59, 1936

In the Privy Council

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.

Record of Proceedings

R. S. LENNIE, ESQ., K.C.,
Solicitor for (Plaintiffs) Appellants.

MESSRS. BLAKE & REDDEN,
17 Victoria St.,
London, S.W. 1,
Agents

MESSRS. FARRIS, FARRIS, MCALPINE, STULTZ, BULL & FARRIS,
Solicitors for (Defendants) Respondents.

MESSRS. GARD, LYELL & Co.,
Leith House,
47 Gresham St.,
London, E.C. 2,
Agents

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INDEX—*continued*

In the Supreme Court of British Columbia

BETWEEN:

MICHAEL BURNS, administrator of the estate of Dominic Burns, deceased, and the said MICHAEL BURNS,

Plaintiffs,

AND:

MABEL BURNS, administratrix of the estate of James Francis Burns, deceased, and the said MABEL BURNS,

Defendants.

No. 1

ENDORSEMENT ON WRIT

THE PLAINTIFF'S CLAIM IS FOR:

A Declaration that:

(a) The Defendant is not the lawful relict of James Francis Burns, deceased.

(b) That the Defendant has no legal claim upon the Plaintiff nor upon the estate of Dominic Burns aforesaid for any distribution thereof nor share therein.

(c) That the Defendant is not in any wise entitled to demand or to receive from the Plaintiff an accounting of his administration of the estate of Dominic Burns, deceased.

(d) That the Defendant has become disentitled to any rights she may 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 Chapter 5 and amendments.

RECORD

In the Supreme Court of British Columbia

No. 1
Endorsement on Writ
Dec. 4, 1936
(Contd.)

The Plaintiff's further claim is that the Grant of Re-sealing under the "Probates Recognition Act" of the Province of British Columbia whereby Letters of Administration issued out of the District Court of the District of Southern Alberta and re-sealed in the Province of British Columbia on the 22nd September, 1936, granting to the Defendant administration of the estate of the said James Francis Burns deceased was improvident and should be revoked and administration of the estate of the said deceased be granted to the Plaintiff as next-of-kin, he being an uncle of the deceased.

The whole of the Plaintiff's claims in this action are made in his capacities as Uncle and next-of-kin of James Francis Burns deceased, he being the brother of Thomas Burns, who was the father of and pre-deceased James Francis Burns aforesaid and as administrator of the estate of Dominic Burns deceased who was likewise an uncle of the said James Francis Burns and who pre-deceased him and in whose estate the said James Francis Burns had, on his death, a vested interest.

The Plaintiff's further claim is for the costs of this action and such further and other relief as to this Honourable Court may seem meet.

RECORD

In the Supreme Court of British Columbia

No. 2
Amended Statement of Claim
June 21, 1937

No. 2

AMENDED STATEMENT OF CLAIM AS AT TRIAL

1. The Plaintiff is a retired farmer and resides in the Municipality of Delta in the Province of British Columbia, and is administrator of the estate of Dominic Burns deceased, who died on the 19th day of June, 1933.

2. The Defendant is a housewife, and resides in the City of Vancouver, Province aforesaid, and has obtained administration of the estate of James Francis Burns deceased, late of the City of Calgary in the Province of Alberta and is acting as such administratrix in the Province of British Columbia under the said Grant re-sealed under the "Probates Recognition Act" of the Province of British Columbia on the 22nd day of September 1936.

3. The said Dominic Burns left him surviving amongst others the said James Francis Burns late of the City of Calgary aforesaid he being then domiciled in the Province of Alberta and who died intestate on the 31st December, 1935 without leaving any issue.

4. On the 22nd March, 1923, the Defendant and the said James Francis Burns went through a form of marriage at Vancouver, British Columbia, and the Plaintiff denies that the Defendant has any interest in any capacity in the estate of the said James Francis Burns upon the following separate and alternative grounds:

(a) At the time of the going through of the said form of marriage in the preceding paragraph mentioned, the Defendant was the lawful wife of one Melvin Stuart Huggins who is still living, and the Defendant therefore is not the lawful widow of the said James Francis Burns.

(b) In the alternative, the Court should determine whether the Defendant is entitled to lay claim to any part of the estate of the said James Francis Burns deceased, as being his widow.

5. The Defendant left the said James Francis Burns in or about the year 1923 and was living in adultery at the time of his death.

6. From the time the said Defendant left the said James Francis Burns up to and at the time of his death, she was living in adultery.

(6a) The said Defendant bore a child to some person unknown to the Plaintiff and other than the said James Francis Burns on or about the 21st day of June 1931.

RECORD

In the Supreme Court of British Columbia

No. 2
Amended Statement of Claim
June 21, 1937
(Contd.)

7. The Defendant concealed the facts alleged in the preceding four paragraphs from the Courts in Alberta when administration of the estate of the said James Francis Burns was granted to her and also from the Court of British Columbia when the said grant was ordered to be re-sealed.

8. That in the Inventory to the Affidavit of Value and Relationship sworn to by the Defendant on the 14th day of September 1936 in support of her application for re-sealing in British Columbia the Letters of Administration issued to her in the Alberta Court, it appears that the only assets of the said deceased at the time of his death consisted of a policy of insurance on his life for $3,000.00 and the interest of the said James Francis Burns in the estate of the said Dominic Burns.

9. On the 19th day of November, 1936, the Defendant claiming herself to be the lawful widow of, and the administratrix of the estate of James Francis Burns, deceased, sought an accounting from the Plaintiff of his administration of the assets of the estate of Dominic Burns aforesaid to this Honourable Court.

(9a) The Defendant took no right to any part of the estate of the said James Francis Burns because she left him as aforesaid and was living in adultery at the time of his death within the meaning of sub-section 1, section 19 of the "Intestates Succession Act" 1928, of the Statutes of Alberta in the words following: "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," the said Statute being now and at all relevant times in force and constitutes the law governing the rights of the Defendant in relation to the estate of the said James Francis Burns.

10. James Francis Burns was a nephew of the said Dominic Burns deceased, and one of his next-of-kin, and is therefore entitled to succeed to a part of his estate.

11. The Plaintiff is a brother of the late Dominic Burns, and claims a right to the administration of the estate of the late James Francis Burns as next-of-kin, and is furthermore entitled under the provisions of the "Administration Act" R.S.B.C. 1936, Cap. 5, and amendments to succeed to a part of his estate:

WHEREFORE THE PLAINTIFF CLAIMS:

(a) 1. The grants of administration to the Defendant as aforesaid were obtained by the suppression of material facts.

2. The Defendant is not the lawful relict and is not entitled to claim any part of the estate of the said James Francis Burns in the character of his widow.

3. The Defendant has no legal claim upon the estate of the said Dominic Burns, deceased.

4. The Defendant is not in any wise entitled to demand or receive an accounting of the estate of the said Dominic Burns deceased.

5. The Defendant is disentitled to any claim or rights upon or to the whole or any part of the estate of the late James Francis Burns as aforesaid by reason of her leaving him and living in adultery at the time of his death within the meaning of the provisions of sub-section 1, section 19, of the "Intestates Succession Act" of Alberta where he was domiciled at the time of his death.

(b) That the grant by re-sealing under the "Probates Recognition Act" of the Province of British Columbia whereby letters of administration issued out of the District Court of the District of Southern Alberta and re-sealed in the Province of British Columbia on the 22nd day of September, 1936, granting to the Defendant administration of the estate of James Francis Burns deceased, should be revoked and administration of the estate of the said deceased be granted to the Plaintiff as next-of-kin, he being an uncle of the deceased.

2. That the Defendant be restrained from dealing with the assets of the estate of the late James Francis Burns aforesaid and account to this Honourable Court for the same.

(c) Costs of this action.

(d) Such further and other relief as to this Honourable Court may seem meet.

Place of Trial: Vancouver, B.C.

DATED at Vancouver, B.C., this 21st day of June, 1937.

"G. F. McMASTER,"
Solicitor for the Plaintiff.

RECORD

In the Supreme Court of British Columbia

No. 3
Demand for Particulars
Dec. 9, 1936

No. 3

DEMAND FOR PARTICULARS

TAKE NOTICE that the Defendants require particulars of the Statement of Claim herein as follows, namely:

1. Particulars of the time and place of the marriage of the Defendant and the said James Francis Burns at Calgary, Alberta, as set forth in paragraph 4 of the Statement of Claim herein.

2. Particulars of the date of the alleged marriage with the said Huggins, where the said marriage ceremony was performed and by whom, where registered, as set forth in paragraph 6 of the Statement of Claim herein.

3. Particulars as to the date of the alleged desertion of the Defendant from the said James Francis Burns, where the said desertion took place, the manner of the said desertion, where the Defendant and the said James Francis Burns were living at the time of the alleged desertion, where the Defendants and the said James Francis Burns lived after the said desertion, as alleged in paragraph 7 of the Statement of Claim herein.

4. Particulars as to how, when, where, and with whom and in what manner, the Defendant was at the time of the death of the said James Francis Burns living in adultery, as alleged in paragraph 8 of the Statement of Claim herein.

5. AND TAKE NOTICE that if the aforementioned particulars are not delivered within five (5) days from service of this Demand for Particulars, then an Application will be made to compel delivery of same.

DATED at Vancouver, B.C., this 9th day of December, 1936.

"G. STANLEY MILLER,"
Solicitor for Defendants.

No. 4

PARTICULARS SUPPLIED BY THE PLAINTIFF (APPELLANT)

PARTICULARS PURSUANT TO DEMAND MADE ON DECEMBER 9th, 1936

1. Particulars of the time and place of the marriage of the Defendant and James Francis Burns are as follows: At St. Andrews Church, Vancouver, B.C., March 22nd, 1923. The allegation contained in paragraph 4 of the Statement of Claim herein to the effect that said marriage took place in Calgary, is an error.

2. Particulars of Defendant's marriage with Melvin Stuart Huggins are more particularly within her own knowledge, the same occurring as the Plaintiff alleges, at the City of Chicago, Illinois, one of the United States of America in the year 1914.

3. Particulars of desertion of the Defendant are as follows:

James Francis Burns had been resident with the Defendant at the City of Vancouver, B.C., subsequent to their marriage in the year 1923 for only a few months when he was required, by reason of a change in employment, to reside in the City of Calgary, Alberta, and immediately after taking up residence there, he requested the Defendant to come there and reside with him, and notwithstanding repeated requests from time to time, this she failed and refused to do so, but continued to reside in the City of Vancouver aforesaid and the said James Francis Burns continued to reside and be employed in the City of Calgary until the time of his death.

4. That the particulars of how, when and where, and with whom and in what manner the Defendant was, at the time of the death of the said James Francis Burns living in adultery, as alleged in paragraph 8 of the Statement of Claim herein, are peculiarly within her own knowledge, but in addition to the child adulterously born to her on the 21st June, 1931, as therein mentioned, there was also born to the Defendant a child in or about the month of January, 1929, of which the said James Francis Burns was not the father.

5. Further particulars will be delivered, if required, after the Defendant's examination for discovery in this action.

DATED at Vancouver, this 22nd day of December, 1936.

"G. F. McMASTER,"
Solicitor for the Plaintiff.

RECORD

In the Supreme Court of British Columbia

No. 5
Statement of Defence and Counterclaim
Jan. 11, 1937

No. 5

STATEMENT OF DEFENCE

1. The Defendant denies the allegations of fact contained in paragraph 4 of the Statement of Claim herein and states that the marriage of the said James Francis Burns and the Defendant was performed at the City of Vancouver in the Province of British Columbia.

2. The Defendant denies each and every allegation of fact contained in paragraph 6 of the Statement of Claim herein and specifically denies that she was married to one Melvin Stuart Huggins at any time or any place.

3. The Defendant denies that she deserted the said James Francis Burns in or about the year 1926 or at any time, and in reply states that the said James Francis Burns deserted her in or about the year 1926.

4. The Defendant denies each and every allegation of fact contained in paragraph 8 of the Statement of Claim herein and specifically denies that she left her said husband, the said James Francis Burns, deceased, and further denies that she was living in adultery at the time of his death and, in further answer to paragraph 8 of the Statement of Claim herein, the Defendant says that the said James Francis Burns, deceased, died on or about the 31st day of December, 1935 at the City of Calgary in the Province of Alberta and at the time of the death of the said James Francis Burns, deceased, the Defendant was not living in a state of adultery and, while denying that she bore a child to some person on or about the 21st day of June, 1931, she further states that if such was the case, same is immaterial to this issue.

5. In reply to paragraph 9 of the Statement of Claim herein the Defendant states that any and all relevant facts were disclosed to the Courts of Alberta and British Columbia when administration of the estate of the said James Francis Burns, deceased, was granted to the Defendant.

6. In reply to paragraph 10 of the Statement of Claim herein the Defendant states that in addition to the assets set forth in said paragraph 10, the estate of the said James Francis Burns, deceased, is entitled to a share in the estate of Bertram Burns, deceased, brother of the said James Francis Burns, deceased, which said brother died at the City of Calgary in the Province of Alberta in the year 1936 and was at the time of his death entitled to a one-fortieth interest in the estate of the said Dominic Burns, deceased.

7. In reply to paragraph 13 of the Statement of Claim herein, the Defendant denies that the Plaintiff is entitled to the administration of the estate of the late James Francis Burns, as his next-of-kin, and further denies that the Plaintiff is entitled under the provisions of the Administration Act, R.S.B.C. 1924, chapter 5, and amendments, to succeed to part of the estate of the said James Francis Burns, deceased.

8. In further answer to the whole of the Statement of Claim herein, the Defendant says that she was appointed administratrix of the estate of the said James Francis Burns, deceased, under Letters of Administration issued out of the District Court of the District of Southern Alberta, Judicial District of Canada, on the 25th day of April, 1936, which said Letters of Administration were re-sealed in the Province of British Columbia, pursuant to the "Probates Recognition Act" of the Province of British Columbia, at the City of Vancouver in the said Province on the 22nd day of September, 1936.

9. The Plaintiff's Statement of Claim herein discloses no cause of action against the Defendant.

WHEREFORE the Defendant prays:

(a) That the Plaintiff's claim herein be dismissed with costs.

(b) Such further or other relief as to this Honourable Court may seem meet.

COUNTERCLAIM

1. By way of Counterclaim, the Defendant (Plaintiff by way of Counterclaim) repeats all of the allegations set out in the Statement of Defence herein.

2. The said Dominic Burns, deceased, died at the City of Vancouver, in the Province of British Columbia, in the year 1933, and left an estate valued for the purposes of probate at $245,415.70, in which the said James Francis Burns, deceased, was entitled to a one-fortieth interest, as appears by Affidavit of Value and Relationship filed in the Supreme Court of British Columbia at Vancouver under Probate File No. 18477; and the estate of the said James Francis Burns, deceased, is further entitled to a share in the interest of his brother Bertram Burns, in the estate of the said Dominic Burns, deceased, which said brother died at the City of Calgary in the Province of Alberta, in the year 1936.

3. The Plaintiff (Defendant by way of Counterclaim) was appointed administrator of the estate of the said Dominic Burns,

RECORD

In the Supreme Court of British Columbia

No. 5
Statement of Defence and Counterclaim Jan. 11, 1937 (Contd.)

deceased, in the year 1934 and since that time he has not made or given any statement of account disclosing the receipts, disbursements, liabilities and assets of the said estate and has refused and neglected so to do in response to requests made by the Defendant (Plaintiff by way of Counterclaim) as administratrix of the estate of the said James Francis Burns, deceased.

4. It is necessary that the Plaintiff (Defendant by way of Counterclaim) render an accounting of his stewardship of the estate of the said Dominic Burns,, deceased, at the present time, in order that the Defendant (Plaintiff by way of Counterclaim) as administratrix of the estate of the said James Francis Burns, deceased, may properly administer the estate of her late husband, of which she is the sole beneficiary.

5. No distribution of the assets of the estate of the said Dominic Burns, deceased, has been made since the date of the death of the said Dominic Burns, deceased, in July, 1933, and such distribution should now be made.

