

EZRA ZWICKER AND EDWARD }  
 ZWICKER (DEFENDANTS)..... } APPELLANTS;  
 1899  
 \*Feb. 22, 23.  
 \*June 5.

AND

ERI ZWICKER, ADMINISTRATOR }  
 OF THE ESTATE OF JOSEPH }  
 ZWICKER (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA  
SCOTIA.

*Deed—Delivery—Retention by grantor—Presumption—Rebuttal.*

The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument.

The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately the grantor retained the possession and enjoyment of it until his death.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiff at the trial.

The facts material to the case are stated in the judgment of the court delivered by His Lordship the Chief Justice.

*W. B. A. Ritchie Q.C.* and *McLean* for the appellants. Undue importance has been attached to the fact that the deed was apparently retained in the possession of the grantor during his lifetime. It seems clear that Joseph Zwicker intended to make the deed operative

\*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick, King and Girouard.

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in every respect. The evidence of the defendant Ezra Zwicker shews that Benjamin Zwicker, the subscribing witness, was present when the deed was given to him. The fact that the deed was taken back and retained does not necessarily render the deed inoperative. The whole transaction amounted to a family settlement or arrangement respecting the property of the intestate, an arrangement made for the purpose of convenience and in order to avoid expense. The plaintiff throughout assented to that arrangement both in the testator's lifetime and afterwards. He should not now be permitted, by taking out administration in respect of an estate in which he and the defendants are solely interested, to interfere with an arrangement so made and acquiesced in by himself. We rely upon *Clinch v. Pernelle* (1), and cases there cited; *Xenos v. Wickham* (2); *Clavering v. Clavering* (3); *Roberts v. Security Co.* (4); *McDonald v. McMaster* (5).

Even if the evidence were insufficient to establish a delivery by Joseph Zwicker in his lifetime the acts of the plaintiff in assenting to the deed as a binding instrument, causing it to be recorded, paying his share of the cost thereof, and in taking possession and claiming under it the property of Joseph Zwicker, prevent him from setting up any title inconsistent with the conveyance in question. 1 Williams on Executors, (9 ed.) 344, 345; *Kenrick v. Burgess* (6); *Whitehall v. Squire* (7). The intestate, having executed the deed, would be estopped from denying its delivery and the plaintiff as his administrator is therefore also estopped in the same manner and to the same extent.

(1) 24 Can. S. C. R. 385.

(4) [1897] 1 Q. B. 111.

(2) L. R. 2 H. L. 296.

(5) 17 N. S. Rep. 438; Cass.

(3) 2 P.Wm. 388, 8 Ruling Cases. Dig. (2 ed.) 246.

576, 580.

(6) Moo. K. B. 126.

(7) 1 Salk 295.

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*Wade Q.C.* for the respondent. The respondent as administrator is entitled to possession and control of all the personal property, documents and writings owned by Joseph Zwicker at the time of his death. The deed of 1877 was never delivered and was not intended to operate as a deed, but as a testamentary writing. It is inoperative as a will by reason of insufficient attestation. It is a question of fact whether the deed was or was not delivered and the findings of the trial judge unanimously upheld by the Supreme Court of Nova Scotia on appeal should not be disturbed.

The appellants, in their ignorance of the law as to delivery, evidently considered as soon as the deed was discovered that it gave them all the personal property Joseph Zwicker owned at the date of the deed. Their conduct in giving up some of the property and only claiming the property they considered their father owned at the date of the deed is consistent with that theory, and not consistent with the theory that the appellants understood the agreement to record the deed to mean an agreement to share the property as set out in the deed, for in the latter case the appellants would have got all the personal property and would not have given up any of it.

The respondent as administrator is not bound by his acts before he was appointed administrator, for those acts were not beneficial to the estate. *Doe d. Hornby v. Glenn* (1); *Metters v. Brown* (2); *Morgan v. Thomas* (3) per Parke B, at page 307.

In any case the respondent was entitled to succeed in his action to recover the release signed by the grandsons, without which the estate could not be settled up in the Probate Court, and, in any case, to

(1) 1 Ad. &amp; El. 49.

(2) 1 H. &amp; C. 686.

(3) 8 Ex. 302.

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the accounting, for it appeared the appellants were holding some property acquired by Joseph Zwicker since the date of the deed and also some property belonging to the estate, not included in the inventory. *Coote v. Whittington* (1).

All the circumstances of the case rebut any presumption as to delivery of the deed. See *Doe d. Garnons v. Knight* (2) at pages 684 and 694 where cases are discussed; *Murray v. Earl of Stair* (3); *National Provincial Bank v. Jackson* (4). There is no plea as to estoppel by the registration of the deed; Odgers on Pleading; *McDonald v. Blois* (5); *Morgan v. Thomas* (6).

