

17, 1934

In the Privy Council.

No. 59 of 1933.

CANADIAN
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APPELLANTS' CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

KENNETH DESOLA JOSEPH and PAULINE
JOSEPH, Executor and Executrix of the
last will and testament of Abe Lyons,
deceased (Defendants) Appellants,

AND

ESTHER PHILLIPS (Plaintiff) Respondent.

APPELLANTS' CASE.

1. This is an appeal from a judgment of the Court of Appeal for Ontario dated 3rd October, 1932, allowing an appeal from a judgment of the Honourable Mr. Justice Orde dated 18th September, 1931, dismissing the action. The appeal relates to the interpretation of the will of the late Abraham Lyons who died in Toronto on 26th July, 1930. Record-
p. 57.
pp. 49-50.

2. The last will of the testator dated 16th June, 1928, contained the following bequest in favour of the Respondent :— p. 70, l. 26.

10 “ I bequeath my personal effects in my room, including pictures,
“ roll-top desk and chiffonier complete with their contents to my
“ niece Esther Phillips, wife of Nathan Phillips.”

3. The desk at the testator's death contained such things as neck-ties, family pictures, books, correspondence, note-paper and a small amount of silver money, stamps, etc. Shortly before the death nine promissory notes and three Bank pass books, one for an account in the Dominion Bank and two for accounts in the Bank of Montreal were in the desk. The testator at his death had on deposit in the three bank accounts a total sum of \$30,575.62 which the Respondent claims under the above bequest. p. 5, l. 41.
p. 6, l. 35.
p. 9, l. 9.
p. 12, l. 1.
p. 19, l. 1.
p. 8, l. 26.

- Record.
p. 72, l. 40. **4.** The pass books contained a record of the sums paid in to the accounts and the withdrawals therefrom. Regulations printed on the books stipulated that "fifteen days' notice of withdrawal will be required if necessary" and that "the pass books must be produced whenever any business is transacted." The common practice in Canada is not to require production of Savings Bank Pass Books. Withdrawals are made by cheques cleared through the Clearing House as in the case of cheques on ordinary commercial bank accounts.
- p. 73, l. 3.
p. 34, l. 18.
p. 56, l. 30.
- p. 15, l. 22. **5.** The Appellant, Pauline Joseph, and the Respondent are sisters and were nieces of the testator. The Appellants, Kenneth DeSola Joseph and 10 Pauline Joseph, are husband and wife.
- p. 70, l. 30.
p. 5, l. 14.
p. 16, l. 24.
p. 5, l. 6. **6.** The testator was a member of the firm of Lyons and Marks, Merchants, and spent most of his time out of town selling goods, returning to Toronto only for week-ends. He was a bachelor and at the time of his last illness lived alone in a room on Euclid Avenue, Toronto.
- p. 4.
p. 5.
p. 15, l. 41.
p. 9, l. 1. **7.** For some time before his death the testator had been in close relationship with the Appellant, Kenneth Joseph, who visited him regularly each week-end and deposited small sums of money for him in the account in the Dominion Bank.
- p. 38, l. 35.
p. 68.
p. 39, l. 6.
p. 39, l. 43. **8.** Two days before making his last will Mr. Oscar King, a Solicitor, 20 acting for the Testator, obtained from Mr. Nathan Phillips, a Solicitor, the Respondent's husband, bonds and securities of the amount of \$51,250 and certain documents including his will dated 18th July, 1925. Mr. King then arranged with the Dominion Bank to keep these papers and securities in a safety deposit box until the testator returned to the City. When the testator returned, Mr. King prepared a new will and it was executed.
- p. 70. **9.** By his last will (16th June, 1928) the testator made bequests to numerous relatives including that contained in the clause in question and gave to the Appellant, Pauline Joseph, \$15,000 ; to the Respondent \$5,000 ; to each of the children of Pauline Joseph and the Respondent \$500 and the 30 residue in equal shares to Kenneth and Pauline Joseph who were appointed executor and executrix.
- p. 22, l. 11.
p. 26, l. 7. **10.** On the day the will was made the testator arranged to retain the safety deposit box at the Dominion Bank in the joint names of himself and the Appellant, Kenneth Joseph, each of whom had a key. Thereafter Mr. Joseph on behalf of the testator opened the box each month to detach coupons from the securities or obtain the promissory notes which were changed from time to time.
- p. 6, l. 3. **11.** About a year before his death the testator gave Mr. Joseph the keys of his desk so that certain valuables could be taken therefrom and at 40 the same time asked Mr. Joseph to obtain and keep a duplicate key to one of the compartments in case anything should happen to him (the testator).

