

30, 1936

No. 58 of 1935.

In the Privy Council.



APPELLANT'S CASE

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN:—

IMPERIAL BANK OF CANADA

(Defendant) *Appellant*

— AND —

MARY VICTORIA BEGLEY

(Plaintiff) *Respondent.*

10

APPELLANT'S CASE.

RECORD.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated December 21st 1934, reversing in part a judgment of the Appellate Division of the Supreme Court of Alberta dated March 24th 1934, which allowed an appeal from the judgment of The Honourable Mr. Justice Boyle delivered on October 26th 1933, in favour of the Respondent for the full amount of her claim.

p. 222, l. 30.

20 2. The action was brought to recover the sum of \$8,500 and interest as being a sum withdrawn from moneys standing to the credit of the Respondent at the Appellant's Calgary Branch by her attorney one J. W. McElroy and in addition the sum of \$2,500 and interest in respect of certain cheques alleged to have been improperly charged to the Respondent's account. The judgment at the trial was in the Respondent's favour as to both claims but was reversed

p. 1, l. 1.

p. 159, l. 3.

p. 191, l. 11.

p. 221, l. 21.

and the action was dismissed by the Appellate Division. The Supreme Court of Canada restored the judgment at the trial in respect of the claim for \$8,500. The present appeal is concerned only with that sum and as to it, in view of concurrent findings in the Courts below, the Appellant does not question that the Respondent was entitled on learning what had been done to repudiate and demand the return of her money.

p. 31, l. 8 )  
p. 87, l. 38)p. 31, l. 37)  
p. 47, l. 6)p. 31, l. 10)  
p. 71, l. 3)p. 47, l. 10)  
p. 244, l. 26)p. 47, l. 21)  
p. 92, l. 16)  
p. 233 )

p. 32, l. 16)

**3.** The Respondent's husband died on December 26th 1928, leaving a Will under which she was sole executrix and the only beneficiary. Instead of taking out probate herself the Respondent 10 arranged to have letters of administration with the Will annexed granted to McElroy, who had been a neighbour and close friend of the Respondent and her husband for over thirty years. She selected as solicitor for the estate and as her own solicitor one John W. Moyer. The Respondent gave McElroy a general power of attorney dated January 28th 1929, to enable him to manage her personal affairs and left for Spokane a day or so later.

p. 93, l. 25.  
p. 92, l. 40)  
p. 93, l. 15)  
p. 32, l. 34.

p. 48, l. 20.

p. 34, l. 12.

p. 33, l. 12)  
p. 19, l. 28)  
p. 49, l. 30)

p. 49, l. 4.

p. 19, l. 45.

p. 254, l. 12.

p. 50, l. 30)  
p. 82, l. 22)

p. 50, l. 9.

p. 251, l. 18.

**4.** McElroy took out letters of administration with the Will annexed, paid the debts of the estate promptly and proceeded to sell the real and personal property of the estate. The Respondent on 20 her return from Spokane on June 19th 1929, found that McElroy had completed the administration to her satisfaction. He had realised \$13,006.35 net. On Friday, June 21st 1929, she attended with McElroy at the Appellant's office, where both the estate and the Respondent's personal accounts were kept. McElroy as administrator gave her a cheque for \$13,006.35 which was deposited to her credit and a few days later he obtained his discharge as administrator.

**5.** The Respondent, desiring McElroy to attend to the investment of her money, executed on June 24th 1929, a power of attorney 30 in his favour at Mr. Moyer's office. The document was in very wide terms and included authority "for her and in her name to draw and "sign cheques . . . and receive the moneys thereon."

p. 39, l. 9.

p. 39, l. 21.

p. 110, l. 42.

p. 256, l. 1.

p. 134, l. 34.

p. 134, l. 11)

p. 134, l. 40)

p. 25, l. 23)

p. 258, l. 1.

**6.** The Respondent left Calgary for Hamilton, Ontario, on June 26th 1929, and did not return until December following. On June 29th 1929, McElroy, who owed the Appellant \$8,518.76, paid his indebtedness by drawing a cheque as the Respondent's attorney for \$8,500 and depositing it along with \$18.76 to his own credit. At the same time McElroy signed and left with the Appellant for safe-keeping a promissory note for \$8,500 in favour of the Respondent 40 payable on demand and bearing interest at 7%.

