

SALE AND SALE v. McMILLAN

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Solicitors—Action for payment of bill of costs—Alleged absence of retainer—Instructions given to solicitors by litigant's husband—Authority of husband—Ratification by litigant's conduct—Estoppel.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1), which, reversing the judgment of McEvoy J., dismissed the action.

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The action was brought by a firm of solicitors against the defendant as executor of the will of Mrs. McMillan, deceased, for payment of a bill of costs for alleged services in conducting certain litigation for the said deceased. The defendant denied that the deceased retained the plaintiffs to act for her in the said litigation. The trial judge, McEvoy J., gave judgment for the plaintiffs, which was reversed by the Court of Appeal (1).

On the appeal to the Supreme Court of Canada, after hearing the arguments of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal with costs and restoring the judgment of the trial judge. Written reasons were delivered by Duff J., with whom Rinfret, Lamont and Smith JJ. concurred, and by Cannon J.

Duff J. held that it was clear that Mrs. McMillan's husband had made himself responsible at each stage of the litigation, and had fully committed himself in respect of the appellants' bills; the one point was whether or not Mrs. McMillan herself, who was the real litigant, was bound. There was no formal retainer by her nor anything personally communicated by her to the appellants which, in itself, could have amounted to a retainer of the appellants by her. But her husband was the general manager of her property in Windsor, and there was evidence also to shew that she was aware that the litigation was proceeding on her account and necessarily, therefore, aware that her husband was interesting himself in it. She gave a bond for security for costs, paid one of the accounts with her own cheque, and there was abundant evidence that accounts sent to her were received, because they were brought in later by her husband. The appellants were for a long period collecting rents and crediting the amounts to the expense of litigation; and in the defence a counterclaim was set up alleging that appellants had received as solicitors for Mrs. McMillan certain

(1) [1931] O.R. 418; [1931] 4 D.L.R. 203.

monies and did not pay them, or account for them, to her, and asking for an account. There was the series of actual occasions on which the appellants acted in the most open way, and to her specific knowledge, as her solicitors; in other words, there was a ratification of the acts of her husband in retaining the appellants, as he undoubtedly did, on her behalf. The application for leave to appeal to the Privy Council, opposed by appellants on her behalf, was in the litigation in respect of which most of the bills were rendered; the party to the litigation was Mrs. McMillan who was the owner of the property concerned; her husband very properly applied for assistance from the Essex Border Utilities Commission in the cost of carrying on the litigation; the sum proposed to be advanced by the Commission was not regarded as anything like the whole of the costs. It was very clearly proved that Mrs. McMillan permitted her husband, in the course of managing her affairs on the Canadian side of the line, to act for her in legal matters. She had, by her conduct, put it entirely beyond her power to dispute her husband's authority to act as her agent in giving instructions in reference to legal matters to the appellants.

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CANNON J. held that there was no doubt that Mr. McMillan requested appellants to oppose the petition for leave to appeal before the Privy Council. Mrs. McMillan, before and after, certainly held out her husband as her agent for everything connected with the property in question. If, in fact, no agency existed, her husband, now her executor, should have sworn to that effect, but had not done so. The trial judge was right in maintaining the action.

Appeal allowed with costs.

G. F. Henderson K.C. for the appellants.

J. B. Aylesworth for the respondent.