SG 1938

APPELLANT'S CASE

In the Privy Council

No. 85 of 1937

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN:

MARY ELIZABETH WOOD, JOHN DOUGLAS WOOD and MARION RUSSELL WOOD an infant by MARY ELIZABETH WOOD her next friend,

(Plaintiffs), Appellants,

and

GERALD ALLAN WOOD

(Defendant), Respondent.

CASE FOR THE APPELLANT

BLAKE & REDDEN,
17 Victoria Street,
London, S.W. 1.

For the Appellants.

LAWRENCE JONES & COMPANY,
Lloyds Building, Leadenhall St.,
London, E.C. 3.

For the Respondent

1938
WARWICK BROS. & RUTTER, LIMITED, PRINTERS
TORONTO, CANADA

WOOD v. WOOD.

CASE FOR THE APPELLANT.

1. This is an appeal by the Plaintiffs in the action from the judgment of the Court of Appeal for Ontario reversing—by a majority of three to two —the judgment of the trial judge in favor of the Appellants, and dismissing the Appellants' action.

2. The action arises in respect to 485 shares, of the par value of $100. each, of the capital stock of Canada Cement Company Limited, part of the assets of the estate of the late Mrs. Mary G. Wood, who died on the 24th day of February, 1924. By her last will, of which Respondent and one Charlotte Isabella Edwards, since deceased, were the Executor and Executrix, the Testatrix after making a number of bequests including several life annuities, gave the residue of her estate to the Appellants and the Respondent, to be equally divided between them. The shares in question, with 15 shares of the same stock bequeathed to one Helen Georgina Carvolth, continued to be held in the name of the Testatrix until December, 1927, and, as a reason for so holding them, Respondent says that there was difficutly in settling the question of succession duties upon the shares, both the Province of Ontario, where the Testatrix had her residence, and the Province of Quebec, in which the Company had its head office, claiming duty.

3. In December, 1927, upon a reorganization of Canada Cement Limited, the certificate for the 485 shares in question, with Miss Carvolth's 15 shares, were surrendered by the Executors on payment to them at the rate of $250. per share. A cheque for $125,000. was issued in the name of Mary G. Wood, the Testatrix, and was endorsed in blank by the Respondent and his Co-Executrix. Respondent thereupon deposited the cheque in his personal bank account and retained the proceeds as his own, paying however to Miss Carvolth the proportion representing her 15 shares.

4. In May, 1935, Respondent brought his accounts as Executor into the Surrogate Court to be passed. His Co-Executrix had died in November, 1928, but no accounts of the Executorship had ever been brought in. In his accounts as presented to the Surrogate Court Respondent charged himself, in respect of his interest in the estate as a residuary legatee, with the sum of $49,788.90, for 485 shares of Canada Cement Limited at $102. per share. p. 126, l. 18. This is entered in the accounts filed as a transaction of February 24th, 1925.

5. Respondent alleges that on or about February 24th, 1925, at the expiration of one year from the death of the Testatrix, the solicitors for the Executors were instructed to prepare a valuation of the residue of the estate and a scheme for its distribution, and that, under the scheme so prepared, the 485 shares of Canada Cement Limited were set aside, with the concurrence of his Co-Executrix, as part of his share of the residuary estate, and that thereupon they became his, but that the shares were not transferred into his name because of the dispute with the Provinces over succession duties.

6. Appellants dispute these allegations of Respondent and say that nothing was done that effected any change in the ownership of the shares in question, and that they remained in the hands of the Executors as an undisposed of asset of the estate until they were surrendered in December, 1927, at $250. per share.

7. The final passing of the Respondent's accounts was deferred by the Surrogate Court judge upon this dispute developing and this action was brought to determine it.

8. The action was tried by Mr. Justice Makins, who found that the Co-Executrix was not a party to the alleged transaction, and that the documents claimed by Respondent to be a scheme of distribution of the estate, prepared by the solicitors, were merely draft proposals primarily as to setting up a trust for the infants, and that there was no satisfactory evidence that the Executrix knew anything about a proposed appropriation of the shares in question to Respondent. He therefore directed that judgment be entered declaring that the 485 shares were held by the Executors at the time of their surrender in December, 1927, as an asset of the estate and were not the property of Respondent personally.

p. 71, l. 29.

