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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 5TH, 1919.

SUCKLING & CO. v. RYAN & HUGHES.

Judgment—Motion for Summary Judgment—Rule 57—Affidavit Filed with Appearance—Cross-examination of Deponent—Action for Price of Goods—Defence—Defect in Quality of Goods and Misrepresentation—Affidavit not Shewing Amount of Reduction Asserted—Leave to File New Affidavits—Waiver of Irregularity—Costs.

Appeal by the plaintiffs from the order of RIDDELL, J., ante 208.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

S. M. Mehr, for the appellants.

T. L. Monahan, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. DECEMBER 3RD, 1919.

*RE DICKENSON AND NORTH AMERICAN LIFE ASSURANCE CO.

Insurance (Life)—Proceeds of Policies Made Payable to Named Wife of Insured—Predecease of Wife—Remarriage of Insured—Ontario Insurance Act, sec. 178 (6 Geo. V. ch. 36, sec. 5)—Division between Surviving Wife and Children—"In Equal Shares."

Application by the administrator of the estate of John Herbert Dickenson, deceased, and by his widow and the guardians of his

* This case and all others so marked to be reported in the Ontario Law Reports.

infant children, for an order for payment out of moneys paid into Court by the assurance companies, being the moneys due under two policies upon the life of the deceased.

J. A. Robertson, for the applicants.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J., in a written judgment, said that, by the policies in question, the proceeds were made payable to Jennie Bartlett Dickenson, the wife of the deceased, if living. She was the first wife of the insured, and predeceased him some years. He afterwards married again, and his second wife, Millie A. Dickenson, survived him. Two children, issue of his first marriage, also survived him.

Under sec. 178 of the Ontario Insurance Act, R.S.O. 1914 ch. 183, as enacted by 6 Geo. V. ch. 36, sec. 5, the wife named in the contract of insurance having predeceased the insured, and he having remarried, "such insurance money . . . shall be for the benefit in equal shares of the wife living at the maturity of the contract and the children of the assured."

The widow contended that the meaning of this statute is that the proceeds of these insurance policies shall be given one half to her, and the remaining one half in equal shares to the children. The statute should not be so read. The wife who survives and the children of the assured are to take "in equal shares," The wife should, therefore, have one third, and not one half, of these funds.

FALCONBRIDGE, C.J.K.B. DECEMBER 4TH, 1919.

GARDINER v. SHIELD.

Executors—Action by, to Recover two Sums of Money Lent by Testator—Defence—Gift of one Sum—Evidence—Corroboration—Entry in Diary—Insufficiency—Evidence Act, R.S.O. 1914 ch. 76, sec. 12—Extended Term of Credit as to other Sum—Acknowledgment—Debt—Release by Parol.

Action by the executors of Foster Shield, deceased, to recover $5,000 and $2,000 alleged to have been lent by the testator to the defendant.

The action was tried without a jury at Lindsay.
R. J. McLaughlin, K.C., and L. R. Knight, for the plaintiffs.
A. J. Armstrong, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that he was of opinion that there was not the corroboration of the defendant's statement which the law required. The Chief Justice did not accept the entry in the defendant's diary as corroboration. In In re Jelly (1903), 6 O.L.R. 481, the Court accepted the claimant's books of account as corroboration, but the books were vouched in numerous entries by the production of cheques payable to the testator's order and endorsed by him, and in other cases by oral testimony. The general correctness of the books was shewn, therefore, by other evidence.

Here there was only the bald entry in the diary, under Thursday the 14th February, 1918: "At Foster's all night. Gave me $5,000. Raining." The part of the entry underlined had the appearance of being written in after the other words, and the defendant admitted that the entry was made at two different times, on the same day.

The question was not whether the defendant was to be believed or not. He was a man of excellent reputation, and he gave his evidence quite satisfactorily, as far as demeanour was concerned.

His good character and the friendly relations subsisting between him and the testator were not sufficient corroboration.

Counsel for the plaintiffs raised the point that, as to the $5,000, it was a debt, and could not be released by parol and without consideration. It was not necessary to go into that.

On both branches of the case, therefore, the defendant failed. It was singular that he signed an acknowledgement of the $2,000 debt without inserting in it the extended term of credit which he now claimed.

Judgment for the plaintiffs for the $5,000 and $2,000, less the sum of $200 paid on the 4th February, and interest, to be computed by the Local Registrar, without costs.

KELLY, J. DECEMBER 6TH, 1919.

RE BARBER AND WALKER.

Vendor and Purchaser—Agreement for Sale of Land—Title—Evidence as to Heirs and Next of Kin of Deceased Owner—Death of Owner and Wife and Children in same Accident—Presumption of Survivorship—Question of Fact—Burden of Proof—Settlement with Next of Kin of Wife—Application under Vendors and Purchasers Act.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objections to the title were invalid, and that the vendor could make a good title.

The motion was heard in the Weekly Court, Toronto.

G. H. Kilmer, K.C., for the vendor.

F. J. Dunbar, for the purchaser.

KELLY, J., in a written judgment, said that the purchaser objected to the title to the land in question, requiring proof that William McCaffrey, who at the time of his death was the owner and in possession of the land, "died without leaving wife or children or any child of a deceased child him surviving," and that all the parties of the third part named in a certain conveyance of the land, dated the 23rd June, 1913, between Charles D. McCaffrey, administrator of the estate of the said William McCaffrey, and Minnie E. Townley, were the only heirs and heirs-at-law of William McCaffrey, and that they were, on that date, all over the age of 21 years.

The vendor made this application, under the Vendors and Purchasers Act, to have it declared that this was not a valid objection to the title.

