THE CANADIAN BANK OF COMMERCE (PLAINTIFF) ..... } APPELLANT;

AND

JOHN H. MOTHERSILL AND THE TRUSTS AND GUARANTEE COMPANY LTD., EXECUTORS AND TRUSTEES OF THE WILL OF CHARLES W. HOARE, DECEASED (DEFENDANTS) ..... } RESPONDENTS.

1936
Nov. 24, 25.
1937
Feb. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Executors—Trustees—Administration of estate of deceased person—Possible deficiency of assets—Notice by executors to secured creditor to place specified value on securities—Creditor not doing so—Creditor selling securities and suing estate for deficiency—Right to recover—Trustee Act, Ont. (R.S.O., 1927, c. 150, as amended in 1931, c. 23, s. 7), ss. 56 (2), 57 (1).*

At the time of his death (November 10, 1931) H. was indebted to the plaintiff bank, which held as collateral security hypothecations by H.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

of share certificates and bonds. The terms of the hypothecations gave the right to the bank upon default in payment to realize on the securities, without prejudice to its claims for any deficiency. Defendants were executors and trustees under H.'s will and obtained probate thereof. The bank demanded payment and threatened to sell the securities and look to defendants for payment of any deficiency. The defendants, on December 23, 1933, notified the bank that they were of opinion that there might be a deficiency of assets to meet creditors' claims and required it, within 30 days, to prove its claims and give particulars of, and place a specified value on, each of its securities. This notice was given pursuant to s. 56 (2) of the *Trustee Act*, R.S.O., 1927, c. 150, as amended in 1931, c. 23, s. 7 (but which fixes no period of time for running of the notice). The bank, on January 4, 1934, wrote to defendants stating the amount due, a list of securities and its intention, failing some satisfactory arrangement, to proceed to realize thereon. On January 23, 1934, it filed its claim with particulars of securities. It did not place a value on the securities. The defendants did not apply under s. 57 (1) of said Act (as amended as aforesaid) for an order requiring the bank to value its securities or be barred from sharing in the estate. The bank sold the securities, commencing on January 15, 1934, and, after notice by defendants of contestation, and pursuant to a court order obtained, sued defendants for the amount of the deficiency.

*Held:* The bank was entitled to recover. The notice of December 23, 1933, the bank's failure to value, and its sale of the securities, did not bar its right to judgment. (Judgment of the Court of Appeal for Ontario, [1936] O.R. 402, reversed).

*Per* Duff C.J.: The effect of the amendment in 1931 enacting ss. 56 and 57 of the *Trustee Act* was not to abrogate the right theretofore existing of a creditor to rank upon the estate of a deceased person and substitute a new right—but to modify the right,—attaching certain incidents to it and giving certain rights to the legal personal representative. As to the right to call upon the creditor to value his security, the statute provides a sanction and nominates the procedure for enforcement, and, by well known principles, the legal personal representative must resort to this procedure in the enforcement of the right. The defendants could have proceeded under s. 57; they could have taken steps to prevent the sale of the securities; it might be that they had an action for damages; but the effect of the statute was not to put the bank, after the notice of December 23, to its election to value its securities or rely exclusively upon them without remedy for any deficiency, nor, merely by reason of said notice and the course taken by the bank, to cause the bank to lose its contractual right to claim for a deficiency.

The statutory provisions in question, postulating, as they do, a possible deficiency of assets, are intended for the protection of the creditors and, where creditors' rights are not in any way in jeopardy, those provisions cannot be resorted to for the sole benefit of the beneficiaries of the estate.

*Per* Rinfret, Crocket and Kerwin JJ.: Where it says in s. 56 (2) that the personal representative "may require" a creditor to place a specified value on his security, the word "require" has not an imperative force, but is merely descriptive of one step in the proceedings that may be taken to secure a valuation by the creditor. As defendants had not followed the notice by securing an order under

s. 57 (1), the bank was never called upon to choose between relying only upon the securities and placing a value upon them, and had never lost its right under the terms of the hypothecations to sell the securities and claim for any deficiency.