WHEREFORE the Defendant (Plaintiff by way of Counterclaim) claims:

(a) An accounting by the Plaintiff (Defendant by way of Counterclaim) as administrator of the estate of the said Dominic Burns, deceased, showing the assets and liabilities, receipts and disbursements of the said estate from the date of the death of the said Dominic Burns, deceased.

(b) Immediate distribution of the estate of the said Dominic Burns, deceased, amongst the heirs thereto.

(c) Costs of this action.

(d) Such further or other relief as to this Honourable Court may seem meet.

DATED at Vancouver, B.C., this 11th day of January, A.D. 1937.

"G. STANLEY MILLER,"
Solicitor for the Defendants.

No. 6

REPLY AS AMENDED PURSUANT TO LEAVE AT TRIAL

1. The Plaintiff joins issue with the Defendant upon paragraphs 2 to 7 inclusive of the Statement of Defence herein.

2. The Plaintiff says that as to paragraph 8 of the Statement of Defence herein, the general issue raised in the Statement of Claim and particulars delivered herein is sufficient answer.

3. The Plaintiff further says that the Defendant should not be admitted to say that she is a lawful widow of James Francis Burns, deceased, because in the year 1926, to secure a Status for Relief under the Act hereafter referred to, she swore to an information charging James Francis Burns as her lawful husband under the "Deserted Wives Maintenance Act," chapter 7, Revised Statutes of British Columbia, 1924, before a stipendiary Magistrate in and for the City of Vancouver, British Columbia, for that he, the said Francis Burns, at the said City of Vancouver on the 25th day of March, A.D. 1926, at the said City of Vancouver, being a husband and under a legal duty to provide necessaries for his wife did unlawfully fail to provide such necessaries the said wife being in necessitous circumstances contrary to the form of the statute in such case made and provided and the said Magistrate after having tried the said charge and heard the Defendant's sworn statement that prior to going through a form of marriage with the said James Francis Burns, she was married to, and had cohabited with, and had two children by, one Melvin Stuart Huggins, referred to in the Statement of Claim, and that he, the said Huggins, was still alive, dismissed the same, whereupon being required by the said James Francis Burns, deceased, so to do, the said Magistrate issued under his hand and the Seal of the Court a Certificate of Dismissal of the said information, pursuant to section 45 of the "Summary Convictions Act" being chapter 245 of the Revised Statutes of British Columbia, 1924, which said dismissal is not now open to appeal, wherefore the Plaintiff says that it was in the said Court decided that she was not the lawful wife of the said James Francis Burns, deceased, and the Plaintiff is entitled to the benefit thereof, and that the Defendant is estopped from alleging now that she is the lawful widow of the said deceased and that the subject of her said alleged marriage to the James Francis Burns is res judicata.

DEFENCE TO COUNTERCLAIM

1. The Defendant by way of counterclaim, denies each and every allegation of fact contained in paragraph 2 of the Counterclaim herein except as to the solemnization of the marriage between James Francis Burns, since deceased, and the Plaintiff by way of Counterclaim.

RECORD

In the Supreme Court of British Columbia

No. 6
Reply and Defence to Counterclaim
June 21, 1937
(Contd.)

2. The Defendant by way of Counterclaim denies each and every allegation of fact contained in paragraphs 3 and 4 of the Counterclaim herein.

3. In answer to the whole of the Counterclaim herein, the Defendant by way of Counterclaim, repeats the allegations set forth in the Statement of Claim and particulars delivered herein, and denies that the Plaintiff by way of Counterclaim is entitled to (a) An accounting by the Defendant by way of Counterclaim as administrator of the estate of the said Dominic Burns, deceased: (b) Immediate distribution of the estate of the said Dominic Burns, deceased: (c) the Costs of this action, or (d) any other relief in the premises.

4. That the laws of the Province of Alberta where the said James Francis Burns deceased was domiciled at the time of his death, do not entitle the Plaintiff by way of Counterclaim to inherit any part of her late husband's estate in the circumstances set forth in the whole of the Statement of Claim herein, and (a) that a relevant part of such Alberta law is set forth as sub-section 1 of Section 19 of the "Intestates Succession Act" 1928 in the Statutes of Alberta as follows: "If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate."

5. In defence of the whole of the Counterclaim the Defendant by way of Counterclaim pleads sub-section 1 of section 127 of the "Administration Act" being chapter 2 of the Statutes of the Province of British Columbia 1925 and Amendments and other parts of the said Statute applicable to the circumstances set forth in the Statement of Claim and Particulars delivered in this section.

6. The Defendant repeats said paragraph 3 of the Reply herein.

DATED at Vancouver, B.C., this 21st day of June, 1937.

"G. F. McMASTER,"
Solicitor for the Plaintiff.

To: Mabel Burns, administratrix of the estate of James Francis Burns, deceased, and the said Mabel Burns.

And to: G. Stanley Miller, Esq., her solicitor.

THIS REPLY AND DEFENCE TO COUNTERCLAIM was filed and delivered by Glenholme Ferguson McMaster, Solicitor for the Plaintiffs, whose place of business and address for service is c/o McMaster & Campbell, 901 Vancouver Block, 736 Granville Street, Vancouver, B.C.

No. 7

NOTICE TO ADMIT FACTS

Delivered to the Defendant Respondent by the Plaintiff Appellant on the 29th day of April, 1937.

The facts, the admission of which is required, are:

1. That Dominic Burns died on the 18th day of June, 1933, at Vancouver, British Columbia.

2. That Letters of Administration were issued in respect of his estate to Michael Burns on the 19th day of July, 1934.

3. That the Plaintiff, Michael Burns, administrator of the estate of Dominic Burns, deceased, is his brother and one of the next-of-kin of the said deceased.

4. That James Francis Burns, his nephew, died at the City of Calgary in the Province of Alberta on the 31st day of December, 1935.

5. That the gross value of the estate of Dominic Burns, deecased, was sworn at $245,415.70 for the purposes of Probate and Succession Duty in British Columbia.

6. That the Defendant Mabel Burns was appointed administratrix of the estate of the said James Francis Burns by Letters of Administration issued out of the District Court of the District of Southern Alberta on the 25th day of April, 1936 which were re-sealed in British Columbia on the 22nd day of September, 1936.

7. That prior to her marriage to the said James Francis Burns, her name was Mabel Ball, daughter of an American citizen born in Chicago in the State of Illinois.

* * * * * *

15. That sub-section 1 of section 19 of the "Intestates Succession Act 1928" of the Statutes of Alberta is in words and figures the same as sub-section 1 of section 127 of the "Administration Act" being chapter 2 of the Statutes of British Columbia, 1925, and is as follows:

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

16. That at the time of the death of the said James Francis Burns on the 31st day of December 1935, there has been no repeal or amendment of the words set forth in the previous paragraph hereof.

DATED April 29th, 1937.

RECORD

In the Supreme Court of British Columbia

Proceedings at Trial May 10, 1937

In the Supreme Court of British Columbia

BETWEEN:

MICHAEL BURNS, administrator of the estate of Dominic Burns, deceased, and the said MICHAEL BURNS,

Plaintiffs,

AND:

MABEL BURNS, administratrix of the estate of James Francis Burns, deceased, and the said MABEL BURNS, housewife,

Defendants.

PROCEEDINGS AT TRIAL

R. S. LENNIE, ESQ., K.C., and G. F. McMASTER, ESQ., appeared for Michael Burns, administrator of the estate of Dominic Burns, deceased.

ROBERT CASSIDY, ESQ., K.C., appeared for Michael Burns.

W. B. FARRIS, ESQ., K.C., and G. STANLEY MILLER, ESQ., appeared for Defendant.

The Court: Who is for the Plaintiff?

Mr. Lennie: I appear for the Plaintiff, my lord, with my learned friend Mr. McMaster. I am appearing for Michael Burns, the administrator.

Mr. Cassidy: I appear, my lord, for Michael Burns.

The Court: That is in his personal capacity.

Mr. Cassidy: In his personal capacity.

Mr. Farris: I appear with my learned friend, Mr. Miller, for the Defendant.

Mr. Lennie: Has your lordship read the pleadings? The action is rather a simple one in a way and yet a difficult one in

another way. It concerns chiefly the interpretation of a section of our Administration Act which reads as follows:

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

The Court: What is that section?

Mr. Lennie: That is of the British Columbia Act, it is sub-section 1 of 121 of the Administration Act which is similar to a section in the Alberta Act.

The Court: That must be the amendment.

Mr. Lennie: It is 1925.

Mr. Farris: Amendment of 1925, chapter 2.

Mr. Lennie: Under the provisions of the Administration Act in British Columbia, the wife would be heir in the circumstances here to this estate that she is making claim to. We say she is deprived of this by reason of this sub-section. Now, as a matter of fact, the British Columbia law has nothing whatever to do with it. I am merely citing that because it is the same as the law in Alberta. The deceased was domiciled in Alberta at the time of his death and, therefore, the Alberta law applies, but for ready reference, we refer your lordship now to that particular section, although I shall prove that the Alberta section is the same. Then there is another issue; that the Defendant who claims to be the wife of James Francis Burns, the deceased, who died intestate—we suggest was not his wife as she had been previously married to another man at the time she went through a form of marriage with the deceased. Now, this whole thing arises from the Estate of Dominic Burns, who was an uncle of James Francis Burns. He died intestate and James Francis Burns died intestate, but James Francis had his domicile in Alberta and therefore, I suggest that the Alberta law applies, but it being in fact similar to ours in British Columbia the reference that I have given your lordship will be sufficient for our present purpose.

The Court: The Alberta law would apply so far as the personal estate, but not in regard to the real estate. Is that correct?

Mr. Lennie: They are both under the Administration Act now. They are dealt with together. Realty and personalty are all dealt with by the Administration Act now.

The Court: If the statutes are the same it makes no difference.

Mr. Lennie: No. I am asking, my lord, to amend the Statement of Claim in some respects.

Mr. Farris: Might I suggest—

Mr. Lennie: I give your lordship a copy of the proposed amendments.

RECORD

In the Supreme Court of British Columbia

Proceedings at Trial May 10, 1937 (Contd.)

Mr. Farris: This action is not a matter of public importance and yet there are matters which I do not think it is in the interests of Justice that the public should be here to hear and I think my learned friend agrees and I suggest that the public be excluded from the hearing.

Mr. Lennie: I have no objection.

The Court: What power have I? I am not quite sure about it. Is there any authority for that?

Mr. Farris: My lord, I did not look up any authority in the matter. I think your lordship has control of your court. It is in the interests of justice.

Mr. Lennie: I presume, my lord, with consent it can be done.

The Court: What was the Alberta case that went from Alberta to the Privy Council—the MacPherson case.

Mr. Lennie: That was where the presiding judge held the trial in chambers, was it not?

The Court: Have you anything further to say on this? With reference to the application that the case be heard in camera, I think that consent of all the parties is not sufficient. I think the obligation is cast upon the trial judge to decide whether the case is one that shall be tried in camera. Looking at the Yearly Practice of 1937 at page 575, there are two classes of cases which are referred to there where the courts do hear cases in camera, neither of which is this case. In one of the cases Local Government vs. Arledge, 1915 A.C. 120, Lord Justice Buckley says: "Normally before a case can be heard in camera, the court must be satisfied that the paramount object of securing that justice will be done, will be rendered doubtful of attainment if the order for hearing in camera were not made." I think perhaps I have the reference wrong. It may be Halsbury who made that statement in Scott vs. Scott. That is the statement of the law. I have nothing to show me that the paramount object of securing justice will be done, will not be secured if the case were not heard in camera. And in the MacPherson case, 1936 Appeal Cases, the court laid it down that even in such cases as divorce the hearings should be in public, so I see no reason why the hearing should be in private.

Mr. Lennie: I would ask, my lord, to be allowed to amend in respect to the matters set forth in the notice of amendment. I do not think my learned friend has any objection.

Mr. Farris: Yes, I cannot see that paragraphs 3, 4, 5, 6, 7, 8, 8A, 9, and 11A really raise any new issue, just a matter of rewarding them, as I see it.

The Court: Then there is no objection to those.

Mr. Farris: Not to those. 11A—I would, of course, take it our pleadings would apply to those as already pleaded to; 11A,

that we have not pleaded to because that is a new paragraph which was added. We deny, of course, that she was living in adultery at that time. Paragraph 3—that is on page 3 of the notice to amend, by adding this paragraph 3; this is paragraph 3 of the reply to the defence and counterclaim. This raises an entirely new issue and is in my opinion with the greatest respect not a proper pleading. It is simply pleading a matter of evidence. It is pleading something that took place in the police court and I think it has no bearing on this action, and is not a proper pleading to be admitted. Therefore, I am objecting to paragraph 3.

Mr. Lennie: Well, paragraph 3 of the reply is really as the result of the examination for discovery and sets up an estoppel. An estoppel, of course, has to be specially pleaded, and the facts came to our attention on the discovery which accounts for them not being in the reply before. Leave to amend, I submit, is granted if no surprise is caused, and there cannot be any surprise here because they attended in the Police Court, and attended on discovery and made the admissions we are alleging there. We are simply asking that it go on the record and I think it is necessary.

Mr. Farris: My learned friend, as I gather, in taking the position that we are estopped from setting up the true position as the result of certain proceedings in the Police Court. Is that what I gather?

The Court: Yes.

Mr. Farris: Surely we are not estopped from anything except on the facts, and the estoppel cannot apply and that is not a proper pleading to be introduced.

The Court: He can set up as a matter of pleadings you are estopped. Whether that is good in law, is another question.

Mr. Farris: He can set it up, but not without the permission of the trial judge and at this time we are into the trial.

The Court: He has to plead estoppel especially and supposing your client goes in the box and then she is confronted with her discovery and she admits all those facts then unless he sets up estoppel—

Mr. Farris: Surely, in a matter of this kind, what are the facts? It is either one of two things. Either she was married or she was not married. Now, the fact that she has, we will say, admitted she was married cannot be set up as an estoppel to the true facts.

The Court: That is a question of law.

Mr. Farris: And I say, my lord, that when your lordship is now at this late date being asked to amend the pleadings and allow a new issue, that the discretion is with your lordship at this stage; that this is an entirely new issue being raised.

The Court: Were not those facts disclosed on discovery?

Mr. Farris: No, I say that the facts set out here were not disclosed on discovery, I say they are not true facts. Oh, no, they are not true facts as you allege them at all and we must plead to it and we will have to have the evidence as to what did take place. This is a new issue, my learned friend is suggesting as I gather that because there was a certain action in the Police Court that this court is bound by that dismissal. That surely is not a proper pleading because it is not sound law on the face of it, and it certainly cannot be sound law that regardless of what might have taken place in the Police Court—it cannot be sound law to say that the Defendant is estopped from asserting a true fact in this court, and that is what my learned friend is trying to submit, that the true facts, regardless of what they may be—that she is estopped from giving the true facts. Surely that cannot be the law, and that is a matter of evidence. They have already alleged, my lord, that she was married to this man Huggins. Now, they come along with a further pleading and say she is estopped from denying that fact. She has denied it. All that my learned friend has here can be given in evidence if it is proper evidence to give, and if it is not proper evidence to be given, it is certainly not proper to be in the pleadings. The onus is on him of proving that she was married to Huggins and she never received a divorce from him. That is the first step that he must prove on that branch of the case. Now, he comes along and says something took place in the Police Court and regardless of whether or not she was married to Huggins, she is estopped from setting up the true facts.

The Court: Your strongest point would be that the estoppel, if there was one, would be between her and her late husband. Her late husband is not a party to these proceedings at all.

Mr. Lennie: It extends to the representative of her husband.

The Court: She is the representative of her husband.

Mr. Lennie: But we claim in this action that she is deprived of any right by reason of the Administration Act. An estoppel would extend as well the administrator as it would to Burns himself.

The Court: Yes, but you see Mrs. Burns is the administratrix of her husband's estate.