9. Respondent appealed to the Court of Appeal. Chief Justice Latchford and Mr. Justice Riddell agreed, for reasons given by each of them, in affirming the findings of fact of the learned trial judge and were of opinion that the Appeal should be dismissed. The majority of the judges, Masten, Middleton and Henderson J.J.A., were of opinion that there had been a valid appropriation of the shares to Respondent for reasons given at length by Mr. Justice Henderson, supplemented briefly by Mr. Justice Masten, and concurred in by Mr. Justice Middleton. Respondent's Appeal was therefore allowed and the action was dismissed.

p. 74.

10. The Testatrix, Mary G. Wood, died possessed of an estate of about $170,000. The Respondent is her son and the Appellants are the children of her deceased son, James Russell Wood. Respondent's Co-Executrix, Charlotte Isabella Edwards, was a sister of the Testatrix, unmarried, and over seventy years of age. By her will the Testatrix made a number of bequests to charities, aggregating $7,000. She gave annuities for life to four nieces amounting in all to $1,200 per year. She distributed 125 shares of the capital stock of The Bank of Nova Scotia among 9 other nieces. She gave 15 shares of Canada Cement Limited to a niece Helen Georgina Carvolth, and $1,000. each to two nephews. To Respondent she bequeathed her shares in the Ottawa Transportation Company Limited, and then after giving her domestic and household effects to her sister, Charlotte Isabella Edwards, and devising certain lands, some to Respondent and one parcel to Appellants, she gave the residue of her estate one-half to Respondent and the other half to be divided equally per stirpes among the Appellant's, the children of her deceased son James Russell Wood, and by a codicil she directed the accumulation of income upon Appellants' shares until they attained the age of twenty-five years, respectively.

p. 146-147.

p. 89.

p. 92, l. 6.

11. The administration of the estate was largely in the hands of the Respondent. It is plain that his Co-Executrix took little part in it. He

kept the accounts or records, such as they were, of the estate transactions. p. 51, l. 17-40.
No books of account were kept but Respondent made memoranda of his transactions on loose slips of paper which are now Exhibit 14. These slips p. 169-198.
he says he kept in his safe. He had at least three bank accounts in which moneys of the estate were deposited and which were to some extent concurrent with one another. From the transactions in the bank accounts it is difficult to discover any system which consistently governed deposits in and withdrawals from the respective bank accounts, in any event for the period important to this action.

12. Except for the collection of the income arising from the assets left by the Testatrix and payment of debts and of the annuities, payment of which the Will directed to commence at the expiration of three months from p. 90, l. 21-32.
death, very little was done in the administration of the estate in the year fol- p. 20, l. 41.
lowing the death of the Testatrix. [See the Executor's statement of receipts p. 21, l. 8.
(p. 101) and statement of disbursements (p. 125) in the accounts prepared for the Surrogate Court in 1935.] There was some realizing upon assets by sale in March and April, 1925, but before the residue then presently available could be ascertained, it was necessary to set aside assets to provide for the payment of the annuities, and this was evidently not done until late in
1925. There were set aside for this purpose bonds of the Provinces of New p. 120-121.
Brunswick and Ontario, but the bank accounts show that the interest upon these bonds was not specifically applied to payment of the annuities until p. 122.
January 1st, 1926, and until that date the interest went into the general re- p. 103, l. 8
ceipts. There never was any document formally declaring a trust of these and l. 13.
assets for the annuities, but the fact that they were treated as part of the general assets of the estate until the end of 1925 is significant when considering what reliance should be placed upon the statement of Respondent as to the division of the estate being made early in 1925 pursuant to an alleged agreement next to be referred to.

13. In Respondent's examination in chief at the trial he said in support of his claim to the shares in question that in February, 1925, there were on hand certain securities which were not authorized trust investments, including the Cement Company shares. He continued as follows:—

"Q. What was done? A. An agreement was reached between myself, p. 25, l. 13-27.
Mr. Hall (solicitor to the Executors) and my aunt—Q. That is Miss Edwards, your co-executrix? A. Yes.—that we create a trust fund to take care of the annuities and that we invest all the securities Mother held in trust investments, put them aside for the children, and to purchase other trust securities to bring up the children's share of the residue of the estate to one
half.

