

Eng. Rep.]

SYKES AND OTHERS, EXECUTORS, V. SYKES AND ANOTHER.

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action was founded was signed and sealed in Montreal, out of the jurisdiction.

W. M. Clark, for the plaintiffs, showed cause, and filed an affidavit setting forth, that the defendants were incorporated by acts of the Province of Canada, and were authorised to do business throughout the whole of the then Province, and to open agencies or branch offices for the transaction of their business; that the application for insurance was made, and the premium therefor paid to the defendants' agent in Toronto, and that the policy was delivered to the plaintiffs in Toronto by the agent of the defendants.

MR. DALTON—The cases in which a foreign defendant may be served out of the jurisdiction are, 1, where the action is brought for a cause of action which arose in Ontario—which would mean in this case both contract and breach—or, 2, for breach of a contract made in Ontario—and I think this policy of Insurance was so made. In *Chapman v. Cottrell*, 3 Hurl. & Colt. 865, a promissory note made, as far as writing and signing could make it without delivery—in Palermo—was sent by the maker to his own agent in London and there delivered to the payee, that was under this statute held to be a contract made in England. Baron Martin in that case puts the case of a deed. He says: "Suppose a deed signed and sealed, and sent to an agent to deliver, but before he does so the delivery is revoked, that is no valid deed."

I shall, therefore, discharge the summons with costs.

Summons discharged with costs.

ENGLISH REPORTS.

COMMON PLEAS.

SYKES AND OTHERS, EXECUTORS, V. SYKES AND ANOTHER.

Executor de son tort—Agent—Fi. fa.

The executor and executrix of S. appointed C., the husband of the executrix, to continue to carry on the business of S. before probate. A judgment was entered up against C. as executor of S.

Held, that the sheriff could not seize goods of S. in the possession of C. as manager for the executors.

[18 W. R. 551.]

This was an action by Albert Sykes and Hannah Shaw, executor and executrix of Ellen Sykes, against the sheriff of the West Riding of Yorkshire, and against Love, an execution creditor of W. H. Shaw, who had entered up judgment against W. H. Shaw and issued execution against W. H. Shaw as executor of Ellen Sykes. The declaration was for trover and trespass. The defendants severally pleaded the general issue and a justification under a writ of *fi. fa.* on a judgment entered up against W. H. Shaw as executor of Ellen Sykes.

It appeared at the trial that Ellen Sykes carried on the business of manufacturing chemist in the West Riding of Yorkshire, and that W. H. Shaw managed the business for her. She died in 1868 and by her will appointed Albert Sykes, resident in Scotland, executor, and Hannah, the

wife of W. H. Shaw, executrix. W. H. Shaw continued to manage the business. In March, 1869, Love obtained judgment by default against W. H. Shaw as executor of Ellen Sykes on a bill of exchange. A writ of *fi. fa.* was sued out and delivered to the sheriff of the West Riding of Yorkshire, against W. H. Shaw as executor of Ellen Sykes. The officer, in execution of this writ, entered the chemical manufactory occupied by W. H. Shaw, seized and sold goods sufficient to satisfy the judgment. After the seizure and sale of the goods, Albert Sykes and Hannah Shaw proved the will as executor and executrix of Ellen Sykes. At the trial of the present action there was conflicting testimony as to whether W. H. Shaw was managing the business as manager and servant of the executor and executrix, or as executor *de son tort*. The jury found that the goods were in his hands as agent of the executors. A verdict was entered against the sheriff for £100, leave being reserved to enter a verdict or nonsuit on the ground that the sheriff was justified under the *fi. fa.* in seizing the goods and a verdict was entered for the defendant Love, the execution debtor.

Field, Q. C., having obtained a rule accordingly for the sheriff, and *Kemplay* having obtained a rule calling on the defendant Love to shew cause why the verdict found for him should not be set aside and a new trial had, on the ground of misdirection of the learned judge in ruling that there was no evidence to fix Love with liability for the seizure of the goods by the sheriff

Kemplay shewed cause against the rule obtained by the sheriff—The jury have found that the executors continued the business. The executors, although they did not prove the will till after the seizure, yet their title relates back to the death of the testator. They could appoint an agent. He cited *Williams' Executors*, 6th ed. 247, 291. The executors have the same power to deal with the property before probate as subsequent to it: 5 Coke, 28. An executor may, before probate, appoint an agent: *Williams on Executors*, 251, 253; *Paul v. Simpson*, 9 Q. B. 35; *Hall v. Elliott*, 3 Peake N. P. C. 119; *Hooper v. Summersett*, Whitwick, 16. The other side are precluded from saying that a man cannot be his wife's servant; *Sharland v. Mildon*, 5 Hare, 469. [*BOVILL, C. J.*—In *Padgett v. Priest* there was no rightful executor.] *Cottle v. Aldrich*, 4 M. & S. 175, is the nearest case to this; but the jury found the other way: *Hill v. Curtis*, 14 W. R. 125, 35 L. J. Ch. 133.

Field, Q. C., and *Forbes*, in support of the rule.—The only evidence of Shaw being the agent to the executors is the statement of the Scotch executor that he was so: *Webster v. Webster*, 10 Ves. 93. [*BOVILL, C. J.*—You must make out that Shaw, who intermeddles with the estate as agent of the executors is a *tort-feasor*.] The goods were in Shaw's possession. *Sharland v. Mildon*, 5 Hare, 469, is clearly an authority in my favor.

BOVILL, C. J.—The judgment in the original action was against Shaw as executor of Ellen Sykes. The writ of execution directed the sheriff to levy goods of Ellen Shaw in his hands as executor. The sheriff accordingly seized and sold the goods in question. There is no doubt