1915

*June 16.
*Nov. 2.

THE TRUSTS AND GUARANTEE COMPANY ..... APPELLANTS;

AND

CLARENCE ARTHUR RUNDLE AND OTHERS ..... RESPONDENTS.

IN THE MATTER OF THE ESTATE OF LILLY RUNDLE, DECEASED.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Appeal—Probate Court—Surrogate Court—R.S.C. [1906] *c.* 139, *s.* 37(*d*).

Under the terms of section 37(*d*) of the "Supreme Court Act" an appeal lies to the Supreme Court of Canada from the judgment of the Appellate Division of the Supreme Court of Ontario in a case originating in a Surrogate Court of that province. Idington J. dubitante.

On the merits the judgment of the Appellate Division (32 Ont. L.R. 312) was affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying an order of a Surrogate Judge on the passing of accounts.

The only substantial question decided on this appeal was one of jurisdiction, namely, whether or not the Surrogate Court of Ontario is within the terms of section 37(*d*) of the "Supreme Court Act," which provides for an appeal "from any judgment in appeal

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 32 Ont. L.R. 312, *sub nom. Re Rundle.*

in a case or proceeding instituted in any Court of Probate." The same question was raised but not decided in the case of *In re Muir Estate*(1).

The proceedings originated in the Surrogate Court when the Trusts and Guarantee Company, administrators of the estate of Lilly Rundle, applied to the Surrogate Judge of the County of York to have the accounts of the estate passed. An appeal was taken from the judge's order to the Appellate Division by which it was varied and the administrators then appealed to the Supreme Court of Canada.

The appellants applied to the registrar of the Supreme Court of Canada to have the security approved, which application was granted for the following reasons.

THE REGISTRAR.—This is an appeal from the judgment of the Supreme Court of Ontario, Second Appellate Division, in an action instituted in the Surrogate Court of the County of York. The appellant, pursuant to the "Supreme Court Act," applies to have a bond as security for his appeal allowed. No objection is taken to the form of the bond, but the sole question is whether or not the Supreme Court has jurisdiction to hear the appeal. The appellant relies upon section 37, sub-section (*d*) of the "Supreme Court Act," which provides as follows:—

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases. * * *

(1) 51 Can. S.C.R. 428.

1915

IN RE RUNDLE.

(*d*) From any judgment on appeal in a case or proceeding instituted in any court of probate in any province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars.

I am called upon first to determine whether the words "Court of Probate" used in this section include the Surrogate Court of the County of York. This provision of the "Supreme Court Act" is a consolidation of an amendment made by 52 Vict., ch. 37. The legislation probably was passed to meet the objections raised by the Supreme Court in the case of *Beamish* v. *Kaulback*(1), where it was held that the Court of Probate of Nova Scotia was not a superior court and, therefore, an appeal taken from such court to the Supreme Court of Nova Scotia was not the subject of a further appeal to the Supreme Court of Canada. At that time the "Supreme Court Act" only gave an appeal in cases originating in a superior court.

The "Ontario Surrogate Court Act," R.S.O. 1914, ch. 62, provides by section 21 as follows.

21. Subject to the provisions herein contained, every such court shall also have the same powers and the grants and orders of such court shall have the same effect throughout Ontario, as the former Court of Probate for Upper Canada, and its grants and orders respectively had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction; and all duties which, by statute or otherwise, were imposed on or exercised by such Court of Probate or the judge thereof in respect of probates, administrations and matters and causes testamentary, and the appointment of guardians and otherwise, shall be performed by the Surrogate Courts and the judges thereof, within their respective jurisdictions.

The origin of the Upper Canada Court of Probate is to be found in an Act passed 33 Geo. III., ch. 8 (1793), which constituted a

(1) 3 Can. S.C.R. 704.

Court of Probate with full power and authority to issue process and hold cognizance of all matters relating to the granting of probates and committing letters of administration and to grant probates of wills and commit letters of administration of the goods of persons dying intestate having personal estates, rights and credits within this province, to be called and known by the name of the Court of Probate of the Province of Upper Canada.

