

CANADA / JUDGMENT

Re Daly; Daly v. Brown

(1907) 39 SCR 122

COURT

Supreme Court of Canada

DECIDED

7 March 1907

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Re Daly; Daly v. Brown

Collection

Supreme Court Judgments

Date

1907-03-07

Report

(1907) 39 SCR 122

Judges

Fitzpatrick, Charles; Davies, Louis Henry; Idington, John; Maclellan, James; Duff, Lyman Poore

On appeal from

New Brunswick

Subjects

Estates

Decision Content

Supreme Court of Canada

Re Daly; Daly v. Brown, (1907) 39 S.C.R. 122

Date: 1907-03-07

Henry S. Daly Personally and as Executor of the Estate of Paul Daly, Deceased Appellant;

and

Edith K. Brown and Dorothy Brown Respondents.

In re Estate of Paul Daly.

1907: February 21, 22; 1907: March 7.

Present: Fitzpatrick C.J. and Davies, Idington, MacLennan and Duff JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Executor and trustee—Moneys of testator—Deposit in bank—Authority to draw against—Gift—Sale by executor—Under value—Jurisdiction of Probate Court.

D. deposited money in bank in the joint names of himself and a daughter with power in either to draw against it. The daughter never exercised this power and when D. died she and her co-executor of his will, in applying for probate, included said money in their statement of the property of the testator.

Held, that the money in bank remained the property of D. and did not pass to the daughter on his death.

An executor sold property of the estate for \$800, his wife being the purchaser. On. passing of the accounts the judge of probate found as a fact that the property was worth \$1,800 and ordered that the executor account for the difference.

Held, that the executor having really sold the property to himself secretly for an inadequate price he was properly held liable to account for its true value.

Held, also, that though the Probate Court could not set aside the sale it had jurisdiction to make such order.

Where by will money was bequeathed to the testator's daughter "to hold and be enjoyed by her while she remained unmarried" with a bequest over in case of her decease or marriage. Held, that the daughter was only entitled to the income from said money and not to the possession and deposition thereof.

Remarks on the absence from the record of the decree of the Court of original jurisdiction.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the ruling of the judge of probates for the City and County of St. John on passing the accounts of the estate of the late Paul Daly. The several questions raised for decision on the appeal are sufficiently stated in the above head-note.

Newcombe K.C. and McKeown K.C. for the appellant.

Gregory K.C. and Macrae for the respondents.

Newcombe K.C. and McKeown K.C. for the appellant. The deposit by the testator of money in the joint names of himself and his daughter with power to either to withdraw it vested such money at the testator's death in the daughter as surviving joint tenant. *O'Brien v. O'Brien*[1]; *In re Eykyn's Trusts*[2]; *Sayre v. Hughes*[3]; *Hepworth v. Hepworth*[4]; *Bennet v. Bennet*[5]; *Fox v. Fox*[6], at p. 99; *O'Brien v. Sheil*[7]; *Standing v. Bowring*[8]; *Payne v. Marshall*[9].

Next as to the sale by appellant. Having assented to the devise to his sister as tenant for life and put her in possession he had no power to sell. At all events he is not subject to the jurisdiction of the Probate Court in this respect. *Dix v. Burford*[10].

The sale was properly conducted and no fraud or collusion is alleged or proved. A decree against him could only be made when he is guilty of a breach of duty. *Norris v. Howe*[11]. The sale is not void but only voidable; *Am. & Eng. Ency. of Law*, vol. 2, p. 1149; and it has been ratified by long continued acquiescence.

Gregory K.C. and Macrae for the respondents. The money deposited belonged to the testator and the evidence must be clear that he intended to divest himself of the property in it. *Grant v. Grant*[12]; *Marshal v. Crutwell*[13];

There is nothing except the form of the deposit to imply a gift and that is not sufficient: *In re Bolin*[14]; *Kelly v. Home Savings Bank*[15]; *Taylor v. Goriell*[16]; *Flanagan v. Nash*[17].

The sale of the leasehold property by appellant was for a very inadequate price and it was secretly purchased by his wife. He was properly held liable to account for its true value. See *Am. & Eng. Ency. of Law*, vol. 2, pp. 1020-1022 and notes. *Pepperell v. Chamberlain*[18].

The devise to testator's daughter for her life or while she remained unmarried only entitled her to the income of the moneys bequeathed. *In re Adam's Trusts*[19]; *In re Thomson's Estate*[20].

The judge of probates had jurisdiction to decree an account from the executor for the true value of the property sold and for the money in bank. See *Harrison v. Morehouse*[21].

The Chief Justice.—This appeal is dismissed with costs. Davies J.—This is an appeal from a judgment of the Supreme Court of New Brunswick confirming an order or decree of the Probate Court for St. John City and County settling the accounts of the executor of the estate and distributing the surplus amongst the legatees.

