

HON. MR. JUSTICE KELLY.

JULY 16TH, 1912.

## EVERLY v. DUNKLEY.

3 O. W. N. 1607.

*Will—Testamentary Capacity—Claim by Daughter to Moneys Deposited in Bank—Trust—Evidence—Joint Account—Survivorship—Conduct of Bankers.*

Action by executor of one Elizabeth Kenny, deceased, for the sum of \$542.17, alleged to belong to the estate of the said deceased, and for an injunction restraining defendants dealing with the same. Defendant Esther Dunkley claimed the moneys in question were hers on the grounds that (1) her mother was mentally incapable of making a will, (2) The moneys after her father's death were held in trust for her under an alleged prior agreement between her father and mother. (3) The money was held by the defendant bank on a joint account of the testatrix and herself with a right of survivorship in herself.

This latter claim was based on the following order to the bank signed by testatrix in August, 1911, some six months prior to her death and when laid up in the hospital with bronchitis, "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny."

KELLY, J., *held*, that defendant Esther Dunkley had failed to prove that her mother was incapable of making a will or that there was any trust in her favour.

That the order to the bank relied on by her did not constitute her a joint owner of the moneys on deposit but was only given for the convenience of the testatrix.

*Payne v. Marshall*, 18 O. R. 488, and other cases referred to. Judgment for plaintiff with costs.

J. A. Walker, K.C., and M. Houston, for the plaintiff.

W. G. Richards, for the defendant, Dunkley.

O. L. Lewis, K.C., for the defendant, Canadian Bank of Commerce.

HON. MR. JUSTICE KELLY:—The plaintiff, who is the executor of the last will of Elizabeth Kenny, deceased, claims \$542.17, and an injunction restraining the defendants from dealing in any manner with these moneys, which were on deposit with the defendant, the Canadian Bank of Commerce, at the time of Elizabeth Kenny's death.

Testatrix, Elizabeth Kenny, made her will on the 16th November, 1911, and thereby appointed the plaintiff, one of her sons, as sole executor. She died in the city of Chatham on February 27th, 1912, and probate of the will was granted on April 4th, 1912, to the executor.