The Governor, Lieutenant-Governor, or person administering the government, presided over the said court and he was given power to appoint an official principal of the court together with a Registrar and necessary officers. By the second section of the same Act, for the convenience of the inhabitants of the province, the Governor, etc., was authorized to appoint a Surrogate Court in each district for the purpose of granting probates and letters of administration presided over by a Surrogate judge. By the 16th section an appeal lay from the Surrogate Court to the judge of the Court of Probate.

In 1858 by 22 Vict., ch. 93, the Probate Court was abolished and the jurisdiction in relation to the granting and revocation of probates and wills and letters of administration was vested in the Surrogate Courts of the province and this has continued the law down to the present time.

At the time *Beamish* v. *Kaulback* (1) was decided, the Court of Probate in the Province of Nova Scotia was substantially identical with the Surrogate Court in the Province of Ontario (R.S.N.S., ch. 395). There was a judge and a Registrar of Probate in each county and the jurisdiction of these judges covered all matters relating to the probate of wills and administration of intestate estates. I am, therefore, of the

(1) 3 Can. S.C.R. 704.

1915

IN RE RUNDLE.

opinion that the words "Court of Probate" used in the "Supreme Court Act," are not to be limited to courts bearing the name of Probate Courts, but apply to Surrogate Courts in other provinces, having similar jurisdiction.

The second point I have to determine is whether this is "an action, suit, cause, matter or other judicial proceeding" or a "case or proceeding" within the meaning of section 37 of the "Supreme Court Act." Mr. Raney contends that it does not fall within that expression; that what the judge has done, has been simply to make an audit of the administrators' accounts and that his action was in no sense judicial. I cannot accede to his argument. The Century Dictionary defines "judicial" as follows:—

> Pertaining to the administration of justice, proper to a court of law; consisting of or resulting from legal inquiry or judgment as judicial power or proceedings.

Webster defines "judicial" as

> practiced or employed in the administration of justice as judicial proceeding.

See also the judgment of this court in *Turgeon* v. *St. Charles*(1).

The facts of this case as disclosed by the judgment of the Court of Appeal, reported in 32 Ont. L.R. p. 312, would appear to be that a dispute arose between the plaintiff and the trust company with regard to an item of $1,100 advanced by the trust company to the infant Rundle out of the corpus of his estate. When the boy became of age, he executed a release to the company for what they had undoubtedly done without warrant or authority, and the administrators'

(1) 48 Can. S.C.R. 473.

accounts were duly audited and passed by the Surrogate Court of the County of York. An action was taken in the High Court to set aside this release and I understand a consent judgment was made by the Honourable Mr. Justice Latchford as follows:—

1. This court doth declare that the order made by Edward Morgan, Esquire, acting judge of the Surrogate Court of the County of York, on the 22nd day of December, 1909, on the auditing and passing of the accounts of the defendants, as administrators of the estate of Lily Rundle, and as guardian of the said Clarence Arthur Rundle, is not binding upon the plaintiffs and that the plaintiffs are entitled to have the said accounts re-taken and re-audited in the said Surrogate Court.

2. And this court doth order that the costs in this action be paid as the judge of the Surrogate Court of the County of York shall determine on the re-taking and re-auditing of the said accounts.

Proceedings were thereupon taken *de novo* by the administrators to pass their accounts before His Honour Judge Winchester, Judge of the Surrogate Court of the County of York. The proceedings are regulated by the Surrogate rules and the petition and affidavits supporting the same and all the subsequent proceedings were carried on under the style of cause "in the Surrogate Court of the County of York." The judge of that court, after reciting the proceedings before him, made an order on the 29th May, 1914, which is the subject of this appeal, in which he made a finding as to the receipts and expenditures of the administrators and directed that the costs which had been referred to him in the judgment of Mr. Justice Latchford, should be paid out of the estate as well as the costs of the administrators in connection with the auditing and passing of accounts.

The "Surrogate Act," R.S.O., ch. 62, sec. 34, provides by sub-section 1 as follows:—

1915

IN RE RUNDLE.

Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court.

Sub-section 5 provides that:—

An appeal shall also lie from any order, decision or determination of the judge of a Surrogate Court on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court, and the practice and procedure, upon and in relation to the appeal, shall be the same as upon an appeal from such a report.

