17, 1934

In the Privy Council

No. 59 of 1933.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN:

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

—and—

ESTHER PHILLIPS,
(*Plaintiff*) *Respondent.*

CASE FOR THE RESPONDENT

RESPONDENTS CASE.

RECORD.

1. This is an appeal from the judgment of the Court of Appeal for Ontario dated the 3rd day of October 1932 reversing the judgment of the Honourable Mr. Justice Orde dated the 18th day of September 1931, which dismissed the Respondent's action. p. 57. p. 49.

2. This action was brought by the Respondent against the Appellants for an accounting by the Appellants for all things removed by them from a roll top desk and chiffonier belonging to one Abe Lyons, which articles were removed by the Appellants shortly prior to the death of the said Abe Lyons; for a declaration that the Respondent was entitled under the terms of the will of the said Abe Lyons to three savings bank receipt books and the moneys represented thereby, promissory notes, mortgages and cash removed by the Appellants from the said roll top desk; for an order that said savings bank receipt books, promissory notes, mortgages and cash be delivered to the Respondent and that the necessary documents be executed to complete the transfer; and for an injunction restraining the Appellants from dealing with said assets; and for damages. p. 1.

3. The Appellants, by their Statement of Defence, admitted that the roll top desk in question had contained savings bank receipt books and certain promissory notes, but denied that the Respondent was entitled thereto and pleaded that they had delivered to the Respondent all her share of the said Estate, except a legacy of $5,000. to the Respondent, which is not in dispute. p. 2.

4. Abe Lyons died in the City of Toronto on the 26th day of July 1930, having made his last will and testament dated 16th June 1928 appointing the

p. 70, Exhibit 1. Appellants to be Executor and Executrix and Trustees of his will. Paragraph 4 of the said will provides:

"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."

p. 89, Exhibit 1. The Respondent is the beneficiary named in the said paragraph 4. Probate of the said will was duly granted to the Appellants on 14th August 1930.

p. 5, ll. 4-8, and ll. 30-35. 5. Abe Lyons at the time of his death, and for some time prior thereto, occupied a room on Euclid Avenue in the City of Toronto, and the roll top desk and chiffonier referred to in paragraph 4 of the said will were in that room.

p. 8, ll. 3-17; p. 9, l. 9 to p. 10, l. 22. The Testator, Abe Lyons, had certain savings bank accounts at the time of his death, and certain promissory notes, and the left-hand drawer of the roll top desk was his usual repository for his savings bank receipt books and promissory notes.

p. 6, l. 28 to p. 7, l. 30. p. 13, l. 38 to p. 14, l. 3. This drawer was kept locked and the Testator retained the key. In other drawers of the desk and in the chiffonier he kept other articles of no great value. Shortly prior to his death Abe Lyons was taken ill, and at that time a savings bank receipt book of the Dominion Bank, two savings bank receipt books of the Bank of Montreal, nine promissory notes and his personal ledger

p. 8, ll. 26-34. were locked up in the left-hand drawer of the roll top desk. At the time of his death there was on deposit in his savings account in the Dominion Bank

p. 29, ll. 6-39. Exhibit 8, p. 94. $2,715.41, and in his accounts in the Bank of Montreal $27,603.64 and $256.57 respectively. The promissory notes totalled $6,213.00.

p. 11, l. 25 to p. 12, l. 24. p. 13, ll. 1-24; p. 18, ll. 29-31. p. 24, ll. 16-23. p. 6, ll. 3-34. 6. During the last illness of the Testator, the Appellant, Kenneth DeSola Joseph, without the knowledge or instructions of the Testator, removed from the roll top desk the three savings bank receipt books and the promissory notes. A duplicate key of the drawer in which they were kept had been given by the Testator to the said Appellant at the time that the Testator moved from the room which he formerly occupied on Bathurst Street to the room in which he was living at the time of his last illness, and the evidence of the said Appellant is that the Testator had told that he wanted him to have a copy of the key in case anything happened to him. The said Appellant at the time of such removal knew the terms of the Testator's will.

p. 7, l. 37 to p. 8, l. 2. p. 21, ll. 37-47.

p. 88, Exhibit 7. p. 24, ll. 7-9. p. 6, l. 40 to p. 7, l. 30. 7. The total estate left by Abe Lyons, as shewn by the Succession Duty Schedule, amounted to $134,874.73. The desk with its contents, other than the savings bank receipt books and the promissory notes above referred to was of no real value.

p. 1, ll. 1-2. 8. The Respondent and the Appellant, Pauline Joseph, are sisters and by the said will the Testator, in addition to the bequest contained in paragraph 4

p. 70, Exhibit 1. above quoted, bequeathed to the Respondent $5,000., and to her sister, Pauline Joseph, $15,000., and after providing for other pecuniary legacies, to the amount of $5,500., the Testator bequeathed all the residue of his estate, amounting to approximately $109,000.00, to the Appellants in equal shares.

p. 72, Exhibit 2. p. 92, Exhibit 4. 9. The savings bank receipt books of the Dominion Bank and of the Bank of Montreal each contained a statement of the terms upon which the money deposited by the Testator with the respective Banks was held. These state-

ments set forth the rules regulating the manner of making deposits and withdrawals, requiring the production of the pass book when money was withdrawn, fixing the length of notice of withdrawal to be given, and providing for the payment of interest from time to time. RECORD.