Q. When you speak of the children, you mean the children that take half the residue, these plaintiffs? A. Yes.

Q. That is set aside those securities that were trust securities, you mean proper investments for trustees? A. Yes.

Q. And then acquire others? A. Yes.

Q. To bring theirs up to one half? A. Yes.

Q. You have described what was to happen about the children, what else? A. Mr. Hall prepared a division of that according to that agreement."

p. 150. A statement (Exhibit 11) was produced and Respondent continued—

p. 27, l. 11. "Q. It was a document that came into existence how? A. As the result of our discussions and agreement of how we were to allot the residue of the estate.

HIS LORDSHIP: Just who agreed to that? A. I agreed and my aunt agreed with it and Mr. Hall our solicitor.

MR. TILLEY: Q. Mr. Hall prepared this as a result of what happened in his office? A. Yes.

Q. Who saw him about it? A. I saw him, I suppose we both saw him.

Q. Do you know? A. I cannot recall the particular day that that was talked of.

Q. Do you remember the talk? A. I remember we had discussed all this sort of thing, that my aunt was quite satisfied, and knew of that agreement of distribution and was satisfied with that."

p. 55. l. 14. On cross-examination with regard to this alleged agreement Respondent further testified as follows:—

"Q. Then you talk about this agreement, let me read you a little from your examination for discovery, and I want to see if you agree with what you said then. This is after you had told me the Cement shares became yours, at Question 196:

'196. Q. I suppose they became yours one time or another. Which time did they become yours? Well, what happened? A. I can't name the date.'

'197. Q. Tell me what you refer to as having happened in Mr. Hall's office? A. Well the suggestion, he made the suggestion—Mr. Hall.'

'198. Q. Which Mr. Hall? A. Mr. B. D. Hall.'

'199. Q. He made what suggestion? A. That we divide the estate—the residue of the estate and create a trust with the infants and we proceeded to do that.'

'200. Q. Who were there at the time he made this suggestion? A. Well, I was there and Mr. Hall was there. I don't know whether my aunt was there or not.'

'201. Q. Well then, there was a conversation between you and Mr. Hall and he suggested that you should form a trust for the infants and divide the estate and form a trust? A. Yes.'

'202. Q. Is that all that occurred at that time? A. I don't know.'

'203. Q. Well, you can tell me if that was all that occurred? A. I can't remember.'

'204. Q. Do you mean your memory fails you? A. I don't think it fails me particularly. I walked out of the door and came down the stairs.

'205. Q. Is that as much as you can tell me? Is that all? That Mr. Hall made a suggestion and you walked out of the door? A. No. I agreed it was—that we should—it was the thing to do to invest our funds in trust securities for the childern.'

'206. Q. Well, you were talking about something that you were advised should be done? A. Yes.'

Q. Now, is that correct, what I have read to you? A. Yes.

Q. That is correct? A. I think so.

Q. If you can speak it as though you really appreciated it; that is right? A. I think it is as far as I know.

Q. I will go on:

'207. Q. Is that as far as you got on that occasion? That you were advised what to do? Did you get any further on that occasion? A. We agreed.'

'208. Q. Who agreed? A. I agreed, or was satisfied, you can put it that way, with his explanation that the residue of the estate should be divided and purchase securities for the infants and to take over the existing trust funds that were held by my lawyers, put them to one side for the children, and sell the Bank of Commerce stock—'

'209. Q. Well? A. And some of the Bank of Nova Scotia stock and with those proceeds then to buy trust securities for the children—'

'211. Q. Yes? A. To the value of half the market value of the residue, exactly one year from the date of Mother's death.' "

He continued further: p. 57, l. 4.

"Q. On your examination you had no memory, had you, of any occasion of your aunt discussing these matters in Mr. Hall's office, you did not know whether she was there? A. No particular time, but I know she had been in Mr. Hall's office and I have been with her.

Q. You have no recollection of her being in Mr. Hall's office discussing these matters about these Cement shares? A. No, we did not discuss the Cement shares at any time particularly except that my aunt knew I was to take those over because they were not trust securities and we were going to take everything else that was trust security and put in for the infants.

Q. I will read Question 237 of your examination:

'237. Q. Mr. Wood, I quite realize that you would have many interviews. But this case, in which you were particularly interested—I want to know whether you had any more than the one conversation that you told me about, with respect to the setting up of trust for the children and the appropriating of these Canada Cement shares to your interest? A. I don't remember.'

'238. Q. I want to put this to you. Don't let us overlook anything. Did you talk this over with your aunt? A. Yes.'