I would interpret these provisions for appeal to be that sub-section 1 has reference to an appeal from the final order, determination or judgment of the court, while sub-section 5 is an interlocutory appeal which may be taken during the course of the audit before the judge. Mr. Raney contends that the order made by the Surrogate judge was an order made under sub-section 5 and that sub-section 1 has reference only to contestations between plaintiff and defendant in such cases as a proceeding in proof of a will in solemn form or where a will is attacked on the ground of undue influence or want of capacity. I do not think this distinction is sound and I hold that the order in this instance made by the Surrogate judge is an order within the provisions of subsection 1 of section 34 of the "Surrogate Act" and is a judgment in a "judicial proceeding" and "is a case or proceeding instituted in a Court of Probate" within the meaning of section 37 of the "Supreme Court Act."

It is to be noted that the appeal under sub-section 5 would be to a judge of the Supreme Court of Ontario, whereas the appeal under sub-section 1 is to the full Court and that in the present case Mr. Raney's clients (so far as the papers and proceedings before me disclose) treated the judgment in question as one

under sub-section 1 because the appeal was taken direct to the Court of Appeal, which has by the new "Judicature Act" been substituted for the Divisional Court instead of being taken to a single judge.

This point being determined in favour of the appellants no further question remains as to the amount involved as admittedly it is over $500. The security is, therefore, allowed with costs.

(Sgd.) E. R. CAMERON.

Rowell K.C. for the appellant.
Hales for the respondents.

THE CHIEF JUSTICE.—An important question of jurisdiction is raised on this appeal, which I think should be determined, although I am of opinion that the appeal should be dismissed on the merits.

The "Supreme Court Act," section 37(*d*), provides for an appeal to this court

from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed $500.

It is true that this legislation originated by reason of a decision of this court in *Beamish* v. *Kaulbach* (1), where it was held that the Court of Probate in Nova Scotia was not a superior court, but the language of the amending statute shews that it was not intended to apply solely to the Maritime Provinces where alone the term "Court of Probate" is used for courts having jurisdiction over estates of deceased persons, the language of the statute being

any Court of Probate in *any* province of Canada.

(1) 3 Can. S.C.R. 704.

1915

IN RE RUNDLE.

The Chief Justice.

In the Province of Ontario prior to 1858, the court having jurisdiction over the estates of deceased persons was called *eo nomine* "the Court of Probate," but after that date its name was changed to the Surrogate Court, and to-day the Revised Statutes of Ontario by ch. 62, sec. 21, in conferring jurisdiction upon the Surrogate Court provide that such court shall have the same powers as the former Court of Probate for Upper Canada.

I am, therefore, of opinion that the Surrogate Court in Ontario is included in the expression "Court of Probate" in the "Supreme Court Act."

DAVIES J.—The judgment of Chief Justice Mulock speaking for the Second Appellate Division of the Supreme Court of Ontario in this case is quite satisfactory to me and I agree in the disposition of the appeal made by that court. I am more glad to find myself in accord with the judgment appealed from because of the ever increasing appointments of trust companies as trustees and executors of the wills of deceased persons and administrators of their estates and the great necessity which exists for impressing upon these companies that while there may be pecuniary advantages arising out of such appointments, there are also necessary liabilities calling for the exercise of reasonable prudence, skill and attention on their part.

On the argument of the appeal a very important question was raised as to our jurisdiction to hear appeals in actions originating in the Surrogate Court of Ontario.

The same point was raised before the Registrar of this court who, after hearing argument on the

1915

IN RE RUNDLE.

Davies J.

point by counsel, affirmed our jurisdiction. I have read his reasons for judgment and agree with them.

The jurisdiction of this Court is to be found in the 37th section, sub-section (*d*), of the "Supreme Court Act," which provides for an appeal to this court

> from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed $500.

This sub-section (*d*) was no doubt enacted in consequence of the judgment of this court in *Beamish* v. *Kaulbach* (1), which held that the Probate Court of Nova Scotia was not a Superior Court and, therefore, an appeal did not lie here from a judgment of the Supreme Court of Nova Scotia in a matter or controversy originating in the Probate Court.

In the Province of Ontario there is no court called the Probate Court. The court which formerly existed there under that name was abolished in 1858 and its jurisdiction with respect to the granting and revocation of probates of wills and letters of administration, etc., was vested in the Surrogate Courts of the province. That jurisdiction still continues and is to be found in the Revised Statutes of Ontario, 1914, ch. 62, secs. 19, 20 and 21.

