56, 1938

No. 85 of 1937.

In the Privy Council.

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*

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— AND —

GERALD ALLAN WOOD (Defendant) *Respondent.*

RESPONDENT'S CASE.

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal from the judgment of the Court of Appeal for Ontario pronounced 19th November, 1936, allowing with costs an appeal by the Respondent from a judgment of Mr. Justice Makins delivered 5th February, 1936.

p. 82.
p. 72.

2. The question raised by the appeal is whether the Respondent must account to the Plaintiff for one-half of the proceeds of the sale by the Respondent on 1st December, 1927, of 485 shares of The Canada Cement Company Limited at $250 a share, with certain dividends and interest, on the ground that the shares then formed part of the residuary estate of his mother, Mary G. Wood deceased, and had not prior to the date of sale been appropriated to him as part of a half share in the residue to which he was entitled under his mother's Will. A second point may arise as to the admissibility of evidence tendered by the Respondent.

p. 3, l. 30.

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p. 89, l. 10. p. 92. l. 15.

3. The late Mary G. Wood died at Peterborough, Ontario, 24th February, 1924. Her sister, Miss Charlotte Isabella Edwards, and the Respondent, her only surviving son, were the Executrix and Executor of her Will dated 29th November, 1923. Probate was granted to them on 27th March, 1924. Miss Edwards died 24th November, 1928, after which date the Respondent acted as sole Executor.

p. 89. l. 5. p.2, l. 42.

4. The Appellants are children of John Russell Wood, a son of the testatrix, who predeceased her. Letters of Guardianship of the persons and estates of the Appellants were granted on 27th September, 1922, to their mother, Jessie Olivia Dixon Wood, now Mrs. O'Connor Fenton. The first named Appellant, the eldest, attained 21 on 29th July, 1934. 10

p. 149. p. 1, l. 26.

5. The assets which came into the hands of the Executors were worth $169,696.60 as follows:—

p. 95. pp. 146-147.

Real Estate:		
Ontario	$2,950	
Alberta	100	
		$3,050.00
Cash		1,360.33
Government Bonds, with accrued interest:		
$15,000 Dominion at 105.15		16,034.70
$10,000 Ontario at 107.50		10,789.50
$10,000 New Brunswick at 106.50		10,741.00
$3,000 Ontario at 98.25		3,001.74
Shares:		
83 Ottawa Transportation Co. at 80		6,640.00
208 Bank of Nova Scotia at 252		52,416.00
104 Bank of Commerce at 184		18,952.00
500 Canada Cement at 88		44,000.00
Mortgage on land in Alberta		1,711.33
Personal and household effects		1,000.00
Total ...		$169,696.60

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pp. 89-92.

6. The Testatrix specifically devised the Ontario real estate: made specific bequests of the Ottawa Transportation shares, and of 125 of the Bank of Nova Scotia shares and 15 of the Canada Cement shares: gave pecuniary legacies of $9,000 and life annuities of $400 to Gertrude G. Monette; $400 to Marion Edwards and $400 to 40

E. Cameron Edwards and Florence Edwards jointly and to the survivor: and gave the residue of her estate one-half to the Respondent and one-half in equal shares to the Appellants, payable as they respectively attained 21 years of age. By a Codicil executed the same day she directed the income from the Appellants' half-share to be accumulated until they respectively attained 25, and should then be paid to them as to both capital and income. pp. 92-93.

7. No change was made in the estate investments until after 24th February, 1925, the end of the first year of the Executorship.
10 The income during the year was allowed to accumulate. p. 21, l. 1.

8. The Executors were advised prior to 24th February, 1925, by the Solicitor who acted for them and for the Appellants' guardian that it was their duty at the expiration of the year to pay legacies, to provide for the annuities, and to make a division of residue as between the Respondent and the Appellants. They were also told that if, after the year, they continued to hold, for the Appellants, any securities that were not authorised investments for trustees under the Trustee Act (R.S O. 1927 Cap. 150, Sec. 26) they would be liable for any resulting loss. pp. 25-28. pp. 32-61. pp. 54-59.

20 **9.** The Government Bonds held by the estate were, but the Bank and Company shares were not, authorised investments for Trustees.