The proceedings taken were at the instance of the surviving executor Henry S. Daly, the present appellant, who had fyled his accounts and obtained a citation calling upon all parties interested, chiefly his nephews and nieces, children of his sister Hester, to shew cause why these accounts should not be finally allowed and passed, and an order should not be made for the distribution of the estate according to the will of the testator.

The accounts as fyled did not credit the estate with any money of the testator at the time of his death and only credited f 800 as the cash received from the sale of certain leasehold premises of testator.

About seven or eight days after testator's death in 1891, Henry S. Daly and his sister Jane Agnes, as executor and executrix of their father's will, had applied for probate thereof, and amongst other statements in their petition which the statute required to be verified on oath, was one that testator had died possessed of personal property to the value of about \$4,800.

It was conceded on the argument that this valuation included certain moneys now in dispute which had been deposited by the testator in his life time in the Savings Bank and Bank of Montreal, in the joint names of himself and his daughter Jane Agnes "with power for either of them to withdraw."

As a fact it was shewn that between March 31st, 1887, when the account in the Savings Bank was opened by the testator, and June, 1891, when he died, there had been two additional deposits made by him personally, and that there had been no withdrawal.

No inventory of the estate was fyled by the executor as required by law until the time when, many years after his father's death, he obtained the citation to pass his accounts and no reference was made in the inventory to these moneys left on deposit, the personal estate being alleged to consist of a certain leasehold interest in some lands and that alone.

The main questions tried out in the Surrogate Court and the Supreme Court of New Brunswick, were first, whether the surviving executor was liable to account to the estate for the moneys standing to the credit of testator and his daughter at time of testator's death in these banks, or whether they passed to the daughter Jane, his co-executrix, as joint depositor with their father by survivorship, in which latter case they went to the appellant under Jane's will ; secondly, the true meaning of the bequest by the testator of all moneys he died possessed of

to his daughter Jane to hold and be enjoyed by her while she remained unmarried;

and thirdly, whether the executor had accounted for the real value of the leasehold sold by him at auction when he returned \$800 as that value, or was bound so to account for its true value in the open market.

About a month previous to obtaining the citation the appellant had fyled an inventory in which the value of the leasehold was put at \$1,500. The evidence of the witnesses at the hearing put the value between that and \$3,500. The probate judge settled it at \$1,800. A preliminary question as to the jurisdiction of the Probate Court of New Brunswick to determine the liability of the trustee executor so far as determining the value of this leasehold was concerned, and to pass his accounts and make distribution of the estate amongst the cestuis qui trustent, under the will, was raised in this court by the appellant for the first time. He had invoked such jurisdiction himself, fyled his accounts, placing such value at \$ 800 at which he had sold, and transferred the leasehold interest, issued his citation for passing same, and for distribution of the estate, and in this court of appeal for the first time raises the question of the powers of the court he had invoked to make the orders he had prayed for, so far as the value of the leasehold he had disposed of was concerned.

A careful reading of "The Probate Courts Act" of New Brunswick, 61 Vict. ch. 35; R.S.N.B. ch. 118 satisfies me that the Probate Courts of that province have been invested with co-ordinate and concurrent jurisdiction with the courts of equity over "all the estates of deceased persons in the province," and as well over the accounts of executors and administrators as such and the distribution of the personal estate of the deceased, as over their accounts as trustees under the will and "over the administration of the trust estate." See secs. 13, 50, 51, 52, 53 and 54.

These concurrent powers are carefully guarded so as to protect all interests concerned. In the first place an appeal is given by section 115, as of right to the Supreme Court of the province from any final order or decree of the judge and when allowed by the Supreme Court or a judge thereof from any decision of the judge of probate, whether a final order or decree or otherwise. Secondly, the Supreme Court in Equity or a judge thereof has power, section 77, in cases where "concurrent or like jurisdiction" has been given to the Court of Probate, to assume exclusive jurisdiction and to stay the exercise of such concurrent powers by the Probate Court or judge taking such powers to itself alone.

Section 58 declares that the passing and allowing of any account of a trust as provided in the Act shall subject to appeal have the same force and effect as if the accounts had been passed and allowed by the Supreme Court of Equity.

There, are many other sections unnecessary to refer to, protecting the interests of parties interested in the administration of an estate and in the passing of the accounts.