'329.—

MR. STRICKLAND: There is a jump in the numbering there.

MR. ROBERTSON: Yes. 329 follows 238:

329. Q. In her home? A. If it was not in the office, it was in her home afterwards. I know I talked it over with my aunt.'

'330. Q. I want to know whether you remember the occasion and what occurred? A. No.'

'331. Q. You can't tell me what was said? A. No.'

'332. Q. And you don't know where it happened or when? A. Either of the two places—the office—Mr. Hall's office or my aunt's house.'

Q. And that is all you can tell us about that? A. I cannot recall conversation about it.'

14. The foregoing is the evidence of the alleged agreement with his

Co-Executrix upon which Respondent rests his claim to the Cement Company shares. He does not allege any other agreement with her. Respondent's evidence is not supported by anything signed or written by his Co-Executrix. There was no memorandum of an agreement, no deed or endorsement or other document of transfer as evidence of her consent or for use when the succession
p. 60, l. 40. duties were settled. Even the dividend cheques and the cheque for $125,000. which Respondent might have had her endorse to him, if she had agreed, are
p. 149. simply endorsed in blank. Appellants' mother, who had been appointed
p. 20, l. 19-39. guardian of their estates, resided with them near at hand, but Respondent does not suggest that he communicated with her in regard to the appropriation of
p. 45, l. 16. these shares. Respondent was not unused to doing business in shares and in trusts. The facts that he was the active Executor, that he was personally interested, and that the beneficiaries interested with him were infants, all demanded greater than ordinary circumspection on his part. That, in these circumstances, he took no care to preserve evidence of an agreement strongly suggests that there was no agreement with his Co-Executrix.

15. The manner in which Respondent himself dealt with the dividends on the Cement Company shares in April and July, 1925, affords further evidence that there was no agreement in February, 1925, by which they were appropriated to him, as he claims. There were dividends of $750. each quarter, but this included the dividend on Miss Carvolth's 15 shares. At the
p. 33, l. 12. trial Respondent first swore that from February, 1925, on he retained the income from the Cement stock and deposited it in his own account. This was not true, and it is not without significance that Respondent should make under oath so definite a statement on a matter of some importance and that the statement should be untrue. Later in his evidence—and after an adjourn-
p. 43, l. 21-35. ment (P. 41, L. 23)—Respondent said that he deposited all but two of the dividends in his own account. These two were the dividends in April and July, 1925. They were deposited by him in the estate account. Respondent
p. 43, l. 36. said that his purpose in depositing the dividends in the estate account was to make up, as a cash adjustment, any balance owing to the children's account.
p. 61, l. 3-25. But he made no such entry on his memoranda slip. (Ex. 14). No slip for April, 1925, is produced—but the July slip has under date July 16th, 1925,
p. 169, l. 26. the bare entry of the deposit to the estate account, with no comment or explanation. With respect to the April dividend, only that part of it accrued from February 24th (the date of alleged appropriation of the shares) would in any event belong to Respondent, and the other part of it belonged to the general estate. Yet it was all dealt with alike by him. Further, the dividends
p. 128, l. 38. on all 500 shares were deposited and Miss Carvolth's proportionate part was
p. 129, l. 11. paid to her—not by Respondent—but out of another bank account of the estate

p. 80, l. 19-28. 16. Mr. Justice Henderson in dealing with the deposit of the dividend cheques for April and July, 1925, refers to the bank account in which the deposits were made as a bank account opened as a separate account for Appellants' share of residue. It is submitted with respect that the transactions in the account show that it was not a separate account for the Appellants. There was no such separate account, in any event, at this time.
p. 205. The account referred to is part of Exhibit 15, and is the account with The