*Per* Davis J.: The defendants, not having obtained the relief provided by s. 57 (1) for breach by the bank of its duty under s. 56 (2) (which relief, being that expressly provided by the same statute which created the new duty, is the only one available), had no defence upon the ground of said breach to the bank's action to recover the amount of the contractual debt.

On an application under s. 57 (1) the judge is not bound to make the order provided for therein; he may exercise his discretion, having regard to all the facts and circumstances brought to his attention.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of McFarland J. (2)) held that the plaintiff's action claiming against the estate of which respondents were the executors should be dismissed.

The material facts of the case and the questions in issue on this appeal are sufficiently stated in the judgments now reported and are indicated in the above headnote. The plaintiff's appeal to this Court was allowed with costs.

*G. R. Munnoch K.C.* for the appellant.

*S. L. Springsteen K.C.* for the respondents.

DUFF C.J.—I agree that the appeal should be allowed.

If I may say so with the greatest respect, it appears to me that there is a fallacy in the judgments in the courts below in this sense: it is assumed, I think, that the right of a creditor to rank upon the estate of a deceased person which obtained at the time of the passing of the enactment now under consideration was by that enactment abrogated and that there was substituted for it a new right, the right given by the statute.

I am unable myself to read the statute in that way. I think the effect is that the right of the creditor is modified, that certain incidents are attached to it and certain rights given to the legal personal representative. Broadly speaking, there is a right to call upon the creditor to value his security and a right to take over the security on the terms mentioned in the statute.

(1) [1936] O.R. 402; [1936] 3 D.L.R. 205.

(2) [1936] 1 D.L.R. 394.

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

Duff C.J.

As regards the first of these rights, the statute provides a sanction, nominates the procedure by which it is to be enforced, and, I think, by the well known principles, the legal personal representative must resort to this procedure in the enforcement of that right.

I am not saying that, as regards the option to take over the security, the ordinary common law remedies are not available, or that, if the creditor is dealing with his securities in such a way as to prevent the legal personal representative exercising his option, the latter is without a remedy.

In the case before us, the creditors, in May, 1932, demanded payment of the liabilities of the deceased and, after having received a notice on the 23rd of December, 1933, from the legal personal representatives requiring the creditors to value their securities, the creditors notified them that unless some arrangement satisfactory to the creditors should be made they would proceed to realize the securities commencing on the 10th of January, 1934. There could be no doubt that the legal personal representatives were apprized of the position taken by the creditors and they chose to rest upon their position under the statute which they conceived to be, as they are contending on this appeal, that, after the notice of December, the creditors were put to their election to value their securities and prove their claims or to rely exclusively upon their securities without remedy in respect of any deficiency.

I do not think that the effect of the statute is to put the creditors in this position. The legal personal representatives might have proceeded under section 57. They might have taken steps to prevent the sale of the securities, and it may be that they have or had an action for damages against the creditors; but there is no warrant in the statute, I think, for saying that the contractual rights of the creditors have been lost by reason of the course they took, in the absence, at all events, of any proceeding under section 57 by the legal personal representatives.

There is one further point which I think ought to be mentioned. These provisions, in my judgment, postulating, as they do, a possible deficiency of assets, are intended for the protection of the creditors of the estate and, where the rights of creditors are not prejudiced, they cannot, I think,

be resorted to by the legal personal representatives for the sole benefit of the beneficiaries of the estate. There is no ground, I think, for imputing to the legislature an intention that, where the claims of creditors are not in any way in jeopardy, the contractual right of any particular creditor shall be impaired for the benefit of the beneficiaries.

The judgment of Rinfret, Crocket and Kerwin JJ. was delivered by

KERWIN J.—This is an appeal by the plaintiff, the Canadian Bank of Commerce, from the judgment of the Court of Appeal for Ontario which, reversing the judgment at the trial, dismissed the action against the respondents, the executors and trustees of the will of Dr. Charles Westlake Hoare.

