59, 1938

APPELLANT'S CASE.

In the Privy Council.

No. 43 of 1938.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

MICHAEL BURNS, Administrator of the Estate of Dominic Burns, deceased, and the said MICHAEL BURNS .. .. (*Plaintiffs*) *Appellants*,

AND

MABEL BURNS, Administratrix of the Estate of James Francis Burns, deceased, and the said MABEL BURNS .. .. (*Defendants*) *Respondents*.

APPELLANTS' CASE.

Record.

1. This is an Appeal from a judgment of the Court of Appeal for British Columbia dated the 11th January, 1938, affirming a judgment of Robertson J. dated the 26th May, 1937. The effect of the said judgment of Robertson J. was to dismiss an action brought by the Appellant whereby he claimed an Order revoking letters of administration of the estate of the above named James Francis Burns deceased granted to the Respondent Mabel Burns, and declaring that the Respondent had no right to share in the said estate, and other relief as hereinafter appears.

p. 110.
p. 105.

2. The said James Francis Burns (hereinafter called "the Intestate") died intestate on the 31st December, 1935, domiciled in the Province of Alberta without leaving any issue.

10

p. 3, l. 18.

3. The Respondent and the said James Francis Burns went through a form of marriage at Vancouver, British Columbia, on the 22nd March, 1923, and the Respondent claims to be the lawful relict of the intestate.

p. 3, l. 20.
p. 118.

4. The Appellant is a lawful uncle and one of the next of kin of the Intestate and claims to be entitled under the provisions of the Intestates Succession Act 1928 relating to the Province of Alberta and amendments thereof to succeed to a part of his estate.

p.4, l. 34.

Vacher.—54131

A

Record.

p. 3, l. 5.

p. 4, l. 30.

5. The Appellant is also Administrator of Dominic Burns deceased who was a lawful uncle of the Intestate and died intestate on the 19th June, 1933, and in whose estate the Intestate was at the date of his death entitled to a share as next of kin.

p. 3, ll. 7-14

6. The Respondent obtained a grant of administration of the estate of the Intestate in the Province of Alberta and on the 22nd September, 1936, the said grant was re-sealed in the Province of British Columbia under the " Probate Recognition Act " of the said Province.

p. 4, l. 14.

7. On the 19th November, 1936, the Respondent claiming herself to be the lawful widow of and the Administratrix of the estate of the Intestate instituted proceedings for an account from the Appellant of his administration of the assets of the Estate of the said Dominic Burns. In the course of these proceedings it became apparent that the issues raised in this action would have to be decided and those proceedings were accordingly stood over to enable the Appellant to bring this action.

p. 83.

p. 1.

8. This action was instituted by the Appellant by Writ dated the 4th December, 1936, claiming a Declaration :—

(A) That the Respondent was not the lawful relict of the Intestate ;

(B) That the Respondent had no legal claim upon the Appellant nor upon the Estate of Dominic Burns deceased for any distribution nor any share therein ;

(C) That the Respondent was not in any wise entitled to demand or receive from the Plaintiff an account of his administration of the estate of Dominic Burns deceased ;

(D) That the Respondent had become disentitled to any rights she might ever have had by reason of her living in adultery apart from and at the death of her husband within the meaning of the provisions of the Administration Act R.S.B.C. 1924, Cap. 5 and amendments. (The material provisions of this Act are the same as those of the Intestates Succession Act 1928 of Alberta (Statutes 1928, Ch. 17) which was actually the governing Statute.)

p. 2, ll. 1, *et seq.*

The Writ further claimed that the said grant of re-sealing dated the 22nd September, 1936, should be revoked and that administration of the estate of the Intestate be granted to the Appellant as his uncle and next of kin.

9. The Appellant's case in the action as pleaded and presented at the trial rested on the following grounds that is to say :—

p. 3, l. 26.

(A) That at the time of going through the form of marriage with the Intestate mentioned in paragraph 3 hereof the Respondent was the lawful wife of one Melvin Stuart Huggins ;

p. 11, l. 9.

(B) That the Respondent was estopped from alleging that she was the lawful wife of the Intestate by reason of certain proceedings in the year 1926 under the Deserted Wives Maintenance Act Revised Statutes of British Columbia 1924 more particularly hereinafter referred to ;

Record. p. 4, l. 19 *et seq.*

(C) That the Respondent had left and was living in adultery at the time of the death of the Intestate within the meaning of Section 19 (1) of the Intestates Succession Act 1928 of the Statutes of Alberta which was applicable by reason of the Intestate having died domiciled in Alberta and was therefore disentitled to share in the estate of the Intestate ;

p. 4, l. 1.

