1941
* Oct. 20, 21, 22, 23, 24.
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* Feb. 3.

EDGAR J. WHITFORD (DEFENDANT) ..... APPELLANT;

AND

SELENA E. WHITFORD, ADMINISTRATRIX OF THE ESTATE OF JAMES E. WHITFORD, DECEASED (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

*Parent and child — Gift — Descent of property — Sum transferred from father's bank account to son's bank account—Death of father intestate —Transaction held to be a gift—Question whether gift was in advancement—Evidence—Burden of proof—Law of Nova Scotia—R.S.N.S., 1923, c. 147, s. 13—Appeal—Claim for accounting—Matters of fact—Concurrent findings in courts below.*

A deceased, resident in Nova Scotia, died intestate. In his lifetime a sum to his credit in his bank account was transferred to a bank account in the name of his son. In disputes after deceased's death, between his widow, suing as administratrix of his estate, and the son, in regard to transactions or arrangements in deceased's lifetime in connection with his affairs, one question was, whether said sum belonged to deceased's estate, or whether it was transferred as a gift, and, in the latter case, whether it was a gift to the son in advancement on account of or in lieu of his distributive share in the estate.

*Held:* On the evidence, the transfer was a gift to the son; and, further (reversing on this point the judgment of the Supreme Court of Nova Scotia *en banc*, 16 M.P.R. 131), it was not a gift in advancement but an absolute gift. The question whether it should be held to have been made in advancement must be decided in accordance with the Nova Scotia statute, R.S.N.S., 1923, c. 147 (*Of the Descent of Real and Personal Property*) and that statute alone. By force of s. 13 thereof, there is no presumption, and the burden of proof is on the party asserting, that the gift was made in advancement. Furthermore, in view of clauses (*a*), (*b*) and (*c*) of s. 13, it would seem to follow that, in order that the intention of advancement may be held as established "by evidence taken upon oath before a court of justice" under the provision in clause (*d*), the evidence

* PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

must be of such a character that it is as forceful, cogent and unequivocal as the writing required by clauses (*a*), (*b*) and (*c*). This reasoning is further strengthened by the words "and not otherwise" at the end of s. 13. Upon the above view of the law, and upon the evidence, it could not be said that the gift was made in advancement.

Appeals on certain other questions decided by said Court *en banc* were dismissed. As to certain items for which appellant was held liable to account, this Court, having held that the contest in regard to them was strictly confined to matters of fact, pointed out that appellant "comes to this Court with concurrent findings against him in respect of matters strictly of fact and as to which he was unable to point to any specific and material mistake in the decisions appealed from", and that this Court found no reason to interfere therewith.

APPEAL by the defendant from part of the judgment of the Supreme Court of Nova Scotia *in banco* (1) and cross-appeal by the plaintiff from part of that judgment. The plaintiff sued as administratrix of her deceased husband's estate. The defendant was the son of the said deceased. The disputes between them were in regard to transactions or arrangements in the deceased's lifetime in connection with his affairs. The questions in dispute on the present appeal are set out in the reasons for judgment now reported.

*W. P. Potter K.C.* and *G. H. Crouse* for the appellant.

*C. B. Smith K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—James E. Whitford died intestate at Chester, in the County of Lunenburg, Province of Nova Scotia, on the 10th day of May, 1938.

The deceased left, surviving him, his widow, Selena E. Whitford, who was appointed administratrix of his estate and who is the respondent, Edgar J. Whitford, a son by his first marriage, who is the appellant, and Fanny Cleveland, wife of Bernard Cleveland, of Halifax, a daughter by his marriage with the respondent.

The respondent, in her capacity of administratrix, brought action against the appellant for:

(*a*) an accounting of all moneys received by the appellant for, or on behalf of, the deceased, or of all dealings and transactions between the deceased and the appellant, and of all transactions carried out by the appellant for

(1) 16 M.P.R. 131; [1941] 2 D.L.R. 701.