Toronto Savings and Loan Co. at Peterborough. The account was opened on April 9th, 1925, by the deposit of the sum of $18,352.56, part of the proceeds of the sale of shares of the Bank of Nova Scotia. The total proceeds were $19,352.56, and the other $1,000. went into the estate's current account in the Canadian Bank of Commerce. Neither this deposit nor the account itself was in any way earmarked for Appellants. Transactions in the account show that it plainly was not a separate account for them. On August 27th, 1925, $9,000 was withdrawn from this account and deposited in the Canadian Bank of Commerce and was used on the same day to pay Ontario succession duties, not only in respect of Appellants' share but also Respondent's share and the shares of other beneficiaries. On July 3rd, 1925, there was a deposit in the account of $80., which represents a dividend on Bank of Nova Scotia shares which were never set apart for Appellants. The next item in this bank account, on July 4th, 1925, is a deposit of $433. This is made up of three items, as appears by the slip in Exhibit 14. It is particularly significant for the present purpose, that $300 of this deposit is interest on the New Brunswick bonds which Respondent says were set apart for the annuitants. Certainly they were never appropriated to Appellants' share of residue and the interest would not be deposited in their account. Then on September 2nd, 1925, Respondent himself drew $300 from this account. At the trial Respondent spoke of this account merely as an estate account, and did not say that it was opened as an account for Appellants' share of the estate, and he was therefore not cross-examined upon it. It is submitted that the foregoing items extracted from the Exhibits plainly establish that, when opened, the account was intended merely as a savings account—bearing interest—for money of the estate generally, that might from time to time be on hand.

p. 102. l. 30.
p. 200.
p. 201, l. 23.
p. 129, l. 17.
p. 94 and p. 96.
p. 205. l. 40.
p. 169, l. 12.
p. 54, l. 12.
p. 206, l. 8.
p. 169, l. 30.
p. 43, l. 34.
p. 205, l. 12.

17. Not only does the examination of the transactions in this bank account destroy the explanation set forth in the judgment of Mr. Justice Henderson of the deposit of the dividend cheques for April and July, 1925, in the estate account. It demonstrates that at the period referred to there had been nothing set aside even for the annuitants, who required to be provided for before residue could be appropriated. It was the end of August—seven months after the alleged agreement in February—when the $9,000. was withdrawn from this bank account to pay succession duties generally.

18. Respondent put forward to support his story of an agreement with his Co-Executrix, Exhibit 11, as a document coming from Mr. Hall, the Solicitor. He says that Mr. Hall prepared it according to the agreement. The Exhibit bears no date, and Respondent first fixed its date as shortly after 24th February, 1925. On cross-examination, Respondent admitted that at the earliest the document could not have been prepared until after 15th April, 1925. A further comparison of items appearing in Exhibit 11 with the same items in the Executor's accounts (Exhibit 8) will show conclusively that Exhibit 11 was not prepared until, at the earliest, June 20th, 1925. An item "10,000 P. G. E. bonds—$9,613.33", representing the purchase of certain bonds by the estate, appears near the foot of the first page of Exhibit 11. This item (with a difference of $1.00) is in the Executor's accounts (Exhibit 8)

p. 25, l. 27.
p. 27, l. 8-23.
p. 28, l. 37.
p. 54, l. 26-40.
p. 101.
p. 150, l. 40.

p.129, l. 9. p. 205, l. 36. under date June 20th, 1925, and the same item appears in the bank account (Exhibit 15) under date June 22nd.

p. 58, l. 10-19. p. 59. l. 17. 19. Further with respect to Exhibit 11, Respondent admitted that it was only a tentative thing, and not a very complete or accurate thing to work from. Obviously that is so. It is quite incomplete. It made no provision for payment of succession duties, nor did it adjust any succession duty already paid. It omitted an item of $5,230.20 which Respondent himself inserted.

p. 129, l. 28. p. 150, l. 39. p. 129, l. 8 and 28. p. 150, l. 41. The Rose Mortgage was inserted at $4,000., although, until October 23rd, 1925, only $2,000. was advanced on it, yet the uninvested cash is also included. There is no evidence that the Executrix ever saw this statement, and it is submitted that it does not in any degree serve as evidence of her assent to an appropriation of the Cement shares to Respondent.

p. 30, l. 3-21. 20. Two other statements (Exhibits 12 and 13) were produced by Respondent. For what purpose and under what circumstances these statements were prepared is not stated. Respondent says that Exhibit 12 is a later adjustment of accounts prepared by the solicitor. There is no evidence that these statements were used for any purpose or that the Executrix ever saw them.

p. 153. p. 156, l. 20. Exhibit 12, which contains entries as late as August, 1925, has the 485 shares of Canada Cement listed among "Assets undisposed of". The entry on the first page of the Exhibit, showing proceeds of these shares at $49,788.90,

p. 30, l. 24-35. was written in by Respondent after he got the statement.

p. 97. 21. The market price of shares of Canada Cement increased after February, 1925. The market price on February 24th, 1925, was $102. per share, with which Respondent has charged himself. In August, 1925, it reached $114.50 per share. This increase of $12.50 per share would make an increase of over $6,000. on 485 shares.