The Probate Court having concurrent jurisdiction therefore with the court of equity over the administration and distribution of the estate of Paul Daly, the appellant, as executor and trustee invoked that jurisdiction, filed his accounts, and prayed that they might be passed and the estate distributed according to the will. He appealed from the order or decree made by the judge to the Supreme Court of New Brunswick, not excepting to the jurisdiction but simply to the merits of the decree. From the judgment of the Supreme Court confirming the decree of the Probate Court, he appeals to this court, and for the first time raises the question of the jurisdiction and powers of the Probate Court. For the reasons I have given I do not think his objections to jurisdiction can be entertained. His remedy if he doubted the jurisdiction of the Probate Court or thought that the circumstances demanded that the estate should be administered and distributed by the court of equity, was to have applied to that court to stay the proceedings of the Probate Court and to administer and distribute the estate.

Then with reference to the merits and assuming that these accounts had been passed and administration and distribution awarded by the court of equity, would this court alter, modify or annul the decree, if that court had determined that under the circumstances it would be an injustice to the beneficiaries under the will to set the sale aside and order a new sale, and had held the executor, trustee, liable to account for the true value of the interest he had disposed of instead of the nominal value he had returned?

Assuming therefore the Probate Court to have had general jurisdiction, the questions remain as to its proper exercise.

Appellant contends with respect to two several sums, one of \$1,095, standing on deposit in the Government Savings Bank at the time of Paul Daly's death in the joint names of himself and his daughter Jane "with power for either one to withdraw" and another sum of \$1,020 standing in a somewhat similar position in the Bank of Montreal, that these sums became Jane Daly's absolutely on her father's death by right of survivorship.

The Court of Probate and the Supreme Court of New Brunswick both held under the evidence that there was absolutely nothing beyond the mere fact of the deposit in the joint names, with power for either to withdraw, to shew that Paul Daly intended these moneys to be a gift to his daughter, and that such fact of a joint deposit standing alone did not create a trust for the daughter under the facts as disclosed. When considered with all the accompanying facts I am of the opinion that this conclusion is correct and that these moneys must be accounted for as part of the estate. Shortly stated these accompanying facts are that each person in whose names the moneys were deposited had the right to withdraw them at any time, that this right could only be exercised with respect to Savings Bank deposits at any rate on production of the deposit book, that Paul Daly appeared to have retained exclusive possession of this during his life and by his will executed previously to the deposits had left all his moneys that he died possessed of to his daughter Jane (the joint depositor who lived with her father alone) while she remained unmarried for her life, and in the event of either contingency (marriage or death) then over to his son and his daughter Hester, and that after testator's death, Jane, together with her brother the appellant, jointly petitioned for probate of their father's will and in such petition stated that the father died possessed of personal property to the value of \$4,800 of which these moneys on deposit admittedly formed a part.

Jane had therefore either been kept by her father in entire ignorance of these deposits in which case the father's silence and the retention by him of the deposit books in his own possession taken in connection with the disposition he had made of the moneys by his will of which she was an executrix would be strong evidence to shew that these deposits were made in the joint names simply for convenience to enable her to draw moneys in his life time in case of sickness or if he thought it desirable for other reasons or after his death as executrix, and not for the purpose of creating a trust for the daughter or making a gift of the moneys to her; on the other hand, if she knew from her father of these deposits having been made then the statement in the petition which had to be filed under oath a few days after the death of the father that these moneys belonged to the estate was cogent evidence that she was aware from the knowledge gained from her father that it was not his intention to make a gift to her by the joint deposit. Any such knowledge as she possessed on the point was doubtless communicated to her co-executor who joined with her in the petition.

Taking all the circumstances together including the facts that the executors continued to deposit to the credit of the same accounts the moneys arising from the sale of the personal property of the deceased, I am not satisfied that the judgments of the courts below on this point should be disturbed.

A large number of cases Irish and American were cited at bar to which I have referred. There is no general governing principle applicable to questions of the kind I am now considering. In every case it is a question of intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties.

Then Mr. Newcombe raised the question as to the power of the executor to sell the remainder of the leasehold having assented to the legacy and put the tenant for life into possession.

Considering that the objection is raised by an executor who has already done the thing he now complains he had no power to do, and has sold the remainder of the leasehold and applied for an order for distribution of the proceeds, the objection seems an extraordinary one. But I do not think there is anything in it. The sale was made not by the executor qua executor, but in his capacity of executor trustee for the beneficiaries. In *Williams on Executors*, 10th ed., p. 49, the law is stated to be as follows:

It sometimes happens that a testator directs his estate to be disposed of for certain purposes without declaring by whom the sale shall be made. In the absence of such a declaration if the proceeds be distributable by the executor, he shall have the power by implication.

I think that rule applies here.