The very unusual circumstances which were the foundation for the motion were, that William McCaffrey, his wife, Laura S. McCaffrey, and their only children, as well as William McCaffrey's mother, all met their death by drowning on or about the 28th September, 1912, in a canoe accident; and, there being no eye-witnesses to the occurrence, no evidence was obtainable as to who, if any of them, predeceased the other or others.

On the return of the motion a direction was made, under Rule 602, that notice be given to Laura S. McCaffrey's next of kin, and the motion was adjourned for that purpose. On the return of the adjourned motion one of the next of kin to whom notice had been so given, a sister of Laura S. McCaffrey, appeared by her solicitor and disclaimed title and consented to be bound: the others on whom notice was served did not appear.

As a matter of law there is no presumption arising from age or sex as to survivorship amongst persons whose death is occasioned by one and the same cause.

The question is one of fact, depending wholly on evidence, and the burden of proof is on the person who asserts the affirmative: Wing v. Angrave (1860), 8 H.L.C. 183; Barnett v. Tugwell (1862), 31 Beav. 232. There was evidence that for several years immediately preceding the date of his decease William McCaffrey was in actual possession and occupation of these lands. On the 21st October, 1912, letters of administration of his estate were issued from the Surrogate Court of the County of York to his brother, Charles D. McCaffrey, who, as such, took over and continued the possession, and, as already mentioned, conveyed the property on the 23rd June, 1913, to Minnie E. Townley, the present vendor's

predecessor in title—the father and brothers and sisters of William McCaffrey joining in the conveyance.

In the circumstances, it followed that, as between the vendor and purchaser, the objection set up by the purchaser must be held to be not valid.

But, even if the objection should not, for these reasons, be held invalid, there was another and a more specific ground why it should not be upheld. Annie Nell Salter, a sister of Laura S. McCaffrey, was appointed administratrix of her estate, and, in that capacity and acting on behalf of herself and the other next of kin of Laura S. McCaffrey, she brought action against the estate of William McCaffrey to establish that Laura S. McCaffrey had survived her husband, and so had become entitled to a distributive share of his estate, and also to establish a claim that moneys of Laura S. McCaffrey had gone into the purchase of the property. The failure of the attempt to establish the fact that Laura S. McCaffrey survived her husband was on record. The solicitor for the plaintiff in the action referred to had made affidavit, in the present proceedings, that a settlement of that action was made, whereby, with the approval of the next of kin of Laura S. McCaffrey, the estate of William McCaffrey made a cash payment, the proceeds of which, after payment of costs, was distributed by him (the solicitor) amongst all of such next of kin, each of whom accepted his or her share thereof. There was no evidence that a formal release was given; but, accepting this uncontradicted evidence, the purchaser's contention must, for this reason as well, fail.

SYLVESTER v. SYLVESTER—MIDDLETON, J., IN CHAMBERS—DEC. 1.

Discovery—Examination of Defendant—Pleading.]—Appeal by the defendant from an order of the Master in Chambers requiring the defendant to attend for re-examination for discovery. MIDDLETON, J., in a written judgment, said that he had read all the papers in this case, and was confirmed in the view that, even treating matters pleaded in reply as set up as part of the main case, the examination had gone as far as the plaintiff was entitled to take it, and that the order of the Master should be reversed. No costs. R. S. Robertson, for the defendant. W. R. Smyth, K.C., for the plaintiff.

CASTONGUAY v. HULL ELECTRIC CO.—FALCONBRIDGE, C.J.K.B.—DEC. 4.

Fatal Accidents Act—Death of Plaintiff's Husband—Action for Damages—Settlement—Approval of Court on Behalf of Infants—Apportionment of Damages—Maintenance and Education of Infants.] —Motion by the plaintiff for judgment in the terms of consent minutes and for the approval thereof by the Court on behalf of the infants, in an action for damages for the death of Charles Castonguay, said to have been caused by the negligence of the defendants. The action was brought under the Fatal Accidents Act by the widow on behalf of herself and her infant children. The motion was heard in the Weekly Court, Ottawa. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he approved of the settlement of action for $5,000 and $200 costs to be paid by the defendants. The elder daughter of the plaintiff and the deceased was now a little over 14 years of age. The younger would be 12 in January next. It was desired to provide for the education of these girls at an institution, which would cost about $300 a year for each. They should be provided for accordingly until they reach the age of 17. That would require $900 for the elder and $1,500 for the younger. The widow should have the remainder, $2,600. In awarding this sum her claim for past maintenance had not been overlooked. The sum of $2,400, less costs of the Official Guardian, fixed at $30, to be paid into Court, and the sums mentioned above to be paid out in quarterly instalments by way of maintenance. S. R. Broadfoot, for the plaintiff. A. C. T. Lewis, for the Official Guardian.

HOSTETTER v. TOWNSHIP OF GRANTHAM—FALCONBRIDGE, C.J.K.B.—DEC. 5.

Municipal Corporations—Interference by Township Corporation with Private Way—Damages—Injunction—Costs.]—Action for an injunction restraining the defendants, the Municipal Corporation of the Township of Grantham, from interfering with the plaintiff's fences and gate along any part of a certain road, which, the plaintiff alleged, was a private road, south of the Pelham stone road, and for damages. The action was tried without a jury at St. Catharines. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he agreed with the plaintiff's contentions on matters both of fact and law. There should be judgment for the plaintiff as prayed with $5 damages, an injunction, and costs. H. H. Collier, K.C., and J. G. A. M. Schiller, for the plaintiff. A. C. Kingstone, for the defendants.