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Nova Scotia in an action brought by the respondent as administrator of his father, Joseph Zwicker, seeking the delivery up of certain specific chattels, of a deed dated the 5th of April, 1877, described in the statement of claim as being from the intestate Joseph Zwicker to Eri, Ezra and Edward Zwicker, and of a document dated the 2nd October, 1884, described in the statement of claim as being from Eri, Ezra and Edward Zwicker to Reuben Ernst, Edward Ernst and Eliah Ernst, and generally the delivery up of all personal property and documents belonging to the estate of Joseph Zwicker. The appellants who were the defendants in the action deny that the documents and personal property specifically claimed by the respondent belonged to the estate of the intestate, and also deny that they have in their possession any property belonging to the respondent as adminis-

(1) L. R. 16 Eq. 534.

(2) 5 B. & C. 671.

(3) 2 B. & C. 82.

(4) 33 Ch. D. 1.

(5) 3 N. S. Dec. 298.

(6) 8 Ex. 302.

trator. At the trial before a judge without a jury, the facts appeared to be that the deed of the 5th of April, 1877, was an indenture made between Joseph Zwicker, the intestate, of the one part, and his three sons the respondent and the appellants of the other part, whereby the grantor purported to convey certain lands to his sons in fee. It also contained a disposition of chattel property in the following words :

I also give unto my two sons, Ezra and Edward, all my stock of cattle, household furniture, farming implements, all personal property but the notes of hand and mortgages, and the house shall be jointly owned by my three sons.

The defendant in his deposition says that Benjamin Zwicker, the witness to the deed, was present when it was given to him. There was no dispute as to the signatures of the subscribing witness and the grantor being genuine, but the death of the subscribing witness, Benjamin Zwicker, was not proved, nor was his signature proved. This, it is explained in an affidavit of Mr. McLean, the appellant's solicitor, filed on the appeal and motion for a new trial, was in consequence of his mistake as to the extent of the admission made between the solicitors for the purposes of the trial. On the motion there was put in an affidavit of Jacob Pickles, a justice of the peace, who deposes that the execution of the deed was sworn to before him by Benjamin Zwicker, the subscribing witness, on or about the 17th of April, 1877. The same deponent also proves the death of Benjamin Zwicker and his handwriting and signature to the deed. This affidavit, which was rejected by the court below, ought in my opinion to have been received, and it sufficiently establishes the execution of the deed so far as regards the signing and sealing of the instrument.

It is however urged, and the court below have given effect to the objection, that there is no proof of the

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delivery of the deed. It is assumed, and it is I think the proper conclusion from the evidence, that the deed was retained in the possession of the grantor until his death, and this fact has been considered sufficient to show that the deed never was so delivered as to take effect as a duly executed instrument. It is in the face of decided cases of the highest authority out of the question to say that a deed must be presumed to have been inoperative for want of delivery merely because the grantor has retained it in his possession for many years and up to the time of his death. The following cases may be selected from a greater number as controverting any such proposition: *Doe d. Garnons v. Knight* (1); *Exton v. Scott* (2); *Fletcher v. Fletcher* (3); *Xenos v. Wickham* (4); *Hall v. Palmer* (5); *Moore v. Hazelton* (6).

In all these cases it was held that the retention of the deed after its signing and sealing by the grantor did not show that the execution was defective for want of delivery even in the case where the fact of its existence had never up to the grantor's death been communicated to the parties claiming under it. In *Fletcher v. Fletcher* (3), Wigram V.C. says:

The case of *Doe v. Knight* (1) shows that if an instrument is sealed and delivered the retainer of it by the party in his possession does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back but such is unquestionably the law.

In *Xenos v. Wickham* (4) Mr. Justice Blackburn in delivering his opinion to the House of Lords thus states the law:

No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. \* \* It is clear on the authorities as well as on the reason of the thing that the deed is

(1) 5 B. & C. 671.

(2) 6 Sim. 31.

(3) 4 Hare 67.

(4) L. R. 2 H. L. 296.

(5) 3 Hare 532.

(6) 9 Allen (Mass.) 102.

binding on the obligor before it comes into the custody of the obligee, nay before he even knows of it.

In the same case Lord Cranworth says :

In the first place the efficacy of a deed depends on it being sealed and delivered by the maker of it, not on his ceasing to retain possession of it. This as a general proposition of law cannot be controverted.

In *Moore v. Hazelton* (1) the court says :

Execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer a delivery.

