1942
*May 27, 28.

DAME MARY EDDELINE MUSSEN (PLAINTIFF) ..... } APPELLANT;

AND

CROWN TRUST COMPANY AND W. H. CLARENDON MUSSEN (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE. PROVINCE OF QUEBEC

Will—Executors—Trustees—Payment by executors to an alleged creditor of estate—Action by an heir alleging illegality of such payment—Executors taking reasonable precautions and acting "en bons pères de famille"—Executors not to be sued personally—Action by legatee must be for accounting or for "réformation de compte"—Action not for one particular act of misadministration, but must cover whole administration of executors.

An action was brought by the appellant, owner of the residue of her mother's estate, who was not entitled to any revenue from the estate until her father's death, against the respondents, the executors, personally only, in connection with the payment of certain debts made by them as such executors. The appellant prayed for a declaration that the alleged creditor could not and did not make any advances or loans to the deceased, that the executors did not legally satisfy themselves that the alleged creditor made advances or loans

*PRESENT:—Duff C.J. and Davis, Hudson, Taschereau and Rand JJ.

to the deceased, that consequently the executors personally were debtors jointly and severally liable to the estate in the sum so paid and that they be ordered to pay that sum into the capital of the estate. The judgment of the trial judge, dismissing the appellant's action, was affirmed by the appellate court.

Held, affirming the judgment appealed from ([1942] K.B. 466), that the appeal must fail. The respondents, and the trial judge so held, before making the impugned payment, took reasonable precautions and have acted "en bons pères de famille"; and the appellant has not proven the accusations of fraud and of reckless administration, as alleged in her statement of claim.

Held, also, that the appellant could not bring action against the respondents personally. Under such circumstances as in this case, the recourse of an interested party, if any, is not by direct action for a specific amount, but is by way of a demand for accounting when there has been none, or by "réformation de compte", when there has been one.

Held, also, that, under the laws of Quebec, a dissatified heir has not the right, as in this case, to sue for a particular act of misadministration, and thus unduly multiply the recourses to the courts of justice. The demand must cover the whole administration of the executors or the period for which the plaintiff is entitled to an accounting. *Davidson* v. *Cream* (27 Can. S.C.R. 362; Q.R. 6 K.B. 34).

Held, further, that the rule is, in such cases, that the defendants must be sued in their quality of executors, and not personally. It is as administrators that they owe an accounting, and their personal liability is involved only for the residue, if there is any.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Belleau J., and dismissing the appellant's action.

The appellant sued the respondents in connection with the payment of certain debts to Mussens Limited amounting to $13,894.01 and made by them as executors of the estate of her mother, the late Dame Mima L. E. Sharpe. By her action, which was taken against the respondents not as executors but personally, the appellant asked (*a*) for a declaration that Mussens Limited, could not and did not make any advances or loans of any kind to the deceased and that neither she, at her death, nor her estate at any time, was indebted to Mussens Limited in any amount whatever, save for funeral expenses; (*b*) for a declaration that the respondents, purporting to act as executors, could not and did not legally satisfy themselves that Mussens

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Limited did at any time advance or loan to the deceased the sums referred to in the statement of account; (*c*) for a declaration that the respondents, purporting to act as executors, paid the above sum of $13,894.01 to Mussens Limited in flagrant disregard of their duties and in breach of their trust, fraudulently and with full knowledge of the fraud; (*d*) for a declaration that the respondents were debtors of, and jointly and severally liable to, the estate in the said sum. The appellant then proceeded to ask for judgment ordering the respondents to pay into the capital of the estate the said sum, in default of which the appellant be authorized to execute said judgment against them jointly and severally, and the proceeds thereof to be paid into the capital of the estate of Dame Mina L. E. Sharpe, and finally for judgment in favour of the appellant against the respondents jointly and severally for the sum of $3,994.50, which would represent half the interest on the capital sum asked for, from the date of the payment to the date of the action.

Walter S. Johnston K.C. and *J. T. Fenston* for the appellant.

J. A. Mann K.C. for the respondent Crown Trust Company.

A. H. Elder K.C. for the respondent Mussen.

At the close of the argument by counsel for the appellant, and without calling on counsel for the respondents, the Court dismissed the appeal with costs.

THE COURT.—We are of the unanimous opinion that this appeal, where no question arises as to the scope of the powers of this Court to grant or refuse an amendment, must fail. We agree with the trial judge, Mr. Justice Belleau, that the executors of the estate of Mrs. W. H. C. Mussen, W. H. Clarendon Mussen, and the Crown Trust Company, the respondents, before making the impugned payment of $14,391.81 to Mussens Limited, took reasonable precautions, have acted "en bons pères de famille", and that the appellant has not proven the accusations of fraud and of reckless administration, as alleged in the statement of claim.

We are also of opinion that the appellant could not bring action against the defendants personally. Under such circumstances, the recourse of an interested party, if any, is not by direct action for a specific amount, but is by way of a demand for accounting when there has been none, or by "réformation de compte", when there has been one.

Under the laws of the province of Quebec a dissatisfied heir has not the right, as in this case, to sue for a particular act of misadministration, and thus unduly multiply the recourses to the courts of justice. The demand must cover the whole administration of the executors or the period for which the plaintiff is entitled to an accounting. (*Davidson & Cream* (1)). And the rule is also that the defendants must be sued in their quality of executors, and not personally. It is as administrators that they owe an accounting; their personal liability is involved for the residue, if there is any.

During the argument, the attention of the Court was drawn to a particular item of $1,000 which in the appellant's views has been improperly charged to capital account. The rights of the appellant to have the necessary corrections made, if there has been any error, cannot be prejudiced by this judgment, and are reserved.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John Fenston.*

Solicitors for the respondent Crown Trust Company: *Wainwright, Elder & McDougall.*

Solicitors for the respondent Mussen: *Mann, Lafleur & Brown.*

(1) (1897) 27 Can. S.C.R. 362; (1896) Q.R. 6 KB. 34