Mr. Lennie: She is at present, but we say before this trial is over she won't be. We are asking in the statement of claim that if we succeed in the action that the re-sealing of the letters probate here in British Columbia should be revoked and if that is secured, we will apply in Alberta to have them revoked there. In any event, my learned friend's argument is an argument on the validity of that plea, not an argument as to whether it should be

permitted. The plea has to be made if we are going to have any benefit from it and the fact that it is pleaded now does not injure him at all. He is not taken by surprise and it is only when he is taken by surprise that he can ask your lordship to impose terms in case you choose to allow it. The matter of allowing it is purely discretionary.

Mr. Farris: It is purely discretionary—

Mr. Lennie: There is a case in the Court of Appeal in England, a judgment of Lord Justice Buckley which I think sets out the rule. He says:

> "The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the court to prove. If he does not do that, the court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be able to rely on it: or it may give him leave to amend by raising it, and protect the other party, if necessary, by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject-matters for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the court will deal with him as is just. Therefore, it was open to Stevens and on that ground I think he succeeds."

And during the course of the argument when the question arose as to whether pleading a statute should be permitted Cozens-Hardy, the Master of the Rolls, said at 724, "If it is necessary to plead the statute we shall certainly give leave to amend."
That is a case of pleading a statute. This is a case of pleading a certificate of dismissal in another court. Now, you cannot be taken by surprise and I submit the amendment ought to be allowed.

The Court: What was that case?

Mr. Lennie: In re Robinson's Settlement. Cant v. Hobbs, (1912) 1 Chancery, 717, at page 728. The sufficiency of the plea is a matter for argument after the evidence is in.

Mr. Farris: My lord, I might just point out to your lordship in a recent case of Levi vs. B.C. Distilleries, a similar point came up before our Chief Justice in which I argued the matter and his lordship at that time did not allow an amendment brought at that late date; we had a right to argue all of the merits of that amendment, in other words. Your lordship in exercising your discretion has the right to say whether or not that is a sound pleading in law. Now, an appeal was taken from that to the Appeal Court and the appeal was dismissed at the last sitting of the court in Victoria. I do not know that the case is reported yet or not. My learned friend is asking the indulgence of the

court at this last moment in the middle of the trial. I quite agree your lordship has the power to grant that indulgence if your lordship says such an indulgence should be granted, but I say in this case this is a case where your lordship should exercise your discretion in not granting that indulgence, because this would make a travesty of justice in this way; that the question at issue is purely a matter of law whether or not that woman at that time was married. Now, the mere allegation that she made some admission otherwise does not change the fact. It does not make her married or does not unmarry her. The whole point is was she married at that time or not, and was she in a legal position to marry Francis Burns when she married him. That is the whole issue, and to say that because of some admission she is estopped from setting up what are the true facts, and that the true facts should be suppressed from the court is to my mind a most astounding proposition. There are two things in that plea, one that she is estopped because of admissions, estopped from dealing with the true facts, and the second is that your lordship in this court is bound by some dismissal certificate given by a magistrate which certainly is not binding upon this court. The facts, of course, are and I would certainly ask for an adjournment and I would have to have the whole facts brought to the court of the reason for that dismissal which my learned friend knows well that the reason for the dismissal was not on account of the fact that she we supposedly married to Huggins, but—

Mr. Lennie: Don't say that.

Mr. Farris: My learned friend has had the correspondence before him; he knows what took place and that a settlement was agreed between the late James Francis Burns and the Defendant in this action. We would naturally have to plead to all of that and plead these facts and bring the proof here. I say my learned friend at this late date is not entitled to put in a pleading of this kind which we would have to plead to exactly as I have stated to your lordship. I would then have to seek out what took place in that court, to have the evidence brought before the court. I am also informed the stenographers who took the evidence at the Police Court are both, I think, dead, and to allow an amendment of this kind, as I say, right at the trial, to my mind would be a very very serious matter and one that I cannot too strongly oppose, so strongly that I could not and would not be prepared to go on to trial now. I say that your lordship has the right to say whether or not he has a reasonable chance of success in a pleading of that kind and I say he cannot succeed in a pleading of that kind on the law. If your lordship rules against me on that, then I, realizing that my view of the law is wrong, there is only one thing for me to do, and that is to be prepared to meet it by facts and I would certainly ask that this paragraph be not allowed.

Mr. Cassidy: My lord, I am appearing in this case for Michael Burns—

Mr. Farris: Before my learned friend proceeds, might I just ask—I notice that Michael Burns is appearing in his private capacity as next-of-kin. As I understand it, Michael Burns has no interest in the matter in his private capacity at all, because of the fact that there are brothers and sisters of James Francis Burns, deceased, and I think he should not be a party to this action in his private capacity. I think his sole appearance is in his official capacity.

The Court: Where is there anything in the pleadings to show he is appearing in his private capacity?

Mr. Farris: The statement of claims says, "and the said Michael Burns." I presume that is in his private capacity.

The Court: Where?

Mr. Farris: Paragraph 3 and the opening of the statement of claim. That is the style of cause, "Michael Burns, administrator of the estate of Dominic Burns, deceased, and the said Michael Burns." And in paragraph 13 he is claiming as the next-of-kin.

The Court: Oh, that is in there. Now, Mr. Cassidy, on this one point.

Mr. Cassidy: My lord, this action would not lie at all without the intervention of Mr. Michael Burns, because Mr. Michael Burns is the next-of-kin. The deceased died intestate and under the law of Alberta which governs this case, which was the domicile of the deceased, the widow takes the whole estate if there are no children of the marriage. She has set up the claim, of course, that she was the widow, and took out letters of administration in Alberta in the character of widow. Then Mr. Michael Burns, who is the only person before your lordship who has any interest contrary to the interests of the widow, saying that he the next-of-kin—he attacks the administration, not the administration which she took out, but the re-sealing of it technically in this Province. This court, I apprehend, has no jurisdiction to set aside an administration granted in the Province of Alberta, but in order to make that available here where the property is coming from Mr. Dominic Burns, the Defendant in this case had that administration which he took in Alberta re-sealed in British Columbia. Now, she demanded then an accounting on the ground that her husband had taken an interest in the intestate's estate of Dominic Burns. She had demanded an accounting as widow and claims she is entitled to the whole estate of the deceased James Francis Burns. We set up against that claim two positions. First, of course, she would take nothing through James Francis Burns unless she was married to him, so we formally deny, as the first position in our claim to set aside this re-sealing and to declare

that she has no right to the estate at all, that she is not the widow. That is point 1. That must be kept separate from the other point that if she was the widow then under the statute of Alberta a wife who leaves her husband and is living in adultery at the time of his death shall take nothing of his estate. There are the two positions. Now, then, with regard to the first position that she is not the widow, my learned friend denies that position; he says, "We deny the assertion that she was not married to James Francis Burns." We are entitled to set up an estoppel to that which we do in the reply, and it cannot be gone into unless it is set up in the pleadings. We set up that she made an application in British Columbia under the Deserted Wives Maintenance Act of British Columbia calling upon her husband for maintenance on the ground and the sole ground that she was his wife, and that he had not supported her. Very well, that was a point of substance, married or not married, and nothing else. The magistrate heard that case and the whole thing is of record. That is to say, the prosecution which alleges her right as a wife and the non-support. In the course of that case she was cross-examined on her own behalf and in the course of cross-examination she admitted she was married to a man called Huggins and that Huggins was still alive, not divorced; he was still alive. Now, under those circumstances that application was dismissed by Mr. Findlay, a magistrate in Vancouver, and he could not do anything else with it. He dismissed it and the whole thing is of record, and that is set up as an estoppel. It is perfectly sound law that you are entitled to set up a previous position taken between the same parties on the same subject matter, namely, the question of marriage and no marriage, and a decision has been come to on it. That is on record, a record of that court. It was a regular hearing just as in any court and it is pleaded. Not only is the record pleaded, but a certificate of the dismissal was taken from the magistrate and that dismissal certificate is also a record which will be before your lordship. Now, to say upon all that we are not entitled to set that up at all—there is no doubt we cannot enter upon it unless it is set up—the law is perfectly clear it is a subject of estoppel. What is still more clear is if we do not set up an estoppel of that kind in terms we cannot take advantage of anything that took place down there. My learned friend with great respect to him is quite mistaken in saying we could take advantage of anything unless we pleaded it on the admission of evidence or anything else. We can take no advantage. Mr. Lennie has cited to you an authority almost in the words that I have said; unless you set it up you cannot take advantage of it and in order to proceed to a trial in the case the court will permit a plea of estoppel, even if it is asked to be introduced at the trial. I have a word more to say presently, but I am just pausing now to let your lordship read your authority.

The Court: I gave a decision on this Deserted Wives Maintenance Act on this point as to estoppel. Yes, Mr. Cassidy.

Mr. Cassidy: Your lordship may ask, "Well, how does it come so late?" This question arose on examination for discovery. As your lordship is aware, the issues have to be closed before an examination for discovery is had. Very well. We did not know about that. This thing was divulged by the Defendant in the course of her examination for discovery. Now, that being so, my lord, is there any reason on earth why we should not be allowed to plead that matter? I don't suppose your lordship is troubled about the question of time. There is the Yearly Practice there, if your lordship will look—

Mr. Farris: I just want to correct an error in my learned friend's statement.

The Court: I cannot hear either of you if both of you speak at once.

Mr. Cassidy: I just want to refer to one or two cases. "In some cases leave to amend so as to completely change a Plaintiff's cause of action has been allowed at the trial on proper terms."

"In a debenture action claiming an injunction leave to amend at the trial by claiming a receiver and manager given though it inserted a complete change in the nature of the action." Hubock v. Hubock (1887) 56 Law Journal, Chancery, 536. And in Kurtz vs. Spence, in 1887, 36 Chancery Division, 770, an application was made at the trial to amend with matters which were entirely new and it was refused, but it came up to the Court of Appeal. The Court of Appeal condemned that refusal and said it ought to have been allowed.

The Court: The case I had in my own mind was Harrop vs. Harrop, 49 B.C., my own decision. It is not directly in point.

Mr. Cassidy: This was an action under the Patents Act. The statement of claim alleged that the Defendant's patent was invalid. Chitty, J., ordered this allegation to be struck out, being of opinion that the validity of the Defendant's patent could not be tried in such an action. After nearly a year, the time for appealing against that order having long expired, the Plaintiffs applied to Kekewich, J., to whom the action had been transferred for liberty to amend the statement of claim by inserting an allegation that the Defendant's patent was invalid. Kekewich, J., refused the application and the Plaintiff's appeal. That was overruled. "Held by Cotton and Bowen, L.J.J., that liberty to amend ought to be given but on special terms, in order that the Defendants might not suffer any loss by the Plaintiffs not having taken the proper course of appealing in due time from the order of Chitty, J." Lord Justice Fry dissenting.

Here is the language of Cotton, L.J. He says:

"If I thought that that point could not be raised in this action, I should say that was a ground for not allowing the amendment."

That is really what my learned friend is saying, but there is no doubt it was a point that could be raised in this action. That is at page 773.

"If I thought that that point could not be raised in this action, I should say that was a ground for not allowing the amendment, but assuming that it can be raised in such an action as this, what then is to be done. I think the court, taking the view which I and Lord Justice Bowen expressed, though we had not to decide it, would say that it is right, having regard to the terms of this rule, that the matter should be introduced so as to allow the question to be decided between the parties . . . When by an amendment the real substantial question can be raised between the parties ought we to refuse to allow the amendment, having regard to the rule, and to the direction in the Judicature Act that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent multiplicity of actions. I have come to the conclusion and Lord Justice Bowen agrees with me that it would be better (if we can do it without injustice to the Defendant) to allow that amendment to be introduced, rather than to leave the Plaintiffs to the liberty which we gave them on the application for leave to appeal, of having the action dismissed without prejudice to their right to bring another action. . ." that does not apply to this. I think in all events that is sufficient.

Now, my lord, that is the point in regard to that. There is something more with regard to that I want to say and that is this. Your lordship will understand that the Plaintiff claims—Michael Burns is a man who has a substantial interest in contest with the Defendant. He is the next-of-kin. He set up first that she is not the widow and alternatively—I notice it is in the pleadings —I am an old fashioned pleader and I like to have the record in such a way that things do not contradict each other in a formal way, but I wanted to say that in the alternative if she is the widow that her husband was domiciled in Alberta and that under the law in that domicile which in this court is a question of fact, and must be applied on the facts, that Alberta says that if a wife leaves the husband—

The Court: Well, you gave me that before.

Mr. Cassidy: And living in adultery at the time of his death, she will take nothing of his estate. He sets that up in the alternative, but it has to be set up as a basis of his claim.

I just happened to notice, if your lordship will look at paragraph 13 of the statement of claim, "the Plaintiff is a brother of the late Dominic Burns and of the late Thomas Burns and claims a right to the administration of the estate of the late James Francis Burns as next-of-kin and is, furthermore, entitled under the provisions of the Administration Act R.S.B.C. 1924, chapter 5 and amendments to succeed to a part of his estate." Now, my lord, that is just simply a slip. He is not entitled under the law of British Columbia to succeed to the estate. He is entitled under the law of Alberta and that must be set out specifically at that point in the statement of claim. He is pleading the law of Alberta which he says prevents this woman from taking any part of the estate and leaves him as the next-of-kin before your lordship to take it and then asks that the re-sealing of the administration be set aside, and, of course, he would be entitled to the administration himself. That is the position and I want to have it in that way.—

The Court: Mr. Cassidy, the difficulty is this that assuming there is estoppel, it is good only between the parties, and those who claim under it.

Mr. Cassidy: Yes.

The Court: It would be good between the late James Francis Burns and his wife.

Mr. Cassidy: Yes.

The Court: But where does Michael Burns, your client, come in and claim the right to take advantage of any estoppel?

Mr. Cassidy: Michael Burns cannot get along here without making out that she was not entitled under her husband—by devolution from her husband, so he has to set up she was not entitled by devolution from her husband. Now, I am on the second branch. He says and must say you are not entitled by devolution and I base my case upon that; that is the case. Now, they answer that. Then he says, "You are not entitled to it if you are the widow because of this." And then they have to deny it. They deny the facts that are set up.

The Court: Yes.

Mr. Cassidy: They say it is not true she left him or was living in adultery.

The Court: How can Michael Burns rely on the estoppel which existed, if it did exist, between the late James Francis Burns and his wife.

Mr. Cassidy: The two parties to this action are substantially as representing the party who has got the estate—

The Court: But how can Michael Burns take advantage if there was such a thing as an estoppel between James Francis Burns, the deceased, and his wife?

Mr. Cassidy: It is not an estoppel between James Francis Burns—there is no estoppel that way—doesn't your lordship see?

The Court: Then, Mr. Cassidy, if that is so there is no estoppel at all, because the estoppel is alleged to have arisen by reason of proceedings between James Francis Burns and his wife long prior to James Francis Burns' death.

Mr. Cassidy: As a matter of pleading, my lord, in order that the question of estoppel should come in at all, we make the allegation that under the law of Alberta setting it out as a fact, she would not be entitled to anything if she left her husband and was living in adultery at the time of his death.

The Court: I know, but just answer that point. Do you say that there is any estoppel—

Mr. Cassidy: No, I am not on the estoppel question at all.

The Court: I am. That is what I want you to deal with.

Mr. Cassidy: We misunderstand each other altogether. Estoppel only arises on the first branch, the first alternative, not the widow—

The Court: Just a moment, Mr. Cassidy.

Mr. Cassidy: We do not question the will. We acknowledge the will for the purpose of what I am saying, but—

The Court: I am dealing with an application to amend in which it is proposed to set up in the reply estoppel. Now, that is all I am dealing with.

Mr. Cassidy: If that is so that your lordship is dealing with that. what I am saying does not amount to anything, except this: I am not dealing with estoppel at all, my lord, not at all; that is my learned friend's argument there. I am dealing—

The Court: I have your other points.

Mr. Cassidy: Your lordship understands there are the two alternatives.

The Court: Oh, yes, I understand that.

Mr. Cassidy: I say estoppel only has relation to the first matter, but on the second all I say is it is necessary for me, Michael Burns, to set up affirmatively in the statement of claim that being a widow she did so and so.

The Court: Those are questions of fact. Your learned friend is not objecting to those.