The bank pass books, the nine promissory notes and a small ledger containing a record of debts owing to the testator were usually among the contents of the left-hand drawer. Record.
p. 8, l. 3.
p. 28, l. 21.
p. 20, l. 18.

12. The testator became ill during the early days of June, 1930, and went to the hospital about 8th June, remaining there until his death on 26th July, 1930. During that time he had not sufficient mental capacity to look after his affairs. On the day following the testator's removal to the hospital, Mr. Marks, his partner, and Mr. Oscar King, the solicitor, knowing Mr. Joseph's relations to the testator, asked him to take care of the testator's p. 11, l. 27.
p. 16, l. 30.
10 affairs. Mr. Joseph obtained the three bank books from the desk, had the books brought up to date by the banks and deposited them along with the small ledger and the nine promissory notes in the safety deposit box. From then until the testator's death Mr. Joseph looked after the disbursement p. 11, l. 31.
p. 18, l. 32.
p. 12, l. 3.
p. 19, l. 29. and collection of moneys on behalf of the testator. p. 40, l. 40.
p. 12, l. 25.

13. A bequest of personal effects, the roll-top desk and its contents was made by the testator in previous wills, the gift at one time being to his sister; at another time to his housekeeper and still later to his niece, Mrs. Phillips. p. 63, l. 6.
p. 64, l. 17.
p. 66, l. 16.

14. The Wills Act of Ontario contains the following provision (R.S.O. 20 1927 Chapter 149) :—

“ 26—(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.”

15. The action was tried before the Hon. Mr. Justice Orde. He was of opinion that the removal of articles from the desk just before the testator's death did not remove them from the ambit of the gift. He did not find cases relating to *donatio mortis causa* of much assistance. He referred to the difference between a bank book which is not a security and instruments p. 44.
p. 46, l. 41.
p. 47, l. 19.
30 such as mortgages and a banker's deposit receipt which are themselves securities. In his opinion the whole clause is controlled by the words “ my personal effects in my room ” and these words included things of a personal character such as furniture, clothing, jewellery, etc., and not assets of an intangible nature like choses in action. He thought it inconceivable that the testator meant to give so large a sum as \$30,000 to any beneficiary by such p. 47, l. 45.
p. 48, l. 20.
p. 48, l. 35. a method and dismissed the action.

16. The plaintiff appealed to the Court of Appeal for Ontario (Mulock C.J.O., Masten and Grant J.J.A.). The Chief Justice thought the Appellant, Kenneth Joseph, had no right to remove the bank books and promissory p. 52, l. 33.
40 notes from the desk to the safety deposit box and that these must be treated as being in the desk at the date of the testator's death. In his view the language of the testator in giving to the plaintiff “ the roll-top desk and chiffonier complete with their contents ” was but another way of saying “ all their contents whether or not they are personal effects in my room.” p. 52, l. 41.

Record.
p. 54, l. 30.

He was of opinion that the bank pass books constituted a contract between the testator and the bank and were subjects of a good *donatio mortis causa* and held that the Respondent became entitled to the moneys in the banks and the promissory notes.

p. 56, l. 11.

Masten J.A. agreed with the Chief Justice.

p. 56, l. 12.

Grant J.A. also agreed with the Chief Justice save that he was in doubt whether the bequest should be construed as bestowing moneys in a savings bank because the bank pass books were in the desk. The pass books appeared to him to be little more than statements of account between the parties and he was unable to concur in the view that a savings bank pass book is in 10

p. 56, l. 26.

substance and effect equivalent to a deposit receipt. With reluctance he

p. 56, l. 41.

felt he should follow the decisions referred to by the Chief Justice and adopt his conclusion.

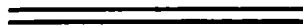
17. The Appellants submit that their appeal should be allowed for the following among other

REASONS.

1. Because the gift was of personal effects only.
2. Because the gift of bank pass books does not include moneys on deposit in the Banks.
3. Because the bank pass books were merely records of the 20 moneys deposited and withdrawn.
4. Because choses in action were not included in the gift.
5. Because the gift included only the contents of the desk at the death.
6. Because the judgment of Mr. Justice Orde was right.

W. N. TILLEY.

C. F. H. CARSON.



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(Defendants) Appellants,

AND

ESTHER PHILLIPS - *(Plaintiff) Respondent.*

APPELLANTS' CASE.

BLAKE & REDDEN,

17, Victoria Street,

S.W.1.