It was next argued that it was incompetent to charge the executor on the basis of wilful default in a proceeding of this kind without pleadings and notice. But as I have already attempted to shew the determination of the facts respecting the value of this leasehold property and its distribution as part of the assets of the estate are questions over which the Probate Court has general concurrent jurisdiction with the equity courts. Any difficulties which exist in the exercise of this jurisdiction are the creation of the appellant himself and he, be it remembered, is the man who has invoked the jurisdiction and asked the court to pass his accounts and make distribution of the assets.

The question arises upon the power of the court to charge appellant as executor trustee with a larger sum than he returned in his accounts as the proceeds of the sale.

The courts below held, I think correctly, that the sale of the leasehold was for a totally inadequate price, that the sale was made without the precautions necessary to safeguard the beneficiaries and that although ostensibly made at auction and to a third person it was really for the trustee executor himself. That being so it needed no authority to shew that the sale could not stand and was not binding on the beneficiaries. It could have been set aside by them on application to the court of equity. The principle is not that a man shall not sell to himself, but that the sale shall be voidable if he is both seller and has a substantial interest in the purchase money. In *re Moore*[22]. But the appellant denies that he was the purchaser or interested in the purchase. He contends

that the sale was a bona fide auction sale at which the best obtainable price was had. The whole evidence gathered round that issue with the result that the courts below found that this property was purchased secretly but really for the appellant for the sum of f 800, that it was worth at least \$1,800, and directed he should be charged with that sum for it instead of the \$800 he returned as the purchase money.

I agree with the contention in the plaintiff's factum that a purchase by an executor at his own sale is not necessarily void but merely voidable at the option of those who may be interested in the estate and that if they do elect to avoid the court of equity would be the proper court for them to appeal to. But here the facts are peculiar. The factum of the appellant shews that up to the hearing of this appeal the point of his contention was that there was no evidence he had any interest in the sale. The proceedings had gone on for some time before it transpired that the sale of the leasehold was really made by appellant to and for himself. The courts below have both found against him on the contention on this point, and we agree in their finding. General jurisdiction over the administration of the testator's estates being vested in the Probate Court and concurrent powers with the court of equity to allow and pass any account the appellant invoked that jurisdiction, the whole case was fought out on the assumption that the court had the necessary jurisdiction and the disputes related alone to the propriety of its exercise.

If the appellant had resold the property at an advance price it is beyond argument that under the findings of fact of the probate judge he would be liable to account to the estate for the enhanced price. In the notes to the leading case of *Fox v. Mackreth*[23], I find it laid down that :

Executors and administrators will not be permitted either immediately or by means of a trustee to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate and must account to the utmost extent of the advantage made by them of the subject so purchased.

I see no injustice in compelling an executor who has secretly sold the testator's property to himself for an inadequate price being compelled to account to the estate for its real and true value. *Hall v. Hallett*[24], and other cases are referred to. In that case the defaulting trustee who had sold shares improperly was not compelled by the court to go into the market and buy back other shares, but the court thought that justice would be done under the circumstances by compelling him to pay the value of the shares.

In the case of *Nant-Y-Glo and Blaina Iron Works Co. v. Grave*[25], V. C. Bacon says at page 748:

I can find no authority and no case has been referred to but *Hall v. Hallett*[24] in which the court has confined its power of relief to the mere restitution of the thing which has been taken away. The court of equity would doubtless mould its relief so as to meet the justice of the case and would not in all cases necessarily consider that full justice had been done by a defaulting trustee by the mere restoration of property he had improperly taken away. The Probate Court might under the circumstances of this case have stayed its hand and referred the parties to the court of equity for relief. But the appellant invoked its jurisdiction, pressed for its exercise, contested and disputed all the facts including the real value of the leasehold he had sold and bought for himself

and now in this court of final resort to which he has appealed desires to have the proceedings reopened and the parties, for a very small sum, put to the great expense of an equity suit to have determined the questions he himself sought to have decided and practically consented should be determined by the Probate Court. I do not think he should be heard to do so.

The only remaining question is as to the meaning of the bequest to the daughter Jane and the executors' duty with respect to the control of the "moneys" which the testator left to her "to hold and be enjoyed by her while she remains unmarried" with a bequest over in case of her decease or marriage.

I am of opinion that with respect to "moneys" Jane was not entitled to the possession and disposition of the same but to the income only.

In the case of *Thorpe v. Shillington*[26] Mowat V.C. held that:

Where money, mortgages and promissory notes were bequeathed to a legatee for life she was not entitled to the possession and disposition of the same, but to the income only, though of farming stock and implements given for life by the same clause she was to have the use in specie.

This being so then the executor would be liable to account to the estate if he handed over the corpus of the moneys to the legatee and any of it was lost. In this case it is apparent none was lost as the appellant on his sister's death received back \$5,000 or \$6,000 being practically her entire estate.