Mr. Cassidy: There is no estoppel on that. I pointed out to your lordship there was a mistake made. I want to make it clear that his second claim is founded upon that clause under the Alberta Act, but that has nothing to do with estoppel. The two things are quite separate questions. Estoppel arises only on the first branch. I say we are entitled in this action to say after what has transpired that she was not the widow. She took certain proceedings based on being the wife against the deceased. The foundation of it was the marriage and she admitted in the

course of the proceedings she was married to this other man. She might make some explanation about her children, if she wanted to say they were lawfully born of the other man. Now, your lordship understands it, I think, now.

The Court: Mr. Lennie, where is estoppel, assuming it existed? and she made those statements in the proceedings under the Deserted Wives Maintenance Act; where can there arise any estoppel between her and Michael Burns?

Mr. Lennie: Well, she claims as a result of her marriage to Francis Burns. Michael Burns claims to be entitled to administer the estate because he is next-of-kin. Now, the question is who should be entitled. Now, that involves a question of, if we eliminate her from the matter, then naturally Michael Burns would be entitled, but the representatives of the parties are equally entitled to raise the question of estoppel. It is undoubtedly according to my information, and that I am prepared to argue at the close of the case, that this proceeding absolutely is a perfect answer to the claim, and what we are asking for now is to be permitted merely to argue that at the close of the case. If your lordship would like me to argue the question now I am prepared to do it.

The Court: I do not want to get into a lot of evidence which may have no bearing on the case. Mr. Farris says if the amendment is allowed then he will want an adjournment and will probably call a lot of evidence on this point. I want to see first of all that the plea of estoppel is one that can arise here between Michael Burns, the Plaintiff in this action, and this lady. Now, ordinarily speaking, certainly an estoppel cannot arise in favour of "A" in proceedings in which "B" and "C" alone are parties unless "A" can show he can claim under the name of the person. How can Michael Burns claim that position here?

Mr. Lennie: If your lordship decides that Michael Burns is next-of-kin, then does he not take the place of James Francis Burns, so far as the estoppel is concerned?

The Court: Not if she was his wife.

Mr. Lennie: Why not?

The Court: Because she would be entitled—

Mr. Lennie: But what we want to establish is that she was not his wife and the estoppel is to stop her from alleging now, having taken that proceeding in the Police Court, that she was married to another man, she is not entitled to come now and say, "No, I was not married to that man. I was married to James Francis Burns," the very man whom she charged, and whom the court said, she was not the wife of.

The Court: What you are really saying is if Michael Burns is successful the estoppel will arise in his favour.

Mr. Lennie: Yes, then he is entitled to the benefit of the estoppel. Now, so far as giving my learned friend an opportunity to meet that is concerned, I do not see that there is anything he can meet. We will produce the certificate of dismissal which contains on its face the charge and that of itself, I think, will be ample, because it is charged in the information that he was her husband which, of course, must be the basis of the charge, and that information is dismissed. Now, it does not matter upon what evidence it was dismissed, it was dismissed.

The Court: Oh, surely, Mr. Farris says it was dismissed pursuant to some agreement.

Mr. Lennie: Oh, no, no.

The Court: That she agreed with her husband.

Mr. Lennie: Nothing of that sort.

Mr. Farris: My learned friend knows to the contrary.

Mr. Lennie: I can establish that beyond any question. If there was any settlement, as he suggests, at all, it was long after that dismissal.

The Court: I would like to be shown some authority that Michael Burns can take advantage of an estoppel.

Mr. Lennie: For instance, see how far this doctrine extends. There is the case of Upper vs. Upper in the Court of Appeal of Ontario, a very strong court, where in one proceeding the wife was found guilty of adultery; in another proceeding the husband was found guilty of adultery; in the third proceeding it was held that the husband was the adulterer and not the wife and the court said, "Well, we are not going to allow these constant findings to bother us." It was decided at one time that the wife was not guilty of adultery. Now, that is sufficient. I refer your lordship to that case (1933) 1 D.L.R., 245, and in that case the action was tried on the 27th and 28th of November, 1930, and judgment was not pronounced until March 22nd, 1932, when the decision was given without any reasons, the same as it was in the Police Court, but the issue is there.

The Court: But the point is that those proceedings were between husband and wife.

Mr. Lennie: Yes.

The Court: And once having determined the question of adultery in those proceedings they held there was estoppel and I, in my humble way, tried to follow that authority in Harrop vs. Harrop where this question came up under the Deserted Wives Maintenance Act, but the point here is whether there is a third person, Michael Burns, who appears on the scene, and can he claim the benefit of any estoppel, assuming there was one?

Mr. Lennie: The first thing he would have to do is to establish his position and his position will not be established unless

your lordship finds in favour of the Plaintiff in this action, but having found it then I say he will be in the same position as the deceased.

The Court: I would like to look at some authorities on this. Will you get the book Bowen on Estoppel.

Mr. Farris: I first want to direct your lordship's attention to this, that as to the facts, my learned friend Mr. Cassidy stated and my learned friend Mr. Lennie acquiesced in his position by his silence, that which must be taken into consideration in your lordship's discretion in allowing an amendment at this late stage —it was stated that the Plaintiffs knew nothing about this Police Court episode until Mrs. Burns was examined for discovery.

Mr. Lennie: Did not know the details.

Mr. Farris: That is a straight misleading statement to the court. In December, or at least in November, on the 30th, before this action was even commenced, an application had been brought in this court in chambers for an accounting and an affidavit was made. Mrs. Burns was cross-examined on that affidavit and the whole matter of this Police Court episode was gone thoroughly into at that time and on the examination for discovery itself my learned friend had the particulars of part of the examination and cross-examined from that and it was from the Plaintiffs themselves that we got the copy of the evidence upon which he applied. They had that before the action started.

The Court: Mr. Farris, I am not really concerned in that, because if they have been dilatory you can be recompensed by the payment of costs, but the point disturbing me is whether or not, as I pointed out to Mr. Lennie, his client Michael Burns can take advantage of this estoppel, because, as it seems to me at the moment, he does not come within the persons who claim under the late James Francis Burns.

Mr. Farris: In the first place, I again reiterate my position, that the proof of the marriage is a matter of law; it is a legal status they enter into. The point in this action first is was Mrs. Burns the lawful wife of James Francis Burns. There is nothing in the world that can estop the proof of that legal matter. It is a legal status and she cannot be estopped from setting up a legal status. She can be estopped from setting up a fact; the question of adultery and the question of a legal status are in an entirely different category. Now, taking the second point as to whether Michael Burns, assuming now for a moment that there was an estoppel, as far as James Francis Burns is concerned, the estoppel, and in this case and in the Harrop case, which I have had the chance of looking at, the estoppel there is an estoppel dealing with maintenance and adultery as between the parties. A certain thing is agreed and the husband and wife are estopped. But we will take one further step. Supposing after that had occurred

they had then come together and lived as man and wife, would such an estoppel apply? It would be condonation then of the adultery in that case and certainly no estoppel can apply. That is a matter solely in the discretion of the husband or the wife. No heir can condone. Therefore, the estoppel can only rest with that individual. Now, we go a step further. Take the present case. There is no suggestion that James Francis Burns objected to his wife receiving this portion of the estate. It can be fairly assumed that the contrary is the case. Your lordship is entitled to know the facts. If your lordship desires them, they can be placed in affidavit form. James Francis Burns from the time of this action in 1926 paid his wife Mrs. James Francis Burns a monthly allowance up until the time of his death.

Mr. Lennie: I am going to give evidence of that in support of my case.

The Court: I am dealing now with the one point.

Mr. Farris: I am pointing that out to your lordship to show how that matter of estoppel, if there was a right of estoppel, was only in James Francis Burns. He had the opportunity in his hands of condoning any acts that occurred. He was the sole person. There is no suggestion or knowledge that James Francis Burns would approve of this—

The Court: The things you are mentioning are an answer probably to the question of estoppel, to allow it to be raised, but the question is now whether the pleadings should be amended accordingly. What I want is some authority to show one way or the other, assuming there was estoppel, does Michael Burns inherit the right to set it up.

Mr. Farris: I am coming first to this and I say I do not believe an authority can be obtained from any court in the world. I don't believe an authority can be obtained which would prevent a woman, who may have denied her marriage at some time, from afterward setting out she was in fact married, when she was in fact married. That goes back to the original case. Even if Burns were alive I think it would be a most astounding proposition if a person was in fact married—in other words, by getting that sort of information it would act as a sort of divorce action, or would create a marriage. Surely, an admission either one way or the other cannot change her status. The fact that she denied the marriage would not make the marriage invalid nor the fact that she admitted the marriage if it did not take place, would create a marriage which never existed. How can there be an estoppel from a condition of that kind? To my mind, with the greatest respect, it is the most preposterous suggestion I have ever listened to or heard advanced to a court.

Mr. Cassidy: My lord, I just want to say one word.

The Court: Yes.

Mr. Cassidy: I ask your lordship to approach this question of estoppel as if there was no other case made by the Plaintiff; that is, that she was not the widow. That clears the point because the other has nothing to do with it at all. Now, your lordship will see that in the circumstances the thing goes around the wrong way. We had to attack, we have to remove her from the position of administratrix and say that you are not the widow, you have no interest in the estate. She denies it and we say, "You are estopped from that now by this."

The Court: Mr. Lennie, I would like to reserve this until after luncheon. In the meantime is there any evidence you can go ahead with?

Mr. Farris: My lord, I am certainly not prepared to go ahead if your lordship should allow that amendment, because I would certainly want a ruling, and would not be prepared to go on. I do not want to go on and take part in the case and prejudice my right of appeal.

Mr. Lennie: There is no objection to going ahead and taking the evidence of a witness from Alberta on the question of domicile which does not have anything to do with this point.

The Court: What about that?

Mr. Farris: I say with the greatest deference, in view of the position taken, I do not desire the matter to be dealt with until we know what issues we are facing. I will have to ask your lordship, as I say, if your lordship should decide that the amendment is a proper one, that the case be adjourned. Now, it may or may not be possible that your lordship may be available when the hearing may come on some time later on, and I do not want to be in the position of having started the case.

The Court: Perhaps the best thing to do would be to adjourn until after lunch and I will give judgment on this question.

(12.30 P.M. COURT ADJOURNED UNTIL 2.15 P.M.)

(2.15 P.M. COURT RESUMED PURSUANT TO ADJOURNMENT)

The Court: In this matter I have come to the conclusion that the amendment should be allowed. The statement of claim sets up that Mabel Burns was not the wife of James Francis Burns, because she was previously married to one Huggins who was alive at the time of her alleged second marriage. The statement of defence denies that, and the Plaintiff now sets up—now wishes to set up and apply that the Defendant be estopped from setting up that she had not been married to Huggins, because of her evidence given in the Police Court in the proceedings under the Deserted Wives Maintenance Act. The only thing is whether

or not on the facts the Plaintiff could successfully set up estoppel. The Plaintiff could not reply upon estoppel, unless pleaded, on notice of motion alone, and I am not at all satisfied the estoppel is open to the Plaintiff, but of course that is a question that has to be argued, and I keep an open mind on it. However, there will be terms imposed if there is to be an adjournment. If you want an adjournment, I will hear you on the question of adjournment, Mr. Farris.

Mr. Farris: As I told your lordship this morning, I feel it would be absolutely unsafe if the argument was allowed to proceed and therefore I must put in pleadings not only denying the facts, but setting out under what circumstances this order was given.

The Court: In other words, you want an adjournment.

Mr. Farris: Yes, my lord. I think your lordship will see at a glance that is absolutely essential.

The Court: It is certainly permisible under all the circumstances. The thing is done. Then what do you say as to that, Mr. Lennie.

Mr. Lennie: I don't see that I can object to that, my lord. I don't see what there is for my friend to produce, but he has the right to have the opportunity, I suppose. But there is another point which arose during the examination for discovery, and my friend and I concluded that instead of making an application to compel the Defendant to answer certain questions, to leave it to the trial Judge, and if your lordship would hear that, I would like to have that dealt with now, because it may involve a further examination of the Defendant for discovery.

The Court: That is a Chamber matter.

Mr. Lennie: That is a Chamber matter, but we agreed to refer it to the trial Judge.

The Court: This should have been spoken to before the trial. This other question should have been also settled in Chambers.

Mr. Lennie: Perhaps we had better wait and see what the rejoinder is. Would your lordship hear one witness from Calgary who has come quite a distance. It will only be a few minutes, and I don't think it is a question that will be disputed—as to the deceased's domicile.

The Court: Any objection to that, Mr. Farris?

Mr. Farris: No.

The Court: That is all right.

Mr. Farris: Excepting insofar as I do not want that your lordship shall be necessarily seized of this case.

The Court: I am seized of it now apparently.

Mr. Farris: I wouldn't think so, my lord, as you are only

acting as a Judge in Chambers up to the moment, in deciding the plea.

The Court: I have started the trial, and have had the application which has been raised.

Mr. Farris: That has been purely dealing with the plea. As your lordship suggested, it is a matter possibly that should have been before a Chamber Judge, and the position is it may be that your lordship will not be available on a suitable date.

The Court: I shall be here the rest of this month.

Mr. Farris: It may not be possible to get this action on during this month.

Mr. Lennie: I don't see what there is to prevent it, because any evidence my friend can produce is here in Vancouver. He should be able to produce it.

The Court: That brings up the question of adjournment. What would you suggest is a proper date. Let us get down to this. This woman knows whether she was married, and she knows about the statement made in the Police Court. What is the delay in getting that evidence?

Mr. Farris: In the first place, my lord, there is the question of the transcript. There was other evidence given at the Police Court. There were solicitors involved who would have to be called—I haven't had an opportunity of seeing them—as to the reason for dismissal, your lordship will see the seriousness of this plea. If we are estopped from setting up the true facts, then the case ends there. My learned friend is apparently relying on a dismissal which he says is based on the fact that the magistrate held that she was married to one Huggins. That is his suggestion to this court and his reason for asking for that amendment.

Mr. Lennie: That is only one branch of the case.

Mr. Farris: That is only one branch of the case, but a branch that means, if my learned friend is right—

The Court: I do not think—I decide whether an estoppel. That does not prevent you following through an estoppel.

Mr. Farris: It very materially changes the whole course of the action. My learned friend, as the plea originally stood, was in the position of having to prove Mrs. Burns' previous marriage, and proving that there was no divorce. He is put on that before he can start with his case, and I know he can't prove that.

The Court: Well, assuming that.

Mr. Farris: Now my learned friend says despite the fact she was never married to Huggins she did make some sort of an admission in the Police Court that she was married to Huggins, and for that reason she is now estopped from setting out the true facts, and that he is going to rely upon these proceedings in the

Police Court. The proceedings at the Police Court, as far as he sets out in his notice of amendment is that she proceeded under the Deserted Wives Maintenance Act, and that for some reason that action was dismissed. He now says the reason that action was dismissed was on account of the fact that it was found at the Police Court that she was lawfully married to Huggins before, and had not been divorced from him, and that therefore she was not married to James Francis Burns.

The Court: The point is in the Police Court she said, it is alleged, she was married to Huggins and was not divorced.

Mr. Farris: She said she had a divorce in the Police Court.

Mr. Lennie: I don't think that is right.

Mr. Farris: That she got a divorce.

The Court: Here is what the pleadings say, that she alleged, she admitted under oath she was married and cohabited with and had two children to one Huggins, and that he was still alive. There is her statement.

Mr. Farris: But my learned friend didn't put in that statement, and I have before me the evidence which she gave that she had been divorced from Huggins.

The Court: You can show all that by her own extract of the evidence, but that certainly will not take any time.

Mr. Farris: Then I don't want in a matter of this kind—I am certainly advised an appeal in the matter will be taken in the ordinary course. I don't know how soon I can get it on, possibly the end of May, but it is certainly necessary to check up the records of that Court to be able to answer this statement.

Mr. Lennie: The clerk of the Court is here in Vancouver.

Mr. Farris: And it was tried back in 1926, and my learned friend knows full well the facts.