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the deceased under a power of attorney dated June 1st, 1931, for the period extending from the said 1st of June, 1931, to the 10th day of May, 1938;

(*b*) a declaration that a certain sum of $34,968.45, withdrawn from the Bank of Nova Scotia, in Chester, by the late James E. Whitford, on or about the 15th day of June, 1931, and transferred to the account of the appellant, was moneys belonging to the estate of the deceased and payable by the appellant to the respondent; or, in the alternative, that the said sum was an advancement on account of, or in lieu of, the appellant's distributive share in the late James E. Whitford's estate;

(*c*) a declaration that the transfer of real property to the appellant by the late James E. Whitford by deed dated the 19th May, 1928, was null and void and bad in law because it was a testamentary document executed contrary to the terms and provisions of the Nova Scotia statute thereto relating; or, in the alternative, that this transfer was an advancement on account of, or in lieu of, the appellant's distributive share in the estate of the late James E. Whitford.

The appellant counterclaimed for a declaration that the purported transfer, on June 6th, 1938, by the appellant to the respondent of a balance of $12,387.75 standing to the credit of the joint account in the name of both the deceased and the appellant was null and void and without consideration, should be set aside and the money returned to the appellant.

The appellant also counterclaimed for an accounting by the respondent of the money received by her from the deceased; but that was subsequently abandoned.

The action was tried before His Lordship Mr. Justice Doull, who decided:

(1) that the transfer of real property dated May 19th, 1928, was not an attempted testamentary disposition; that it was a gift by the deceased to the appellant, but a gift in advancement;

(2) that the appellant was obliged to account to the respondent for moneys received by him in connection with certain transactions, including the moneys handled by the appellant from the time of the execution of the power of attorney of June 1st, 1931, to the death of the deceased;

(3) that the transfer by the deceased to the appellant of the sum of $34,968.45, on June 15th, 1931, was a gift to the appellant, but a gift in advancement;

(4) that the appellant's claim for the return of the balance of the joint account ($12,387.75) should be dismissed, the learned judge holding that the creation of the account was not a gift by the deceased to the appellant of a joint interest therein but an account for the convenience of the deceased; and that, therefore, it belonged to his estate;

(5) that the counterclaim of the appellant should be dismissed.

On appeal to the Supreme Court of Nova Scotia *in banco* the decision of the learned trial judge was affirmed, except in the following respect:

The lands described in the deed of conveyance of the 19th of May, 1928, were declared to have been an unconditional gift, not a gift in advancement. (Mr. Justice Carroll, dissenting, would have declared that the transfer of the bank account of $34,968.45 was also an unconditional gift).

In this Court, the appellant contended that the judgments appealed from were erroneous in failing to apply to the gift of $34,968.45 transferred by the deceased to the appellant on the 15th of June, 1931, the same reasoning as was applied to the gift of the lands made in the deed of May 19th, 1928, and to declare accordingly that the money gift was also an unconditional gift for the same reasons that the gift of the lands was declared to have been so made.

The appellant further contended that no duty to account was ever undertaken by him, and that, if it is to be implied that he was under such a duty, he had accounted; further, that, at all events, no such duty to account existed in respect of certain specific transactions dealt with in the judgment of the trial judge; and, finally, that the order with regard to the balance of $12,387.75 standing to the credit of the joint account should be reversed and that the purported transfer of such balance by the appellant to the respondent, on June 6th, 1938, should be set aside.

The respondent cross-appealed with regard to the item of $34,968.45, contending that this money belonged to the estate and had not been given by the deceased to the

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appellant. There was no cross-appeal by the respondent with respect to the order of the Court of Appeal concerning the gift of lands, of May 19th, 1928, and the decision on this point is, therefore, left undisturbed.

At the conclusion of the argument of counsel for the appellant before this Court, it was intimated that we would not require to hear counsel for the respondent, except as to the following three items:—

(1) The transfer of the bank account of $34,968.45; as to this, counsel for the respondent was, in any event, entitled to be heard in connection with her cross-appeal;

(2) The specific transaction with one Harvey Hatt;

(3) The sum of $4,912.65 in connection with the Corkum and Mader transaction.

The three items just enumerated are, therefore, those to which we must now turn our attention.

It will be convenient to take up first the bank account of $34,968.45, which is the most important because of the amount involved and the points of law raised in connection therewith.

The deceased, James E. Whitford, carried on the business of farmer, drover, butcher and money lender. He was able to amass considerable wealth in the prosecution of his varied activities.

The appellant, his only son, left school at a very early age and began to assist his father on the farm and in his other businesses. He lived with his father and was not in the receipt of any wages. He undoubtedly was an important factor in contributing to his father's success in business.

On the 15th of June, 1931, the father had standing to his credit in the Bank of Nova Scotia, at Chester, a sum of $34,451.73.