The testator had incurred liabilities to the Bank and, from time to time, as collateral security therefor had hypothecated to the Bank a number of share certificates and bonds. This action was brought to recover the amount claimed to be due under the various obligations after crediting thereon the proceeds of the sale of the securities. The correctness of the sum for which judgment was entered after trial is not in question, but liability is disputed by reason of the sale by the Bank of the securities under circumstances now to be explained.

The form of hypothecation signed by Dr. Hoare on each occasion contained a list of the particular securities deposited therewith and continued:

> The above mentioned securities and any renewals thereof and substitutions therefor and the proceeds thereof are hereby assigned to and are held by the Canadian Bank of Commerce (hereinafter called the Bank) as a general and continuing collateral security for the payment of the present and future indebtedness and liability of the customer to the Bank wheresoever and howsoever incurred and any ultimate unpaid balance thereof, and such securities, or any part thereof from time to time, may be realized, sold, transferred and delivered by the Bank in such manner as may seem to it advisable and without notice to the undersigned, in the event of any default in such payment, or prior to any such default in the event that the said securities, or any part thereof from time to time shall, in the opinion of the Bank, depreciate in value. The proceeds may be held in lieu of the securities realized and may, as and when the Bank thinks fit, be appropriated on account of such parts of the said indebtedness and liability as to the Bank seems best, without prejudice to its claims upon the customer for any deficiency.

Dr. Hoare died November 10th, 1931, and on April 10th, 1932, letters probate of his last will and testament were granted to the respondents. By a letter of May 14th, 1932,

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

Kerwin J.

addressed to the respondents, the Bank demanded payment of all the deceased's liabilities to it, concluding its letter as follows:

> Without prejudice to or limiting the effect of the above demand further notice is hereby given that if payment is not provided forthwith or adequate collateral security furnished, we will sell the securities we hold at our discretion and look to you for payment of any deficiency.

Discussions ensued as to the possibility of the Bank holding the pledged securities for a rise in the market, or placing a valuation on them with the understanding that the estate would bear any loss or reap any appreciation that might occur by reason of changing market conditions; but these proposals were deemed unsatisfactory by the superior officers of the Bank and of the Trusts and Guarantee Company Limited, one of the executors. On December 23rd, 1933, the executors gave the Bank a notice, which will require consideration later, but which is inserted at this point in order to complete the narrative:

> In the Surrogate Court of the County of Essex.
>
> In the matter of the Estate of Charles W. Hoare, late of the Town of Walkerville, County of Essex, Deceased.
>
> To— The Canadian Bank of Commerce.
>
> The Executors of the Will of Charles W. Hoare, Deceased, being of the opinion that there may be a deficiency of assets to meet the claims of creditors against the said estate, hereby give you notice that you are hereby required pursuant to the provisions of The Trustee Act, R.S.O., 1927, Chapter 150, and amendments thereto, and more particularly the Statute Law Amendment Act, 1931, Section 7 thereof, to prove your claim, if any, against the estate of the said Deceased, within thirty (30) days from the date hereof.
>
> And further take notice that you are required, within thirty days from the date hereof, to state whether you hold any security for your claim or any part thereof, and to give full particulars of the same, and if such security is on the estate of the Deceased, or on the estate of the third person for whom the estate of the Deceased is only indirectly or secondarily liable to place a specified value on each and every such security.
>
> Dated this 23rd day of December, A.D. 1933.
>
> The Trusts and Guarantee Company Limited
> Per "O. H. Birchard"
> Manager.
> and "J. H. Mothersill,"
> Executors of the Will of
> Charles W. Hoare, Deceased.