The Court: There are two things. One is you are going to appeal, if you mean that. Assuming you do, of course, there is no difficulty about serving notice of appeal and applying for stay of trial at the action. The other point is to what date this trial should be adjourned.

Mr. Farris: I am suggesting that your lordship should fix a time, at a date to allow that appeal to take place. I want to call your attention to the fact it isn't delay on our part because we have forced this trial on.

Mr. Lennie: My lord, might I point out this, that my learned friend doesn't need to appeal from this order your lordship has made. An appeal would be just as effective from that after you gave judgment on the whole case.

The Court: I do not think the Court of Appeal would listen to him.

Mr. Farris: That is surely for me to decide, my lord.

Mr. Lennie: If he chooses to take an appeal, he is very foolish, I think.

Mr. Farris: I am not taking any advice from my learned friend.

The Court: How long do you think it would take you to get ready?

Mr. Farris: What date is two weeks from to-day?

The Court: The 24th.

Mr. Farris: That isn't a good day. I would suggest, then, my lord, two weeks from Tuesday. That would be the 25th.

The Court: How long do you think this trial will take?

Mr. Farris: I thought it would be through in about 15 minutes, my lord.

The Court: How long do you think it will take—a day, two days.

Mr. Farris: I couldn't tell you now.

Mr. Lennie: I should think it would take a day. I have to bring a witness from Calgary to prove the Alberta law.

The Court: Well, the 25th.

Mr. Lennie: The 25th, all right.

Mr. Farris: I may say my learned friend suggested about bringing a witness from Calgary to prove the Alberta law. I have already agreed I will admit that the Statute of Alberta was identical with the Statute of British Columbia.

Mr. Lennie: You have admitted that, but then there are other features of the Alberta Law to be determined. For instance, our Administration Act is not identical in the matter of issue. I think there is no doubt upon that point.

The Court: The trial will be adjourned till the 26th of May.

Mr. Lennie: The 26th?

The Court: Yes.

Mr. Lennie: Will your lordship hear that witness?

The Court: As to the terms you have to pay as a condition precedent to the amendment, the out of pocket expenses and the hearing fee, and then any costs thrown away will be payable by you in any event.

Mr. Lennie: Very well, my lord.

Mr. Farris: This is an estate matter, and I think the costs of the day should be—

The Court: I give the usual order.

Mr. Farris: Of course it is an unusual case, and I think it should—

The Court: About this witness.

Mr. Lennie: I call Mr. Burns, Mr. Frederick Burns.

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

F. J. Burns Direct Exam.

FREDERICK JOSEPH BURNS, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. Where do you reside, Mr. Burns? A. Calgary.
Q. In the Province of Alberta? A. Yes.
Q. What relation was Dominic Burns to you? A. My uncle.
Q. What relation was James Francis Burns to you? A. My brother.
Q. Where did your brother reside at the time of his death? A. Calgary, Alberta.
Q. When did he die? A. The end of 1935.
Q. 1935? A. 1935, yes.
Q. As a matter of fact the 31st of December, 1935, wasn't it? A. Yes.
Q. And what was your father's name? A. Tom Burns.
Q. Thomas Burns? A. Yes.
Q. He was a brother of Dominic? A. Yes.
Q. Dominic died in 1933, I believe? A. About that time.
Q. Where was Francis born? A. Manitoba.
Q. Did he move from Manitoba to Calgary? A. Yes.
Q. About what time? A. About 1904.
Q. Did you move to Calgary with him? A. Yes.
Q. And did the whole family move to Calgary? A. Yes, the family moved at the same time.
Q. Your brother John, I believe, had been in Calgary before you got there? A. Yes, for two or three years.
Q. What was his position there? A. He was in the employ of Burns & Company.
Q. They are the meat packers, are they? A. Yes.
Mr. Farris: I don't know what my friend is leading to.
The Court: Domicile, I suppose.
Mr. Lennie: Q. How long did your family reside in Calgary? A. From that time to the present.
Q. Do you remember at any time Francis leaving Calgary? A. He was out of Calgary for short periods.
Q. He was out of Calgary for short periods? A. Yes.
Q. When? A. He was employed on one of the ranches, I believe, about 1913 and 1914, near Pincher Creek, and his work required he should travel out of the City east and west for a number of years. Besides that he came over to B.C. to go into the employ of our uncle, Dominic, about 1921.
Q. How long was he there? A. I think he continued in his employ until December, 1922.
Q. What did he do then? A. He returned to Calgary

and after a short stay there came back to Vancouver, and he remained here for several months, I believe.

Q. What year would that be? A. Probably 1923. 1922 he discontinued his employ with Uncle Dominic.

Q. After he finished at Dominic's ranch where did he go? A. What employment?

Q. Where did he go? A. He went to Calgary, and after a short stay there returned to Vancouver for several months, then he went back to Calgary again.

Q. When did he last go back to Calgary? A. Well, he was in and out of Calgary, travelling both east and west up to about the middle of 1926, I imagine.

Q. During that time where was his home? A. I suppose he regarded Calgary as his home.

Q. You referred to 1926. Has he been out of Calgary since 1926, to your knowledge? A. Oh, yes, he has been, I think he went over to the Old Country with stock, and he used to regularly go east with stock.

Q. He was one of the shipping men of the firm? A. Yes.

Q. And constantly resided in Calgary? A. Yes, on his return.

Q. You had a brother Bertram, hadn't you? A. Yes.

Q. Where is he? A. He was killed in a motor accident last year.

Q. Where? A. Montreal.

Q. Last year. You mean 1936? A. Yes.

Q. That was a year after Francis' death? A. About six months.

Q. Where was he buried? A. Calgary, Alberta.

CROSS-EXAMINATION BY MR. FARRIS

Q. You are very familiar with the details of your brother's life? A. Not particularly.

Q. You knew of his marriage in 1923? A. I heard of it after.

Q. When did you hear of it first? A. Probably a year after, or six months.

Q. Were you aware of a settlement arrangement, separation arrangement made between his wife and himself? A. What do you mean by that?

Q. Under which your brother agreed to pay her a certain monthly amount? A. I heard that had been done.

Mr. Lennie: You don't need to say what you heard.

Mr. Farris: He is in cross-examination. He can say what he heard.

Q. You knew your brother had been charged with not maintaining his wife? A. Yes.

Q. And you knew as a result of those proceedings a settlement arrangement was made? A. I couldn't say positively I knew it had been the result of that.

Q. It was about that time anyway? A. Yes. As to when it was made I have no idea.

Q. You knew following that at least he did pay her a monthly sum? A. Yes.

Q. And that was continued up until his death? A. Well, that I couldn't say definitely myself of my own knowledge.

Q. Well, from what you know.

The Court: That is all hearsay.

Mr. Farris: I want to find out what this witness knows.

The Court: It is not evidence what he heard from somebody else.

Mr. Farris: My lord, surely in cross-examination I have the right to ask this witness these questions. It will have some bearing on the general situation. I quite realize that his hearing of certain things might not be in itself direct evidence, but—

The Court: That is all I want to emphasize.

Mr. Farris: Q. When you say you heard of it, where did you get your information from? A. From conversations with other people.

Q. From your brother—did you discuss it with your brother? A. I guess probably it was a brother of mine, not with the brother that died.

Q. Did you have any reason to examine his books, or to find out anything about his estate? A. No, I never examined his books.

Q. As a matter of fact, didn't you yourself make some payments on account of the arrears? A. No.

Q. You never did? A. No.

Q. Did you not make a payment to one Allen, on account of the arrears? A. No.

Q. Never made her any payments? A. Allen?

Q. George Allen? A. No.

Q. Are you sure of that? A. Positively, unless I gave it to somebody else who in turn gave it to them, but that wasn't my intention.

Q. You didn't know you were making any payments on account of your brother's arrears? A. No.

Q. Michael Burns, the Plaintiff in this action, what relation is he to you? A. My uncle.

Q. And you are the brother of the deceased, James Francis Burns? A. Yes.

Q. And you have other brothers who were living at the time of his death? A. Yes.

Q. As far as you know, do you know whether he left any children or not? A. Not that I know of.

Mr. Farris: That is all, thank you.

The Court: Q. What was the age of James Francis Burns at the time of his death? A. Well, he would be 45 next July. He died a year and a half before that—43½, I guess.

Q. Do you know if he owned real estate in the Province of Alberta. Did he own his own home, for instance? A. No. He didn't own his own home.

Q. Is he on the voter's list, do you know? A. I have no knowledge of that.

(WITNESS ASIDE)

Mr. Lennie: We might now refer to the admissions made, to clear the air for the balance of the trial.

The Court: Any objection?

Mr. Farris: No.

The Court: Better put them in as one exhibit.

Mr. Farris: Oh, just the formal admissions, yes.

Mr. Lennie: I will put in the formal admissions. It consists of a letter from the Defendant's solicitor.

(LETTER DATED MAY 6, 1937, MARKED EXHIBIT No. 1)

The following facts are admitted:

(1) That Dominic Burns died on the 18th day of June, 1933, at Vancouver, British Columbia.

(2) That Letters of Administration were issued in respect of his estate to Michael Burns on the 19th day of July, 1934.

(3) That the Plaintiff, Michael Burns, Administrator of the Estate of Dominic Burns deceased is his brother and one of the next-of-kin of the said deceased.

(4) That James Francis Burns, his nephew, died at the City of Calgary in the Province of Alberta on the 31st day of December, 1935.

(5) That the gross value of the Estate of Dominic Burns deceased was sworn at $345,415.70 for the purposes of Probate and Succession Duty in British Columbia.

(6) That the Defendant Mabel Burns was appointed Administratrix of the Estate of the said James Francis Burns by Letters of Administration issued out of the District Court of the District of Southern Alberta on the 25th day of April 1936 which were re-sealed in British Columbia on the 22nd day of September 1936.

(15) That sub-section 1 of section 19 of the "Intestate Succession Act 1928" of the Statutes of Alberta is in words and fig-

RECORD

In the Supreme Court of British Columbia

Proceedings at Trial May 10, 1937 (Contd.)

ures the same as sub-section 1 of section 127 of the "Administration Act" being chapter 2 of the Statutes of British Columbia, 1925, and is as follows:

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

Mr. Lennie: Then, No. 16, Mr. Farris, you haven't admitted it by the letter. Are you admitting that?

Mr. Farris: I don't know what it is (looking at document). Yes.

Mr. Lennie: (16) That at the tme of the death of the said James Francis Burns on the 31st day of December 1935, there has been no repeal or amendment of the words set forth in the previous paragraph hereof. My friend has pointed out that the word "you" is used instead of "I" in Mr. Miller's letter, Exhibit 1. I suppose that is all right.

Mr. Farris: Are you going to take up the question of discovery?

Mr. Lennie: Yes. There are some short witnesses here who, if my learned friend didn't object, I would like to call. They are here now, and I do not know when I will be able to get them again.

The Court: Tell Mr. Farris what you want.

Mr. Lennie: For instance, the doctor that attended Mrs. Burns and the doctor in charge of the Mental Hospital at Westminster.

Mr. Farris: Yes.

Mr. Lennie: And the keeper of the records at the hospital, Mr. Fish.

Mr. Farris: Yes.

Mr. Lennie: That is all, I think.

Mr. Farris: I would suggest in that case that my learned friend proceed as far as he can with this case, and we still then have the right of filing our reply without prejudice or right of appeal, and to file our amendment and have the opportunity of having that time to meet the matter.

The Court: I want to get it perfectly clear. Any right you have against my order allowing the amendment and of course subject to your right of appeal—

Mr. Farris: It may be possible, if my learned friend puts in his evidence I won't even object.

Mr. Lennie: My friend is getting optimistic now.

The Court: You mean you may be ready to go on?

Mr. Farris: I might be.

The Court: That is good news. All right, let us go ahead.

Mr. Farris: That is as long as my rights are preserved.

The Court: Of course your rights may change as you change your position.

Mr. Farris: Then unless it is clearly understood that any rights I may have are preserved, I woudn't want to go on.

The Court: If you decide to go on with the case—I am talking about these three witnesses—

Mr. Farris: If we go into the question of defence—

The Court: You will be willing to go on without an adjournment?

Mr. Farris: Yes.

Mr. Lennie: Then I put in the examination for discovery of the Defendant. Questions and answers 1 to 146, 160, 185, and the discussion previous to it, after 184, between counsel, to 207 inclusive; 216 to 223 inclusive; 231 to the end of the examination.

The Court: I would like to say something. When I said I thought the Court of Appeal would not listen to you, what I meant was, I understand their ruling is they will not listen to an appeal of this sort on an interlocutory matter. They desire the whole trial be proceeded with and closed and then hear the whole appeal at one time on all points.

Mr. Farris: I know that is the rule, and I doubt if we have the right of appeal on that. I think that is a very grave question whether or not there is any right of appeal in an interlocutory matter afterwards, and as a matter of fact one of the reasons for the Bar Association asking the change for more often sittings of the Court of Appeal was that these interlocutory appeals could be taken.

The Court: I meant I thought they would not hear it, having laid down rules.

Mr. Farris: I was rather startled at your lordship's suggestion.

The Court: I did not mean that at all.

(Mr. Lennie reads Examination for Discovery of the Defendant, Mabel Burns, Questions 1-146 inclusive and Question 160).

Mr. Farris: I think my objection must be taken now. I take the same objection now that I did on the examination. This was taken subject to my being allowed to make the objection on the hearing. My position is this: Your lordship has the Statute in front of you, and will see that there are two qualifications that apply; first, that the wife must have left the husband, and secondly that she was living in a state of adultery at the time of his death. Now, that doesn't refer to any intervening time The Statute is definite and fixes the time as of his death. Now, the questions I have objected to, which my friend proposes to read, are questions based on certain matters which happened in 1929 to 1931, four years before the death of Mr. Burns, and which

could possibly have no bearing on the state she was living in at that time. And I think that objection is a proper and a valid objection.

Mr. Lennie: My position is this, my friend's objection begs the whole issue in this action. It is true that the statute says we must first prove she left her husband, and then that she must have been living in adultery at the time of this death, but the period between those two dates I say she has to account for or we have to account for her. If we could establish for example that she was living in adultery at any time during that period, it would be sufficient, because the purpose of the Statute is to deprive the wife of any interest in her husband's estate when she is separated from him and is living in adultery. Now, I submit your lordship, that I should be able to show any facts or circumstances, whatever they may be, as to her conduct between those two dates. Then your lordship will come to the conclusion as to whether she has been living in adultery as contemplated by the Statute; and to argue now that I am not entitled to submit that evidence is merely to say I must argue my case without the evidence to support it.

The Court: What Mr. Farris says is this: A woman may have left her husband ten years ago, she may live in adultery for two or three years after, she might have been a virtuous woman for the last eight years. Then he says she would not come within this prohibition, that she wasn't living in adultery at the time of the death of her husband. You, on the other hand, say you are entitled to show she lived in adultery for two years and during the remaining eight years she was living in adultery.

Mr. Lennie: Yes, or I am entitled to show she was profligate during that period. I am entitled to show almost any circumstance I can that would be admissible for the purpose of your lordship's determining whether she was living in adultery at any time between the date of their separation and the date of his death. Otherwise, look at the absurd position it would be. My friend would say she could live in adultery for the whole period up to a week or a month before he died, and if she, without his consent or condonation had been living in adultery prior to that, the Act has no application, which is absurd.

Mr. Farris: My answer is the Act is there. An Act must be strictly construed. That is a very stringent Act. It doesn't say the words my learned friend suggests it might have said. If the Act had meant that at any time during the time she has left her husband, and prior to his death she has lived in adultery, then the Act should so state. The Act is clear. The English language couldn't make it any clearer—that she was living in a state of adultery at the time of his death—and I don't see any

argument on the matter. What happened four or five years, or even, as my learned friend says, a month before—the Act is clear, and contemplates a woman living in open adultery at the time of death with some other man, or living in a state of prostitution or something of that sort. Then she shall not inherit, if, at the time of his death, she is doing that.

The Court: Supposing at the time of death she was living under the same roof as say, "John Jones," and she admits that four or five years prior to the death of her husband she had a child to John Jones. Would that not be admissible as bearing on the question of her relations here?

