

1894 JAMES MCGREGOR GRANT AND)
 *May 9, 10. RONALD CAMERON GRANT (DE- } APPELLANTS ;
 FENDANTS)..... }

AND

OLIVIA MARY MACLAREN AND }
 OTHERS (PLAINTIFFS)..... } RESPONDENTS ;

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Executors and trustees—Accounts—Jurisdiction of probate court—Res judicata.

A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the probate court.

The Supreme Court of Canada, on appeal from a decision that the said charges were properly disallowed, will not re-consider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved.

A letter written by a trustee under a will to the *cestuis que trust* threatening in case proceedings are taken against him to make disclosures as to malpractices by the testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship.

APPEAL from a decision of the Supreme Court of New Brunswick, reversing the ruling of the judge in equity on exceptions to a referee's report.

The defendants, the Grants, were executors and trustees under the will of John W. Nicholson, who had been a wholesale liquor dealer in the City of St.

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

John, N. B. The plaintiffs were children of said 1894
 Nicholson, and beneficiaries under the will. Being GRANT
 dissatisfied with defendants' management of the estate ^{v.}
 plaintiffs had endeavoured to get R. C. Grant to resign MACLAREN.
 his position as executor and trustee and have one of
 themselves appointed in his stead, and in answer to a
 letter proposing this change J. McGregor Grant wrote
 to the plaintiff, Mrs. MacLaren, a letter containing the
 following threats :

“ If I chose to retaliate, as you richly deserve, I
 could put the Dominion Government in possession of
 information which would justify them, either now or
 at any time within fifty years, in seizing the books
 and property of the estate, and leaving you all simply
 paupers with the reputation of the family irretriev-
 ably ruined, and the public astonished with a revela-
 tion of over twenty years of the most successful fraud,
 not only on the Government but on themselves as
 customers. The question has often been put to me :
 How has Mr. Nicholson accumulated such a large
 fortune when other liquor dealers could not ? I and
 four others in St. John could answer that question,
 and could tell how night after night the shutters of
 the store would be put up, the door carefully locked
 and barred, all lights extinguished except on the
 lower story, all chinks in the windows covered over,
 the nuts cautiously taken off the copper hasps of the
 customs bonded warehouse, the doors opened, cask
 after cask rolled out, one-fourth of the contents trans-
 ferred to empty casks ready in the duty paid ware-
 house, the quantity abstracted replaced with alcohol
 water and colouring mixture, the adulterated casks mar-
 ked with chalk on the chine, rolled back into the bonded
 warehouse and afterwards sold to the public, and the
 Government defrauded of the duty on the quantity ab-
 stracted. Every cask that came into the store, whether

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— of brandy, whisky, wine or gin, was treated in this manner, and the profit on every quarter cask averaged \$25, and the invoice books in my possession will show that the estate is liable to the Dominion Government for nearly \$300,000, or in other words, the duty on one fourth of every cask of liquor imported ;”

“I am not desirous of attempting to injure you as you have attempted to injure me ; fortunately none of my family were ever engaged in the liquor traffic, and therefore any exposure, although it might be intensely gratifying to the St. John public, would be harmless to myself and family, but you can see that your own selfishness and base ingratitude may at any time place you in an unfortunate position, and so serious is the offence in the eyes of the law that had the particulars been divulged in the lifetime of your father it would have cost him his liberty. I do not intend that either of you, or any of your sisters, shall become trustees.”

After receiving this letter the plaintiffs instituted a suit in equity for the purpose of having the Grants removed from the trusteeship of the estate. At the hearing the judge in equity, without entering into the merits of the suit, ordered a reference to have the accounts of the defendants taken. When the case came before the referee defendants' counsel claimed that as the accounts had been passed every year before the Probate Court they could not be reviewed in the equity suit, but the referee proceeded to investigate them and disallowed a number of items as improper charges. On exception before the judge in equity to the referee's report that learned judge held that the passing of the accounts by the Probate Court was final, and not open to review in another proceeding. On appeal from this ruling it was reversed by the Supreme Court of New Brunswick, and the report

of the referee was confirmed. The defendants then
appealed to this court.

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McLeod Q. C. and *Palmer Q. C.*, for the appellants. MACLAREN.
The matter of the accounts was, by the action of the
Probate Court, *res judicata*, and could not be attacked
in a collateral proceeding. *Doe d. Sullivan v. Currey* (1);
Cummings v. Cummings (2); *Harrison v. Morehouse* (3).

Hazen for the respondents was stopped by the court.

THE CHIEF JUSTICE.—(Oral judgment). We do not
think it necessary to hear the learned counsel for the
respondents any further as we all think the appeal
must be dismissed.