Mr. Bonnezen was then local manager of the Bank. His evidence on this matter is as follows:

Counsel having shown to him a bank withdrawal slip wherein James Whitford acknowledged to have "received from the Bank of Nova Scotia the sum of thirty-four thousand nine hundred and sixty-eight 45/100 dollars, balance of account and interest to date to be charged to Account No. 1222", he stated that the slip was made in his own handwriting. His recollection was that, a few

days before, the appellant, Edgar J. Whitford, called at the bank and they discussed the matter of the account being transferred from the father's name to the son's; and he drew this withdrawal slip, having computed the interest to the end of the month, i.e., to the end of June, 1931. He handed it to Mr. Edgar Whitford and thinks he also suggested that he might also have a witness, although, as he said, it is not customary to have a witness on withdrawal slips.

It was only because of the large amount involved that the witness was advising him in that way to the best of his ability.

His recollection was that Mr. Edgar Whitford said his father was simply contemplating transferring the account to his (the son's) name; he did not assign any reason, nor did the witness consider it his duty to cross-question either party as to their motives; they simply came to him as a business man and asked his advice.

Having filled out the withdrawal slip, he gave it to Edgar Whitford. Later, on the 15th June, one Roy Nauss came into the bank and asked him to step outside to speak to Mr. James E. Whitford. He did so, and the old gentleman handed him the bank book. The withdrawal slip was folded up inside the book. Mr. Bonnezen started to open it and James E. Whitford made a gesture. Bonnezen said to the old gentleman: "Do you acknowledge this as your signature?" (on the slip withdrawal). And he said: "I do." Bonnezen said: "This is your wish?" And the old gentleman assented. Bonnezen then adds:

> I simply complied with his wishes. I retained the bank book and the slip until the 2nd of July, when I issued a fresh book in the name of Edgar J. Whitford, which you will find there with his signature on it.

Bonnezen, immediately upon having returned to his office, wrote on the withdrawal slip the following endorsement:

> At 9.25 a.m. on 15th June, 1931, Roy Nauss called at Bank and asked the Mgr. to step outside and speak to Mr. Whitford. I found Mr. Jas. E. Whitford and his son together in the latter's car and the former stated within signature was his and that the transfer was in accordance with his wishes. Edg. Whitford and Roy Nauss were in the car at the time.
>
> (Sgd.) R. T. B. Bonnezen, Mgr.
>
> Witness to the visit of Roy Nauss to the Bank as aforesaid.
>
> (Sgd.) K. M. Hume, Teller.

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As stated by Mr. Bonnezen, on 2nd July, that is: after the month of June, for which the interest had been calculated to make up the total of $34,968.45, the latter sum was put to the credit of the appellant in a fresh account opened under number 3061.

The trial judge and all the judges of the Supreme Court *in banco,* upon this evidence and the other circumstances testified to in the course of the trial, held that there was a gift of the amount in question to the appellant by his father. On the record, these concurrent findings are amply warranted; and there would be no justification to disturb them in this Court. The cross-appeal therefore fails.

But the question remains whether, as held by the learned trial judge and the majority of the Court *en banc,* this gift should be held to have been made in advancement.

Now, there exists in Nova Scotia some statutory provisions dealing with gifts or grants made in advancement by an intestate during his lifetime. They are to be found in sections 8-13 inclusive of ch. 147 of the Revised Statutes of 1923. The material section concerning the matter now under discussion is expressed as follows:

> 13. Every gift or grant made by an intestate in his lifetime to a child or grandchild shall be deemed to have been made in advancement if,—
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> (*a*) it is so expressed in writing in a grant thereof; or
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> (*b*) it is so charged in writing by the intestate; or
>
> (*c*) it is so acknowledged in writing by such child or grandchild; or
>
> (*d*) it is proved to have been so made by evidence taken upon oath before a court of justice,
>
> and not otherwise.

As a consequence of the existence of this provision, a reference to English decisions and to statements of English textbook writers, under a different law and different statutes, may, no doubt, be interesting; but we apprehend that, in this case, the matter stands to be decided in accordance with the Nova Scotia statute—and with that statute alone.