Mr. Farris: I quite agree with your lordship. Your lordship will have a note of my objection. I said if my learned friend would undertake to connect those instances up with what happened at his death, then I wouldn't object. I think that position taken by your lordship is perfectly sound. My learned friend now says his case must fall by the wayside unless this evidence is put in. My learned friend, if he is putting in circumstances of which this might be corroboration, should first put in those circumstances. Then your lordship would have an opportunity of judging whether or not this evidence is admissible as connecting it with those circumstances at the time of his death, but my learned friend cannot come in and put in something that happened four or five years ago, and say from that you can draw deductions of what might be five years from now.

The Court: The only thing is a person alleged to have lived in adultery four or five years prior to his death is the person with whom she was living at the time of his death. "At the time of his death." The statute seems clear to me.

Mr. Lennie: Your lordship will observe—

The Court: If you say it applies to some person living in adultery two years before, and then led a virtuous life, would she be cut out of this?

Mr. Lennie: Yes.

The Court: And then living with a man 20 years before.

Mr. Lennie: If the period of separation extended that long.

The Court: If she lived for a day in adulterous intercourse with men after the death of her husband, and then lived a perfectly virtuous life, your submission is this section would cut her off.

Mr. Lennie: Yes, but it isn't necessary to go that far. What I say is, that would be evidence of adultery and then it would be for your lordship to determine whether there was sufficient evidence to actually come within the section, but the evidence itself is admissible. What is the effect to be given to that evidence is an entirely different thing, and that is a matter which your lordship will deal with after all the evidence is in,

and when we argue the question as to why this Act was passed, and what was the intention and all that sort of thing. But to exclude the evidence I submit is practically making it a termination of the action, unless we show to your lordship that on the day he died she was living in adultery. I say that is one of the reasons that Act was passed. Your lordship will observe that Act is common to a number of provinces. The Acts of, I think, Saskatchewan, Manitoba, Alberta, British Columbia, and I think New Brunswick, were all made uniform by that legislation during that year, and my suggestion in argument to you is going to be that a woman, to inherit anything from her deceased husband's estate, must be able to show that she was a good woman all the time she was separated from him, because if he knew that she was a bad woman, he had his opportunity to make a will or divorce her, but as long as the Act states in the shape it is in at the present time, we are entitled, I say, to consider all the facts and circumstances there may be, regarding that woman's method of living during the period of separation, and up to the time of his death, and then your lordship will say whether those circumstances amount to what the Act says—living in adultery at the time of his death.

The Court: Does this proposed evidence connect up someone with whom she admits she had adulterous relations, say two years before Mr. Burns' death?

Mr. Lennie: 1931.

The Court: Suppose she admitted having adulterous relations in 1931 with a Mr. Smith. Is he shown to have anything to do with her at the time of death in 1936.

Mr. Lennie: No, but we are going to show where she was during the period, and there is a perfectly good reason why she couldn't have been living in adultery at that time, and if the thing is going to be carried to the extent my friend suggests, we would have to establish the woman was in the penitentiary, for example, at the time of his death. There might be all sorts of circumstances that would account for her living a perfectly good life during part of the period, but that is not what the Statute strikes at. The Statute strikes at depriving an adulterous wife from receiving any benefit from her husband's estate. In other words, to receive a benefit from your husband's estate you must be a faithful woman regardless of the fact you are separated from him. I may say, my lord, I haven't discovered any case on that feature of it since this Act was passed, and from that point of view it is an important question. It is evidently the first time a court has been called upon to interpret this Section of the Act.

The Court: You are going to argue that if she is guilty of

adultery say three years before her husband's death, then she is barred by this Section of the Act.

Mr. Lennie: I am going to argue that, and I am going to produce evidence to show her conduct subsequent to that, and up to the time of his death, so that you will be able to say whether all these circumstances amount to a condition of living in adultery. The Act doesn't say she must live in adultery with one person; simply that she was living in adultery. The time is specified in the Act; first the time she left him, and second the day of his death. Now, my suggestion is she must be a good woman during that period. And if I can establish she wasn't, then your lordship will consider all the circumstances and decide as a matter of interpretation whether those circumstances warrant you in holding that she was living in adultery at the time of his death.

Mr. Farris: I understood my learned friend to say, to admit to the Court that not only did he suggest he did not suggest she was living in adultery at the time of his death, but there were circumstances from which it would be inferred she was living in adultery at the time of his death, and I think that is the fact.

Mr. Cassidy: I would like to say a word, my lord. This Statute of Alberta—there is a similar Statute in British Columbia. It is a matter of first impression what the precise meaning is. It is evidently not intended to have the very narrow meaning that you must prove the act of adultery at the time of death or thereabouts. What it is intended to do is to provide first, leaving the husband and then living in adultery at the time of the death. Now, your lordship, the evidence that is proposed here is only a portion of the case. There will be other evidence besides the evidence of this cross-examination; but to say you are going to rule out any particular piece of evidence is simply to avoid taking notice of what would at least be a factor taken accumulatively with other evidence that might be given. There is another matter, and that is when you find here that a woman had been living in adultery with a certain man at the time of her marriage, unknown to the husband at the time that he married her, and then you find afterwards—at least the parties were separated in the sense he was up in Calgary and she was down here—but that man was living at the time, Huggins, and there were other men associated—I can't go into the whole evidence now—at different periods. But upon the whole you have to say whether this, amongst other evidence, is not evidence which must be taken into consideration, and to rule it out would possibly be unfair. I suggest, my lord, that the evidence should certainly be admitted on this question in that view. There are a great many cases, your lordship where, in the old English Statutes like the Statute of Westminster providing re dower and so on of women living in adultery, and the Courts have taken a very

strong view on those questions and have given a very much wider application as against the wife than the words would seem probably to bear. It is clear it doesn't mean mere proof of adulterous acts at the time of death. There is no doubt that from the time of that marriage she never intended to be a real wife to him. Of course it is a matter of putting the evidence in, I suggest that your lordship should receive the evidence that has been taken on the examination for discovery.

The Court: I have very grave doubts about it, but it is a matter of cross-examination. What I propose to do is to reserve this until the conclusion of the Plaintiff's case. Then I will be in a better position to judge if it is admissible. What is occupying my mind at the present time is proving living in adultery some years before the death is not within the section of the Statute.

Mr. Lennie: I quite understand your lordship holding a view like that. I hope on the argument I will be able to satisfy you that is not the proper interpretation.

The Court: It is understood this is reserved until the conclusion of the Plaintiff's case.

Mr. Farris: With leave to put this evidence in at that time?

The Court: Yes. That is questions 185 to 207.

Mr. Lennie: Question 216.

Mr. Farris: All these questions, your lordship will note, are dealing with the same period of time.

Mr. Lennie: This went in without objection.

Mr. Farris: It all, after that, was subject to that understanding and objection. I allowed you to go on; to save any further applications you were allowed to go on then and to ask all these questions, subject to the hearing of the trial.

The Court: Is that the same class of evidence?

Mr. Farris: Yes, it is all dating back to that period of time.

The Court: If that is so, that will be reserved with the other.

Mr. Farris: There is no question asked after 1931.

Mr. Lennie: The only point is—I can understand my friend being worried about these other questions, but some of the witnesses I propose to call are going to give evidence along the same line, and if that evidence is not going to be admitted, there is hardly any use calling them.

The Court: You mean the witnesses you are going to call this afternoon?

Mr. Lennie: Yes.

The Court: That is different. I did not know that.

Mr. Farris: I shall certainly make the same objection. My learned friend has already admitted to this Court that at the time of the death and for some time before that she was not living in a state of adultery and could not have been. My learned friend stated that to the Court, and that is the fact, and my learned friend knows it. My learned friend made that definite statement to the Court.

Mr. Lennie: That is absurd.

Mr. Farris: I think my learned friend should give the undertaking, as counsel, to the Court if he is pressing for these questions, that he does intend to give evidence to the contrary as at the time of Mr. Burns' death.

Mr. Lennie: I am not going to give any undertaking of that sort. I am going to supplement this evidence.

The Court: I will reserve questions 216 to 223. I can see this question is going to have to be decided very shortly.

Mr. Lennie: Then question 231—that is all along the same line.

The Court: All right.

Mr. Lennie: Of course it puts me in this position, my lord, with regard to some of the witnesses I want to call, that you will probably want to decide that question before you hear their evidence.

The Court: It is coming down to that. You say there are cases on that. Mr. Cassidy referred to certain cases decided under an English Statute.

Mr. Lennie: That is part of my argument. I have several cases on that, my lord. I didn't want to argue them on the question of admissibility of evidence.

The Court: Mr. Farris is objecting on the ground it cannot be admissible. I have got to decide that question now.

Mr. Lennie: Very well. I first give your lordship a series of authorities on the question of necessaries, questions of dower, questions of insurance, and questions under the Deserted Wives Maintenance Act, and under other Acts, all going to show that the living in adultery deprives the wife of certain things that she would have under the law if she hadn't been an adulteress. That is what the Legislatures had in mind when they framed this legislation, and the legislation is in different terms according to the different Statutes under which it is enacted. I would like your lordship to read those cases to show the extent to which the courts have regarded a person living in adultery.

The Court: Take the case of necessaries. A woman separates from her husband, she is living apart from him, and as long as she is decent he has to provide for her, but the moment she embarks on a life of adultery, she loses that right.

Mr. Lennie: That is what the Legislature had in mind, ever since the Statute of Westminster, which provided for the husband not being responsible in case of the wife's adultery. The other statutes passed were based on that, and this one was a uniform law so far as the estates of deceased persons were concerned.

The Court: It would have been so easy, if a wife leaves her husband and has lived or is living in adultery at the time of his death—why put "at the time of his death"?

Mr. Lennie: If she were living in adultery. The Statute is dealing with estates, and of course it must refer to the time of his death, and that is the only purpose of the use of the words "at the time of his death." That fixes the time between the separation and the death. If she is living in adultery—it isn't living in adultery at the time of his death. That only has reference to the respective times. One is the time of leaving, and the other is the time of death. The living in adultery applies to any intervening period. The words "At the time of his death" had to be there. What they might have done is to have said "living in adultery which had not been condoned at the time of his death," but that was not necessary. If there is any condonation, then, of course the Statute doesn't apply, but it is presumed that the living in adultery is any period during the date of separation and the date of death. Let me refer your lordship to the Married Women's Relief Act of Alberta, 1910 Second Session, chapter 18, section 2.

> "The widow of a man who has hitherto died or who hereafter dies leaving a will by the terms of which his said widow would in the opinion of the judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief." "8. On any such application the court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances." "10. Any answer or defence that would have been available to the husband of the application in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act."

That, of course, refers to adultery, but that is the method they have under the Married Women's Relief Act of depriving a wife of some interest under the will she would have had.

The Court: That applies to adultery any time after separation?

Mr. Lennie: Yes. Then there is a very important case on that: Drewry v. Drewry, 1916, 30 Dominion Law Reports, p. 581 where the Privy Council decided against the lower Courts that a wife's separation from her husband, unjustifiable by her, and

such as would be a complete defence to an action for alimony, disentitles her to any allowance out of her husband's estate. Subsequently section 10 was repealed, and it was held by the Court of Appeal of Alberta it was not retroactive. The following paragraph from Lord Shaw is important:

> "In the present case it would be, in their Lordships' opinion, a reversal of the express provision of the Statute to permit the Respondent, after 24 years' separation—unjustifiable upon her part—from her husband, to make a claim upon his estate such as could be made by a wife living in family with him or having a just right to alimony from him."

Then there is the Insurance Act. This appears to be a Statute of British Columbia, chapter 20, 1925:

> "Where the wife or husband of the person whose life is insured is designated as beneficiary, and it appears, in the case of the wife, that she is living apart from her husband in circumstances disentitling her to alimony, or in the case of the husband, that he is living apart from his wife in circumstances disentitling him to an order for restitution of conjugal rights, and that there is no other member of the case of preferred beneficiaries whom the insured may designate as beneficiary in place of the designated beneficiary, the Court may, on the application of the insured, and on such terms as may seem fit,declare the designated beneficiary disentitled to claim the benefit of the provisions of this part relating to preferred beneficiaries, and the insured may then deal with the policy as provided by section 99."

The Court: What Section was that you just read?

Mr. Lennie: 107. Then I would like to refer your lordship to the sections of the Interpretation Act. While he is away getting that, I refer your lordship to the Deserted Wives' Maintenance Act, chapter 67 of the Revised Statutes section 6: "No order for the payment of money . . . unless the adultery has been condoned." They were dealing, of course, with a different subject, and for that reason they put in the words "unless the adultery has been condoned."

The Court: That covers the case—suppose a wife deserts her husband or he deserts her. A month or six weeks or six months after she commits adultery, then he condones that, and then later on he deserts her again; she can come in under the Act. There you have no limitation of time; here you have got the time of the death.

Mr. Lennie: Yes, but here, if my friend wants to prove condonation he can do it, but it is up to him to prove that.

The Court: But first of all you have to bring the lady within the terms of the section. I am pointing out just now the difference.

Mr. Lennie: The difference is this one is dealing with live persons; the other is dealing with dead ones.

The Court: In the Deserted Wives Maintenance Act the adultery might have been committed six years or six months of the wife's application under the Act, but in this case you have got the wording of the Statute which says "living in adultery at the time of death."

Mr. Lennie: What I say is "at the time of death" has merely reference to the time of his death; you must not read it as living in adultery at the time of the death; living in adultery at any time, but naturally dealing with estates—

The Court: You say a wife who leaves her husband and a month afterwards enters an adulterous relationship with a man and continues that for two months, and then was a perfectly pure virtuous woman for six years, and her husband dies, she would be said to be living in adultery at the time of his death?

Mr. Lennie: Yes.

The Court: You go that far?

Mr. Lennie: Yes, I go that far. If there has been any condonation, then the Section wouldn't apply, but the onus is on my friend to show any condonation. The living in adultery is all I have to prove, and then it is for him to show any condonation, and if he doesn't then I say the words "at the time of his death" merely are there for the purpose of the Statute dealing with a person's—a deceased person's estate, and had they been living, naturally the Section would have provided for condonation the same as it does in the Statute relating to deserted wives. Sections 19 and 20 of the Interpretation Act, my lord: (Reading).

Now, the previous state of law makes no difference except in considering the interpretation to be placed upon it. Now, for example—this, of course, has nothing to do with this case, but by way of showing the interpretation to be placed upon this Section perhaps it may be regarded, although it is repealed and of course a repealed enactment should not be looked to for the purpose of construing an existing statute. I would refer your lordship on that point to Vacher vs. London, 13 Appeal Cases page 117. This, of course, as I say, is not to be looked at for the purpose of interpretation, but by way of information to show what the real meaning of it is, and I think perhaps I should call it to your attention. It is Section 133-A—I haven't the Chapter here, but it is in 1924.

The Court: What Act?

Mr. Lennie: The Administration Act. Anyway, the Section reads as follows: "If a wife has left her husband . . .

estate." Now, that shows that there were three distinct reasons in 1924. One was the leaving him, and living in adultery at the time of his death, another was leaving him for a period not condoned, and the other was desertion. That Section, no doubt, was before the parties who prepared this uniform legislation, and I have no doubt all the Provinces had different laws, perhaps of a similar kind, and when they came together they said "Let us make the law uniform"; and it means anyway that living in adultery is the essence of the Statute, and the dates are merely fixed by the words "left" and "at the time of his death." So the Court will see at once that living in adultery is the thing that deprives the wife of any interest in the estate, and the other words simply have reference to the time.

