[HIGH COURT OF AUSTRALIA.]

PLUNKETT . . . . . APPELLANT;
DEFENDANT,

AND

BULL . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 16, 17, 18.

Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

Evidence—Admissibility—Declaration against interest— Claim against estate of deceased person—Onus of proof.

In an action against an executor to recover money alleged to have been lent to the testator in various sums from time to time, evidence was given on behalf of the plaintiff that prior to his death the testator and she had an interview at which they had a settlement of accounts whereupon the testator paid her £500 and acknowledged that he still owed her £550. Evidence was tendered on behalf of the executor of a conversation immediately before the settlement of accounts, in the course of which the testator had said that he was going to settle up with the plaintiff and that he owed her £500. This evidence was rejected.

Quœre, whether the statement of the testator was a declaration against interest so as to be admissible.

But, *held*, that the weight of the evidence, if admitted, was not sufficient to vitiate a finding in favour of the plaintiff.

The onus of proof in an action against an executor to recover money alleged to have been lent to his testator discussed.

Decision of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Margaret Jane Bull against Robert Plunkett, executor of Joseph Plunkett,

deceased, to recover the sum of £554 0s. 6d. as being money lent to the testator.

The action was heard by *Hood* J., who gave judgment for the plaintiff for £526 0s. 6d.

From that decision the defendant now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Mitchell K.C. and *J. Macfarlan*, for the appellant.

McArthur K.C., *Starke* and *Morley*, for the respondent, were not called upon.

During argument reference was made to *R.* v. *Overseers of Birmingham* (1); *Higham* v. *Ridgway* (2); *Hudson* v. *Owners of the Barge Swiftsure* (3); *Williams* v. *Geaves* (4); *R.* v. *Inhabitants of Worth* (5); *Newbould* v. *Smith* (6); *Taylor* v. *Witham* (7); *Bewley* v. *Atkinson* (8); *In re Perton*; *Pearson* v. *Attorney-General* (9).

GRIFFITH C.J. This is an action brought by the respondent against the appellant as executor of her deceased brother. The case made at the trial, and which was fairly open upon the pleadings, was this:—The plaintiff, who was a widow with seven children, having come into possession of a sum of money, and being desirous to make use of it for the benefit of her family, paid to her brother, the deceased, various sums from time to time, amounting altogether to £1,054, to be employed or invested for the benefit of herself and her children. The payments began in 1898, and extended over rather more than four years. In 1911 she and her brother came together, when he admitted that he owed her altogether on account of these payments a balance of £1,050, and said that he would give her £500 at once, and pay the balance of £550 when he sold certain property. He accordingly paid her the £500, but did not pay the balance, and the action was brought to recover it.

(1) 1 B. & S., 763.
(2) II. Sm. L.C., 11th ed., 327.
(3) 82 L.T., 389.
(4) 8 C. & P., 592.
(5) 4 Q.B., 132.
(6) 29 Ch. D., 882; 33 Ch. D., 127; 14 App. Cas., 423.
(7) 3 Ch. D., 605.
(8) 13 Ch. D., 283.
(9) 53 L.T., 707.

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The plaintiff, who is apparently not a woman of education, had banking accounts at the Bank of New South Wales and in the Savings Bank. She gave evidence in detail, narrating what I have stated, and that evidence was corroborated by other witnesses as to the arrangement made in 1911, the payment of the £500, and the promise to make the further payment. The learned Judge was satisfied that she and her witnesses were substantially telling the truth. That is purely a question of credibility. He had the witnesses before him, and we are not in a position to know what weight he attributed to the manner in which they gave their evidence or the extent to which that weight was affected by cross-examination. On that evidence there is no ground at all for disturbing the finding of the learned Judge.

But it is suggested that the judgment should nevertheless be set aside on the ground of the wrongful rejection of evidence. The evidence tendered was a statement said to have been made by the deceased to a friend on the day on which he paid the £500, which it was sought to make admissible on the ground that it was a declaration against interest. We are told that when the evidence was tendered the learned Judge remarked that a declaration against interest was not admissible unless made in writing, and that thereupon the matter was not further pressed. I find it very hard to think that there was not some misunderstanding, or that the real position was brought to the mind of the learned Judge. It is a rule that ought to be remembered that, where evidence is tendered and rejected, and it is intended to take advantage of the rejection, the ground upon which it is sought to make it admissible must be distinctly brought to the mind of the Court. It is not sufficient, where evidence is tendered upon one ground which will not support its admission, to show that there was another ground upon which it was admissible, but which was not mentioned. I cannot help thinking that some mistake of that sort was made.

But this Court desired, assuming that difficulty to be out of the way, to know the nature of the statement of the deceased which was relied upon as being a declaration against interest, and we were informed by counsel that the evidence proposed to be given was that on the day on which the £500 was paid the

deceased, in the course of a casual conversation with a friend, said that he was going to settle up with his sister and that he owed her £500. It is contended that the statement that the deceased owed the plaintiff £500 was a declaration against interest, and that what he said about settling up with her was also admissible as being connected with it, and, therefore, that the whole statement was evidence that he owed the plaintiff no more than £500. In considering whether an alleged statement is against interest you must take the whole of it together, and, taking the whole of the suggested statement together, I have great difficulty in seeing how it can properly be construed as a declaration against interest. I know of no case in the books in which such a statement made under such circumstances has been held admissible (*a*).