By letter dated January 4th, 1934, the Bank notified the executors of the amount of its claim and of its determina-

tion to realize the securities, commencing January 10th, 1934, unless arrangements satisfactory to the Bank were made in the meantime, but did not "place a specified value" on the securities. No such arrangements being made, the Bank commenced to realize the securities on January 15th, 1934, and continued from time to time until they were all sold. After crediting the proceeds of the sales a balance remained, for which the Bank is admittedly entitled to judgment in this action against the executors unless the latter are able to escape liability by virtue of the combined effect of the notice of December 23rd, 1933, and of the provisions of sections 56 and 57 of the Ontario *Trustee Act* as enacted by section 7 of chapter 23 of 21 Geo. V. These sections are as follows:

56. (1) On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor holding security on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, shall place a value on such security and the creditor shall rank upon the distribution of assets only upon the unsecured portion of his claim after deducting the value of the security, unless the personal representative shall elect to take over the security as hereinafter provided.

(2) Where the personal representative of a deceased person is of the opinion that there may be a deficiency of assets, he may require any creditor to prove his claim and to state whether he holds any security for his claim or any part thereof, and to give full particulars of the same and if such security is on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, to place a specified value on such security and the personal representative may either consent to the creditor ranking for the amount of his claim after deducting such valuation or may require from the creditor an assignment of the security at an advance of ten per centum upon the specified value to be paid out of the estate as soon as the personal representative has realized upon such security or is in a position to make payment out of the assets of the estate and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor, shall be the amount for which he shall rank upon the estate of the deceased debtor.

(3) Where inspectors have been appointed as hereinafter provided or where the estate is being administered under the direction or by a court, the personal representative in making his election shall act under the direction of the inspectors or of the court, as the case may be, and the remuneration of the inspectors shall be determined by the surrogate court judge on the passing of accounts.

(4) If the claim of the creditor is based upon a negotiable instrument upon which the estate of the deceased debtor is only indirectly or secondarily liable and which is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section and shall put a value on the liability of the person primarily liable thereon as his security for the payment thereof, but after the maturity of such liability and its non-payment he shall be entitled to amend and revalue his claim.

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

Kerwin J.

57. (1) Where a creditor fails to value any security held by him which under the provisions of this Act he is called upon to value, the personal representative may apply to the judge of the surrogate court from which probate or letters of administration were issued in a summary way for an order that unless a specified value shall be placed on such security and notified in writing to the personal representative, within a time to be limited by the order, such claimant shall, in respect of the claim or the part thereof for which security is held, be wholly barred of any right to share in the proceeds of the estate unless the judge upon the application of the creditor extends the time for the valuation of the security.

(2) Where an estate is being administered by or under the direction of a court, such court shall exercise the jurisdiction conferred by this section upon the judge of the surrogate court.

It will be observed that the executors' notice was given under subsection 2 of section 56, as it is stated therein that the executors are "*of the opinion* that there may be a deficiency of assets to meet the claims of creditors." The heading "In the Surrogate Court of the County of Essex" is in error, as the notice was not given in the course of any proceedings in that court. The only other remark that might be made with reference to the form of the notice is that there is no authority in sections 56 and 57 of the *Trustee Act* whereby the executors might limit the Bank to "thirty days from the date hereof" to give particulars of its claim and to value its securities. It was suggested that the Court should declare the period a reasonable one, but in my view of the matter the point need not be considered.

It is admitted that in fact the assets of the estate are about sufficient to liquidate all claims against it and certainly are more than ample to pay all claims except the one in suit. However, presuming good faith on the part of the executors in forming their opinion as to the possibility of a deficiency of assets, the question still remains as to whether the giving of the notice and the subsequent sale of the securities by the Bank debar the latter from recovering judgment.

It is undoubted that, at the date of the death of Dr. Hoare, under the power given by the various hypothecations, the Bank could have sold its securities and claimed for any deficiency; and that right continued down to the receipt by it of the notice of December 23rd, 1933. However, it is argued that subsection 2 of section 56 of the Act is imperative where it states that the personal representative "may *require* any creditor to prove his claim, etc." While it is admitted that if the creditor abstains

from valuing his securities, the only remedy of the personal representative to compel valuation is to secure an order under subsection 1 of section 57, nevertheless it is contended that in this case, by selling the securities subsequent to the receipt of the notice, the Bank has elected to rely upon such securities. With great respect to the opinions of the learned judges in the Court of Appeal, who so construed the statute, I am unable to agree.