Mr. Farris: My lord, I think there is very little I can add. My learned friend has quoted a number of statutes, some of them making positions very clear. This statute is equally clear. It is especially clear in view of the fact it is a general Statute made for the uniformity of laws. This power of interpretation is certainly not the power of amendment. Your lordship is not sitting here as a Legislature. A Legislature is surely presumed to be knowing what it is doing, and when the legislature fixed the time, they could have put in very easily "living in adultery which had not been condoned prior to his death." They could have put in "A woman having left her husband and has at any time been guilty shall not be entitled to take part in her husband's estate." There are so many simple forms in the English language to cover the matter that your lordship, I submit with the greatest respect, cannot go to the extent of amending the Statute and saying the Statute meant that which it does not say. The Statute is clear. What does it say? "who is living in adultery at the time of the death." How can your lordship say that meant at some other time? To me, with the greatest respect, my lord, it seems there is no argument to meet that suggestion. My learned friend hasn't attempted to do so. He says that living in adultery means at any time, and "At the time of death" just fixed the time. With the greatest respect, my lord, I can't possibly follow just what he means. If the Statute was as indefinite as my learned friend is in his argument, in respect to intention then I might see where there was some difficulty in finding what it means, but if there can be a more complete simple English sentence than in that Statute, I cannot possibly conceive it. I think there is nothing further I can add to assist your lordship.

The Court: The words of the Section are "If the wife has left her husband and is living in adultery at the time of his death", that, to my mind, indicates the present condition which

existed at the time of the death of the husband, namely, living in adultery. It does not seem to me that was ever intended to include, for the sake of argument, that three years before the wife had performed an adulterous act and then thereafter for years before her husband's death, lived a pure life. It might include a case where, for instance, a woman was living with a man as his mistress for a period, say, of two months before the husband's death, and then that man went on a visit to England, she expecting and he expecting he would return at the end of three months to resume that intercourse. It appears to me the words of the Statute are clear and would not indicate adultery committed four or five years before. For those reasons I think it will have to be excluded. Of course I may say if that evidence were connected up—for instance if the living with a man in 1931 was connected up with the same man living under the same roof in 1936—

Mr. Lennie: You don't need to live under the same roof.

The Court: Well, under such circumstances that might indicate the adulterous conduct in 1931 was continuing, the evidence might be admissible. If you undertake, as counsel, to connect it up that way, I will admit that evidence.

Mr. Lennie: I will be glad to give an undertaking, but I may be mistaken in your lordship's view and then be accused of not living up to the undertaking.

The Court: What I mean is, the man mentioned here to whom she is alleged to have had a child in 1931. Does this evidence show that relationship continued on to the time of death.

Mr. Lennie: I think it does.

The Court: With that same man?

Mr. Lennie: Yes, I think so.

The Court: That is a different thing. I will admit that.

Mr. Lennie: It is very difficult here to deal with the question of admissibility at all, and I would have preferred that the evidence should have been given and then sorted out afterwards and so much rejected and so much admitted.

The Court: I prefer to sort it out at the time.

Mr. Lennie: Then I may as well get along.

The Court: You have my ruling.

Mr. Lennie: Supposing I call a witness, my lord, who says that there is something wrong with this woman, I mean subsequent to the time when she had this child, that she became infected so that she couldn't be able to live in adultery with anybody. How about that?

The Court: I will deal with that situation when it arises. Supposing that condition existed six months before the death, you would say she was still living in adultery?

Mr. Lennie: Yes.

The Court: Although she couldn't have adulterous connection.

Mr. Lennie: I would go this far, I would go so far as to say that when you are defining living in adultery you are not subject to any limitations, and if we can show for example that the Defendant was a profligate—I don't want to expand, but your lordship understands what I mean—that would be sufficient without distinctly showing that she was connected up with any other man.

The Court: If living that sort of life at the time of his death, I do not suppose your friend disputes that would fall under the Section.

Mr. Farris: What is that?

The Court: You couldn't object to evidence which would show that at the time of death of Mr. Burns she was living a profligate life?

Mr. Farris: No, my lord.

The Court: But it is a different thing to show that five or six years before his death she had adulterous connection with some individual which didn't continue.

Mr. Farris: I think my learned friend should very properly start with at the time of his death, and then if he wants to corroborate that he can.

Mr. Lennie: I will conduct my own case, if you don't mind.

The Court: Call your evidence.

Mr. Lennie: I call Mr. Fish.

FREDERICK JOHN FISH, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. What is your occupation? A. Supervisor of medical records at the Vancouver General Hospital.

Q. Supervisor of records at the General Hospital Vancouver? A. Yes, sir.

Q. How long have you held that position? A. Since 1930.

Q. Have you a record of Mrs. Mabel Burns in your records? A. Yes.

Q. On what date? A. The records show she came in—

Mr. Farris: On what date, you were asked? A. It covers several dates.

Q. What year, then? A. 1931.

Mr. Farris: I am taking objection to any records dealing with 1931. The same applies, that unless my friend is connecting that up with the date in 1936, five years later—I think my learned friend should start in December, 1936, and work backwards.

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

J. M. Jackson
Direct Exam.
May 10, 1937

The Court: This man is only speaking from records. That is hearsay evidence. A person has to be called who knows of his own knowledge.

Mr. Lennie: I have the doctor here.

The Court: That is a different thing, but the record is not evidence.

Mr. Lennie: Will you stand down a moment, please?

(WITNESS ASIDE)

JOHN M. JACKSON, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. What is your occupation? A. Physician.

Q. Where do you conduct your business? A. Provincial Mental Hospital, Essondale.

Q. Do you know the Defendant Mabel Burns? A. Yes.

Q. Was she in your institution? A. Yes.

Q. When? A. August, 1934 to February, 1935.

Q. What was her condition? A. Neuro-syphilis.

Q. Did you attend her? A. Yes.

Q. And what other doctors? A. Dr. Murray and Dr. Ryan. I think that is all.

Q. By whom was she committed? A. Dr. J. H. McDermott and J. G. McKay.

Q. Are they practising in Vancouver and locality? A. Yes.

Q. And was she committed under some Act, or just a general committal? A. Under the Mental Hospitals' Act.

Q. And for what reason? A. For treatment.

The Court: Is that not hearsay again?

Mr. Lennie: Q. What was her condition when she entered the hospital?

Mr. Farris: You are speaking from your personal knowledge.

Mr. Lennie: Yes. Speaking from your personal knowledge what was her condition? A. She was suffering from neuro-syphilis.

Q. What effect had that on her? A. Do you mean physically or mentally?

Q. On her mind? A. She was considered unable to govern herself and her affairs in order to be commitable.

Q. Well, how would you describe that condition in medical terms? A. The large diagnosis is that which I gave you—neuro-syphilis.

Q. Was that the cause of insanity? A. Yes.

Q. Could there have been any other cause? A. Yes.

Q. What other cause? A. Well, it may have been a separ-

ate psychosis, but in view of the fact that we had definite laboratory evidence of syphilis, it was presumed her mental symptons were being caused by that.

Q. Just what do you mean by that, Doctor—I don't quite understand these medical terms—in plain terms, in plain English? A. She was mentally ill, mentally abnormal. Tests of her blood and spinal fluid were definite proof she was infected by syphilis, and the mental picture was that found in such cases, so we presumed syphilis was the cause of her mental condition.

Q. You spoke of two different kinds of syphilis. What were the two? A. I said neuro-syphilis.

Q. What does that mean? A. That it is invading the nervous system.

Q. What is the other word? A. It means of the rest of the body, not involving the nervous system.

Q. How is syphilis contracted. Could you tell in this case how it was contracted? A. No.

Q. What is the usual—

The Court: I suppose there are half a dozen different causes.

Mr. Lennie: Q. Could you tell how this was caused? A. No.

J. M. Jackson Cross-Exam.

CROSS-EXAMINATION BY MR. FARRIS

Q. Mrs. Burns left the hospital in February, 1935? A. Yes.

Q. I presume she was in a mental and physical condition to leave? A. Yes, she was improved.

(WITNESS ASIDE)

OLIVER SIDNEY LARGE, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

O. S. Large Direct Exam.

DIRECT EXAMINATION BY MR. LENNIE

Q. You are a practising physician residing in Vancouver, Doctor? A. I am.

Q. And have been for how long? A. 24 or 25 years.

Q. Do you know the Defendant Mabel Burns? A. Yes.

Q. Did you have occasion to attend her? A. I did.

Q. When? A. 1931.

Mr. Farris: Now, my lord, I am objecting to this going back to 1931. If he was her physician I certainly wouldn't expect he would divulge what was given to him as a physician.

The Court: I cannot tell what the evidence is until I hear it.

Mr. Lennie: Q. You attended her? A. I did.

Q. In the Vancouver General Hospital? A. Yes.

Q. In 1931. What date? A. June 21st.

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

O. S. Large Direct Exam. May 10, 1937 (Contd.)

Q. And for what? A. I confined her for a premature baby.

Q. Was it a boy or a girl? A. A girl.

Mr. Farris: I am of course taking objection to this, my lord.

Mr. Lennie: Q. Did you have occasion to see her again afterwards? A. Not that I can remember of.

Q. You were just called in for that one occasion? A. I may have been once or twice after that, but I have no recollection, and no records of it.

Q. Did you register the birth? A. Yes.

Q. You heard Dr. Jackson just now speak of syphilis. Is that a cause of a mental condition? A. It can be a cause.

Q. Would it bring about the mental condition? A. I don't know what the mental condition was.

O. S. Large Cross-Exam.

CROSS-EXAMINATION BY MR. FARRIS

Q. Were you called by Mrs. Burns? A. Yes—at least someone.

Q. You were her physician at the time? A. Yes.

Q. I presume you got her permission to give this evidence? A. No.

Q. Are there ethics in your profession? A. Yes.

Mr. Lennie: Q. You were served with a subpoena by the Plaintiff? A. Yes.

Mr. Farris: Q. And raised no objection to giving this evidence? A. I did.

Q. In court? A. No.

Q. You have discussed it, I presume, beforehand? A. No.

The Court: Q. You did object to giving evidence? A. Not in Court.

Q. But when served with the subpoena? A. Yes.

(WITNESS ASIDE)

F. W. Gosse Direct Exam.

FREDERICK WILLIAM GOSSE, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. What is your occupation? A. Contractor.

Q. Where do you live? A. 1686 West 12th.

Q. Vancouver? A. Yes.

Q. Have you some property there? A. Yes, sir.

Q. Just describe it, will you? A. Well, the house was turned into some suites, and I have a little house at the rear.

Q. You have one in suites and another house at the rear? A. Yes.

Q. Do you know the Defendant, Mabel Burns? A. Yes.

Q. Did she occupy the suite in the rear—the building in the rear? A. Yes.

Q. During what period? A. Oh, a few years, maybe up around August, 1934. I am not definite about that, you know.

Q. No, that is near enough. She left your place at some time. When was that? A. About that time, I think.

Q. Where did she go then? A. I think she went to some apartment on Broadway.

Q. Was she there after she returned from the Mental Hospital, do you know? A. No, I don't think she came back there.

Q. She left before that? A. Yes, no—well, I think she was there when she went. She was taken from there.

Q. She was taken from there to the Mental Hospital? A. That is to Essondale. That is what I understood.

Q. Did you have occasion to see her there from time to time? A. Yes.

Q. For what purpose? A. Well, collecting her rent.

Q. And what time of the day or night did you usually go there to collect the rent? A. Well, more times in the evening than any other time.

Q. Did you ever see anybody with her during those times?

Mr. Farris: My lord, that is a very leading question.

The Court: Put it another way.

Mr. Lennie: Take the different times you were there, and tell us who else was present.

The Court: What he saw.

Mr. Lennie: Q. What did you see? A. I can't say I saw anything out of the ordinary much.

Q. Do you know George Allen? A. Yes.

Q. Did you see him there?

Mr. Farris: My learned friend is surely going beyond the limits.

The Court: That may be all right. George Allen does not come into the picture until later on.

Mr. Lennie: Q. No. I just want to know. Do you know George Allen? A. Yes.

Q. Did you see him there? A. Sometimes, yes.

Q. Frequently? A. Oh, quite a few times.

Q. At what hour of the day? A. Usually in the evening when I went there to collect.

Q. Was Mrs. C. L. Welch living in your place that had apartments at that time? A. I presume that would be Mrs. Wildes at that time.

CROSS-EXAMINATION BY MR. FARRIS

Q. Mrs. Burns had two children? A. That is what I understood.

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In the Supreme Court of British Columbia

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Q. You saw them there from time to time? A. Yes.
Q. They were there from time to time? A. Yes.
Q. Mrs. Burns lived as your tenant for some years? A. Yes.
Q. If there was anything improper that you knew of, you certainly wouldn't have kept her as a tenant, would you? A. Well, I shouldn't, if I actually knew about it.

(WITNESS ASIDE)

L. F. Gosse
Direct Exam.
May 10, 1937

LLOYD FREDERICK GOSSE, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. What is your occupation, Mr. Gosse? A. In the service of my father.
Q. Who was the last witness? A. Yes.
Q. How long have you been in that service? A. All my life.
Q. Do you know Mrs. Mabel Burns, the Defendant in this action? A. I do.
Q. Where did you first see her? A. In the rear of the house, at the back, that father spoke about.
Q. She rented that from your father, did she? A. Yes.
Q. How frequently did you see her there? A. Every so often I had occasion to collect the rent.
Q. You were collecting rent from her, were you? A. Yes.
Q. At what time of the day did you call for that purpose? A. Well, nothing definite, sometimes in the day and sometimes in the evening.
Q. At what time of the evening? A. Different times in the evening whenever opportunity came my way to go there.
Q. Can you fix any hours? A. No, generally in the early part of the evening.
Q. Do you know George Allen? A. Yes.
Q. Have you seen him there? A. Yes.
Q. How frequently? A. I couldn't say that, nothing definite at all.
Q. But you have seen him there? A. I have seen him there.
Q. On many occasions?
Mr. Farris: Surely my learned friend—
Mr. Lennie: All right. Your witness.

L. F. Gosse
Cross-Exam.

CROSS-EXAMINATION BY MR. FARRIS

Q. You saw the children of Mrs. Burns around? A. Yes.
Q. How old were they? A. Oh, I couldn't definitely say, maybe 15 and 18, something like that.

Q. And they were around there and lived there with her? A. Yes.

Q. The mother and the three children living there all the time? A. Yes.

The Court: Q. How many bedrooms were in this small house? A. There was one bedroom. And a large living room.

Q. What else? A. The bathroom.

Q. Is that all? A. That is all.

Q. One bedroom, living room, kitchen and bathroom? A. Yes.

(WITNESS ASIDE)

The Court: Does that exhaust your short witnesses?

Mr. Lennie: I have one more, Mrs. Manford.

The Court: All right, let us have her.

Mr. Lennie: I guess she is not here.

The Court: Very well. We will adjourn until eleven o'clock tomorrow morning.

(COURT THEREUPON ADJOURNED AT 4.35 P.M. UNTIL 11.00 A.M. MAY 11th, 1937)

May 11, 1937, 11 a.m.

(COURT RESUMED PURSUANT TO ADJURNMENT)

Mr. Lennie: Mrs. Welch.

OLGA WELCH, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. Where do you live, Mrs. Welch? A. 3563 Quesnel Drive.

Q. How long have you lived there? A. Since February 1st.

The Court: Where does she live?

Mr. Lennie: Q. Just where do you live again? A. 3563 Quesnel Drive.

Q. Quesnel Drive? A. Quesnel Drive.

Q. Quesnel Drive. How long have you lived there? A. Since February 1st.

Q. Since February 1st? A. Yes.

Q. Did you ever live at 1686 12th Avenue West? A. Yes.

Q. In what building of these premises did you live? A. In a large residence.

Q. Is that the building referred to by Mr. Gosse? A. Yes.

Mr. Farris: When did she say she lived there?

Mr. Lennie: I haven't got that yet.

Q. When were you living there? A. We moved in there the fall of 1929.

Q. Yes, and how long did you remain? A. Until the 1st September, 1935.

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

Olga Welch
Direct Exam.
May 11, 1937
(Contd.)