22. The several matters referred to in the preceding paragraphs, that is, the continued deposit of the dividends in the estate account in April and July, 1925, the fact that Exhibit 11 is at the best of no earlier date than the end of June, 1925, and was then only tentative and incomplete, and that Exhibit 12, of no earlier date than August, 1925, lists the Cement Company shares as "Assets undisposed of", the payment from the bank account with Toronto Savings and Loan Company in August, 1925, of $9,000. for succession duties on the shares in the estate of the Respondent and of the annuitants as well as on the shares of the Appellants, and the fact that there was no setting aside of assets for either the annuitants or the Appellants for many months after February 24th, 1925, strongly indicate that Respondent, who had all of these matters in his own hands, was not acting upon an agreement made in February, 1925, as he claims, but that his course of conduct was dictated by other considerations. Respondent's many inaccuracies in his evidence with respect to these several matters, and his obvious attempt to make them appear consistent with and support his story of an agreement with his Co-Executrix in February, in disregard of the facts of the transactions themselves as disclosed by the documentary evidence, serve to further impair his reliability as a witness.

23. In October and November, 1925, Respondent had one Lawrie, an accountant, employed in preparing a statement of the estate. Respondent

alone gave Mr. Lawrie his instructions and his work was done at Respondent's house. Mr. Lawrie had no memory of the Co-Executrix being there. Respondent says that he gave his Co-Executrix a copy of Mr. Lawrie's report, but there is no evidence that he or anyone else ever discussed it with her or explained it to her. There is no evidence other than that of the Respondent that the Executrix was given a copy of the Report and there is no evidence that she approved it. On objection by Counsel for Appellants, the Report was not received in evidence. p. 62, l. 16. p. 69, l. 4-9. p. 41, l. 36.

24. Respondent alleges that after February 24th, 1925, he proceeded to set apart for Appellants their one-half of the residue of the estate, and he claims, and Mr. Justice Henderson has held, that this involved an appropriation to Respondent of the Cement Company shares, as they were not included in Appellants' one-half. Mr. Justice Henderson says that, apart from his agreement to accept them, in making the appropriation to the infants he must be taken to have accepted them. In Appellants' respectful submission, this conclusion is not by any means a necessary one even if the premises were accepted. In any event, it is submitted that the approval of his Co-Executrix was essential to the appropriation of any part of the assets of the estate to Respondent. Until she assented, the shares were simply undisposed of assets. p. 81, l. 14.

25. It is, moreover, far from plain that at any time there was any definite setting aside of Appellants' share of residue. There was no declaration of any trust of assets held for them. In March, 1927, there was paid out of the Toronto Savings and Loan account $531.96 as an instalment of the Annuitants' succession duty. In November, 1927, when the question of succession duty on the Cement Company shares had been settled and the duty in Quebec came to be paid, Respondent used in paying it $3,000. drawn from the Toronto Savings and Loan Company account—his own share as well as Appellants'. Yet this is the account which it is contended was opened specially for Appellants' share. Respondent seems always to have been able to apply to such purposes as suited him at the time any part of the estate. In fact, as long as the annuitants lived, a complete and irrevocable appropriation of assets to residue was not possible. The bonds which Respondent says he set apart for the annuities, as set forth in the account filed in the Surrogate Court, bore interest at 6%. Half of them matured in 1936 and the other half are due in 1941. At 6%, the income was just enough to meet the annuities, and at rates of interest likely to be available on future re-investment the income will fall distinctly below the $1,200. per annum required. Some new arrangement would seem, therefore, to be necessary, and in all probability further capital will need to be set up to provide the required income. Where this further capital is to come from if the Respondent has put his full share of the remainder of the estate in his pocket does not appear. p. 130, l. 28. p. 207, l. 8. p. 88, l. 20. p. 207, l. 28. p. 203, l. 14. p. 120.