In view of the opening phrases of subsection 1 of section 57, "Where a creditor fails to value any security held by him which under the provisions of this Act he is called upon to value," the executors could not, without a prior request, obtain the order mentioned in a later part of the subsection. That request is provided for by subsection 2 of section 56, as the Bank is not "called upon to value" except when the executors have required the Bank so to do. The words "may require" are not imperative but merely descriptive of one step in the proceedings which the executors may take to secure a valuation by the creditor. This conclusion is fortified by the words "called upon to value" in subsection 1 of section 57.

Under the hypothecations, the Bank had the right to sell the securities "without prejudice to its claims upon the customer for any deficiency." The Bank never gave up its right under these documents, and, in my view of the statute, it was never called upon to choose between relying only upon the securities and placing a value upon them. I fail to see that the respondents' argument is strengthened by stating that, by reason of the Bank's neglect to value its securities, the executors lost their right either to consent to the Bank ranking for the amount of its claim after deducting such valuation, or to require from the Bank an assignment of the securities at an advance of ten per centum upon the specified valuation (subsection 2 of section 56). That right is given only if the creditor, in pursuance of the notice or of an order obtained under subsection 1 of section 57, actually does value.

The members of the Court of Appeal considered they were bound by *In Re Beaty* (1), a decision under the *Insolvent Act* of 1875 (38 Vict., chapter 16), but I am unable to find any analogy between the provisions of any

(1) (1880) 6 A.R. 40.

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

Kerwin J.

insolvency legislation, crystallising, as they generally do, the rights of creditors as of the date of insolvency, and the legislation here in question. Moreover, section 82 of the Act under consideration in the *Beaty* case (1) provided that

> no dividend shall be allotted or paid to any creditor holding security from the estate of the insolvent for his claim, *until the amount for which he shall rank as a creditor upon the estate as to dividends therefrom, shall be established as hereinafter provided.*

Section 84 then provided that a creditor holding security

> shall specify the nature and amount of such security * * * in his claim, and shall therein, on his oath, put a specified value thereon.

It is true that section 82 is not specifically mentioned in the judgments, but the decision was arrived at after a consideration of the scope of the whole Act and the intention of Parliament in dealing with secured creditors. Even in comparing various Insolvency Acts, the differences in the schemes adopted must be borne in mind. In the *Beaty* case (1) the Court distinguished a previous decision, *In Re Hurst* (2), under the *Insolvent Act* of 1864, and the present *Bankruptcy Act* deals with secured creditors in a manner quite different from that in either the statutes of 1864 or 1875.

The sections of the *Trustee Act* replaced by 21 Geo. V, chapter 23, section 7, dealt only with the estates of deceased persons "in case of a deficiency of assets" and these provisions may be traced back to 59 Vict. (Ont.), chapter 22, *An Act respecting the Estates of Insolvent Deceased Persons.* It was in 1931 that the legislature for the first time undertook to deal with the situation where the personal representative was of the opinion that there might be a deficiency of assets. For the reasons already given, it is impossible to find in the legislation an intention that a holder of securities (which may include, as in this case, those having a fluctuating value) is compelled to decide, upon the receipt of a notice from the personal representative of a deceased debtor, whether to value his securities or to realize upon them; at the risk, in the latter event, of losing his right to rank upon the estate for any deficiency.

The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

(1) (1880) 6 A.R. 40. (2) (1871) 31 U.C.R. 116.