Indeed, it may be said here as Boyd C. said of the Ontario statute, on the same subject-matter, in the case of *Re Hall* (1):

> The English cases I have consulted exhibit a very peculiar and anomalous state of the law. It seems to be held that, for the purposes of distribution, loan, gift, and advancement may be treated as almost

(1) (1887) 14 O.R. 557, at 558-559.

interchangeable terms. * * * But our statute requires that some certainty of definition be given to the term "advancement", by the very fact that it is to be evidenced by writing. * * *

and, in *Filman* v. *Filman* (1), Spragge, V.C., refers to the English cases and says the provisions inserted in the Ontario Act were to avoid the questions which have arisen in England as to what constituted an advancement. With due deference, the same may be said of the Nova Scotia statute, although the Ontario Act requires a writing and does not contain any provision similar to clause (*d*).

While apparently in England, under certain circumstances, a gift may be presumed to have been made in advancement, it is clear that in Nova Scotia such a presumption is never to be admitted. By force of section 13, the rule is that a gift or grant, made by an intestate in his lifetime to a child or grandchild, shall not be deemed to have been made in advancement. In order that such a gift or grant may be held to have been made in advancement, it must have been so expressed or charged in writing by the intestate, or it must be so acknowledged in writing by the child or grandchild. The only other case where a gift or grant made to a child or grandchild may be held to have been in advancement is "(*d*) if it is proved to have been so made by evidence taken upon oath before a court of justice". And, so that there may be no doubt about the intention of the Legislature, section 13 adds: "and not otherwise".

This, in our view, means, in the first place, that the burden of proof is on the party asserting that the gift is in advancement. Therefore, it excludes presumptions; for, as well said by Graham J. (with whom Archibald J. concurred), in his reasons for judgment in the present case:

> If the presumption applied, the burden of proof would be on the other side; and the party asserting advancement might stand upon it and produce no evidence. That is not possible in face of the words of our statute.

It cannot be that the Legislature, when enacting a statute whereunder a gift or grant shall not be deemed to have been made in advancement, unless "it is proved to have been so made" in certain specific ways therein enumerated, should be understood to have intended that the advancement may be proved by evidence based upon presumption.

(1) (1869) 15 Gr. Ch. 643, at 647-8.

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Furthermore, if the gift or grant cannot be deemed an advancement unless expressed in writing, or charged in writing, by the grantor, or acknowledged in writing by the grantee, as required by subsections (*a*), (*b*) and (*c*), it would seem to follow that, in order that the intention of advancement may be held as established "by evidence taken upon oath before a court of justice", the evidence must be of such a character that it is as forceful, cogent and unequivocal as the writing required by subsections (*a*), (*b*) and (*c*).

This reasoning is further strengthened, as already mentioned, by the addition at the end of section 13, of the words: "and not otherwise". These words, if they are to be given a meaning, must evidently exclude certain kind of evidence; and, therefore, it cannot be accurate to say that the proof required under the statute "is subject to the ordinary rules of evidence", which is stated by the learned trial judge as the principle by which he was guided in reaching the conclusion that the gift of $34,968.45 had been made in advancement to the appellant by his father.

Upon that view of the Nova Scotia law on the subject, it must be found that there is absolutely no evidence in the record to the effect that the gift of the bank account of $34,968.45 was made in advancement at the time when the father gave that amount to the appellant. There is no writing in which such an intention was expressed, or charged, by the father, or in which it was so acknowledged by the appellant. There is no evidence of any statement that the gift was "so made" on the 15th of June, 1931.

In order to satisfy the burden of proof put upon her, as pointed out by Carroll, J., in the Court of Appeal, the respondent is compelled to rely on certain statements made by the appellant himself, when he was heard as a witness on her behalf.

Truly, the learned trial judge stated that he thought he should "regard the defendant's evidence, where it is in conflict with others", with some suspicion; and in cases where he is in conflict with the plaintiff, the learned judge added: "I prefer to believe her". But, on the point we are now discussing, this statement of the learned trial judge has no application, for the evidence of the appellant with regard to the declarations made by the intestate

regarding this matter stands uncontradicted; and, in fact, the respondent must depend on the appellant's evidence in her attempt to establish the advancement.

So that the respondent finds herself in this dilemma: Either the appellant, upon this point, is to be disbelieved, and the result is that the respondent is left with no evidence at all relating to the advancement; or, for the proof that the gift was made in advancement, the respondent must look to the evidence of the appellant, and, therefore, the question of his credibility must not be allowed to enter into the discussion. The respondent is bound to ask the Court to put a construction upon the appellant's evidence as it was given.