7. McElroy, who was a farmer, had an account with the Appellant for many years. He had a substantial loan and overdraft, which was reduced from \$24,000 in 1923 to \$5,286 on December 31st 1928. The Appellant had held as security for this loan a first mortgage on McElroy's farm and a second mortgage on another property known as the Kinneburgh Farm. The first mortgage was given up in December 1928, and the Appellant thereafter held the second mortgage and later an unregistered third mortgage on the Kinneburgh Farm. The liability had increased to \$7,296 by March 25th 1929, when it was reduced to \$3,423 and it had again increased to \$8,518.76 on June 29th 1929. No further security was taken for these advances as the Appellant considered that McElroy was good for this amount. McElroy advised the Appellant in the spring of 1929 that he expected to pay off the balance of his loan by the sale of the Kinneburgh Farm and that if he did not make this sale he could borrow the necessary moneys from the Respondent.
8. Following the payment of McElroy's loan on June 29th 1929, the Appellant released the third mortgage on the Kinneburgh Farm, the only security it then held. McElroy continued to do business with the Appellant and advances were subsequently made to him without security.
9. On her return from Hamilton the Respondent attended at the Appellant's office on December 24th 1929, and had her bank book written up. This being the first time the accountant Chambers had seen her since McElroy left the promissory note for \$8,500, he produced the note and showed it to her. She appeared to be puzzled and said she had not expected McElroy to borrow so much, but in spite of this she made a further loan of \$1,400 to McElroy on January 2nd 1930.
10. About the end of January 1930, Chambers at the Respondent's request produced for her inspection all the cheques which McElroy had issued as her attorney and answered such questions as she asked about them. On February 2nd 1930, the Respondent wrote to McElroy complaining of the way he was treating her and on March 31st 1930, she again wrote demanding a full statement. As a result Moyer repaid to the Respondent on May 14th 1930, certain moneys he had obtained from McElroy out of the Respondent's account. She claimed that this had been done by an unauthorised use of the power of attorney.
11. The Respondent claims that while she was in the hospital in June 1930, McElroy told her that he had used her money to pay

p. 104, l. 36)  
p. 103, l. 11)

p. 123, l. 34.  
p. 103, l. 22)  
p. 104, l. 15)

p. 105, l. 31.

p. 104, l. 15.

p. 106, l. 8.

p. 131, l. 28.

p. 110, l. 9.

p. 105, l. 38.

p. 118, l. 7.

p. 137, l. 24)  
p. 143, l. 41)  
p. 144, l. 14)

p. 136, l. 18.

p. 137, l. 43.

p. 138, l. 6.

p. 40, l. 1)  
p. 276, l. 15)

p. 138, l. 28)  
p. 144, l. 25)

p. 277, l. 1.

p. 277, l. 18.

p. 55, l. 4)  
p. 56, l. 15)

p. 263, l. 1.

p. 45, l. 1.

p. 61, l. 43)  
p. 80, l. 15)

p. 131, l. 42.  
p. 62, l. 3)  
p. 63, l. 32)

his debt to the Appellant at the suggestion of its Manager (Weaver). Weaver denies making any such suggestion. The Respondent was satisfied at this time that McElroy would repay the money that fall and was prepared to wait for payment until the crop season was over. The Respondent had Moyer come to the hospital and prepare a new Will for her. Among other changes she appointed another executor in place of McElroy.

p. 61, l. 37)  
p. 94, l. 21)

p. 64, l. 39.  
p. 302, l. 46.  
p. 40, l. 40.  
p. 62, l. 19.  
p. 63, l. 40.  
p. 62, l. 24.  
p. 64, l. 25.  
p. 278, l. 1.

