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HIGH COURT DIVISION.

CLUTE, J. JUNE 2ND, 1919.

*LEAVITT v. SPAIDAL.

Insurance (Life)—Benefit Certificate—Designation of Beneficiaries by Document Signed by Assured in the Form of a Will but not Executed as a Will—Effectiveness—Insurance Act, 2 Geo. V. ch. 33, secs. 2(19) and 171—Reference in Will to "Insurance"—Subsequent Renewal of Insurance Certificate—Benefit Made Payable to Estate of Assured—Annulment of Previous Designation—Insurance Moneys Paid to Treasurer of Province of Quebec—Imposition of Tax—Incidence of—Contest as to whom Moneys Payable—Costs.

Special case stated under Rule 126 to determine the question whether the plaintiff, the administrator of the estate of William H. Leavitt, deceased, or the defendants, is or are entitled to a sum of money in the hands of the Treasurer of the Province of Quebec.

The case was heard in the Weekly Court, Toronto.

J. A. Macintosh, for the plaintiff.

J. A. Hutcheson, K.C., for the defendant D. M. Spaidal and for the Official Guardian, representing the infant defendants.

CLUTE, J., in a written judgment, said that the deceased Leavitt, at the time of his death and for many years before, was an associate member of the Dominion Commercial Travellers Association, and by the terms of his membership a mortuary benefit of $1,200 was payable to his estate. The liability of the association to pay $1,200 was admitted; but, a claim having been made by the defendant D. M. Spaidal on behalf of his children, the infant defendants, the association declined to pay the plaintiff, and paid

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

the money into the Provincial Treasurer's office to abide the determination of the question now raised.

The deceased (who was domiciled in Ontario) had signed a document in the form of a will, which was in existence at the time of his death, but was not executed in accordance with the Wills Act, and was invalid as a testamentary document. It contained this clause: "I appoint D. M. Spaidal, Brockville, sole executor, to pay debts and sell ranch and collect all accounts and insurance. The proceeds to be divided between his children and the children of Fred Tisdale." This document was dated the 28th September, 1915, and signed "William H. Leavitt." There were no witnesses. Leavitt died intestate on the 8th March, 1918. The association were not notified by the intestate of the execution of this document, nor were the defendants. It was stated in the special case that, after the death of his wife, the intestate said to D. M. Spaidal that it was his wife's wish that the infant defendants should share in his (Leavitt's) estate, and then mentioned his insurance, calling it his "Travellers' insurance." It was admitted that he had no other insurance.

His membership in the association was renewed annually in the month of January by the signing, upon a form provided by the association, of an application for renewal, and forwarding the same to the association accompanied by the renewal premium of $10; and on or about the 2nd January, 1918, the association received from Leavitt a renewal application, signed by him, and containing the words, "Benefit in case of death payable to my estate."

The plaintiff relied on In re Jansen (1906), 12 O.L.R. 63, where it was held that a will, invalidly executed, is not an "instrument in writing" effectual to vary the benefit of an insurance certificate. That case was decided under the Insurance Act, R.S.O. 1897 ch. 203, sec. 160 (1). The change made by the Ontario Insurance Act, 2 Geo. V. ch. 33, sec. 171, and sec. 2.(19), rendered the document signed by Leavitt effective to constitute the infants named therein beneficiaries, although it was not effective as a will. The simple description "insurance," there being no other insurance, was sufficient: sec. 171 (5).

But the application for renewal, making the insurance "payable to my estate," annulled the declaration previously made in favour of the infants: sub-sec. 3 of sec. 171.

There should be judgment in favour of the plaintiff, declaring that he, as administrator, was entitled to receive the $1,200, less a tax of $24 imposed by the Province of Quebec. The defendants should not be held liable for the $24. The contest was reasonable and proper, and the payment of the insurance money to the Provincial Treasurer was proper.

All parties should have their costs out of the fund, the administrator as between solicitor and client.

LENNOX, J. JUNE 4TH, 1919.