Before closing I wish to say a word about the form in which the case came before us. No formal decree or order was made in the Probate Court and had the fact been brought to our notice at the beginning of the argument I would have been strongly inclined to urge that in accordance with the practice of the court the appeal should either be dismissed or stand over until the record was properly completed and the decree was actually taken out and was before us, but as all parties strongly urged that the issues were sufficiently defined in the reasons for judgment given in the courts below and that further postponement would in view of the amount in dispute result in comparatively speaking heavy costs, the court somewhat reluctantly consented to hear the argument, intimating, however, that its doing so must not be taken as a precedent.

Whatever may be the practice of the Supreme Court of New Brunswick in hearing appeals from the Surrogate Court, a jurisdiction covering interlocutory as well as final judgments, I think it should be clearly understood that an appeal to this court will not be heard unless the formal decree has been taken out and appears upon the record.

In my judgment the appeal should be dismissed with costs and the decree taken out in accordance with the judgment of the judge of probate. *Idington J.*—This is an appeal by Henry S. Daly the surviving executor of the last will of his late father, Paul Daly, from a judgment of the Supreme Court of New Brunswick, affirming the judgment of the Probate Court of the City and County of St. John, upon the hearing of a petition by said surviving executor to the judge of the said court to have the accounts of the administration of said estate, by said surviving executor, duly allowed and passed.

The petition alleged that the petitioner had administered the said estate, and that there was annexed to the petition the account of such administration.

In pursuance of the prayer to have all proper citations issued and orders given in the premises, such citations were issued and all persons concerned in the estate appeared.

The account annexed to the petition has been as a result of the inquiry amended in some ways that the appellant does not complain of but in others that he does complain of.

The testator died on or about the 5th of June, 1891.

The last will now in question was made on the 12th of February, 1886, and appointed the appellant and his sister Jane Agnes Daly, executor and executrix thereof.

The testator bequeathed to Jane Agnes Daly certain leasehold property while she remained a single woman or until death and then over to be sold and equally divided between the appellant, if living, and another sister or others; or over otherwise in alternative events and in ways needless to detail here.

The testator's said will then contained the following provisions: And as to any money of which I may die possessed after the paying of my funeral expenses and the charges of proving this my last will, I give, devise and bequeath the same to my said daughter, Jane Agnes Daly, to hold and be enjoyed by her while she remains unmarried, and in case of her decease or marriage, whichever event may first happen, I direct the same to be divided equally between my son, Henry S. Daly, and my daughter Hester V. Brown; and in case of the death of either the said Henry S. Daly or Hester V. Brown before such division takes place, then the share of the one so dying without children her. or him surviving, shall enure and be paid to the survivor, otherwise the children of the one first dying shall be entitled to share equally with the survivor.

The testator after making this will deposited from time to time in the Saving Bank and in the Bank of Montreal on deposit receipts.

A feature common to each set of these deposits was that either the testator or his said daughter Jane Agnes Daly could withdraw such deposit.

Some slight differences might be noted in the mode of deposit, in each case, but in the view I take these need not, as they might otherwise have required to be, dwelt upon.

At the time of the death of the testator the result of these deposits was that over a thousand dollars was left in each place of deposit. The daughter never drew upon either account, and may not have known of either.

The appellant in his account annexed to the petition for passing accounts, gave no credit for these sums deposited, though in the petition for probate signed by him and his sister, they were included in the estimated sum of the personalty belonging to the testator's estate.

Many presumptions of law and of fact may have left it a fairly arguable question, whether or not these sums had not by survivorship become the property of Miss Daly, but I cannot see how these slight presumptions can be now maintained by the appellant, against this solemn admission on his part, that in fact they did form part of the testator's estate.

I am therefore unable to come to any other conclusion than that thus declared by the appellant and his sister.

She was allowed by the appellant who received them to use, and in part at least to carry, these deposits, received after the grant of probate to them, as executor and executrix,

beyond the jurisdiction of the court granting probate.

It is urged that she was entitled to possess them, and so deal with such deposits as she saw fit, until the bequest over became operative.

I cannot assent to such a proposition.

She cannot be said to have been the specific legatee of these sums in any such sense as to entitle her to the exclusive possession of them.

The rule laid down in *Howe v. Earl of Dartmouth*[27] seems applicable and the principle upon which it proceeds is conclusive against such a contention.

The appellant as executor became possessed of these funds and in duty bound to see that they were so secured that they should be available for those entitled, to what remained of them at her death.

Clearly the appellant once possessed of these moneys, (which were not like the leasehold estate specifically bequeathed), as the facts shew he was, is bound to account for them.

It seems no formal judgment ever issued in the Probate Court.

We are left to construe the opinion of His Honour Judge Trueman as a decree. I understand counsel for respondent do not claim it means more than that the appellant must, after reasonable time to realize upon the securities the late Miss Daly held, representing these moneys, become bound to pay over and distribute the same.

