

In the result, the appeal as against the banks was dismissed, MACLAREN, J.A., dissenting; and the appeal as against the trusts company allowed, MEREDITH, J.A., dissenting.

HIGH COURT OF JUSTICE.

MIDDLETON, J.

DECEMBER 29TH, 1911.

RE LEYS.

Will—Legacies Payable out of Income of Estate—Investment in Shares of Trading Company—Profits of Business of Company—Apportionment between Income and Capital—Dividends Paid not Representing Income.

Petition by nephews and nieces of John Leys, deceased, beneficiaries under his will, for a direction that the profits of the business, in the petition referred to, earned since the testator's death, but not distributed, be declared income, and that the amount thereof be paid to the petitioners, subject to any arrears due to the testator's widow and to Harriet Geddes.

T. P. Galt, K.C., for the petitioners.

H. S. Osler, K.C., for the Official Guardian.

MIDDLETON, J.:—The testator died on the 29th January, 1892. By his will he gave certain annuities during the life of his wife, payable out of income, and directed that the residue of income should be divided among his nephews and nieces. Upon the wife's death, the estate is to be divided (after setting apart a certain sum) between the nephews and nieces then living and the child or children of any then deceased; and, if all die without leaving issue, then the estate is to be divided among the next of kin living at the wife's death.

At the time of the death, the testator held \$140,000 of the capital stock of a certain company—\$310,000 represented the total paid-up capital. The assets of this company were nominally \$762,292, and outside liabilities \$351,289, leaving a surplus of \$374,902, or \$64,902 more than the capital. The real situation of this company was such that the stock could not be sold; and the directors deemed it prudent to reduce the liabilities. Accordingly, with the concurrence of the executors, no dividends were declared, save on four occasions, from the date of the death till 1908, when the business was sold, the purchaser paying par for the stock.