The latter section expressly provides that every such surrogate court shall have the same powers, etc., and its grants and orders the same effect as the former Court of Probate for Upper Canada had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction, and that all duties which by statute or otherwise were exercised

(1) 3 Can. S.C.R. 704.

1915

IN RE RUNDLE.

Davies J.

by such Court of Probate or the judge thereof in respect of probates, administration and matters and causes testamentary and the appointment of guardians and otherwise should be performed by the Surrogate Courts.

These latter courts were substantially the same courts as the probate courts, though under another name, and if the legislature has somewhat added to their jurisdiction, such addition cannot, in my opinion, affect the right of appeal under the "Supreme Court Act."

I think the section of the "Supreme Court Act" quoted above applies to these surrogate courts of Ontario (so called) and are not to be limited to those courts in some of the provinces such as Nova Scotia exercising the same jurisdiction and called "probate courts."

It is a mere question of name only, not of substance. The courts are the same courts: their jurisdiction covers the same subject matters. The only difference lies in the name given to the courts, and in Ontario it is expressly enacted that their powers and duties shall embrace all those of the old probate courts.

I would dismiss the appeal with costs.

IDINGTON J.—This appeal is from the judgment of the Appellate Division of the Supreme Court of Ontario reversing an order of the judge of the Surrogate Court of the County of York made as a result of his passing the accounts of the appellant as an administrator and guardian appointed by the said court.

The first question to be considered is our jurisdic-

tion to hear such an appeal. Any we have must rest on section 37, sub-section (*d*), as follows:—

(*d*) From any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed five hundred dollars,

first enacted in 1887 by 50-51 Vict. ch. 16, and probably as result of the decision of this court in the case of *Beamish* v. *Kaulbach*(1), where it was held no appeal would lie to this court from a Court of Probate of Nova Scotia, inasmuch as it was not a superior court within the meaning of the "Supreme and Exchequer Court Act." The issue in that case was the validity of a will.

The meaning of this enactment came in question in the recent case of *In re Muir Estate*(2). In that case as the parties were evidently on their way to the Judicial Committee of the Privy Council and only calling here as at a half-way house, neither side cared to have the question raised, for they desired and got the opinion of this court on the main issues raised in appeal without any very express decision being reached by the court on the question of jurisdiction.

I, however, then examined that question in its bearing upon that case and set forth my views to which I may be permitted to refer without repeating them at length here.

This case is, however, essentially different from what was involved therein. That went to the question of the jurisdiction of the Surrogate Court in Manitoba granting probate before or until the succession duties were provided for.

(1) 3 Can. S.C.R. 704. (2) 51 Can. S.C.R. 428.

1915

IN RE RUNDLE.

Idington J.

This, however, is of an entirely different character. The issues raised herein have nothing to do with the grant of administration.

It is assumed that grant was rightfully made and is no way in question.

In Ontario the judges of the surrogate courts have, as results partly of the development of practice and partly of statutes passed since the above quoted amendment to the "Supreme Court Act," obtained very extensive powers over the administration of estates concurrently with what still exists in the Supreme Court and formerly existed almost entirely in the Court of Chancery, and later, after the passing of the "Judicature Act," in the High Court of Justice in virtue of its equity jurisdiction.

The outline of the story of how that has come about is somewhat thus:—

Administrators were always required to give a bond with sureties for the due administration of the estates entrusted to them and to exhibit an inventory of the estate and make, or cause to be made, a true and just account of the administration when required.

Any one aggrieved by misconduct in any such regard might apply to the surrogate judge to obtain an assignment of the bond in order to bring an action upon it.

Incidentally thereto the judge might have to examine the accounts of the administrator to ascertain if there was reason to believe there had been such a breach of the condition of the bond as entitled the applicant to its assignment. There was no final adjudication upon the rights of the parties arising out of the accounting in such a proceeding. All it in-

volved might be whether a *primâ facie* case had been made out. Or possibly the rights had been determined by the Court of Chancery in the course of an administration suit and the establishment therein of what constituted a breach of the condition of the bond which the sureties were then called upon to make good.

Ever since 1859 the surrogate judges had power to make allowances to the administrator, executor or trustee in the way of compensation for his services upon his passing his accounts.