**12.** McElroy paid \$400 with interest on account of the \$1,400 loan on July 8th 1930, prior to which the Respondent had only \$51.38 in her account. On July 10th 1930, McElroy took the Respon- 10  
dent on a motor trip to Spokane, where they visited her sister. McElroy stayed two or three days, during which time he and the Respondent quarrelled about her money, but the quarrel was settled before he left.

p. 64, l. 35.

p. 62, l. 35.  
p. 79, l. 21.

p. 43, l. 28)  
p. 79, l. 30)

**13.** The Respondent returned to Calgary about the middle of August 1930, and saw McElroy in September, when he repaid the balance of the \$1,400 loan. She transferred her account to the Bank of Montreal on September 10th 1930, and on December 31st 1930, removed her papers from the safety deposit box in the Appellant's office and later on another occasion took away McElroy's note for 20  
\$8,500 from the Appellant.

p. 66, l. 2)  
p. 67, l. 1)  
p. 282, l. 20)

p. 67, l. 10.

p. 45, l. 9)  
p. 66, l. 45)

**14.** On August 1st 1931, McElroy, at the Respondent's request, gave her a new promissory note for \$9,419.11, being principal and accrued interest to that date. The Respondent consented to the interest rate being reduced to 6% on the understanding that McElroy would pay off the note in September 1931. She says that this was the first time she knew that McElroy had taken the \$8,500.

p. 48, l. 1.  
p. 67, l. 32.

p. 68, l. 26)  
p. 85, l. 45)

p. 93, l. 44.

p. 68, l. 4.

**15.** The Respondent learned on her return from a visit to Victoria, B.C., in September 1931, that the farmers had suffered losses in their crops. She, therefore, wanted security and instructed 30  
Moyer to obtain from McElroy either security or payment. This was the Respondent's first intimation to Moyer that she had any complaint about the way McElroy had handled her affairs. She had a number of interviews with McElroy and Moyer during the next year without getting any satisfaction.

p. 88, l. 17)  
p. 91, l. 3)

p. 89, l. 4)  
p. 90, l. 1)  
p. 95, l. 24)

p. 283, l. 17.

**16.** The Respondent attended at Moyer's office with McElroy about September 3rd 1932, on which occasion they appeared to be very friendly. She agreed to renew the note for two years with interest at 6% and McElroy agreed to give her an assignment of a certain sale agreement as collateral security. This arrangement 40

- was made in spite of Moyer's warning that the Respondent was depriving herself of her right to compel payment of the note for a period of two years. Moyer, in the presence of the Respondent, prepared a new note for principal and accrued interest to September 1st 1932, which McElroy signed. Moyer subsequently prepared the assignment but two or three days later the Respondent advised Moyer that she revoked the agreement. Moyer went away and on his return informed McElroy of this but in the meantime McElroy had executed the assignment.
- 10     **17.** The Respondent later wrote requesting McElroy to come to see her and on September 29th 1932, threatened that if he did not do so, she would go to see him. About this time she changed her solicitor and took her papers including the three notes away from Moyer. Her new solicitors demanded payment from the Appellant of the amounts of all cheques issued by McElroy as the Respondent's attorney, except the amount of the Moyer cheque. On the Appellant refusing to pay, this action was commenced in December 1932. The Respondent retained the notes.
- 20     **18.** The Respondent was in the Appellant's office many times after the middle of December 1929. She thought the Appellant and McElroy were wrong in using her money as they did, but no complaint was made to the Appellant until October 1932. On January 20th 1927, McElroy was worth \$70,000 in excess of his liabilities. His financial position did not change much up to January 1st 1930, but in the next three years there was a progressive depreciation in the value of farm properties. On November 21st 1932, an execution for \$1,938.62 and \$128.70 costs was placed in the Sheriff's hands against McElroy which remained unsatisfied at the date of trial.
- 30     **19.** The Respondent knew that the Appellant and others thought she had loaned money to McElroy but she did not deny at any time that she had done so. She refused to listen to the advice of others and admits that she deliberately misrepresented the situation in order to protect McElroy. She did not disclose to her solicitor what she had learned although she called him in to change her Will on that account.
- 40     **20.** The Respondent and McElroy, except for occasional quarrels, were always on very friendly terms. The Respondent seems to have contemplated marriage with McElroy, whose wife died in 1919. Her correspondence was of an intimate and affectionate character particularly after her stay in Calgary in June 1930. It continued in this strain until September 1932.

p. 90, l. 25)  
p. 95, l. 9)

p. 88, l. 31)  
p. 90, l. 46)  
p. 293, l. 20)  
p. 89, l. 42)  
p. 295,     )  
p. 95, l. 37)

p. 298, l. 34.

