

preserve the property, although not strictly a debt of the estate, was deducted by the Surrogate Court Judge from the amount found to be in the hands of those who made the payments, and so was deducted from the amount with which the executors were charged. The evidence before that Judge warranted what he did; and his approval was final and binding upon all the parties represented except so far as fraud or mistake might be shewn: In re Wilson and Toronto General Trusts Corporation (1908), 15 O.L.R. 596.

The appeal should be allowed in part, and judgment should be entered for the appellant for \$1,256.03, being one-quarter of his share of the moneys in the hands of the executors, with such interest only as the amount had borne since it was paid into Court in this action, and less the costs to be mentioned.

In view of the way in which the charges of fraud and improper dealing were persisted in, it would be fair to award no costs of the action to the appellant and to allow to the respondents their costs as executors out of the estate down to the date of the payment of the \$1,256.03 into Court, of which the share of the appellant should pay one-quarter. The appellant should also pay the costs after the date of payment into Court. There should be no costs of the appeal, as success was divided.

Reference to *Bruty v. Edmundson*, [1917] 2 Ch. 285, [1918] 1 Ch. 112, on the question of costs.

Appeal allowed in part.

HIGH COURT DIVISION.

SUTHERLAND, J.

JUNE 10TH, 1918.

HOLMES v. HUSBAND.

Mortgage—Action by Administrator of Estate of Deceased Mortgagee—Defence of Mortgagor—Instrument not Intended to be Operative or Intended as Security for Interest only—Evidence—Gift—Delivery of Instrument—Registration—Registry Act, sec. 50—Possession of Instrument by Mortgagor.

Action by James Holmes, administrator of the estate of Jessie Holmes, deceased, to recover the principal and interest due upon a mortgage executed by the defendant in April, 1912, in favour of Jessie Holmes, to secure \$3,500 and interest. The mortgage was registered in May, 1912. Jessie Holmes died intestate on the 23rd April, 1913. The action was begun in July, 1917.