These provisions tended to the development of a practice of passing accounts, but, if my memory serves me correctly, there was nothing final therein in the way of determining the rights or liabilities of the administrator till comparatively recent legislation, of which 10 Edw. VII., ch. 31, sec. 71, is now, in R.S.O. 1914, ch. 62, sec 71, the outcome.

I may, in passing, point out that the administration of estates, originally part of the exclusive jurisdiction of the Court of Chancery, and later, after law and equity courts were consolidated by the Judicature Acts, of the High Court, has in practice, without depriving the higher courts of jurisdiction, largely passed by virtue of a few minor, but growing, powers, aided by numerous statutes, into the surrogate courts of Ontario.

These statutory provisions promoted a less expensive mode of administration than had prevailed in the Court of Chancery or the High Court of Justice.

I doubt if the legislature of the province ever desired that in aiding such development as a means of the economical administration of justice, in that regard, it desired an appeal to exist to this court as part of the system.

1915

IN RE RUNDLE.

Idington J.

Of course it matters little what they desired if the legal result of a correct interpretation of the above quoted amendment brings that about.

I may suggest, however, that I hardly think Parliament would have intended to bring about any such undesired and undesirable result.

The local Legislatures can remove many subjects of litigation from the jurisdiction of this court by providing, through inferior courts, for the judicial determination of matters which formerly were and still are subject matters to be dealt with in superior courts.

Important litigation finds its way to the superior courts in any case where the parties so desire.

Now are we, by a side wind as it were, to gather in appeals originating in the inferior courts as well as those originating in the superior courts ?

This appeal is a very good illustration of the probable result of such a development.

I cannot think it ever was the intention of Parliament to bring about such a result.

I think all that was intended by the amendment in question was to give an appeal in cases that belonged, properly speaking, to the courts of probate as such.

The validity of a will must always be an important question and trials of issues which involved that in cases, where as in Ontario the amount of the estate in controversy must exceed a thousand dollars, probably was all the amendment extended to.

If, for example, the judges of the county courts, who are generally judges of surrogate in their respective counties, were called only judges of surrogate and

1915

IN RE RUNDLE.

Idington J.

their jurisdiction as judges of county courts by process of consolidation were transferred to them as judges of surrogate, would that enable appeals in all cases now within county court jurisdiction to be brought here ?

The case of *Daly* v. *Brown*(1) was referred to in the argument herein and if the point had been raised therein and decided I should feel bound to follow it. No such question, however, was raised. A question was raised of the jurisdiction of the provincial court, but none as to the competence of this court.

For my own part I confess I was, until the question was raised in *In re Muir Estate*(2), under a vague impression that the amendment was intended only to apply where, as in the Maritime Provinces, the courts were designated "Probate Courts."

The fact that the amendment stood so long without any litigant, in a province where the courts of probate are called "Surrogate Courts," attempting to come here by virtue of it, seemed to lend *primâ facie* a colour to this idle notion.

My examination of the question in that case convinced me for reasons I therein assigned that such a construction was untenable.

To say the least the jurisdiction in such cases as this must be exceedingly doubtful; and it has ever been the rule of this court where the jurisdiction was doubtful not to exercise it.

I conclude, therefore, for the foregoing reasons this appeal should be dismissed, but without costs as the point was not taken by appellant and hence not argued as it might otherwise have been.

(1) 39 Can. S.C.R. 122. (2) 51 Can. S.C.R. 428.

1915

IN RE RUNDLE.

Duff J.

DUFF J.—I think the Appellate Division has drawn the line a little more narrowly than I should have done. The Ontario courts, however, appear to have found from experience that the practice of requiring guardians to obtain antecedent sanction with regard to extraordinary expenditures must be strictly insisted upon for the protection of the property of infants on pain as a rule of the guardian establishing to a demonstration and entirely satisfying the conscience of the court as to the propriety of the payments not so sanctioned; and although this practice cannot be strictly said to be enjoined by law, yet if followed with reasonable regard to special circumstances, it is not necessarily out of harmony with the law and this court ought not to interfere with a judgment pronounced in the spirit of this settled practice unless it appears that some injustice has been done. I concur in dismissing the appeal.

As to jurisdiction I think "Court of Probate" in section 37(*d*) denotes any court exercising a general probate jurisdiction.