10. At the date of his will the Testator was living on Bathurst Street, and the roll top desk and chiffonier were at that time in his room, and said roll top desk contained the savings bank receipt books and notes, and there was to his credit in the savings bank accounts approximately $14,500. p. 23, ll. 17-23. p. 74, Exhibit 10. p. 76, Exhibit 12. p. 85, Exhibit 9.

11. The action was tried before the Honourable Mr. Justice Orde on 25th June 1931. The learned Trial Judge held that the roll top desk was the usual repository for the savings bank receipt books and promissory notes, and that the removal thereof from the desk shortly before his death did not remove them from the ambit of the gift, but he held that the whole of clause 4 of the will was controlled by the words "my personal effects in my room," and that only things falling within that description passed to the Respondent; that the words "personal effects in my room" were intended to mean only things of a personal character such as furniture, clothing or jewellry, which could have a local situs, and not assets of an intangible nature like choses in action; and that the words "including pictures, roll top desk and chiffonier complete with their contents" were only added for more abundant caution, in order to make it clear that the Testator intended by those words to include the pictures, the desk and the chiffonier and any other light things contained in the last two articles. He dismissed the Respondent's action without costs. p. 46, ll. 18-33. p. 46, l. 41 to p. 47, l. 8. p. 48, ll. 20-22. p. 49, ll. 12-15. p. 48, ll. 22-31. p. 49, ll. 28-29.

12. On appeal to the Court of Appeal for Ontario the judgment of the learned Trial Judge was reversed and the Respondent's appeal was allowed with costs. The Right Honourable the Chief Justice of Ontario in his reasons for judgment, in which the Honourable Mr. Justice Masten concurred, held that the savings bank receipt books and promissory notes were illegally removed from the Testator's desk by the Appellants, and must be deemed to have been in it at the time of his death; that the fair inference to be drawn from the will was that the Testator intended that whether or not the contents of the roll top desk would pass as personal effects, they were to pass to the Respondent; that the word "including" as used by the Testator means something in addition to what was included in the preceding words "personal effects in my room," and is a word of enlargement rather than a word of limitation, and that the expressed intention of the Testator was to give to the Respondent all the contents of the roll top desk, including the bank books and notes. He further held that the savings bank receipt books were more than a mere acknowledgment of the Banks' indebtedness; each sets forth the terms upon which the money is held and constituted a contract between the Testator and the Bank which was capable of being the subject of a good donatio mortis causa; and by like reasoning a good testamentary gift; and that under the fourth paragraph of the will the Respondent became entitled to the moneys and notes in question. The Honourable Mr. Justice Grant concurred in the judgment, but stated that if he were not bound by the decisions in the Ontario Courts and in the English Courts, he would p. 57, ll. 24-34. p. 51. p. 52, ll. 33-35. p. 52, l. 44 to p. 53, l. 2. p. 54, ll. 1-11. p. 54, ll. 12-13. p. 54, l. 29 to p. 56, l. 10. p. 56, ll. 8-10. p. 56, ll. 20-28.

RECORD. p. 56, ll. 41-44.

have been disposed to hold contrary to the other members of the Court as to the moneys on deposit with the Banks. He concluded, however, that the decisions are so numerous and of so great weight that he was bound to follow them and concurred in allowing the appeal.

13. The Respondent respectfully contends:

1. That on a proper construction of the will the savings bank receipt books and the promissory notes passed to the Respondent.

2. That the gift to the Respondent of the savings bank receipt books is a valid gift of the moneys represented thereby.

3. That the removal of the savings bank receipt books and the promissory notes from the roll top desk by the Appellant, Kenneth DeSola Joseph, during the last illness of the Testator, and without his knowledge or instructions, did not operate to defeat the gift to the Respondent.

4. That the evidence relating to the prior revoked wills of the Testator admitted at the trial, but not acted upon by the learned Trial Judge, or the Court of Appeal is not relevant to the issues raised in this action and was not admissible.

14. The Respondent humbly submits that the appeal from the judgment of the Court of Appeal for Ontario should be dismissed for the reasons stated in the reasons for judgment delivered by the Judges of the Court of Appeal for Ontario, and for the following, amongst other

REASONS

1. Because under clause 4 of the will the Testator gave to the Respondent all the contents of the roll top desk.

2. Because the savings bank receipt books and the promissory notes formed part of the contents of the roll top desk and therefore passed to the Respondent.

3. Because the gift of the savings bank receipt books constituted a gift of the moneys represented thereby.

4. Because the savings bank receipt books constitute contracts between the Testator and the Banks, and these contracts, including the moneys represented thereby, passed to the Respondent.

5. Because the words "my personal effects in my room" in clause 4 of the will are themselves broad enough to include the savings bank receipt books and promissory notes, and are effective to pass them to the Respondent.

6. Because the word "including" as used in clause 4, "including pictures, roll top desk and chiffonier complete with their contents" is a word of enlargement and not a word of limitation, and expresses the Testator's intention that even if the savings bank receipt books and promissory notes would not pass to

the Respondent as personal effects, they were to be included in and form part of the gift.

7. Because the roll top desk was the usual repository for the savings bank receipt books and promissory notes, and the unauthorized removal thereof by the Appellant, Kenneth DeSola Joseph, did not operate to defeat the gift thereof to the Respondent.

N. W. ROWELL.

G. C. LINDSAY.

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—and—

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CASE FOR THE RESPONDENT.

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