NATIONAL TRUST COMPANY LIMITED, AND NATIONAL TRUST COMPANY LIMITED AS ADMINISTRATOR *de bonis non* OF THE ESTATE OF ANTON OSADCHUK, DECEASED (DEFENDANT)..... APPELLANT;

1942
*Oct. 29, 30
1943
*Feb. 2

AND

NICHOLI OSADCHUK AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Executors and Administrators—Trusts and Trustees—Claim by defendant, administrator of an estate, that certain mortgage investments had been made for and allocated to the estate—Transaction attacked as amounting to a sale by defendant to itself as administrator—Accounting—Interest.

This Court held (affirming a holding of the Court of Appeal for Saskatchewan, [1942] 1 W.W.R. 163) that the defendant company, the administrator of an estate, had not the right, however honest were the circumstances, to allocate to the estate as investments thereof, certain mortgage securities which had been taken by defendant in its own name for moneys advanced out of its own funds; that the transaction amounted to a sale by defendant to itself as administrator, which the law does not permit. (Also this Court expressed doubt whether the allocation was sufficiently proved).

The Court declined to hold upon the evidence, as contended by defendant, that the allocation, rather than being a disposal by defendant of securities which it had taken to itself, was in fact only the concluding step in making the investments for the estate.

It was held that, in the accounting to be made by defendant in the estate, defendant must be held to have, as funds of the estate uninvested, the sums debited to the estate for such investments, and also was liable to account for and be debited with interest thereon at 5 per cent. per annum from the date when the principal sums were so debited to the estate, with half-yearly rests down to the final passing of the accounts; and defendant could not charge for any sums expended by it in connection with the mortgaged lands or in protecting the mortgages as securities, nor should it be charged with the receipts.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) dismissing (Gordon J.A. dissenting) its appeal from the judgment of MacDonald J. (2) holding that the defendant must be held to have, as administrator *de bonis non* of the estate of Anton

(1) [1942] 1 W.W.R. 163; [1942] 1 D.L.R. 145.

(2) [1941] 2 W.W.R. 219; [1941] 3 D.L.R. 620.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Osadchuk, deceased, the sum of $3,000 (the amount of two mortgage securities which the defendant claimed it had allocated to the estate as investments thereof) of trust funds of the estate uninvested, that the plaintiffs (beneficiaries of the estate) were not chargeable with any sum or sums expended by the defendant in connection with the mortgaged lands or protecting the mortgages as security, that the accounts in the estate be referred back to the Surrogate Court to be dealt with, so far as the matters in question in this action were concerned, on the basis of his judgment, that there be a reference to ascertain what sum might properly be charged against the defendant in respect of interest or compound interest, and upon confirmation of the referee's report the defendant should be chargeable with the amount found in such report as confirmed, and in passing the accounts the Surrogate Court should debit the defendant therewith.

Glyn Osler K.C. and *E. L. Medcalf* for the appellant.

A. C. Stewart K.C. for the respondents.

The judgment of the Court was delivered by

HUDSON, J.—This is an appeal from the Court of Appeal of Saskatchewan, which, by a majority, affirmed a decision of Mr. Justice MacDonald at the trial in favour of the plaintiffs, respondents.

Letters of administration of the estate of Anton Osadchuk were granted to the appellant company on the 21st of July, 1919.

The sole beneficiaries of the estate were the three respondents, who at that time were infants of tender years.

The value of the estate coming into the hands of the appellant was estimated at $5,494 in July, 1919, and by December, 1919, appellant had funds in hand in excess of $3,500.

The respondents, having come of age, commenced this action on 3rd January, 1941, claiming a general accounting of the estate by the appellant, and in particular of the two sums aggregating $3,000 claimed by appellant to have been invested for the estate.

These investments consisted in, (1) a mortgage dated 31st December, 1919, from one William Mont Lock, covering a half section of land in Saskatchewan, to secure the repayment of $1,300; (2) a mortgage dated October 29th, 1919, from one Swaney John Thorarinson to the company, covering another half section of land, to secure the repayment of $1,700. These sums were advanced by the appellant company out of its own funds and the mortgages were taken in the company's own name.