I am of opinion that the Probate Court had no
jurisdiction over the accounts in so far as the charges
and disbursements of the defendants were incidental
to their duties as trustees and not to their duties as
executors. Therefore whatever the Probate Court may
have determined with respect to the accounts of the
trustees, as distinguished from those of the executors,
was rightly held by the court below not to be binding
on the equity court. The technical rule relied on by
the appellant that a judgment cannot be attacked for
want of jurisdiction in a collateral proceeding does
not, it seems to me, apply to such a case. For this
the case of *Atty. Gen. v. Hotham* (4) which was referred
to by my brother Taschereau during the argument is a
sufficient authority.

The exceptions to the referee's report were properly
disallowed by the full court on the appeal to it from
the equity judge who had allowed some of these
exceptions. There being no *res judicata* binding on
the referee it appears to me that we cannot now
interfere so far as to reconsider the several items in

(1) 1 Pugs. 175.

(2) 123 Mass. 270.

(3) 2 Kerr 584.

(4) Turn. and Russ. 219.

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the accounts which have been made the subject of exceptions for the purpose of ascertaining if the exercise of discretion by the referee, confirmed as it has been by the court on appeal, should be altered by this court. Two tribunals have already pronounced upon them and exercised a judicial discretion in the allowances made and no question of principle is involved. Certainly this court as a second court of appeal ought not to review the items of the account in detail in such a case as this. It is laid down in two recent cases in the House of Lords (1) that where two courts have concurrently decided a question of fact that tribunal will not review their decisions, and this principle of adjudication seems to me to apply still more strongly where the subject matter of appeal is one in which the courts appealed from have exercised a discretion as to amounts, not involving any question of principle, in allowances made in taking trustee's accounts.

With reference to the conduct of the trustees which has been dwelt upon by Mr. Hazen, it appears to me that Major Grant acted most improperly in writing the letter which is set out in the bill. The judge in equity ought to have removed Major Grant from the trusteeship at once. A trustee who threatens to betray the interests of his *cestuis que trust* in the manner in which Major Grant did in the letter in question should not have been allowed to remain in control of the trust estate as that gentleman has been left up to the present time. I cannot understand how any court of equity, having regard to the relationship existing between trustees and *cestuis que trust*, especially where some of the latter were infants or married women (as in the present case), could allow a trustee who had so far

(1) *Owners of the "P. Caland"* 145 ; *McIntyre Bros. v. McGavin & Freight v. The Glamorgan S.S. Co.* [1893] A.C. 275 ; 1 Repts. 250.
 [1893] A.C. 216 ; 1 Repts.

forgotten his duties as to write such a letter still to continue in the administration of the trust funds and property. Therefore, so far as the conduct of the trustee ought to have any influence on the questions involved in the exceptions taken to the referee's report, it must be decidedly unfavourable to the appellants.

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If I were called upon to take the accounts over again, scrutinizing each item and thus reviewing the discretion exercised by the referee and the Supreme Court of New Brunswick, I could come to no other conclusion than that arrived at by those tribunals.

The charges disallowed were excessive and improper. The payment of \$1,500 a year as a salary to Ronald C. Grant for collecting rents, in addition to the allowance he was entitled to receive as a trustee under the will, was unjustifiable. The trustees were paid for performing the duties of their office and beyond that clerks were employed and a commission allowed to Charles Grant, another son of the appellant, for collecting the rents due to the estate. These charges indicate that there was generally extravagant expenditure.

My reason for making these observations is that the circumstances upon which I have remarked appear to me to afford good ground why we should not be astute in scrutinizing every item in the trustees' accounts which has been disallowed, and why we should adhere to the judgment of the court below as having been a reasonable and proper exercise of its discretion. Further, I think even if we were to take the accounts over again we ought to come to the same conclusion as the Supreme Court.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I concur in everything said by his Lordship. As to the letter written by Grant I can only

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say that, could I find words of condemnation stronger than those used by Mr. Justice Tuck I would employ them. I think what he said is exactly what these gentlemen deserve. It is this: "The man who could write such a letter to ladies, his relatives, of whose estate he had control is not fit to be a trustee, and had the hearing been before me I would have dismissed J. McGregor Grant at once, without hesitation, and have ordered an account to be afterwards taken. A more cruel, I was about to say diabolical, letter, under the circumstances, could not have been written. Young ladies, without father or mother, are asking from Mr. Grant only that which they believe to be their right, and they are answered with an implied threat to blast the reputation of their late father, or if not that, then to make him appear contemptible in their eyes. It is a heartless letter, and unworthy of a gentleman."

I think these men deserved fully what has been said and I concur with his Lordship that they should have been dismissed from their position as trustees, and disconnected from the estate, at the first opportunity given to the court. I can only say that I hope, for the sake of the administration of justice in New Brunswick, that these men will not be allowed to remain long as trustees of this estate.

SEDGEWICK J.—I also concur, and I think that, considering the circumstances under which the reference was ordered, the appellants here are not the persons to avail themselves of the objections made.

Appeal dismissed with costs.

Solicitors for appellant J. McG. Grant: *E. & R.*

McLeod & Ewing.

Solicitor for appellant R. C. Grant: *C. A. Palmer.*

Solicitors for respondents: *Straton & Hazen.*