

Privy Council Appeal No. 59 of 1933.

Kenneth de Sola Joseph and another - - - - *Appellants*

v.

Esther Phillips - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST MARCH, 1934.

Present at the Hearing :

LORD BLANESBURGH.

LORD WARRINGTON OF CLYFFE.

LORD ATKIN.

LORD MACMILLAN.

LORD ALNESS.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

This is an appeal from a judgment of the Court of Appeal of Ontario, dated the 3rd October, 1932, allowing an appeal from the judgment of Orde J.A., dated the 18th September, 1931.

The appeal raises a short question on the construction of the will of the testator, Abe Lyons.

The will was dated the 16th June, 1928. The testator died on the 26th July, 1930, after an illness which began early in June. On the 8th June, 1930, he was moved to hospital, where he remained until his death. During that time he was mentally incapable of looking after his affairs.

He was a member of the firm of Lyons & Marks, and spent most of his time travelling for the firm, only returning to town for week-ends. He lived alone in one room in Euclid Avenue, Toronto.

The appellant, Kenneth Joseph was in the confidence of the testator, looking after his private financial affairs. He and the testator each had a key of a safety deposit box in their joint names

at the Dominion Bank, in which securities of the testator were kept. The appellant opened this once a month for the purpose of detaching coupons and other purposes connected with the securities. He also, at the testator's request, procured a duplicate key of the drawer hereinafter mentioned in the desk in his room.

Under these circumstances, the testator made his will. It was prepared by his solicitor on his instructions.

The will is in paragraphs. Paragraph 1 contains the usual direction for payment of debts and so forth. Paragraph 2 contains a bequest of a specific legacy of a gold watch. Paragraphs 3 and 4 are in the following terms :—

“ 3. I bequeath my jewels, including my diamond bar pin and extra stone in safety deposit vault at Toronto General Trust Corporation to my niece, Leah Singer, wife of Israel Singer.

“ 4. I bequeath my personal effects in my room, including pictures, roll-top desk and chiffonier complete with their contents to my niece, Esther Phillips, wife of Nathan Phillips.”

Paragraph 5 contains special directions for the disposal of his interest in his firm's business and paragraphs 6 to 16 contain a number of pecuniary legacies and a residuary gift in favour of the appellants, who are also appointed executor and executrix.

Among the pecuniary legacies were one of \$5,000 to the respondent and to each of her children living at his death \$500.

The question arises with regard to the bequest of the personal effects contained in paragraph 4 and in particular, as to the contents of the roll top desk.

In the desk below the roll top there was a drawer. This is the drawer of which as hereinbefore mentioned, the appellant Kenneth Joseph had a duplicate key. When the testator was taken ill in June, 1930, there were in this drawer three pass books referring to his deposit accounts, two in the Bank of Montreal and one in the Dominion Bank for a total sum of \$30,575.62, and nine promissory notes, all payable to order and not endorsed and all of apparently little or no value.

Shortly after the removal of the testator to hospital the first appellant in (as their Lordships believe) perfect good faith and as he thought, in the testator's interest and on his behalf, removed the pass books and the promissory notes from the drawer and deposited them in the safety deposit box above referred to. Their Lordships attribute no blame to the appellant for his action, but for the purposes of their decision assume that it did not affect any right of the legatee, and proceed to deal with the case as if the books and notes had formed part of the contents of the desk at the death of the testator. The desk also contained other things as to which no question has been raised.

The question is whether the bequest on its true construction is only of things which can properly be treated as personal effects that is to say, physical chattels, having some personal connection

with the testator such as articles of personal or domestic use or ornament, clothing furniture and so forth which would not include money or securities for money or whether in the actual contents it extends to the choses in action represented by the pass books and the promissory notes.

Their Lordships are of opinion that the former is the true construction. The bequest is one of personal effects and it cannot properly be said that by the mere direction to include the desk with its contents he intended so to enlarge the scope of the bequest as to include property not within the term "personal effects," and the inclusion of which would convert the bequest into a pecuniary legacy of over \$30,000. Probably the testator regarded the pictures, the chiffoier and the desk as of a special description making it desirable *ex abundanti cautela* to mention them as being in his view, covered by the terms of the bequest, and considerable support is afforded to this view by the bequest in paragraph 3. That is a bequest of jewels, including two particular jewels in a safety deposit vault and not in his own room. The use of the word "including" in this paragraph clearly did not extend the bequest to anything not a jewel. The frame of the will, the separation of the specific gifts of chattels from the pecuniary legacies, points in the same direction.

If the above view upon the construction is correct, the pass books and promissory notes not being within the description of personal chattels it becomes unnecessary to consider whether they were of such a nature that the bequest of them would have conferred on the legatee the right to the choses in action represented by them respectively. Their Lordships however, must not be supposed to accept the views of the Court of Appeal on this point. With all respect they appear to have been misled by decisions on the law affecting *donationes mortis causa*. These gifts depend for their validity on the physical delivery to the donee of something the possession of which may confer a title to claim the real subject of the gift. In the case of a legacy the subject of it if a chose in action may be itself bequeathed, and the bequest entails on the executor the duty of placing the legatee in possession. The case of *re Robson* [1891] 2 Ch. 559 was one purely of construction and depended on its own peculiar circumstances.

On the whole, their Lordships are of opinion that the appeal should be allowed and the order appealed from should be reversed and that of the Supreme Court restored, and that there should be no order as to the costs either in the Courts below or of this appeal. They will humbly advise His Majesty accordingly.

In the Privy Council.

KENNETH DE SOLA JOSEPH AND ANOTHER

v.

ESTHER PHILLIPS.

DELIVERED BY LORD WARRINGTON
OF CLYFFE.

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