RE RUSSELL AND BILLING.

Vendor and Purchaser—Title to Land—Sale by Mortgagee—Evidence—Possession—Rights of Mortgagor—Limitations Act—Application under Vendors and Purchasers Act—Costs.

An application by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that he had shewn a good marketable title to the land.

The motion was heard in the Weekly Court, Toronto.
E. D. Armour, K.C., for the vendor.
W. A. McMaster, for the purchaser.

LENNOX, J., in a written judgment, said that the devolution of the paper-title to the lands in question was not traced or shewn, but the vendor evidently derived title from William S. Grimshaw, who purchased from Sarah McLeod, and obtained a deed of the property on the 15th October, 1914. This deed (36271) was not produced, but was referred to in the requisitions as purporting to be made in pursuance of powers contained in a mortgage of the land in question. The mortgage was made in 1889, and a sale was attempted in 1892. It was not pretended that the proceedings for sale were faulty, defective, or irregular. Just what they were was said to be of record in the proper registry office. It was argued for the vendor that deed No. 36271 could be relied on as the deed of either an absolute owner or mortgagee, notwithstanding the recitals, inasmuch as it contained the word "grant" and equivalent terms—perhaps rather inadequately expressed—and, as this statement as to the form of the deed was not questioned, it should be accepted: and the deed should be held to operate as contended for.

The property was not built on until 1914, but the declaration of James B. McLeod established that from 1892 until 1914 his mother was in possession of the property in the way that unremunerative city properties are almost universally held, that is, she was assessed, and assumed and discharged all the obligations—absolute or qualified—incident to ownership; that she exercised the right of selling gravel etc.; and that her title was not disputed by anybody. This state of facts was not questioned. Having regard to the character and condition of the property, she must be considered as having been in possession continuously from about 1892 until the time she sold; and, long before 1914, the mortgagor's rights were barred.

Reference to In re Alison, Johnson v. Mounsey (1879), 11 Ch.D. 284. The right of a mortgagee in possession to sell the mortgaged property after the statutory period had expired was recognised in that case in both Courts.

There was no outstanding right in the mortgagor or his representatives, and the objections of the purchaser failed. The vendor was able to make a good title.

The purchaser was not an unwilling purchaser; he had acted in good faith, and raised questions as to which there might reasonably be differences of opinion; and so each party should bear his own costs.

ROSE, J. JUNE 6TH, 1919.

TINNEY v. WRIGHT.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser to Compel Specific Performance—Defences—Statute of Frauds—Memorandum in Writing—Authority of Agent—Effect of Subsequent Sale by Vendor to Another—Second Purchaser in Possession without Conveyance—Judgment for Specific Performance.

A purchaser's action for specific performance.

The action was tried without a jury at Guelph.

C. L. Dunbar and L. M. Goetz, for the plaintiff.

George Bray, for the defendant.

ROSE, J., in a written judgment, said that two defences were raised by the pleadings: (1) that there was no sufficient memorandum in writing; (2) that one Lasby, who signed the document which was relied upon as a memorandum of the bargain, was not the vendor's agent. Upon both of these issues the learned Judge found against the defendant, and reserved judgment only for the purpose of considering what, if any, effect ought to be given to the fact that, after the contract had been made between the plaintiff and the defendant, the defendant sold the land to one Boys, who paid part of his purchase-price and entered into possession, but did not receive a deed.

Boys was not a party, and, therefore, although he was called as a witness at the trial, the learned Judge was not in a position to determine whether Boys had acquired any right to possession

superior to the right which the plaintiff would acquire by virtue of a decree against the defendant; but, after consideration of the memorandum of authorities furnished by counsel, the learned Judge reached the conclusion that the plaintiff was entitled to the decree, for whatever it might be worth to him.

There should, therefore, be a judgment, in the usual form, for specific performance, with a reference to the Local Master at Guelph as to the title; the defendant to pay the plaintiff's costs.