WILLIAM THOMPSON AND ADAM PINCH, EXECUTORS OF THE LAST WILL AND TESTAMENT OF JOHN DAVID THEWES, DECEASED (PLAINTIFFS) ..... } APPELLANTS;

1903
*Nov. 18,19.
*Nov. 30.

AND

THOMAS COULTER (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action by executors — Evidence — Corroboration — R. S. O. [1897] *c.* 73, *s.* 10.

In an action by executors to recover money due from C. to the testator it was proved that the latter when ill in a hospital had sold a farm to C. and $1000 of the purchase money was deposited in a bank to testator's credit; that subsequently C. withdrew this money on an order from testator who died some weeks after when none was found on his person nor any record of its having been received by him. C. admitted having drawn out the money but swore that he had paid it over to testator but no other evidence of any kind was given of such payment.

Held, reversing the judgment of the Court of Appeal, that a *primâ facie* case having been made out against C. and his evidence not having been corroborated as required by R. S. O. [1897] ch. 73, sec. 10, the executors were entitled to judgment.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiffs the verdict for defendant at the trial having been set aside.

The action by the executors of J. D. Thewes was to recover money alleged to be retained by defendant under the circumstances mentioned in the above headnote. Though respondent's counsel on the appeal contended that there was not sufficient proof of defend-

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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ant having drawn the money out of the bank, the only substantial question to be decided was as to whether or not he had paid it over to Thewes, as his evidence of such payment was an admission that he had received it and he had also admitted it in other ways.

Hodgins K.C. for the appellants. Coulter having admitted that he obtained the money from the bank, the onus is on him to shew that he paid it over and his own testimony to that effect must be corroborated *Stoddart* v. *Stoddart* (1); *In re Finch* (2); *McKay* v. *McKay* (3); *Tucker* v. *McMahon* (4); *Rawlinson* v. *Scoles* (5).

Aylesworth K.C. for the respondent. Plaintiffs only proved receipt of the money by defendant's admission and, if they take his evidence, they must accept it in full.

The conduct of Thewes in refraining from any inquiry about the money after he gave defendant the order is sufficient corroboration. *Radford* v. *MacDonald* (6); *Green* v. *McLeod* (7).

The judgment of the court was delivered by

KILLAM J.—It was argued before us that there was not such evidence of the defendant's liability as to enable the plaintiffs to invoke the aid of the statute preventing the defendant from obtaining a verdict or decision in his favour upon his own uncorroborated evidence, but I am of opinion that there was.

The defendant's depositions admitted that he had withdrawn the money from the bank, though he stated that this had been done at the request of Thewes who had informed him that he wished to use it. There was no clear statement that he had paid it to Thewes

(1) 39 U. C. Q. B. 203.
(2) 23 Ch. D. 267.
(3) 31 U. C. C. P. 1.
(4) 11 O. R. 718.
(5) 79 L. T. 350.
(6) 18 Ont. App. R. 167.
(7) 23 Ont. App. R. 676.

His own subsequent conduct in setting up the payment to the bank, both in conversation with the plaintiff Thompson and in his correspondence with the plaintiff's solicitor, without mentioning the withdrawal, and in failing to give any account or explanation when charged by the solicitor, over two months before action, with the withdrawal, was in my opinion clearly sufficient to enable the court to draw an inference against him.

A *primâ facie* case of liability for the money withdrawn was made out and the only direct evidence of its payment to Thewes was given by the defendant, who was not entitled to a decision in his favour without the corroboration which the statute requires.

The provision (R.S.O. [1897], c. 73, s. 10) is as follows:

In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

In my opinion this enactment demands corroborative evidence of a material character supporting the case to be proved by such "opposite or interested party" in order to entitle him to a "verdict, judgment or decision." Unless it supports that case, it cannot properly be said to "corroborate." A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case.

The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances. *McDonald* v. *McDonald* (1).

The expressions used by the learned judges of the Court of Appeal in *In re Finch* (2) appear to me applicable under this statute. Jessel, M.R., there said,

(1) 33 Can. S. C. R. 145. (2) 23 Ch. D. 267.

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as I understand, corroboration is some testimony proving a material point in the tertimony which is to be corroborated. It must not be testimony corroborating something else—something not material.

And Lindley L.J., said,

evidence which is consistent with two views does not seem to me to be coroborative of either.

In the present case there does not seem to me to be any evidence which can properly be treated as corroborating the defendant on the only point on which the onus was upon him, that as to the payment of the money to Thewes.

Except for the defendant's own testimony, all the evidence was consistent with the retention of the money by the defendant. The circumstances on which the Court of Appeal have relied as corroborative may possibly tend to make it seem improbable that the defendant took away and kept the money without Thewes' approval or consent, but they seem to me in no way inconsistent with the hypothesis that Thewes assented at the time to its retention by the defendant at his own request or for some purpose of Thewes.

In view of the course followed in this case, if anything had been presented on behalf of the defendant calculated to show that corroborative evidence could still be obtained, I think that he should have had a chance to produce it. This, however, has not been suggested, and I think that the appeal should be allowed and the judgment of the Divisional Court restored.

Appeal allowed with costs.

Solicitors for the appellants: *Davis & Healy.*

Solicitor for the respondent: *J. W. Hanna.*