26. Mr. Justice Henderson comments upon the circumstance that Mr. Hall, who acted for the Executors, is Solicitor in this action for the Appellants, and he suggests that as Mr. Hall was not called as a witness to contradict Respondent, the evidence of the latter should be accepted. It is true that Mr. Hall was Solicitor for Respondent and his Co-Executrix in their representa- p. 81, l. 30. p. 22, l. 33.

tive capacity as Executors of the estate. It does not appear that he was at any time Respondent's personal solicitor. He was, moreover, Solicitor at times for Appellants' mother, who was their guardian, and he and Respondent were together acting for her as such guardian under a formal document in connection with Appellants' interest in another estate. Under these circumstances it is submitted that it is neither improper that Mr. Hall should act for the Appellants against Respondent in his personal capacity in this action nor remarkable that he should refrain from offering himself as a witness against Respondent in respect of matters connected with the acts of the Executors as such. Can it be doubted that if he had been asked to give evidence as a witness for Appellants of conversations or instructions of the Executors relating to the estate, it would have been objected that he was not at liberty to disclose them? It is submitted with respect that the fact that Mr. Hall was not tendered as a witness for the Appellants under the circumstances is not a matter calling for comment, and the fact that he was not called by Appellants to testify will not establish confidence in Respondent's evidence when that evidence itself does not inspire it.

p. 77, l. 23.

27. Mr. Justice Masten puts forward as a fair test of whether an intention to appropriate actually existed, the question whether, if Cement Company shares had fallen in price instead of going up, the Respondent could have brought the shares into hotchpot and shared in the other securities. With respect it is submitted that the proposed test takes one nowhere in this case. Doubtless Respondent himself had the intention to appropriate the shares to himself. Whether his Co-Executrix ever had any such intention is quite another question, and one of more importance, and one is not assisted in finding an answer to it by considering the question suggested by His Lordship. It is not to be overlooked that Respondent was a trustee, and as such he might well be under liability under a given set of circumstances without being entitled to a personal profit if the circumstances were reversed.

28. If the effect of the Succession Duty Act either in Ontario or in Quebec was to prevent the transfer of property of the Testatrix until succession duty in respect of it was paid, it is submitted that this is merely another obstacle confronting the Respondent in his claim that the shares had become his. He puts forward the provisions of the Succession Duty Acts as a reason why the shares were not formally transferred into his own name, but the Quebec Statute provides that no transfer of the properties of any estate or succession shall be valid if the taxes have not been paid and no executor shall consent to any transfer or payment of legacies unless the duties exigible have been paid in full.

R.S. (Que.) 1925, ch. 29, sec. 14 (7).

29. It is submitted that the facts of the case do not bring it within that class of case where it is permissable for Executors to transfer to one of their number who is also a beneficiary, shares listed on the stock exchange at the then market price. Respondent has taken the market price as of an arbitrary date exactly one year from death. It was not—according to Respondent's own story—until after that date that the shares were, as he says, allotted to him. The market was a rising market. At the best, Respondent's case can be put no higher than this—accepting his own story—that there was no deal-

p. 56, l. 40.

ing with these shares on February 24th, 1925, but that at some indefinite later time it was assumed, for the purposes of division, but contrary to the fact that such an appropriation had been made on February 24th, 1925. He asks the Court to accept his own evidence of this assumption and to act upon it for his personal advantage and to the disadvantage of Appellants for whom he was a trustee.

Appellants submit that the Judgment of the Court of Appeal for Ontario is wrong and that the Judgment of the trial Judge was right, for the following among other

10 REASONS

1.—Because there had been no valid appropriation of the shares to Respondent.

2.—Because Respondent's evidence that he had agreed with his co-executrix that the shares should be appropriated to him should not be accepted.

3.—Because the burden of proof of an appropriation of the shares to him was on the Respondent and he has not satisfied it.

4.—Because there was no act of the Executor and Executrix in any way implementing an intention to appropriate the shares to Respondent even if it is found that they had such an intention.

20 5.—Because the shares in question remained in the hands of the Executors as undisposed of assets until surrendered to the Company in December, 1927.

6.—Because any agreement, if an agreement is found to be established, was an agreement made after 24th February, 1925, that the Executors would treat the shares as if they had been transferred on that date. The pretended transfer as of that date is a mere fiction.

7.—Because the proceeds of the surrender of the shares in December, 1927, were received by the Executor and Executrix as part of the residuary assets of the estate in their hands.

8.—Because the Succession Duty Act (Quebec) prevented a valid appropria-
30 tion of the shares to Respondent until succession duties in respect of the shares were paid.

R. S. ROBERTSON,
of Counsel for Appellants.