Later, on the 18th of March, 1920, the appellant in its books debited the estate with these sums, respectively, and claims to have then allocated these mortgages to the estate. The investments turned out badly and involved a serious, if not total, loss of both amounts.

The allocation, if any was legally made, was of a very informal character and, at the trial, Mr. Justice MacDonald held that the evidence was insufficient to establish any such allocation.

However, in the Court of Appeal all the learned Judges were of the opinion that an allocation of each of the mortgages had been sufficiently proved.

In the second place, Mr. Justice MacDonald held that the transaction amounted to a sale by the National Trust Company, the appellant, to itself as administrator, and was void for that reason.

On this second point, the majority of the Court of Appeal, consisting of Chief Justice Martin and Mr. Justice Mackenzie, agreed with the trial Judge, Mr. Justice Gordon dissenting.

Having come to the conclusion that the trial Judge and the majority in the Court of Appeal are right on the second point, it is unnecessary for me to deal with the first, beyond saying that I am by no means prepared to say that the learned trial Judge was wrong in his conclusion.

On the second point, the law is not seriously in question. A number of the relevant authorities are referred to in the judgments in the courts below, and I will here add only some quotations from a very recent decision in the House of Lords: *Regal (Hastings), Ltd.* v. *Gulliver*

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and others (1), the statement of Lord Sankey at page 381, approving of Lord Eldon in *Ex parte James* (2):

> The doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In *Hamilton* v. *Wright* (3) the headnote reads:

> A trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

To the same effect are statements by other members of the House of Lords (4), particularly Lord Wright at page 393, quoting Lord Justice James in the case of *Parker* v. *McKenna* (5):

> * * * that the rule is an inflexible rule and must be applied inexorably by this Court which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

The point most strongly pressed upon us by Mr. Osler for the appellant was that the learned Judges below failed to address themselves to the question whether the transaction was the concluding step in making the investments for the estate, or whether it was a transaction by which the trustee disposed of property which it had bought for itself and found it convenient or desirable to sell to the estate.

This really is a question of fact. I have read the evidence and I do not think that it affords any room for the inference which Mr. Osler asks us to draw. The money was loaned to the mortgagors admittedly from the funds of the appellant company itself; the mortgages were taken in the name of the company; it was, therefore, perfectly free to keep or dispose of these mortgages as it pleased. In

(1) [1942] 1 All E.R. 378.
(2) (1803) 8 Ves. p. 337, at 345.
(3) (1842) 9 Cl. & Fin. 111.
(4) In *Regal (Hastings), Ltd.* v. *Gulliver, supra.*
(5) (1874) 10 Ch. App. 96, at 124, 125.

the case of one of them at least, the mortgage was taken before the appellant company had estate funds in hand to make the advance. Moreover, I am of the opinion that where, as in this case, the beneficiaries were all very young children with no one to look after their interests, there could be no justification in drawing any inference favourable to their trustee as against them.

The accounts of the estate were referred back to the Surrogate Court, to be dealt with on the basis that the appellant company must be held to have three thousand dollars of trust funds of the estate uninvested.

There was also a reference to the Registrar, directed to ascertain whether interest may properly be charged against the National Trust Company in respect of interest or compound interest.

I think the judgment below should be amended by providing that the appellant company is liable to account in the Surrogate Court for interest upon the principal sum of three thousand dollars at the rate of five per centum per annum from March 18th, 1920, with half-yearly rests down to the final passing of the accounts in the Surrogate Court, and that the Surrogate Court shall debit the appellant therewith. In dealing with these accounts, which by the judgment are referred back to the Surrogate Court, the various items therein credited by the appellant as receipts should be deleted as well as any disbursements expended by it in connection with the mortgaged lands or protecting the mortgages as securities. With this amendment, I would dismiss the appeal with costs.

Appeal dismissed with costs, with amendment of judgment below in respect of accounting.

Solicitors for the appellant: *Smith & Matheson.*

Solicitors for the respondents: *Stewart, Brown & Wylie.*