IN THE MATTER OF THE ESTATE OF JOSEPH E. ATKINSON, deceased.

1953

*Feb. 27
*Mar. 2, 3, 4
*June 8

NATIONAL TRUST COMPANY LIMITED, Executor of the Estate of JOSEPH E. ATKINSON ..... APPELLANT;

AND

THE PUBLIC TRUSTEE, THE TRUSTEES OF THE ATKINSON FOUNDATION and THE OFFICIAL GUARDIAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors and Administrators—Compensation—Passing Accounts—Appeal from Surrogate Court Judge's Order—Jurisdiction of Court of Appeal —The Surrogate Courts Act, R.S.O. 150, c. 380, s. 31(1)—The Trustee Act, R.S.O. 1950, c. 400, s. 60(3).

Where pursuant to s. 60 (3) of *The Trustee Act,* R.S.O., 1950, c. 400, the judge of a surrogate court in the passing of the accounts of an executor of an estate, fixes the allowance to be paid such executor, and as provided by s. 31 (1) of *The Surrogate Courts Act,* R.S.O., 1950, c. 380, an appeal from such award is made to the Court of Appeal, that Court may direct further evidence to be taken before the Senior Master and upon its return, set aside the allowance made, and itself determine the amount to be paid.

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APPEAL from an Order of the Court of Appeal for Ontario (1), allowing an appeal by the Public Trustee from an Order of Barton J. of the Surrogate Court of the County of York on passing the accounts of the Executor of the will of Joseph E. Atkinson, deceased. The total value of the assets of the estate amounted to $12,200,624.20 and the period of administration was approximately three years. The amount allowed the executor was $375,000. The Court of Appeal ordered the amount of compensation reduced to the sum of $149,124.57. The executor appealed to this court on the ground that the Court of Appeal was not entitled to set aside the allowance made by the Surrogate Court Judge unless some error in principle was shown.

C. F. H. Carson, Q.C. and *Allan Findlay* for the executor, appellant.

J. J. Robinette, Q.C., L. H. Snider, Q.C. and *J. D. Pickup, Q.C.* for the Public Trustee, respondent.

G. W. Mason, Q.C. for the trustees of the Atkinson Foundation.

P. D. Wilson, Q.C. for the Official Guardian.

The CHIEF JUSTICE:—I agree with the reasons of my brother Kerwin.

The judgment of Kerwin and Estey, JJ. was delivered by:—

KERWIN J.:—In passing the accounts of the appellant as executor of the estate of Joseph E. Atkinson, a Surrogate Court Judge allowed it the sum of $375,000 as "a fair and reasonable allowance for (its) care, pains and trouble and (its) time expended in or about the estate" pursuant to s-s. 3 of s. 60 of *The Trustee Act*, R.S.O. 1950, c. 400. Since by the terms of Mr. Atkinson's will property was given for a charitable purpose, the Public Trustee was interested as appears from *The Charities Accounting Act*, R.S.O. 1950, c. 50, and in accordance with s-s. 9 of s. 72 of *The Surrogate Courts Act*, R.S.O. 1950, c. 380, notice of taking the

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accounts had been served upon him. The appellant had filed in the Surrogate Court a "Statement of Compensation" reading as follows:—

Probate Value	12,200,624.20	
3% on	12,200,624.20	366,018.72
Revenue Account		
5% on	467,805.67	23,390.28
		389,409.00
Fee Asked	$ 375,000.00	

On the date fixed for passing the accounts, the Public Trustee filed a statement of "Compensation estimated by the Public Trustee on basis of completed performance by Executor of its limited duties", in which he suggested that a lump sum, not exceeding $100,000, be awarded as compensation, and gave certain figures which it was stated would be useful in arriving at such an amount. At the very outset, therefore, it was apparent that there was a dispute as to the amount of the allowance to be fixed by the judge.

By s-s. (1) of s. 31 of *The Surrogate Courts Act*:—

31. (1) Any party or person taking part in the proceedings may appeal to the Court of Appeal from any order, determination or judgment of a surrogate court or a judge thereof in any matter or cause if the value of the property affected by such order, determination or judgment exceeds $200.