But I do not think it necessary to pursue that matter further, because if the statement were admitted its weight would be so small—indeed, infinitesimal—that I cannot think that the learned Judge, who was satisfied that the plaintiff's witnesses were telling the truth, ought to have allowed his mind to be influenced by what was, at best, a casual observation made to a person having no interest in the matter, and having no reason to remember the exact words used. I think, therefore, that there is no ground for saying that the admission of the evidence, if it ought to have been admitted, either could or ought to have affected the mind of the learned Judge.

For these reasons I think the appeal fails.

ISAACS J. I quite agree that the appeal should be dismissed.

The first point argued was as to the rejection of evidence. It was urged that evidence of statements by the deceased against his interest had been rejected because they were oral, and upon no other ground. It does not appear on the notes before us that that point was distinctly urged before the learned Judge so as to convey to his mind that the point was that, as is well settled, oral declarations, if against interest, are as admissible as written ones, and I think there must have been some misunderstanding.

(*a*) Note added by the learned Chief Justice: See *Lloyd* v. *Powell Duffryn Steam Coal Co.*, (1913) 2 K.B., 130.

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I have no doubt that counsel intended to convey that argument, but I feel quite confident that it was not conveyed to the mind of the learned Judge. One of the declarations proposed to be given in evidence is alleged to have been made before the payment of the £500, and was, as we are told, substantially this: that on the morning of the day on which that payment was made, and before it was made, the deceased had said to a witness unconnected with the case, "I am going to have a settlement with my sister. I owe her £500." For myself, I think that that would be a declaration against interest. But if the learned Judge had admitted the evidence, he would have had to consider the length of time that had elapsed since the statement was made by the deceased, that the person to whom it was made was not interested and would have no particular reason for remembering the exact form of the statement, and that a very slight alteration in form would alter the whole meaning of the statement. As the learned Judge believed that the plaintiff was honest—and she was vitally interested in the matter, and particularly interested in recollecting what was said to her—the declaration against interest would have had comparatively little weight, and I do not think it would possibly have influenced him so far as to turn the scale.

The next point to which our attention was drawn was a suggested misdirection of the learned Judge. It is said that he misdirected himself as to the onus of proof in the early part of his judgment. I have read the passage again, and am confirmed in my impression that the learned Judge was merely stating the general rule in cases of this kind, and not the exception to the general rule, which was put to him as to the onus of proof with relation to the *Statute of Limitations*. Read in that general form I see nothing to complain of, and think that he was right. It is only afterwards that he came to the facts of the particular case.

Then we come to the question how far the onus of proof which lay upon the plaintiff was satisfied. She had the burden of establishing the original creation of the indebtedness of the deceased to her, and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against

the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as *primâ facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue. In the case of *Lachmi Parshad* v. *Maharajah Narendro Kishore Singh Bahadur* (1) some observations were made by the Privy Council with reference to the sufficiency of proof. In that case their Lordships were not satisfied that the plaintiff had established a reasonably clear case. For instance, he had failed to bring forward evidence which he ought to have brought forward, and which was available. That was a material circumstance, and having regard also to some other circumstances of the case their Lordships thought that his appeal should fail. Lord *Morris* said:—"In an action brought to recover money against an executor, or, as in this case, the heir, of a deceased person, it has always been considered necessary to establish as reasonably clear a case as the facts will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself." In the present case it has not been suggested, and on the facts before us I do not see how it could be suggested, that any further evidence could be given or any further light thrown upon the case from the plaintiff's side. She has called all the evidence she could, and the learned Judge was satisfied that she and her witnesses are credible. As the learned Judge believed her as to the original advances, as to the terms on which they were made and as to what took place on 22nd September 1911, she has succeeded because she has established not only the original indebtedness but also that the part payment—which as a payment in fact is admitted on both sides—was a part payment on account, so as to take the case out of the *Statute of Limitations*. The onus is upon the plaintiff to establish that. It may be established in various ways. If the debt were a unified debt so that payment of a small amount would, unless the contrary were expressed, be an acknowledgment of the whole debt, and if there were nothing to the contrary, that would be sufficient. In the present case, however, the debt is not a unified debt, but is composed of a series of independent

(1) L.R. 19 I.A., 9.

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advances, payment of any one of which would not be an admission of liability for the others. But that difficulty is got over by the plaintiff's own evidence. She testified that her brother acknowledged the whole debt and promised to pay the balance when he sold certain property. If that is true it carries the case over the Statute. As the learned Judge has believed her evidence as to that fact, and as that evidence is corroborated—though I do not say corroboration is necessary as a matter of law,—it seems to me that the plaintiff's case is established.

As to the objection that there was a trust, I think it is met in this way:—The money had been collected and voluntarily handed over to her for the benefit of herself and her children, and I think it is a proper conclusion that she may be taken in the circumstances to have allowed her brother, as a business man, to act as a business agent to invest the money, and, if there was a trust, she allowed herself to be a trustee, and allowed her brother to act as agent for those for whom she was a trustee in investing the money and getting the returns from it. She represented all the beneficiaries in employing her brother, and she represents them now in getting the money from his estate, and all are bound.

GAVAN DUFFY J. In the circumstances of this case, I think it is only necessary to say that I am not satisfied that the judgment appealed against should be disturbed.

RICH J. I am not disposed to interfere with the findings of fact at which *Hood* J. arrived. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Secomb & Woodfull.*
Solicitor, for the respondent, *L. L. Benjamin.*

B. L.