Although these authorities are not referred to in the judgment under appeal I assume they were cited in the court below, and that their decision holding the deed inoperative proceeded on the ground that the facts in evidence rebutted the presumption in favour of the due execution of the instrument. These facts are said to consist not only in the retention of the deed by the grantor, but also in the fact that it comprised all the property which he possessed, and that it professed to dispose of this property immediately and that inconsistently with its tenor the grantor retained the possession and enjoyment of his property until his death. No case is referred to as warranting the proposition that this is sufficient to control the effect of the deed, and in the absence of authority I see nothing to authorise it. The circumstance of non-communication to those taking benefits under the deed (if we are to assume such to have been the fact), is shown by the cases referred to to be immaterial, and it may well be that the intestate thought fit to trust to the good feeling and affection of his sons not to disturb him in his enjoyment. At all events we could not disregard a rule of law sanctioned by such high authority and in so many reported decisions without making a precedent which we should be compelled to follow in other cases.

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When Joseph Zwicker died in 1894 this deed came into the possession of his sons, and they, including the respondent, agreed to act upon it, and did act upon it by placing it upon the county registry of deeds in order to do which they had of course to treat it as a valid and subsisting instrument by proving it in the manner required by the law. The respondent, moreover, contributed his share of the expense of registration.

Further, it is out of the question to say that there was no communication of the deed to the sons during the grantor's lifetime. One of the documents sought to be recovered is the bond already mentioned dated the 2nd of October, 1884. By this instrument the three sons became bound to pay certain sums to three grandsons of the intestate named Ernst, sons of two of his daughters, both of whom were dead. These sums were duly paid on the testator's decease. To this bond there is appended a memorandum also under seal of the intestate himself as follows :

All the real estate already divided amongst my three sons Eri Zwicker, Ezra Zwicker and Edward Zwicker, to stand and remain as at present provided. The remainder of my real estate to be divided amongst my three aforesaid sons as they shall agree amongst themselves, after my death. My said three sons to divide equally amongst themselves all notes, judgments, mortgages or written obligations to pay money as remain after the death of my wife Barbara Zwicker.

All the household furniture, live stock and farming implements to be equally divided between my two sons, Edward Zwicker and Ezra Zwicker after the death of my wife, Barbara Zwicker.

(Sgd.) JOSEPH ZWICKER (L.S.)

Witness :—

(Sgd.) GEORGE WILSON.

The division referred to in this memorandum must be taken to have reference to the division effected by the deed as no other division is suggested.

As the testator lived for some ten years after this and retained the bond which upon his death the sons



were compelled to implement (as they did), the arrangement then come to, having the deed for its basis, was a clear recognition of the distribution effected by the deed and to disturb it now would be most inequitable and unjust.

The testator's widow died soon after him.

Upon receiving the several sums mentioned in the bond the three grandsons released and discharged the estate from all claims. It is not shown or even alleged that there are any debts due by the estate. The only persons therefore beneficially interested were the three sons, the appellants and the respondent. Soon after their mother's death, which took place in 1895, they agreed to a distribution of the personal property, and it was accordingly divided. There can be no doubt of this agreement having been come to and having been acted upon. The judgment of Mr. Justice Henry who tried the case without a jury contains the following passage :

Notwithstanding the transaction by which it clearly seems to me that the plaintiff previous to his becoming administrator of his father's estate, agreed with his two brothers, who were the only persons interested in the estate, to act upon the deed and divide the property in accordance with its terms, I feel bound to hold that the plaintiff in his capacity as administrator is entitled to recover.

After this the respondent took out letters of administration, the expenses of which were paid in equal proportions by the three brothers, and now by this action seeks to repudiate the arrangement to which he was a party for the division of the personal property as well as the deed.

The learned judge who tried the case thought he was not bound in his character of administrator by what he had been a party to and had acquiesced in before he administered. Two cases are referred to in his judgment for this proposition ; they are, however, easily distinguishable. They were both cases at com-

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mon law in which it was held that the acts of an administrator before the grant did not affect him. Here, however, all equitable considerations are open, and it is manifest that there are no persons beneficially interested but the three parties to the family arrangement, of whom the respondent was one. Is it then to be said that the respondent is to be at liberty to break up this arrangement in order that he may as administrator get into his hands property which upon the most ordinary principles of equity he might be called on to return the next day in another action instituted to compel him to carry out his agreement. Surely this would be encouraging a circuitry of litigation which we are told it is the policy of courts of justice to prevent.

I am of opinion that the appeal must be allowed with costs and the action dismissed also with costs.

*Appeal allowed with costs.*

Solicitor for the appellants: *A. K. McLean.*

Solicitors for the respondent: *Wade & Paton.*

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