p. 294, l. 1.

p. 86, l. 10)  
p. 68, l. 22)  
p. 90, l. 43)  
p. 22, l. 39)  
p. 25, l. 8)

p. 68, l. 7)  
p. 90, l. 43)

p. 57, l. 11)  
p. 58,     )  
p. 59,     )  
p. 60, l. 4)  
p. 140, l. 37)

p. 63, l. 17)  
p. 77, l. 23)  
p. 78, l. 6)  
p. 226, l. 16.  
p. 129, l. 42.

p. 51, l. 21)  
p. 147, l. 35)  
p. 150, l. 21)  
p. 150, l. 39.

p. 69, l. 15)  
p. 94, l. 6)  
p. 138, l. 6)  
p. 267, l. 11)  
p. 282, l. 10)

p. 241, l. 35)  
p. 259, l. 27)  
p. 69, l. 24)  
p. 282, l. 1)

p. 63, l. 6)  
p. 94, l. 5)  
p. 94, l. 19)

p. 138, l. 19.

p. 71, l. 8.

p. 261, l. 5)  
p. 262, l. 28)  
p. 268, l. 40)  
p. 275, l. 6)  
p. 280, l. 33)  
p. 290, l. 1)  
p. 293, l. 8)

p. 138, l. 4)  
p. 259, l. 24)

p. 41, l. 5)  
p. 52, l. 33)  
p. 57, l. 9)  
p. 41, l. 3.

p. 140, l. 38)  
p. 302, l. 25)

p. 41, l. 23.  
p. 42, l. 6.

p. 41, l. 32)  
p. 42, l. 19)  
p. 60, l. 9)

p. 60, l. 45.  
p. 45, l. 5)  
p. 152, l. 5)

p. 42, l. 35)  
p. 61, l. 43)

p. 68, l. 38)  
p. 88, l. 17)  
p. 89,     )  
p. 90,     )

p. 43, l. 28)  
p. 65, l. 15)  
p. 79, l. 29)

p. 155, l. 1.

p. 156, l. 10.

p. 165, l. 20.  
p. 178, l. 10.

**21.** The Respondent's recollection is very vague and her evidence contains many contradictions and uncertainties. She does not think the three interviews with Chambers in December 1929, and in January and February 1930, took place but admits she may be wrong. Several times between December 1929, and June 1930, McElroy advised her that he had put her money out on loan to farmers. She had her bank book written up many times, and the balance extended, but claims she was arranging to invest her money and on coming into the Appellant's office on June 4th 1930, was surprised to find she had none to invest. She says she then had a 10 conversation with Chambers somewhat similar to the one he says took place on December 24th 1929. She claims she understood him to say McElroy had used only \$4,500 and names two different dates as being the first occasion she knew McElroy had taken \$8,500. She tells different stories as to when she first knew that McElroy had borrowed her money to pay his debt to the Appellant. Her evidence is in direct contradiction to that of Moyer as to events leading up to the taking of the second renewal note in September 1932. She is quite uncertain as to when she took McElroy's note from the Appellant's office and as to her subsequent disposition of it. 20

**22.** The trial Judge found that the Respondent did not lend or agree to lend any money to McElroy; that he took her \$8,500 by the improper use of the power of attorney; that in the circumstances the Appellant was put on inquiry and that having failed to make inquiry it was responsible. He further held that the Respondent was not estopped from asserting her claim and that she had not ratified the transaction. He gave judgment in favour of the Respondent for the full amount of her claim with interest and costs.

**23.** The Appellant appealed to the Appellate Division of the Supreme Court of Alberta. Harvey C.J. (Clarke, Mitchell and 30 Lunney, J.J.A. concurring) was of opinion that McElroy had no authority to use the power of attorney for his own benefit and in the circumstances that the Appellant could not retain the money if the Respondent had repudiated McElroy's act when she learned of it. He thought that Chambers' evidence should be accepted, and also Moyer's evidence where it conflicts with that of the Respondent. He found that McElroy's act in drawing the \$8,500 from the Respondent's account had been ratified and that she had elected to look entirely to McElroy. He was also of the view that the Respondent was bound to notify the Appellant of McElroy's absence of authority 40 if she intended to rely on it as against the Appellant, but that instead of doing so she made representations to the Appellant that he

actually had authority. The Chief Justice had no doubt that the Appellant was prejudiced by relying on these representations and was of opinion that an estoppel of the most complete kind was established. He would allow the appeal with costs.

