ALBERT E. C. MAY (PLAINTIFF).....APPELLANT;

AND

GEORGE LOGIE (DEFENDANT).....RESPONDENT.

1897

*Mar. 16, 17.

*May 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence—New trial—Champerty—Maintenance.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid.

Held, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed.

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

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APPEAL from the decision of the Court of Appeal for Ontario (1), which affirmed the judgment of the Chancery Division of the High Court of Justice (2), dismissing the plaintiff's action with costs.

The appellant brought his action claiming title to certain lands under the heirs-at-law of William Pidgen, deceased, and to have an alleged will and sheriff's deed upon which the respondent's title depended, set aside.

The will is as follows:—"I, William Pidgen, of the Township of Etobicoke, in the County of York, Yeoman, do declare this to be my last will and testament revoking all others by me heretofore made. It is my will that as to all my estate both real and personal, whether in possession expectancy or otherwise which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth, to be executrix of this my will," and is in the testator's own handwriting.

The plaintiff contended that the will was void for uncertainty and that the deed from the sheriff was illegally and irregularly issued. The courts below held that the will was valid and gave the lands in fee simple to the testator's wife under whom the respondents claim their title to the lands in question.

Donovan for the appellant.

Shepley Q.C. for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed. In the first place the appellant failed to give proper evidence establishing the title of the persons under whom he claims as heirs at law of William Pidgen, deceased. The only proof

(1) 23 Ont. App. R. 785. (2) 27 O. R. 501.

of the relationship of the persons who were the grantors in the alleged conveyance of the 20th June, 1894, to Walter J. Kilner, to be found in the record, is that contained in the deposition of the witness William Pidgen. This young man who was only twenty years old when he left England in 1890, assumes to give the history of his father's family; but he discloses in his evidence that what he knew of it he only learned from other persons, in other words, that his evidence was mere hearsay consisting of statements which his father, who was still living, had made to him. Thus for instance, on re-examination by the counsel for the plaintiff, he is asked "Is it possible that one of the brothers or sisters named by my learned friend, left any children?" And this question being objected to, the following evidence is given.

Q. If they had any children would you have heard of it? A. Yes.

Q. Did you ever hear that they had no children? A. I heard my father say that all that were left were the ones that I mentioned.

Q. You heard that they did not leave any children? A. Yes.

Q. And that those persons you have named were the only survivors of William Pidgen? A. Yes, the ones I have mentioned were the only ones that were related to him.

This, as the respondent in his factum insists, is of course not the proper way to prove pedigree which includes heirship or descent. In such cases it is true that hearsay evidence of a peculiar kind is admissible, but this is limited to declarations made by a person who is proved, by evidence *aliunde* his own statements, to be a relation of the parties of whose existence or death he spoke, and who is himself deceased, for nothing can be better established than that such declarant, if living, must himself be called as a witness, and that his declarations are in that case inadmissible. There could be no possible difficulty in examining Thomas Pidgen, the father of the witness, in England, under a commission before which, in the

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present state of the law, he might have been compelled by process to appear. This principle of the law of evidence is so elementary that it scarcely requires any reference to authority. Taylor (1) and Greenleaf (2) may, however, be referred to as stating this rule of evidence which prevails in America as well as in England.

Another defect in the proof of descent is this. When William Pidgen died in 1878 the law of Ontario on the subject of the descent of real property was regulated by the Act of 1852, and under that Act, William Pidgen having died without issue, his heir at law was his father, if living. The age of William Pidgen is nowhere stated, and even if it were, we cannot presume that his father died before him. There is, therefore, really nothing to shew that the persons mentioned in the deposition of the witness William Pidgen, ever had any interest whatever in these lands. The respondent has taken the objection to the sufficiency of the proof of heirship upon the first point very precisely in his factum, and I can see no answer to it. It constitutes therefore, by itself, a sufficient answer to this appeal and as such must prevail.

I could not, however, assent to a judgment for the appellant even if I thought the plaintiff had proved his title, and that all the defences pleaded had failed. In such case, I should have been of opinion that the respondent was entitled to a new trial on the ground that evidence had been improperly rejected.

I think for several reasons the defendant was entitled to be informed who the party in interest, represented in the somewhat unusual transactions respecting this property by such men of straw as Kilner and May, really was. The defendant was entitled to know with whom he was really and actually contending, in order that he might be able in future to protect himself from further litigation by the parties having the beneficial

(1) 9th ed. p. 413-427. (2) Ed. 1896, vol. 1, p. 104 *et seq.*

interest. He was also entitled to know the terms of the trust under which Kilner held the land in order that he might be assured that the conveyance from Kilner to May was not in breach of trust, for if it were such, and so not binding on the beneficiary, a judgment in this action either way would not be conclusive on the *cestui que trust*, and not being conclusive, would leave the defendant exposed to future litigation by the beneficial owner.

Then for another reason evidence which was rejected ought to have been received. The acquisition of this land under the purchase from the alleged heirs at law was a very exceptional, not to say a suspicious, transaction, which in my opinion the defendant was entitled to have thoroughly probed on cross-examination, by way of testing the sufficiency of the plaintiff's proof of title, if for no other reason. Aside from this, however, altogether, there was on the record a defence distinctly pleaded setting up the illegality of the transfer of title from Kilner to May, by reason of champerty or maintenance. I am not at all sure that, as it is, on the evidence of Kilner and May taken in conjunction with that of Merritt A. Brown, this defence was not established, but I do not proceed on that ground, in dismissing the appeal. I am, however, clear that the defendant was entitled to have answers to many of the questions which were put by his counsel which were overruled. I refer particularly to questions put to the witnesses Kilner, May, Brown and especially to the witness Donovan, who was also counsel for the plaintiff at the trial.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Joseph A. Donovan.*

Solicitors for the respondent: *William Mortimer Clark & Gray.*