DAVIS J.—The Ontario Legislature, in its *Statute Law Amendment Act, 1931* (21 Geo. V, ch. 23, sec. 7), enacted new sections 56, 57 and 58 of the *Trustee Act*. New sec. 56 (1) deals with the administration of the estate of a deceased person in case of a deficiency of assets; new sec. 56 (2) deals with the case where the personal representative of a deceased person "is of the opinion that there may be a deficiency of assets." This subsection is as follows:

56. (2) Where the personal representative of a deceased person is of the opinion that there may be a deficiency of assets, he may require any creditor to prove his claim and to state whether he holds any security for his claim or any part thereof, and to give full particulars of the same and if such security is on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, to place a specified value on such security and the personal representative may either consent to the creditor ranking for the amount of his claim after deducting such valuation or may require from the creditor an assignment of the security at an advance of ten per centum upon the specified value to be paid out of the estate as soon as the personal representative has realized upon such security or is in a position to make payment out of the assets of the estate and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor, shall be the amount for which he shall rank upon the estate of the deceased debtor.

The respondents, the personal representatives of the late Charles Westlake Hoare, deceased, who died on or about the 10th day of November, 1931, gave a notice to the appellant, the Canadian Bank of Commerce, a secured creditor of the deceased, under date of December 23rd, 1933, wherein they expressed their opinion that there might be a deficiency of assets to meet the claims of creditors against Dr. Hoare's estate and, pursuant to the amendments of the *Trustee Act* made by the *Statute Law Amendment Act, 1931*, "required" the appellant to prove its claim, if any, against the estate of the said deceased within thirty days from the date thereof. It is to be noticed in passing that new sec. 56 (2) does not fix any period of time for the running of the notice contemplated by that subsection. The notice continued:

And further take notice that you are required, within thirty days from the date hereof, to state whether you hold any security for your claim or any part thereof, and to give full particulars of the same, and if such security is on the estate of the deceased, or on the estate of the third person for whom the estate of the deceased is only indirectly or secondarily liable to place a specified value on each and every such security.

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

Davis J.

In partial compliance with the said notice, the appellant filed its claim, dated the 23rd day of January, 1934, with particulars in detail of the numerous securities held by it, but did not value such securities. By a letter dated the 4th day of January, 1934, the appellant had advised the respondents of the then amount of the indebtedness, $67,249.85, and had given a list of all the securities, and, after referring to an earlier demand for payment dated May 14, 1932, which had not been met, had stated:

> Unless some arrangement satisfactory to the Bank is made in the meantime, the Bank has determined to proceed to realize these securities commencing on the 10th of January, 1934, and as to the proceeds realized the Bank will exercise its right to apply the same on such part or parts of the indebtedness of the late Dr. Hoare to the Bank as the Bank may see fit.

No arrangement was made by the respondents satisfactory to the appellant and the appellant commenced to realize on the securities on or about 15th January, 1934. The realization was substantially completed during the month of January, though the sale of some of the securities did not occur until February. On the 26th of February, 1934, the respondents served notice on the appellant, pursuant to sec. 62 of the *Surrogate Courts Act,* that they contested the appellant's claim. The notice, entitled "In the Surrogate Court of the County of Essex," continued:

> You may apply to the Judge of this Court for an Order allowing your claim and determining the amount of it; and if you do not make such application within thirty days after receiving this notice or within such further time as the judge may allow you shall be deemed to have abandoned your claim and the same shall be forever barred.

On the 17th day of April, 1934, the appellant, pursuant to an order made by the Judge of the Surrogate Court, dated the 19th day of March, 1934, which had ordered and directed the appellant to bring an action in the Supreme Court of Ontario within thirty days for the purpose of establishing or recovering its claim against the respondents, issued the writ of summons in this action to recover payment of the amount of the deficiency following upon the sale of the securities. There is no dispute between the parties as to the amounts involved, $26,828.45 in respect of a claim upon a guarantee bond and $882.55 upon a promissory note.

The learned trial judge gave judgment in favour of the appellant, but that judgment was set aside on appeal by

the Court of Appeal for Ontario. The appellant in this Court seeks to have the trial judgment restored.

The respondents have really only one defence to the action; that is, that the appellant failed to value the securities in accordance with the respondents' demand or notice dated the 23rd December, 1933, given pursuant to new sec. 56 (2) of the *Trustee Act*, and, having sold and disposed of all or substantially all of the securities before the expiration of the time limited by the demand or notice for complying therewith, thereby lost its right to recover the amount of the deficiency resulting from the sale of the securities.