I would give the time that would be reasonable to do so, but in any event declare that he must account for the sums in question within such reasonable time with interest from the death of the late Miss Daly.

Another question raised by the appeal is, that the appellant claims he has been wrongfully charged with the sum of one thousand dollars, lost to the estate by reason of his having sold at a sacrifice the leasehold property.

He sold at public auction, without proper means to protect the estate from loss, and I have no doubt by circuitous methods, not countenanced by any law, acquired in name of his wife this leasehold property.

I doubt somewhat the jurisdiction of the Probate Court thus to deal with such a matter upon an application to pass accounts.

Though a sale by a trustee to an agent for himself, in substance to himself, is often spoken of as no sale, and as void, the result is not accurately described by these words.

It is for the cestui que trust to say whether or not he will permit it to stand.

It may be better for him to affirm such a sale. It may be more advantageous than to insist on avoiding it. In such a case it is not open to the offending trustee to insist upon its nullity.

The rule first suggested by Lord Thurlow, and later adopted by Lord Eldon, in *Ex parte Hughes*[28] and *Ex parte Lacey*[29], that the property should, if the cestui que trust so elect, be put up for resale at the price at which the trustee had purchased and if any advance made the resale should take effect, but if no bidding the trustee should be held to his bargain, seems to be in accord with reason and justice.

Lewin on Trusts, 10th ed., says at p. 561, that

the same principle has since been followed in numerous other cases, and the practice may be considered as settled.

What authority has the Probate Court to deal with the matter in that way in passing accounts?

I asked counsel to point out to me the statutory provision giving the Probate Court, which is the creation of statute, or judge thereof, any such jurisdiction. He faintly relied on the implied power in the section providing for a final passing of accounts and discharging the executor or trustee.

I fail to be able to construe that section or anything in the Act in question as giving any such power.

The property in sales such as that in question often passes out of the control of the trustee into hands entitled to retain it and then the trustee may be compelled by the cestui que trust to account for the differences of price or for the difference between the sum the trustee paid and the real value of the estate at the time of the purchase with interest. See Lewin, p. 561.

I doubt if on the passing of accounts the Probate Court or judge can apply this remedy against the will of either party concurred. I incline, however, to the opinion that all parties agreeing he can. Many things here and there in the statute, such as the jurisdiction given over the property, the power to enforce filing an inventory and the power of removal of the executor guilty of waste and to substitute another who no doubt could sue for such loss by waste, indicate that by consent the probate judge might in assessing such damages be acting within what is implied in these more comprehensive powers.

The parties are not agreed as to what was intended here.

Counsel for appellant urges that all that took place in regard to the valuation of the property in question is attributable to the issue of whether or not the appellant had become entitled to his discharge.

If the appellant had been able to satisfy the learned judge of the Probate Court that he had credited full value of the property no need for going further. But it is said if he failed to so satisfy the learned judge then all the judge could do was to refuse to discharge him, and let the matter stand over until, by some more appropriate proceeding, the amount of loss to the estate might be determined and recovery from the executor had.

The difficulty I find is that while the evidence given on both sides might be attributed to the determination of this suggested primary question, it seems to be impossible to suppose on all the facts appearing that such was the real purpose of the appellant in conducting his side of the question.

I cannot find that he ever took the ground that it was not competent for the learned judge to determine the whole matter in difference as he has done.

A perusal of the evidence, and consideration of the manner of presenting it, leads me to the conclusion that both sides assumed the learned judge had jurisdiction to try such issues, and at all events understood that the contest conducted was of that nature and that its result would be, if the evidence warranted it, the charging appellant with such loss.

I do not infer that any other contest was made than the right of respondents to have the appellant made answerable for such loss. The appellant clearly denied the loss, and in any event, the liability on his part, even if it existed, inasmuch as he had sold by auction to the highest bidder, to make it good.

These are objections quite different from objecting to the jurisdiction of the forum. Indeed he seems to have selected this forum to dispose of the whole of those matters in issue. Can he escape from the result?

His grounds of appeal to the Supreme Court of New Brunswick are set forth in detail, and I do not see my way to reading them as covering an objection to the jurisdiction of the trial judge.

Can he now raise that question? Can he do so any more than one who has submitted to any other form of arbitrament?

This is not the case of a tribunal absolutely without jurisdiction. In such cases the mere trial decides nothing,

It is the case of a tribunal having a jurisdiction to pass upon accounts the party moving it presents, and in which rectification of such accounts is clearly a matter incidental to the full discharge of the duty thus devolving upon the court. The boundary lines of this power of rectification are exceedingly difficult to define in some cases. The mistake in stating an amount

received from a sale is clearly within it. The petitioner, assenting to that power of rectification, being extended to the case of an amount set down, not by mistake but correctly, yet the result of mistake, in conducting the business of the trust, clearly must bind him.