10. All the shares except Canada Cement shares were transferable on share registers kept in Ontario on Probate being taken out in Ontario and were therefore capable of sale and transfer immediately on Probate being issued. The Cement shares were transferable only at Montreal. Ontario claimed $2,832.50 Succession Duty on them, while Quebec claimed $3,482.73. Ontario notified the Executors that it disputed the claim made by Quebec. p. 94, l. 10. p.155, l. 40. p. 88. p. 93, l. 40.

30 **11.** Pending the settlement of this dispute, the shares could not be transferred by reason of the provisions of the Quebec Succession Act. Ontario ultimately gave up its claim, and Duty was paid to Quebec on 10th November, 1927. In the meantime the shares stood on the Company's Register in the name of the Testatrix. p. 148.

12. In these circumstances, the Executors agreed, acting in conjunction with the Solicitor, that the Respondent would take on account of his interest in the residue the 485 Canada Cement shares at their value on 24th February, 1925, and that authorised invest-

ments belonging to the Estate or acquired for the purpose would be set aside for the Appellants.

p. 150, l. 42.

13. The market price of Canada Cement shares on 24th February, 1925, was $102 per share, making $49,470 for the 485 shares. To this was added, improperly as against the Respondent, $318.90, representing a proportion of the usual dividend payable in the following April, making the total value at which the shares were taken over by the Respondent $49,788.90.

p. 21, l. 41.
p. 54, l. 12.
p. 127, l. 20.
p. 102, l. 30.
pp. 205-206.

14. The Executors immediately after the 24th February, 1925, paid the legacies and appropriated $10,000 Ontario Bonds and 10 $10,000 New Brunswick Bonds held by the estate, each bearing interest at 6% per annum, to secure the annuities. They appropriated to the Appellants' trust $15,000 Dominion Bonds and $3,000 Ontario Bonds held by the estate. They sold the Bank of Commerce shares for $20,311.21 and purchased for the Appellants' Trust Company Debentures and Government Bonds at a total cost of $19,799.18. They also sold all except 20 of the Bank of Nova Scotia shares (which included 21 shares sold on behalf of Beneficiaries to provide the amounts payable by them for Succession Duty) and deposited out of the proceeds $18,352.56 and $2,614.40 to the credit 20 of a Savings Account which they opened for the Appellants. From this account they advanced in June, 1925, $2,000 on a Mortgage and paid $9,613.33 to acquire additional Bonds, the Mortgage and the Bonds being appropriated to the Appellants' trust. Later, on October 24th, 1925, an additional $2,000 was paid out of the account as an advance on the same mortgage.

pp. 28-29.

15. The Solicitor took an active part in arranging the division of residue and in acquiring authorised investments to make up the Appellants' share. In April 1925, when all but 20 of the Bank of Nova Scotia shares had been sold, he advised the Respondent that 30 his share in the residue would exceed the value of the Cement shares, and that he might as well take the 20 Bank of Nova Scotia shares as part of his share. To this the Respondent agreed, and the 20 shares were accordingly withdrawn from sale. They were taken over by the Respondent at $5,228.80. No objection has been made to this transaction.

p. 43, l. 40.

16. Securities amounting to some $55,000 having thus been appropriated to the Respondent, he caused to be paid into the Appellants' savings account the dividends payable on the 485 Cement shares and the 20 Bank of Nova Scotia shares in April and July 1925. 40

Those payments were made to ensure that the Respondent's appropriation should not exceed one-half of the residue.

17. The Solicitor prepared three statements (Exhibits 11, 12 and 13) to assist in working out the equal division. They afford confirmation of the arrangements made for division, though they were not precise or accurate. They gave information as to how matters stood from time to time as authorized securities were being acquired.

pp. 150-168.

18. In order to arrange the exact division, Accountants were employed, who made up the accounts to the end of October, 1925, setting out the distribution of residue between Mr. Wood and the Appellants. The learned Trial Judge on objection taken by Counsel for the Appellants, declined to receive the accounts in evidence or to permit the Accountant to explain the division in detail. Copies of the Accountant's Report were furnished to the Executors and to the Guardian and were acted on by all parties thereafter. Income tax statements made by or for the Respondent, the estate and the infants, were based on the division though the learned Judge declined to admit statements themselves in evidence.

p. 44, l. 15.
pp. 33-41.