24. McGillivray J.A. dissenting in respect of the \$8,500 cheque adopted the findings of the trial Judge. He thought that the Appellant was not an innocent party; that there was no evidence of ratification and that the Appellant could not successfully invoke the doctrine of estoppel because the Appellant has not established that  
10 it had been prejudiced. He would dismiss the appeal as regards the \$8,500. p. 178, l. 14.

25. The Respondent appealed to the Supreme Court of Canada. Duff, C.J. (Crockett, Hughes and Maclean J.J. concurring) was of opinion with regard to the \$8,500 cheque that there was a fiduciary relationship between McElroy and the Respondent and that in the circumstances this fiduciary relationship was transmitted to the Appellant. He thought that the suspicions of the Appellant's officers must have been roused and held that the absence of inquiry was sufficient to make the Appellant accountable to the Respon-  
20 dent. In his view the Respondent was not estopped. He was of the opinion that the Respondent had established her equitable title to the moneys and that her claim could not be denied on the ground of acquiescence. He was not satisfied that the Respondent ratified McElroy's misappropriation. He found McElroy's act was not one which the Appellant could ratify, and that the evidence was sufficient to sustain the findings of the trial Judge, on the questions of estoppel and ratification. With a good deal of hesitation he came to the conclusion that the only liabilities to the Bank which McElroy was authorised by the power of attorney to pay were the liabilities  
30 of the Respondent. He would allow the appeal in respect of the \$8,500 cheque. p. 195, l. 20.

26. Cannon J. (dissenting) was of the opinion that with full knowledge of what had taken place the Respondent was determined to accept McElroy as her debtor and to shield him against the Appellant. He was of the view that the payment of \$8,500 to the Appellant was an act susceptible of ratification and found it difficult to conceive of stronger acts of ratification than exist in this case. The Respondent in his opinion could not keep McElroy's notes and at the same time ask the Appellant to pay even if  
40 McElroy at first did more than he was authorised to do. The facts reveal conduct which he thought was only consistent with a waiver of the Respondent's complaint against the Appellant. The Respondent's conduct amounted to a representation intended to induce the p. 213, l. 11.

Appellant to believe that McElroy was authorised to act as he did, that his debt was paid and that the Appellant no longer had reason to protect itself against him. The Appellant was prejudiced by acting on this representation and he thought there were the essential elements giving rise to an estoppel. He was also of the view that if the Respondent had not advanced the money to McElroy she had induced the Appellant to believe that she had done so, or at least if she had not done that, that she had ratified his acts.

**27.** The Appellant submits that its appeal should be allowed for the following amongst other 10

### REASONS

- (1) Because the Respondent, though entitled to repudiate what her agent did, elected to affirm it.
- (2) Because there was ratification by the Respondent with full knowledge.
- (3) Because the Respondent treated the transaction as a loan by her to McElroy and contracted with him for its repayment with interest.
- (4) Because the Respondent accepted and still retains the promissory notes given to her by McElroy. 20
- (5) Because the Respondent waived any rights she had against the Appellant.
- (6) Because the Respondent is estopped from maintaining the action.
- (7) Because the judgments of the majority in the Appellate Division of the Supreme Court of Alberta and of Cannon J. in the Supreme Court of Canada are right and should be affirmed.

W. N. TILLEY.

C. F. H. CARSON. 30



**In the Privy Council.**

**ON APPEAL**

**FROM THE SUPREME COURT OF CANADA.**

---

**IMPERIAL BANK OF CANADA**

**(Defendant) *Appellant***

*v.*

**MARY VICTORIA BEGLEY**

**(Plaintiff) *Respondent.***

---

---

**C A S E**

**FOR THE APPELLANT.**

---

---

**LAWRENCE JONES & Co.,**

**Lloyds Building,**

**Leadenhall Street, E.C.3,**

***Appellant's Solicitors.***