And what the appellant stated as witness with regard to the $34,968.45, is as follows:

> He [his father] told me he was going to give me the bank account; that there was plenty in his estate for all of us afterwards.
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> * * *
>
> Q. [to the defendant] Didn't he tell you he wanted you to have—he wanted Mrs. Whitford and Mrs. Cleveland [the daughter] to have the money and you to have the rest of the property?
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> A. Yes, he told me that the property was of no use to Mrs. Whitford or his daughter; he wanted me to pay in cash the $15,000.
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> Q. When had he told you that for the first time?
>
> A. Shortly after the power of attorney.
>
> Q. Before you had the bank account transferred?
>
> A. No, after.

In another part of his evidence, the appellant stated that his father's wish was that, after the latter's death, he should give $10,000 to his widow and $5,000 to his daughter, as their respective share in the estate.

As a matter of fact, shortly after his father's death, the appellant offered the money to the respondent and her daughter. The offer appears to have been accepted; but, at the last moment, something prevented the transaction from being completed; and then ensued the present lawsuit.

This evidence—which is all that is to be found in the record on the subject—falls far short of establishing, on the part of the father, an intention of making an advancement within the requirements of section 13 of the statute.

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Indeed, it may lead to a contrary conclusion; and, as was said by Carroll, J., it tends to show that "these gifts were absolute".

But the least that may be said is that the father's declarations, as reported by the appellant, do not manifest an intention of making a gift in advancement; and they do not supply, for the purposes of the respondent's contention, such cogent and convincing evidence as, in our view, is required by the Nova Scotia statute to decide that the gift is proven to have been made in advancement.

In the Court *en banc,* Carroll, J., was of opinion that the gift of the bank account was an absolute gift. Graham and Archibald, JJ., expressed grave doubts whether "the transfer of the bank account was an advancement", although they stated they did not want to "dissent from that conclusion of the trial judge".

But, with respect, we think that the conclusion of the trial judge on this point was arrived at as a consequence of a construction of the Nova Scotia statute with which we find ourselves unable to agree; and, as a result, applying to the facts and to the evidence what we conceive to be the intention of the Legislator, we conclude that the respondent has failed to establish that the gift of $34,968.45 was made in advancement to the appellant by his father.

As for the two other items on which, at the hearing, we expressed our desire to obtain the benefit of the argument of the respondent's counsel, after further consideration, we agree with the learned Chief Justice of Nova Scotia that the contest in regard to these transactions is strictly confined to matters of fact; and, upon this point, all the members of the Court *en banc* agreed with the Chief Justice.

Under the circumstances, the appellant's position in this Court on these two items is not, of course, even as favourable as it was in the Court of Appeal; for he comes to this Court with concurrent findings against him in respect of matters strictly of fact and as to which he was unable to point to any specific and material mistake in the decisions appealed from. We do not find any reason why we should interfere with the judgments *a quo* with regard to these two items.

The combined result in favour of the appellant, both in the Supreme Court *in banco* and in this Court, is that he finally succeeds on the contest concerning the deed of lands dated May 19th, 1928, and the gift of the bank account of June 15th, 1931, by far the two most important items in the litigation between the parties. We think, therefore, justice would be done if the order as to costs in the trial judgment is set aside and replaced by the following:

" The plaintiff will recover from the defendant one-third of her costs of action to be taxed, and all the costs of the taking of accounts before the Referee, including the costs of the Referee; and she will be entitled to her costs of the counterclaim."

In the Supreme Court *in banco,* the appellant should recover against the respondent his costs of and occasioned by the respondent's cross-appeal which was there dismissed. He should also recover his costs of the appeal to that Court incidental to, or connected with, the issues on which he ultimately succeeds in this Court (as if the Supreme Court *in banco* had given the judgment we are now rendering); and the respondent should recover against the appellant her costs of the appeal to the Supreme Court *in banco* incidental to, or connected with, the issues on which she ultimately succeeds in the present Court (again as if that Court had given the judgment we are now rendering).

The appeal is allowed to the extent above indicated, with full costs of appeal to the appellant, and the cross-appeal is dismissed without costs.

*Appeal allowed in part, with costs of appeal.*

*Cross-appeal dismissed without costs.*

Solicitor for the appellant: *W. P. Potter.*

Solicitor for the respondent: *L. A. Lovett.*