

The appeal was heard in the Weekly Court at Toronto.

G. H. Watson, K.C., for the appellants.

W. S. Middlebro', K.C., for the adult beneficiaries other than Mary Stroh.

F. W. Harcourt, K.C., Official Guardian, for the infants.

FALCONBRIDGE, C.J.K.B., said that the appeal was from the formal order of the learned Judge, and not from his reasons for judgment. The formal order disallowed the payment of \$1,500 made by the executor to his wife, Mary Stroh, for a promissory note alleged to have been made by the testatrix. It neither allowed nor barred the claim of Mary Stroh, and she was free to take any action which she might be advised to take, to recover from the estate.

If the executor had in good faith paid this claim before bringing in his accounts, the learned Judge had jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts: *In re MacIntyre* (1906), 11 O.L.R. 136.

The payment of this money by the executor to his wife without any notice to the beneficiaries was most ill-advised and improper; and even harsher adjectives might appropriately be used. The first notice which other parties interested had of the payment was by seeing the item in the executor's accounts.

The learned Chief Justice said that, if he were concerned with the merits of Mary Stroh's claim, he would entirely agree with the findings of the learned Judge—who had the additional advantage of seeing the witnesses.

The alleged rejection of evidence consisted in the very proper refusal of the Judge to re-open the case or allow fresh evidence to be adduced, in circumstances which would not at all have justified him in so doing, according to the well-settled practice of the Court.

The appeal should be dismissed, with costs to be paid out of the share of Mary Stroh.

To prevent misapprehension, the order dismissing the appeal is declared to be without prejudice to the right of Mary Stroh to take such proceedings as she may be advised to enforce her alleged claim on the estate.