I cannot distinguish this case from the latter.

There was no surcharge as I conceive there ought to have been to present the matter properly. There were no pleadings or issue of any kind such as might have possibly been directed. The ordinary case requires none. I mention these things to shew how loosely the parties proceeded without objection by the appellant. Hence when they disagree here as to the meaning of their proceedings below we have to extract from the whole proceedings the intention of the parties as best we can. The respondents must be held to have assumed and recognized that the property itself had got into innocent hands.

The appellant cannot be heard now to take any other position. His case has not, on the facts, any merits. His appeal must be dismissed. But the formal judgment should protect him from the possible embarrassments created by want of any formal judgment in the Probate Court.

MacLennan J.—There are two main points in this appeal. The first relates to the jurisdiction of the Probate Court to charge the appellant with the loss to the estate by reason of a sale of the testator's leasehold house at an' undervalue; and the second to the claim of the appellant, as executor of the estate of his sister Jane, that his sister became, at her father's death, entitled by survivorship to the money on deposit with the government and the Bank of Montreal on savings account.

As to the first point, it is contended that the leasehold having been sold at public auction, after due advertisement, the propriety or validity of that sale could not be attacked or questioned by the probate judge, and that the only forum in which that could be done was the Supreme Court in Equity. It may be that the sale could not be set aside in the Probate Court, but it is not necessary to decide whether that could be done or not, for the probate judge did not assume to do that, and could not have done so without the purchaser Wilson, or the appellant's wife, for whom the purchase was said to have been made, or both of them, being made parties to the proceeding, which was not done.

What the learned judge has done, and what he had undoubted authority to do, is to find that the property was sold at a great undervalue, by the wilful neglect and default of the appellant, as the surviving executor of his father's estate.

The testator died on the 5th June, 1891, and on the 12th of the same month, the appellant and his sister Jane who were appointed executor and executrix of his will, presented a petition to the judge of probate asking for probate thereof to be granted to them, and stating that the testator had no real estate, but had personal property to the value of about \$4,800 all situate within the City of St. John. Allowing for the money and household furniture, which was the only other property left by the testator; the leasehold must have represented about \$ 2,200 of that valuation.

The appellant made no application to have his accounts as executor passed until after the death of his sister Jane, on the 6th of April, 1903. On the 16th May, 1903, he made an affidavit, verifying an inventory of the estate, in which he described the lease- hold in question as being valued at f 1,500, and it is shewn to have been assessed at that sum. There is evidence that offers of f 1,500 and f 1,800 for the property had been made to the appellant and refused by him, and witnesses of experience deposed to valuations as high as \$2,500 and \$3,000.

The property was sold for \$800, a sum slightly less than the clear rental income for two years.

It is clear that when an executor or trustee for sale has disposed of property at a gross undervalue, he may be called upon, in an accounting, to explain his conduct, and if it appears that the loss arose by reason of his neglect, carelessness or other misconduct, he may be charged therewith, as for wilful neglect and default.

In such a case it is not necessary for the cestui que trust to take proceedings to set aside the sale. In many cases that may not be possible; the purchaser may have bought fairly and honestly, and may have got a good title, and the only remedy available to the beneficiary may be to hold the executor or trustee responsible for his neglect of duty.

That is what the learned judge has done here, and I think he had sufficient evidence before him to support his finding.

The appellant and his wife had been living in the ground floor of the house for about seven years, and were still in occupation at the time of the sale, and another tenant occupied the first floor. The purchaser at the sale was one Wilson, who deposes that he bought the property for the appellant's wife, that he had the request from her personally, saw her personally and spoke to Mr. Bustin about it, and he understood that Bustin and Porter were acting for the appellant. The appellant however denies that he knew his wife was the purchaser until after the sale, but knew immediately afterwards. He was present at the sale, which was managed by his solicitors Bustin & Porter. In his evidence he at first endeavoured to conceal that his wife had been the purchaser. He said:

Mr. Wilson was the purchaser. Mr. Wilson is my landlord now. I have made no arrangement with Mr. Wilson for rental. He has not paid me the \$800. I do not know of my own knowledge that Mr. Wilson has paid the \$800. I do not intend purchasing the property, and I do not know that my wife intends purchasing.

Afterwards, however, he admits that he knew immediately after the sale that Wilson purchased for his wife. It is not difficult from all this to infer that the cheque which Mr. Wilson says he gave in payment, was repaid with the money which was drawn upon it.