19. Disbursements made after the 31st October, 1925, in which the residuary legatees were jointly interested were paid one-half by the Respondent personally, and the other one-half out of the Appellants' trust fund.

p. 43, l. 10.

20. At the time the 425 Canada Cement shares were allocated to the Respondent he was already the owner of 180 Cement shares. It was not his wish to increase his holding by the additional 485 shares. He therefore borrowed from his wife 120 Canada Cement shares and sold 300 shares at the market in January, 1926, the price obtained being less than the price at which he took over the estate shares.

p. 46, l. 28.
pp. 48-49.

21. He did not make any later purchases of similar shares, and he accounted to his wife from time to time for the dividends from and ultimately for the price received for 120 of the 485 shares at $250 a share.

22. In June 1935, on the passing of accounts the Surrogate Judge directed an issue "as to the items in dispute". Instead of proceeding to the trial of an issue in the Surrogate Court this Action was brought for a declaration that the Respondent was liable to account for one-half of the price realised and dividends received on the Canada Cement shares. The claim was based on allegations

p. 19, l. 5.
pp. 1-6.

in the Statement of Claim and Reply that the shares still belonged to the estate. It was not alleged that the appropriations made in 1925 were voidable because of any unfairness or impropriety on the part of the Respondent.

23. Makins J., who tried the Action, treated the appropriation of the shares to the Respondent as a sale of the shares to himself and stated that an Executor could not make a sale to himself of property of the estate, and declared that the shares at the time of the sale remained the property of the estate, and he directed the Defendant to account. The formal Judgment directed the Respondent to account to the Appellants "for one-half of the moneys received by him upon the redemption "of the said shares with interest thereon and of the dividends "received by him in respect thereof after due allowance is made for "any part of the said residue set apart on account of the Plaintiffs' "share thereof and for any interest received thereon" with a reference to the local Master at Peterborough to take an account. The Judgment recognizes that appropriations had been made of authorized investments for the Appellants.

p. 70.

p. 73, l. 10.

24. The Court of Appeal (Latchford C.J.A., Riddell, Middleton, Masten and Henderson, JJ.A.) allowed the Respondent's Appeal and dismissed the Action with costs, Latchford C.J.A. and Riddell J. dissenting. The majority held that the Executors might appropriate non-Trustee investments to the Respondent, and that an effectual appropriation had been made. The learned Chief Justice held that an effective appropriation had not been made. Riddell J. said: "I have read the evidence with care; and while, had I been the Trial "Judge, I might have arrived at a different conclusion, I find it "impossible for me to say that the learned Judge was wrong—to "doubt is to affirm, and I think the appeal must be dismissed with "costs".

pp. 76, 77, 82.

p. 74.

The Respondent submits that there was ample evidence of an effective appropriation of the Canada Cement shares to the Respondent, but if the evidence is not sufficient the Appellants should not be heard to complain owing to the rejection of additional evidence at their instance, or the Case should be referred back to enable the additional evidence to be submitted.

The Respondent submits that this Appeal should be dismissed for the following amongst other

REASONS.

1. Because the shares in question became the property of the Respondent long before the sale or redemption in December, 1927.

2. Because the shares were effectually appropriated to the Respondent as part of his half share in the residue.

3. Because an equal share for the Appellants was satisfied by the appropriation of other assets.

4. Because the appropriation to the Appellants in 1925 of securities equal in value to one-half of the residue was an appropriation of the other half to the Respondent.

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5. Because the Appellants have not sought to set aside the appropriation made in 1925.

6. Because if the appropriation is not effective the sale by the Respondent of 300 shares should be treated as a sale of that number of shares on behalf of the estate.

7. Because if the appropriation was not effective the Respondent would have rendered himself liable for retaining unauthorised investments for a period of three years.

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8. Because the Judgments of the majority in the Court of Appeal are right for the reasons assigned.

W. N. TILLEY.

B. V. McCRIMMON.

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— AND —

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CASE FOR THE RESPONDENT.

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