It does not follow that every judgment or order of such a court is appealable; but the judgment now before us is, I think, well within the purview of the sub-section.

ANGLIN J.—For the reasons which I stated in *Standard Trusts Company* v. *Treasurer of Manitoba* (1), during the argument of this appeal I doubted our jurisdiction to entertain it. I cannot yet believe that Parliament intended by the amendment now embodied in clause (*d*) of section 37 of the "Supreme

(1) 51 Can. S.C.R. 428.

1915

IN RE RUNDLE.

Anglin J.

Court Act" to confer a right of appeal from the provincial Appellate Court to this court in cases originating in the surrogate courts of Ontario whenever the matter in controversy amounts to or exceeds $500. Cases originating in other inferior courts in that province cannot be brought here whatever the amount involved; and where the right of appeal in proceedings originating in the Supreme Court of the province is dependent upon the amount in controversy it must exceed $1,000. To allow costly appeals to this court in mere matters of summary accounting in the Ontario Surrogate Courts is destructive of the purpose for which this jurisdiction was given to those courts. It seems to me deplorable that the allowance or disallowance of an item of $500 by a surrogate judge auditing the accounts of an executor, administrator or guardian may be made the subject of an appeal to this court. Yet, upon mature consideration, I am unable to say that an Ontario surrogate court is not a "court of probate," or to find any sufficient ground for denying a right of appeal which clause (*d*) of section 37 purports in explicit terms to give.

Upon the merits, except in regard to two items, I think the appeal cannot succeed. It would be most unfortunate were anything that we might do to encourage a departure from the wholesome practice which requires guardians of infants to obtain the prior sanction of the court to any encroachment on the capital of the estates of their wards, or a relaxation of the tacit rule prescribing that when such prior sanction has not been obtained guardians seeking to have expenditure made out of capital allowed must establish by the clearest and most convincing proof

1915

IN RE RUNDLE.

Anglin J.

that an order sanctioning it would have been made had it been applied for in advance. The appellants failed to satisfy the judges of the Appellate Division that they would have obtained such an order in regard to a large part of their expenditures in the present case, and in the disallowance by that court of all the items in question except two I have not been convinced that there has been any error.

One of the two excepted items is a sum of $100 deducted from the commission of $500 allowed by the Surrogate Court judge to the appellants, who were administrators of the estate of Lilly Rundle and guardians of the estate of her son, as he says in recompense for their services

> in dealing with the estate and handing the balance over to the plaintiffs.

The deduction was made by the Appellate Division on the assumption that of the $500 commission allowed $100 was for the services of Mr. Warren as guardian of the person of the infant. With respect, I find nothing whatever in the record to warrant that assumption and I think it should not have been made.

The other item is the allowance by the judge of the Surrogate Court to the appellants of the costs of an action brought by Clarence A. Rundle against them to set aside a release which they had obtained from him. The appellants acceded to this claim and judgment was pronounced by consent setting aside the release, and, presumably, to avoid the necessity of any consideration of the merits of the action in the High Court Division, referring the question of the costs of it to the judge of the Surrogate Court to whom the taking of the accounts was remitted. In

dealing with these costs of proceedings in another court I think the Surrogate Court judge acted as *persona designata* and that his disposition of them, however erroneous it may be deemed, was not subject to appeal. Both these items should be allowed to the appellants. Subject to this modification I think the appeal fails and should be dismissed. But in view of the result there should be no costs to either party.

BRODEUR J.—I am of opinion that the judgment *a quo* should be confirmed.

It has been found, it is true, that the minor, Charles A. Rundle, deceived the company appellant; but it was also the duty of the company, as guardian of his property, to look after his proper maintenance according to his position in life.

If the expenditure for the maintenance had not exceeded the income of the infant's property, no serious blame perhaps could be made to the guardian. But the expenditure exceeded largely the income; it was not made according to the position in life which the minor occupied before his mother's death and it developed in the young boy very bad habits which have perhaps affected his future.

Besides, that money was expended without the guidance and the authorization of the court.

Appeal dismissed with costs.

Solicitors for the appellant: *Rowell, Reid, Wood & Wright.*

Solicitors for the respondents: *Mills, Raney, Hales & Irwin.*