It is noticeable that the advertisement of sale is defective. It is silent as to the duration of the term, or whether renewable, or what the income was from rents. The sale was without reserve or a reserved bid, notwithstanding a suggestion by the solicitor of the respondents that a sale without reserve, or without an upset price being fixed, might result in the property being greatly sacrificed. The answer by the appellant's solicitors to this suggestion was, in effect, that neither

he nor his clients had any right to interfere, and that the executor had the sole right to decide how it should be disposed of. In the same letter they stated that the property was assessed for \$1,500, and in a subsequent letter that two offers had been made of about \$1,750 each.

I am of opinion that the probate judge was right in charging the appellant on the footing of wilful neglect and default, and that the sum with which he has charged him was well warranted by the evidence.

It was objected before us that it was not competent to the probate judge to take the account against the appellant on the footing of wilful neglect and default, for want of jurisdiction and for want of pleading. I think, looking at the provisions of the Probate Act, ch. 118, R.S.N.B., 1903, there can be no question of the learned judge's power, and as to the want of pleading it is too late, the appellant not having, so far as appears, raised the objection in either of the courts below, to raise it for the first time in this court

The other question has also in my opinion been rightly decided against the appellant.

It is hardly disputed, and I think could not be for a moment, that the money which was deposited, both in the Bank of Montreal and in the Government Savings Deposit, was the testator Paul Daly's money. But it is said that the form of the receipts given for those deposits made the father and his daughter Jane joint tenants of the money, so that at the father's death his daughter became entitled to the whole by survivorship. I do not see how that can be so. In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole, by authorizing his daughter also to draw. He could still draw the whole whenever he pleased, up to the day of his death, and if he did it would all be his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all, and a payment to her would have discharged the bank; but the money would still have been the father's money in her hands. She would have been accountable to him for it all. If I authorize another to draw a cheque on my bank account that is not necessarily or *prima facie* a gift. My mandatory would be responsible to me for so much money, unless I gave it to him expressly as a gift. Here there are no words at all of gift used by the father. He gave her nothing but authority to draw or to receive his money, expressly reserving and retaining his own right. It is no more than if he wrote to the bank saying, I authorize you to honour my daughter's cheques on my deposit.

The daughter was therefore no more than an authorized agent, and when her father died the authority he had given was revoked by operation of law, and the funds remained the money of the testator's estate, subject to the provisions of his will.

The daughter never drew anything during her father's life time, but within eight days after his death, instead of claiming the money as her own, joined her brother the appellant in a petition for probate, declaring that her father's estate was of the value of about \$4,800, which it could not possibly be without including the savings deposits.

Not only that but on the same day of the signing of the said petition she deposited \$250 of money found in the testator's house in one of the savings accounts, and made two further similar deposits, one of \$100 admitted to have been her father's money, and the other on the 6th October afterwards, the sum of \$189 the proceeds of the sale of the testator's household furniture.

These subsequent deposits shew that neither at the time of the testator's death nor for months afterwards, had his daughter Jane any idea that the deposits stood in any different position from the rest of her father's estate.

I am therefore clear that the judgment is right in relation to the savings deposits. On the other minor questions which were raised by the appellant I entirely agree with the judgment of the probate judge.

Duff J.—I concur for the reasons stated by Mr. Justice Maclellennan.

Appeal dismissed with costs.

Solicitors for the appellant: Bustin & Porter,

Solicitor for the respondents: A. J. Gregory.

[1] 4 O.R. 450.

[2] 6 Ch. D. 115.

[3] L.R. 5 Eq. 376.

[4] L.R. 11 Eq. 10.

[5] 10 Ch. D. 474.

[6] 15 Ir. Ch. 89.

[7] Ir. R. 7 Eq, 255.

[8] 31 Ch. D. 282.

[9] 18 O.R. 488.

[10] 19 Beav. 409.

[11] 15 Mass. 175.

[12] 34 Beav. 623.

[13] L.R. 20 Eq. 328.

[14] 136 N.Y. 177.

[15] 103 N.Y. App. Div. 141.

[16] 66 N.J. Eq. 262.

- [17] 185 Pa. St. 41.
- [18] 27 W.R. 410.
- [19] 11 Jur. N.S. 961.
- [20] 14 Ch. D. 263.
- [21] 4 N.B. Rep. 584.
- [22] 51 L.J. Ch. 72.
- [23] White & Tudor's Leading Cases in Equity, 7 ed., vol. 2, at page 745.
- [24] 1 Cox 134.
- [25] 12 Ch. D. 738.
- 24 1 Cox 134.
- [26] 15 Gr. 85.
- [27] 7 Ves. 137.
- [28] 6 Ves. 617.
- [29] 6 Ves. 625.

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Prepared on 25 October 2026 · Esheria