Now sec. 57 (1) of the *Trustee Act* as enacted by the *Statute Law Amendment Act, 1931*, provides as follows:

> 57. (1) Where a creditor fails to value any security held by him which under the provisions of this Act he is called upon to value, the personal representative may apply to the judge of the surrogate court from which probate or letters of administration were issued in a summary way for an order that unless a specified value shall be placed on such security and notified in writing to the personal representative, within a time to be limited by the order, such claimant shall, in respect of the claim or the part thereof for which security is held, be wholly barred of any right to share in the proceeds of the estate unless the judge upon the application of the creditor extends the time for the valuation of the security.

The respondents never applied to the Judge of the Surrogate Court for an order barring the appellant of any right to share in the proceeds of the estate. No such order is set up as an answer to the action, and it is frankly admitted that no such order was ever sought by the respondents. It is suggested that because the securities, or at least some of them, had been actually sold before the expiration of the thirty days' notice, nothing was to be gained to the respondents in applying for the order. There was some suggestion during the argument that under section 57 the Surrogate Court is bound to make an order such as provided in that section when there has been a failure on the part of the secured creditor to value securities, but I do not read the section in that way. While the personal representative may apply "in a summary way" for the order, that does not mean that the order is to be granted *ex parte* as a matter of right. It merely means that the application is to be dealt with in an expeditious manner, the same as an application for summary judgment in an action. The Surrogate Judge undoubtedly may exercise

1937

CANADIAN BANK OF COMMERCE v. MOTHERSILL ET AL.

Davis J.

his discretion, having regard to all the facts and circumstances which may be brought to his attention. But no such application was made and no such order obtained and yet the respondents set up the failure of the appellant to value the securities, pursuant to the written demand of the respondents, as a bar to the action to recover the debt.

There is no dispute that by written contract the deceased gave the appellant an express right not only to sell the securities but to look to him for any deficiency on the sale of the securities. The contractual rights and obligations are perfectly plain, and the appellant is entitled to recover the debt sued for unless there is some statutory bar arising out of the failure of the appellant to place a value on the securities in compliance with the respondents' demand of December 23, 1933. The only statutory bar is provided by sections 56 (2) and 57 (1) of the *Trustee Act* above set out. In my opinion, the respondents had no defence to the action upon the debt unless they could produce an order of the Surrogate Judge properly made under sec. 57 (1) wholly barring the appellant of any right to share in the proceeds of the estate of the deceased. That there was a breach on the part of the appellant of the statutory duty, I think is plain. The statute gave the right to the respondents in the circumstances (the good faith of the respondents' opinion that there might be a deficiency of assets is not questioned) to require the appellant to place a specified value on the securities. But this was an entirely new statutory duty imposed by sec. 56 (2) upon secured creditors of deceased persons in cases where the personal representative is of the opinion that there may be a deficiency of assets, and the statute which imposed the duty expressly provided by sec. 57 (1) a remedy for a breach of the duty. In my opinion, that is the only available relief.

Lord Esher, M.R., in *Robinson* v. *Workington Corporation* (1), said:

> It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy.

Craies on Statute Law (4th ed., 1936), at p. 220, states the general rule in these words:

> If a statute creates a new duty or imposes a new liability, and prescribes a specific remedy in case of neglect to perform the duty or dis-

(1) [1897] 1 Q.B. 619, at 621.

charge the liability, the general rule is "that no remedy can be taken but the particular remedy prescribed by the statute."

The respondents, not having obtained the statutory relief that may be given in the event of a breach of the statutory duty, had no defence upon that ground to the appellant's action to recover the amount of the contractual debt. And no other ground of defence than the breach of the statutory duty was relied upon.

The appeal must be allowed and the judgment at the trial restored, with costs to the appellant throughout.

*Appeal allowed with costs.*

Solicitors for the appellant: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondents: *McTague, Springsteen & McKeon.*