(D) That the Respondent obtained the said grant of re-sealing dated the 22nd September, 1936, and also the original grant of administration in Alberta by the suppression of material facts.

10. Sub-section 1 of Section 19 of the Intestates Succession Act 1928 of the Statutes of Alberta is in the following terms :—

p. 4, l. 24.

" If a wife has left her husband and is living in adultery at the time " of his death she shall take no part in her husband's estate."

p. 88. pp. 91, 92, 97, 98. p. 32.

11. In the course of the proceedings the Respondent was examined on discovery pursuant to Rule 370 of the Supreme Court of British Columbia. On the advice of her Counsel she refused to answer a number of questions directed to matters in issue in the action as more particularly hereinafter mentioned and by arrangement between Counsel it was reserved to the trial Judge to say whether such questions should or should not be answered. Notwithstanding requests by Counsel for the Appellant at the trial the trial Judge gave no directions that any of the said questions should be answered. It is submitted that he was wrong in omitting to give such directions for the reasons hereinafter stated.

12. The following facts were proved or admitted in the course of the proceedings :—

p. 93, l. 8 to p. 94, l. 19. p. 92, l. 9.

(A) That the Respondent and one Melvin Stuart Huggins had lived together as man and wife and been so recognised in Chicago and Calgary and that she had had two children by the said Huggins aged 22 and 21 respectively ;

p. 92, l. 35 *et seq.* p. 94, l. 20 *et seq.*

(B) That in the year 1926 she brought proceedings at Vancouver under the " Deserted Wives Maintenance Act " and swore in the said proceedings that she was previously lawfully married to the said Huggins ;

p. 92, l. 15

(C) That the said Huggins was alive in the year 1926 ;

p. 94, l. 36 *et seq.* p. 95, l. 41 *et seq.*

(D) That she also swore in the said proceedings that she had obtained a divorce from Huggins but subsequently admitted in her evidence on discovery in this action (when she stated that she had never been married to Huggins at all) that this statement was untrue ;

p. 115.

(E) That the said charge against the Intestate was dismissed the Magistrate issuing a certificate of dismissal dated the 24th August, 1926, to the effect that having tried he thereby dismissed the case ;

(F) That the Intestate came from Calgary (Alberta) to Vancouver for his marriage to the Respondent ; they had a home in Vancouver for about two years, the Intestate travelling to and fro from Calgary ; they separated in 1926. Thereafter the Intestate, to the knowledge

Record.

of the Respondent, had his home in Calgary, but she never joined him there, remaining in Vancouver ;

p. 90, ll. 36, 43.

(G) That the Respondent and the Intestate did not live together from 1926 until he died ;

p. 97, l. 34.

(H) That in the year 1931 she had a child of whom the Intestate was not the father ;

p. 57, l. 29 *et seq.*
p. 58, l. 31 *et seq.*
p. 60, l. 34 *et seq.*
p. 61, l. 23.
p. 62, l. 40 *et seq.*
p. 81, l. 36 *et seq.*

(I) That for some years after 1926 she was associated with a man called George Allen who visited her in the evenings about twice a week ;

(J) That between 1929 and August, 1934 (when she was removed to an Institution) the house in which she was living on 12th Avenue, West Vancouver, was frequently visited by a man "sometimes every day," "more often at night," and left on occasions at 2 o'clock in the morning ;

10

p. 116.

(K) That in obtaining the original Grant of Administration in Alberta and the said Grant of Re-sealing dated the 22nd September, 1936, the Respondent did not disclose any of the facts mentioned in the foregoing sub-paragraphs (A) to (J) inclusive.

13. The questions which the Appellant declined to answer on discovery were questions 61 and 62 inclusive (the answers to which were proved aliunde) 65 to 67 inclusive 192 and 195 204 and 205. Among such questions were questions as to who was the father of the child born in 1931 and whether it was Mr. Allen. It is submitted that all such questions were relevant and should have been answered since evidence of previous adulterous association between the Respondent and Allen would support the inference of a continuing adulterous association at the date of the death of the Intestate.

20

pp. 91 to 99.

14. The Respondent called no evidence at the trial of the action. Certain formal admissions on discovery were put in.

p. 31.