Acting under this provision the Public Trustee appealed to the Court of Appeal against the amount of the allowance fixed by the Surrogate Court Judge. After a lengthy argument, the Court deemed that it and counsel would be unduly restricted in the consideration and presentation of the questions raised by the paucity of the material then available. Accordingly, in pursuance of the powers conferred upon it by s. 27 of *The Judicature Act*, R.S.O. 1950, c. 190, it directed a reference to the Senior Master at Toronto to make such inquiries as might be deemed necessary to enable the Court, on further consideration, finally to dispose of the matter. Evidence was taken on six different days before the Master and the transcription thereof and the exhibits were returned to the Court of Appeal.

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Kerwin J.

The matter came on for further argument and consideration whereupon the Court of Appeal determined that a fair and reasonable allowance was $149,124.57.

The evidence need not be detailed as it is sufficiently summarized in the reasons for judgment of the Court of Appeal (1). In view of this evidence, which had not been presented to the Surrogate Court Judge, the Court of Appeal was in a much better position than he to fix the allowance. The matters to be considered in fixing such compensation have been established for some years by decisions of the Ontario Courts, including several in the Court of Appeal, and there is really no dispute as to what these matters are or that they are not proper. It was contended, however, that the Court of Appeal was not entitled to set aside the allowance made by the Surrogate Court Judge unless some error in "principle" was shown, by which could only be meant that the Surrogate Court Judge failed to apply one or more of the applicable matters. That contention is unsound. The parties admit that five per cent on the revenue account is correct but the dispute is as to the allowance to be made otherwise. If in that connection the Surrogate Court Judge proceeded upon a percentage basis, the Court of Appeal considered that basis to be an improper one, and in the circumstances of this case we agree. If, on the other hand, he merely fixed a total amount, the Court of Appeal decided that that amount was excessive, and we consider that it had not only the jurisdiction (which was not denied), but should exercise it. We think the Court of Appeal exercised that jurisdiction properly and we are unable to say that the amount fixed by it should be increased.

The appeal should be dismissed. Not as a precedent but under the circumstances, the order as to the costs of this appeal should be the same as the Court of Appeal made with respect to the costs of the appeal before it.

RAND J.:—The Court of Appeal, to enable itself to pronounce intelligently upon the appeal from the Surrogate Court, found it necessary to direct the taking of evidence in detail to show the work done by the Trustees, its significance, its results, and the responsibility attending it, for which the fee was allowed on the passing of the accounts

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at which no such enquiry had been made. The facts disclosed were subjected to a careful appraisal. Since this is a matter peculiarly within the judicial administration of the province, it would require something patently unjust, which I cannot say I find here, before I would venture to substitute my evaluation of the services rendered for that of the Court of Appeal. Standards of fees are essentially local, and those who are familiar with their application, influenced as it is by the total surroundings, are in much the best position to make that assessment. The administration of this power may, at times, tend to become mechanical, or there may be occasions when particular adjudications appear to be so; at such times the supervisory power of the Appeal Court is properly called upon to restore substance and reality to its exercise.

I would, therefore, dismiss the appeal. All parties will be entitled to costs out of the estate, those of the appellant to be as between solicitor and client.

LOCKE J.:—I have examined with care all of the evidence taken before the Senior Master pursuant to the Order of the Court of Appeal. It cannot be said that the Court has erred in stating the principles to be applied in determining the compensation of the executor and the amount awarded is that considered by all of the learned Judges to be fair and reasonable. I have come to the conclusion that in these circumstances the judgment from which the appeal is taken should not be disturbed and would dismiss the appeal.

I would allow the parties to this appeal their costs out of the estate, those of the appellant as between solicitor and client.

Appeal dismissed. Costs payable out of estate.

Solicitors for the appellant: *Tilley, Carson, Morlock & McCrimmon.*

Solicitor for The Public Trustee, respondent: *L. H. Snider.*

Solicitors for The Trustees of the Atkinson Charitable Foundation, respondents: *Mason, Foulds, Arnup, Walter & Weir.*

Solicitor for The Official Guardian, respondent: *P. D. Wilson.*