

Date: 20010509
Docket No.: CAC 167630

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Saunders, 2001 NSCA 87]

Freeman, Chipman and Flinn, J.J.A.

BETWEEN:

EDMUND RALPH SAUNDERS

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: The appellant in person, for the appellant
Peter P. Rosinski, for the respondent

Appeal Heard: May 9, 2001

Judgment Delivered: May 9, 2001

THE COURT: Appeal dismissed per oral reasons for judgment of
Freeman, J.A.; Chipman and Flinn, J.J.A. concurring.

FREEMAN, J.A. (Orally):

[1] The appellant Edmund R. Saunders, formerly a lawyer of some forty years standing, has appealed his conviction on a charge of theft of more than \$5000. from the estate of Dorothy Crouse, contrary to s. 334 of the **Criminal Code**, while acting as executor. He was sentenced to a 12-month conditional sentence.

[2] He acknowledged taking more than \$100,000. from the estate in several transactions which he covered by placing promissory notes in appropriate amounts in the estate file. The money was used to pay mortgages on his daughter's property, his own property, and to settle a claim against him respecting another estate. He says he had assets sufficient to cover the withdrawals and in November, 2000, he repaid the estate \$125,000. to settle a \$133,000. judgment the estate obtained against him after his removal as executor.

[3] Under s. 322(1)(a) of the **Criminal Code** theft includes the temporary deprivation of the owner or a person with a special property interest in the thing stolen.

[4] Mr. Saunders argued on appeal, as he did at trial, that all the estate assets were vested in him as executor and he could do with them anything the testatrix could have done, if living, provided he did not waste the estate and could account for all the assets at the time of closing. Until that time, beneficiaries had no legal right or control over the estate. He asserted it was not possible for an executor who met those conditions to steal from an estate while still entitled to possession and control of the assets. But even if theft could occur, the Crown had not proven that Mr. Saunders did not have an honest but mistaken belief in his ability to deal with the estate money as he did. He had no intent to deprive the estate, or any owner of the funds or a person having a special interest in them, because he created promissory notes to cover money he used for his personal purposes.

[5] These devious arguments do not require lengthy treatment. They are subsumed by the overarching duty of the executor to act as an honest trustee and to bring to his tasks the fiduciary's standard of utmost good faith. Estate assets are things set apart from an executor's own property and must be handled so they are immune to any ill fortune that might befall the executor personally. They are not on loan from the testatrix, or the estate, to the executor, and the beneficiaries should not have been exposed to concern as to Mr. Saunders' ability to repay his

promissory notes. When an executor removes estate funds from the estate and uses them for his own purposes, whatever those purposes may be, and however briefly, in our view he commits theft.

[6] In a revealing passage of his testimony Mr. Saunders stated:

I have, and I still stand behind that, that an executor should not be entitled to do what I did do, but I say an executor is entitled to do it as I did, but I think there should be some way of controlling an executor so that he wouldn't invest in such things. But under our current law an executor has absolute jurisdiction over those funds, the same as the testatrix would have if she was here, and I say I was not doing anything that she could not have done if she was here.

[7] Justice Davison did not accept the appellant's position that he was ignorant of the civil law:

As I have stated, I don't accept the evidence of the accused. His answers to questions were evasive, the steps he took in these proceedings, and the manner in which he exercised his role as trustee impairs any chance of my accepting that evidence. I do not believe he used the funds for any benefit to the estate or the beneficiaries. I do not believe that he believes he was correct according to the civil law.

In my view, the Crown has proved beyond a reasonable doubt all of the elements of theft.

[8] In our view Justice Davison committed no reversible error of fact or law and we endorse his judgment. The appeal is dismissed.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.