15. The action came on for hearing before Robertson J. and in the course of the trial the Appellant obtained leave to amend his Pleadings so as to raise in his Reply the question of estoppel mentioned in paragraph 9 (B) hereof. Counsel for the Respondent was offered opportunity of delivering a further pleading in answer to the said amended Reply but did not avail himself of this opportunity.

30

p. 101.

16. On the 26th May, 1937, Robertson J. delivered judgment dismissing the Appellant's action. He held on the first point that the evidence in fact showed that the Respondent was not (without alluding to the evidence that showed the Respondent and Huggins had lived ostensibly as man and wife) married to Huggins. He held that there was no estoppel either by record or in pais. On the second point he said :—

p. 102, l. 35 *et seq.*

"First of all, there is no evidence that the Defendant left the "Plaintiff. The second requirement of the Statute is that she 'is living "'in adultery at the time of his death.' In my opinion this statute "means exactly what it says. This means a state of affairs existing "at the death of the husband. It is not sufficient to prove that a person

40

Record.

" was living in adultery, say for two years, before the death of her
" husband. It is not sufficient to show isolated acts of adultery com-
" mitted a long time prior to the husband's death. There must be
" evidence from which the Court can draw the inference that the wife
" was living in adultery at the time of her husband's death."

He referred to the two American decisions of *Zeigler v. Mize* (1892) 31 N.E. 945 and *Spade v. Hawkins* (1916) 110 N.E. 1010 and regarded them as establishing the proposition that it must be clear that at the time of the death of her husband the wife was living in adultery and concluded as 10 follows :—

p. 103, l. 7.
p. 102, l. 15.

" Now the facts in this case are that prior to her marriage to Burns
" the Defendant had lived in adultery with Huggins up to about 1919.
" There is nothing to show what her actions were between that date
" and 1923 when she married Burns with whom she lived for about three
" years and then separated. It is shown that she had a child in 1931.
" It is also shown that she went into a mental hospital in 1934 and
" continued there until 1935 and that she was suffering from Neuro-
" syphilis. There is nothing to show when she became infected with
" the disease mentioned or by whom she was infected ; in fact, it might
20 " have been hereditary. There is nothing to show any improper conduct
" on her part since she left the hospital. For these reasons I think the
" Plaintiff has failed to bring the Defendant within the Section of the
" Statute. The action is dismissed with costs."

p. 104, l. 15 *et seq.*

A counterclaim by the Defendant in the action was dismissed without costs as being more proper to be dealt with in Chambers.

p. 104, ll. 35 & 36.

17. The Appellant appealed from this decision to the Court of Appeal for British Columbia. The appeal was heard before Martin C.J. McPhillips J.A. and Sloan J.A. and was on the 11th January, 1938, dismissed with costs. No reasons were given for this decision.

p. 110.

30 **18.** The Appellant submits that the judgments in the Courts below were wrong and ought to be reversed and that relief should be granted to the Appellant as prayed by his Statement of Claim in the Action or alternatively that a new trial be granted for the following amongst other

REASONS.

1. Because there was evidence of the marriage of the Respondent and the said Huggins before 1923 from their cohabitation ostensibly as man and wife and her evidence in the 1926 proceedings which was not displaced by the Respondent's denial of the marriage in these proceedings.

2. Because there was no evidence that that marriage had come to an end before the Respondent was married to the Intestate.

3. Because there was evidence that the Respondent left the Intestate since she made no attempt to join him at his home in Calgary and the finding of the trial Judge to the contrary on this point was wrong.

4. Because upon the facts proved or admitted there was sufficient evidence upon which the Court could and should have inferred that the Respondent was living in adultery at the date of the death of the Intestate. 10

5. Because the said Grant of re-sealing dated the 22nd September, 1936, was obtained by the Respondent by the suppression of material facts.

6. Because the Respondent has in all the circumstances no right to administer or share in the estate of the Intestate.

7. As regards the claim for a new trial because the trial Judge wrongly omitted to direct the Respondent to attend and answer questions of vital relevance and importance put to her upon her examination for discovery. 20

CYRIL RADCLIFFE.
G. P. SLADE.

In the Privy Council.

No. 43 of 1938.

On Appeal from the Court of Appeal for British Columbia.

BETWEEN

MICHAEL BURNS, Administrator of the Estate of Dominic Burns, deceased, and the said MICHAEL BURNS (*Plaintiffs*) *Appellants*,

AND

MABEL BURNS, Administratrix of the Estate of James Francis Burns, deceased, and the said MABEL BURNS (*Defendants*) *Respondents*.

APPELLANTS' CASE.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.