trusteeship. The present action was then brought by the newly appointed trustees against the defendants.

The action was tried before the Chancellor who gave judgment in favour of the plaintiffs (2). His judgment

(1) 20 O.R. 382. (2) 19 O.R. 426.

1893

CUMMING v. THE LANDED BANKING AND LOAN COMPANY.

was affirmed by the Queen's Bench Division (1), whose decision was afterwards reversed by the Court of Appeal (2). The plaintiffs then brought the present appeal.

Marsh Q.C., for the appellants, referred to *Duncan* v. *Jaudon* (3); *Hill* v. *Simpson* (4); and *Haynes* v. *Forshaw* (5), where *Hill* v. *Simpson* (4) is cited as authorities for the contention that defendants, in dealing with Wragg, were bound to make inquiries

W. Cassels Q.C. and *Mackelcan* Q.C., for the respondents, cited *Ashton* v. *Atlantic Bank* (6); *Forbes* v. *Peacock* (7).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The Chancellor by whom this action was originally tried, the Queen's Bench Division consisting of three judges, and the learned Chief Justice of the Court of Appeal, all came to the conclusion that in the matter of the assignment of the mortgages in question Wragg was acting as trustee, and not in the capacity of executor, under the will of James Cumming. Three learned judges of the Court of Appeal arrived at a contrary conclusion. In the several judgments which were delivered in the courts below the reasons for and against the view which ultimately prevailed are fully set forth.

I have come to the conclusion that the judgment in the court of first instance was entirely right, and that for the reasons given by the Chancellor to whose conclusions, as both regards the facts and the law, I give my unqualified assent.

Had Wragg not been an executor under the will of Cumming at all no one can doubt that there would

(1) 20 O.R. 382.
(2) 19 Ont. App. R. 447.
(3) 15 Wall. 165.
(4) 7 Ves. 152.
(5) 11 Hare 104.
(6) 3 Allen (Mass.), 217.
(7) 1 Ph. 717.

have been a breach of trust in the assignment of these mortgages of which the respondents must be deemed to have had notice. That there would have been in that case in fact a breach of trust is evident, as Wragg had no power to deal with or transfer the securities in which the trust funds belonging to the estate might happen to be invested.

Granting that there was authority to invest the trust funds in the mortgages to Foley & Brignall yet Wragg would have been guilty of a breach of trust in taking those securities in his own name alone. He would have been guilty of a further breach of trust when he assigned these mortgages to the building society, and of yet another dereliction of his duty as a trustee when he made the transfer to the respondents.

Then, on the face of all the instruments,—the mortgages themselves, the assignments to the building society, the re-assignments by the latter to Wragg, and the assignments by Wragg to the respondents,—he is described as a trustee. This was beyond all doubt or question sufficient to give notice to the respondents that he was a trustee professing to act under some trust contained in the will of James Cumming. They, therefore, had constructive notice of the trusts contained in that instrument. If they had made the inquiries which they ought to have made they would surely and easily have discovered the fraud and breach of trust which Wragg was perpetrating.

It is said, however, that Wragg having been an executor as well as a trustee, and the law being that as an executor he had power without the concurrence of his co-executor to make a valid mortgage of any of the assets provided the mortgagees had no notice either from the nature of the transaction or from extrinsic circumstances that he was acting in fraud of the estate, he must be assumed to have been acting as executor in

1893

CUMMING, v. THE LANDED BANKING AND LOAN COMPANY.

The Chief Justice.

these transactions, and that therefore the respondents having had no actual notice of any breach of trust are purchasers for value without notice and entitled to hold the mortgages as such. The case of *Ewart* v. *Gordon* (1) is relied on as an authority for this. I was counsel for the defendant in that case, and my recollection of it, confirmed by a recent perusal of the judgment, leads me to the same conclusion as the Chancellor, viz.: that the actual decision there has no bearing on the present question.

As regards Wragg himself and all persons taking securities from him it would, I think, without altogether ignoring *Sweeny* v. *Bank of Montreal*, (2) be impossible to say that he was not acting as on the face of these instruments he declared himself to be acting, viz., as a trustee and not as an executor.

The respondents' own officer in his evidence swears that the respondents' company dealt with Wragg as a trustee, and in their statement of defence they do not even set up the ground the majority of the Court of Appeal have rested their judgment upon, namely, that he was acting as an executor.

I think it impossible now to hold that Wragg was acting as executor after having announced himself to be dealing with the respondents as a trustee, and after their own officer's admission that they dealt with him in that character.

Further, I am not prepared to say that after all the debts of an estate are paid, and after the lapse of ten years from the testator's death, there ought not to be in any case at least a presumption that one of several executor-trustees who is dealing with assets is so dealing with them *quâ* trustee and not as executor. I think in such a case it should lie on the person seeking to uphold the transaction to show that he dealt with

(1) 13 Gr. 40. (2) 12 App. Cas. 617.

the other party as an executor. What I have now said may perhaps to some extent contravene propositions laid down in *Ewart* v. *Gordon* (1), or in some of the cases relating to the same estate decided at the same time. I should be unwilling to do this did I not feel that that case was a very strong decision bearing hardly on the beneficiaries of the estate. I do not go so far as to say that the presumption I speak of ought to be conclusive, but I think it ought at least to shift the burden of proof. Then, if it is sufficient for that purpose it is clear that the respondents here cannot say that they did not deal with Wragg as a trustee, for they accepted transfers of these securities from him acting ostensibly in that character, and moreover their officer says they dealt with him as a trustee.

I also agree with Mr. Justice Street that if it was necessary to show that these mortgages had been appropriated to the trust (referring to the case of *Willmott v. Jenkins*) (2), there was proof of such an appropriation here, inasmuch as that fact appeared from the form of the mortgage deeds themselves. What could show more plainly that personal assets held originally by an executor, who was also a trustee, had been turned over to the trust than the fact that he had invested them in securities taken in favour of the trust ?

If there had been within the scope of the trust power in Wragg acting alone to deal with these securities in the way he has done, and the only breach of trust had consisted in his misapplication of the moneys received from the respondents, then it would have been a case within the statute which relieves persons rightfully and innocently dealing with trustees from seeing to the application of purchase money and loans. But, as I have said, the dealing with the securities themselves,

(1) 13 Gr. 40. (2) 1 Beav. 401.

1893

CUMMING v. THE LANDED BANKING AND LOAN COMPANY.

The Chief Justice.

not merely the use made of the proceeds, involved a breach of trust of which the respondents must be taken to have had constructive notice.

The original judgment pronounced by the Chancellor must be affirmed with costs to the appellants in all the courts.

Appeal allowed with costs.

Solicitors for appellants: *Lount, Marsh & Lindsey.*

Solicitors for respondents: *Mackelcan, Gibson & Gausley.*