Q. 1935? A. Yes.
Q. Do you know Mabel Burns, the Defendant in this action? A. Yes.
Q. Was she living in these premises during that period? A. Part of the time.
Q. Part of the time? A. She moved before I left.
Q. She moved before you left? A. Yes.
Q. I see. You were there until 1935? A. Yes.
Q. When did she move, do you know? A. Sometime the year before.
Q. The year before? A. Yes.
Q. Just describe the house that you lived in? A. It was a large—just an ordinary residence.
Q. An ordinary residence? A. Yes.
Q. Had it been converted into an apartment? A. No, not at that time.
Q. Not at that time? A. No.
Q. I see. Was it subsequently? A. Pardon?
Q. Was it converted into an apartment later? A. Later, right after I moved.
Q. After you moved? A. Yes.
Q. I see, and where was she living? A. In a house just at the rear of our house.
Q. At the rear of your house? A. Yes.
Q. How did you enter her house from the street? A. There was a walk led right past our house just at the side of it.
Q. At the side of it? A. Yes.
Q. Leading to her house? A. Yes.
Q. Had you an opportunity of observing who went to her house from time to time? A. Yes.
Q. Yes, who have you seen going to her house? A. Well, that is rather vague, but you know—numbers of people.
Q. Numbers of people. Any men? A. Yes.
Q. At what time of the day or night would you see them? A. Sometimes in the daytime, sometimes in the evening.
Q. Well, have you anyone in mind in particular that you saw frequently there? A. I have seen someone going in frequently, yes.
Q. Do you know who it was? A. Only by hearsay.
Q. Yes, never mind that. Was it the same person that you saw go there frequently? A. Yes.
Q. Yes, and how frequently? A. Well, sometimes every day.
Q. Sometimes every day? A. Yes. There may have been times when I didn't see him.
Q. Yes. Was it a man or a woman? A. A man.

Q. A man, and what—Can you describe the man? A. Yes. He was rather heavy-set, short. I believe he is here in court today.

Q. Oh, can you pick him out in court? A. I don't see him now. He can't be here at present.

The Court: Speak up. You say you do not see him?

Mr. Lennie: She says she doesn't see him now. A. He was here earlier.

Q. He was here earlier? A. Yes.

Q. I see. Do you know his name? A. I have heard it.

Q. Yes. Well, how frequently did you see him in the daytime as compared with the night? A. Well, he was more often at night.

Q. More often at night? A. Yes.

Q. At what hour of the night? A. Well, sometimes quite early in the evening, sometimes later.

Q. Well, how late? A. Do you mean going in or leaving?

Q. Going in or coming out. A. Well, I have seen him going in quite early; sometimes later in the evening.

Q. At what time would he come out? A. The hours would vary.

Q. Well, give us some idea. Just tell us what you know about it. A. Well, I have seen him leaving at 11 o'clock. I have seen him leaving at 2 o'clock.

Q. In the morning? A. Yes.

Q. Who was living with Mrs. Burns at the time? A. Her two children.

Q. Her two children? A. That is when we first moved in.

Q. When you first moved in? A. Yes.

Q. Were they with her all the time? A. As far as I know.

Q. As far as you know. You had occasion, I suppose, to see Mrs. Burns frequently? A. Well, I would see her coming and going, yes. I would see her about the yard.

Q. Did you know her personally? A. Well—

Q. Were you on speaking terms with her? A. Well, other than "How do you do?" or "Good-morning," I don't think we had much—

Q. You were not friends? A. I couldn't say that we were not friends or that we were friends.

Q. I see; it was just an acquaintance? A. Yes.

Q. How did you find Mrs. Burns? What sort of woman was she?

Mr. Farris: Oh, now.

A. I couldn't tell you that I—

The Court: Just a minute.

The Witness: I really don't—

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

Olga Welch Direct Exam. May 11, 1937 (Contd.)

The Court: Wait a minute. This woman here just had a nodding acquaintance. She couldn't possibly give evidence on that.

Mr. Lennie: She might have observed something.

The Court: If she saw anything wrong with her behaviour, that is one thing.

Mr. Lennie: Yes. Could I put it this way, my lord.

Q. Did you observe anything about Mrs. Burns? A. Well, no, I don't know just exactly what you mean.

Q. Well, as to her condition.

Mr. Farris: Well, now, my lord, I don't think he should suggest anything.

The Court: Perhaps that is again suggesting.

Mr. Lennie: Q. Did anyone else reside with her beside the children? A. You mean any strangers?

Q. Yes. A. Not that I know of.

Q. Not that you know of? A. No.

Q. There was no person permanently in the house with her beside the children? A. Well, the last year or two there was a small child there.

Q. How small? A. Well, when I first saw it it was just a tiny baby.

Q. A baby in arms? A. Yes.

Q. How late—when was that? A. Possibly in 1933, but I couldn't be definite about that.

Q. Yes, sometime before she left? A. Oh, yes.

Q. Did you know anything about that child? A. No.

Q. She never told you? A. No.

Mr. Lennie: All right, thank you.

Olga Welch Cross-Exam.

CROSS-EXAMINATION BY MR. FARRIS

Q. You are not suggesting, are you, Mrs. Welch, that you saw somebody going in daily into Mrs. Burns' house from 1929 till the time she left? A. I couldn't say daily, but frequently.

Q. Frequently. You didn't see that particular person you have mentioned go into that house before—at least three years before she left, did you? A. I can't be sure of that.

Q. No, and it might have been at least three years before you couldn't have seen it. That is all.

S. A. Boyle Direct Exam.

(WITNESS ASIDE)

SARAH ANN BOYLE, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. Where do you live, Mrs. Boyle? A. 1083 Richards Street.

Q. Did you live in the Casa Rey Apartments? A. Yes, I did, for five months.

Q. For what? A. For five months.

Q. For five months? A. Yes.

Q. What period? A. From the 26th August, 1936, until the 27th January, 1937.

Q. Yes. Do you know Mabel Burns, the Defendant in this action? A. Yes.

Q. Did she live there? A. Yes.

Q. At that time? A. Yes.

Q. You were caretaker there, were you not? A. Yes.

Mr. Farris: Now, my lord, I don't know what question my friend is directing to, but if your lordship will note that the period at which this woman lived in these apartments was some six months after the death of the late James Francis Burns and could certainly have no bearing on the case.

Mr. Lennie: Well, I submit it has, because if we can connect up some of the discussions that took place between them it might have a very important bearing on some evidence that has been already given.

The Court: I do not know yet what the evidence is going to be. Go ahead, Mr. Lennie.

Mr. Lennie: Q. Do you know a man named Allen? A. I have never seen him.

Q. Never seen him? A. No.

Q. Did you ever hear his name mentioned by Mrs. Burns? A. Yes, I have.

Q. You have? A. Yes.

Q. Yes. Just tell us how, will you? A. Well, I heard—I heard her say she had been speaking to Mr. Allen over the phone.

Q. Yes. A. And I have taken messages from him over the phone.

Q. From him? A. Yes.

Q. To convey to her? A. Yes.

Q. Did he say his name was Allen? A. Yes.

Q. What—

Mr. Farris: Now, my lord, surely that would be—

Mr. Lennie: What message was it?

The Court: Just a minute. You see, that is very leading. You must first of all prove it was Allen. I suppose the fact that a message was received by Mrs. Boyle—

Mr. Farris: This is a period six months after the death of Francis Burns, surely it can have no bearing.

The Court: Mr. Farris, if you fail to prove adultery six months afterwards, that would not affect the case at all, but this evidence connected up with other evidence might enable me to

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

S. A. Boyle
Direct Exam.
May 11, 1937
(Contd.)

come to a conclusion as to what was happening at the time of the death of Burns.

Mr. Lennie: Q. Just go on, Mrs. Boyle. Tell us something about— A. Different times Mr. Allen phoned, and when Mrs. Burns was not there to reply he asked me, if she wasn't in, to come to the phone, he asked me to say—

The Court: That is not evidence.

The Witness: To say Mr. Allen—

Mr. Lennie: Q. Never mind what she asked you to say. He phoned and asked you to tell Mrs. Burns something? A. Just that he had phoned.

Q. How frequently did that happen? A. Oh, perhaps twice a week.

Q. During the time that you were there? A. Well, most of the time twice a week, I will say for most of that time.

Q. Did Mrs. Burns have a phone in her apartment? A. No.

Q. What phone did she use? A. She used ours—the caretaker's phone.

Q. She used yours, yes. Did she phone in your presence to anyone at any time? A. Well, if I was within reach, sometimes I was in the suite and sometimes not. Sometimes I opened the door while I was working around, but more frequently I was in there.

Q. Well, did you hear any of her conversation? A. I couldn't say that I paid attention to it, except hearing that she was phoning to Allen. I heard the name.

Q. You heard the name? A. Yes.

Q. Yes. Well, what did she call him when she phoned him? A. Sometimes George, sometimes Georgie.

Q. Who was in the apartment with her? A. Her children as far as I know—two children.

Q. Anyone else? A. Well, I never heard of anyone else.

Q. Do you know what visitors she had? A. Yes, I have seen a lady who was in court coming to see her—two different ladies.

Q. Yes. Have you seen any man? A. Once I saw a man knocking at the door, but I didn't know him.

Q. You didn't know him? A. No.

Q. Did you ask who he was? A. No.

Mr. Lennie: I see.

Mr. Farris: No questions. Oh, just one question.

Q. The children, how old were they? A. Oh, perhaps 20 and 22, or thereabouts.

The Court: Q: 20 and what? A. About 20 and 22, I thought.

Mr. Farris: That is all, thank you.

(WITNESS ASIDE)

Mr. Lennie: I tender now in evidence, my lord, certificate of the stipendiary magistrate in and for the City of Vancouver, Mr. J. A. Findlay, dated 24th August, 1926, in which he certifies that the information laid by Mrs. Burns was tried by him and dismissed. It is a statutory certificate given under the Summary Convictions Act, the words being "I did after having tried the said charge dismiss the same."

Mr. Farris: Said charge of what? What is the charge?

Mr. Lennie: Well, the charge is contained in the certificate: "For that he the said Francis Burns at the said City of Vancouver on the 25th day of March, A.D. 1926, at the said City of Vancouver, being a husband and under a legal duty to provide necessaries for his wife, did unlawfully fail to provide such necessaries, the said wife being in necessitous circumstances, contrary to the form of the statute in such case made and provided."

Mr. Farris: Well, my lord, I certainly object to that certificate being filed. I can't see where that has any bearing on this case whatever.

The Court: Well, first of all—

Mr. Lennie: It is section 45 of chapter 245 of the Revised Statutes, 1924, Summary Convictions Act.

The Court: Yes, I have just sent for it to see what it says.

Mr. Lennie: That is admissible, I submit, under section 30.

Mr. Farris: It is admissible for what purpose? There is no question of a certificate made in a certain case being used. What it has to do with this action I can't see.

Mr. Lennie: Section 45 reads (reading).

The Court: That does not give it very clearly.

Mr. Lennie: No, I am not saying that does. He gives a certificate under the Act which he is called upon to give. Now I say that is admissible under Section 30 of the Evidence Act.

The Court: Yes, by section 30, Mr. Farris, it seems to be admissible.

Mr. Farris: Quite true, my lord, but a certificate that Thomas Walker was convicted ten years ago of some offence, how can that possibly be admissible in an action of this kind? What has that to do with this action in any way, shape or form?

The Court: Well, it is connected up with the discovery that was put in. The weight of the evidence is one thing, the admissibility is another. He is putting in a certified copy of a record.

Mr. Farris: Well, I take my objection to it, my lord.

The Court: I think it is admissible. The weight is another matter altogether.

(DOCUMENT MARKED EXHIBIT 2)

RECORD

In the Supreme Court of British Columbia

Proceedings at Trial May 11, 1937 (Contd.)

Mr. Lennie: Now then, I ask my friend to produce the cross-examination of Mabel Burns on that hearing.

Mr. Farris: I haven't that.

Mr. Lennie: Oh, yes, you have.

Mr. Farris: I certainly have not. It is not in my control.

Mr. Lennie: We got a copy from you.

Mr. Farris: My friend must prove that evidence of what took place on that hearing.

Mr. Lennie: I don't have to prove anything of the sort.

Mr. Farris: All right, conduct your own case then.

The Court: Well, you have asked him to produce it, and he says he has not got it.

Mr. Lennie: Yes. Well, in any event, that is the cross-examination which was referred to in the discovery evidence, and I presume that it is not necessary for this purpose—the discovery evidence will answer the purpose, because these are the questions to which I had reference.

Now I ask my friend to produce the Administrator's oath in Alberta—an affidavit of the Defendant Mabel Burns.

Mr. Farris: We haven't that.

Mr. Lennie: You haven't that?

Mr. Farris: No.

Mr. Lennie: Well, then, I will ask to put in a certified copy.

Mr. Farris: Let me see it. Yes, that is all right, I don't object to that.

The Court: No objection; all right.

Mr. Lennie: I call particular attention, my lord, to paragraph 3 and paragraph 11. Paragraph 3, "That the deceased at the time of his death was 41 years of age, leaving him surviving his lawful widow and relict, Mabel Burns, your affiant." And 11: "That the said deceased left no children him surviving and that no infants are interested in the estate and that I his widow am the person solely entitled thereto."

And paragraph 2 also: "That the said deceased died on or about the 31st day of December, A.D. 1935, at the said City of Calgary and that he had at the time of death his fixed place of abode at the City of Calgary in the said Judicial District; and that during the six years next preceding his death he resided at the following places: 1212 5th Street East, Calgary, Alberta." And then there is the ordinary form of oath. This is certified by the court.

Mr. Farris: I am admitting it.

The Court: It is admitted. Mr. Farris has no objection. All right, next.

(DOCUMENT MARKED EXHIBIT 3)

Mr. Lennie: Now then, the only question left as to evidence providing the law of Alberta is this discovery evidence that your lordship I don't think has dealt with yet—ordered it should go in. We stopped at certain questions, your lordship will remember.

Mr. Farris: I understood your lordship's ruling it was not to go in, but if at the end of my friend's case if he was able to attach that discovery evidence up with events at the time of his death that you would hear his application at that time.

Mr. Lennie: Of course, this involves a little more than that, because the question is are we entitled to answers to the questions that she has refused to answer, and if we are, why shouldn't we be permitted to continue the examination before the court sits again in the matter?

Mr. Farris: Well, my lord, now my friend is taking a position which is highly unfair, and which he knows is unfair. It was agreed that rather than the application being to the court that he could proceed with his examination as far as he wanted to, and that on the hearing of the trial he would then have the right to determine whether these questions were properly asked or not, and I had the right to object to that, but to save time, and now my friend is suggesting that he can have the right to go back over and examine again.

Mr. Lennie: Well, on questions arising out of the answers that are given to the questions that my friend objected to, that is all.

The Court: Well, you want her to answer these questions, 185 to 207, questions 216 to 223, and questions 231 to the end, and the objection was raised that that evidence could have no possible bearing on that question that you raised under the statute, I mean referring to any adultery at the time of the death, because it was five or six years before the death of Burns.

Mr. Lennie: Yes, and my answer to that was that all evidence between the date of separation and the date of death of whatever nature or kind should be admitted.

The Court: Well, I see no evidence at all to show any act of impropriety on the part of Mrs. Burns—at least for some years prior to her husband's death. There is no evidence at all of any association of any sort which would lead to that.

Mr. Lennie: Well, that may be—that does not dispose of the matter at all. There are certain questions which I think without any doubt should go in—from 233 to the end. There is no reason that I can see why these should not go in—

The Court: 233?

Mr. Lennie: 234.

Mr. Farris: What are the questions again?

Mr. Lennie: 234; "What were you doing at Banff? A. Waiting table". That has nothing to do with the objection that my friend has I don't think.

Mr. Farris: I take it, my lord, possibly to save any trouble, I will allow—I will let that go in.

Mr. Lennie: You won't object?

Mr. Farris: I won't object.

The Court: All right, 234—

Mr. Lennie: 234 to 239 then go in. And the rest of the matter I understand your lordship will deal with at the conclusion of the case.

The Court: Well, that is what I said, after the evidence is concluded.

Mr. Farris: Now as I understand, so there will be no misunderstanding, my friend is adjourning to get the evidence of one witness only—a lawyer from Calgary, and that the date is being fixed on the 18th to suit his convenience of coming from Calgary, and that otherwise the Plaintiff's case is closed.

Mr. Lennie: I think that is right, my lord.

The Court: Very well. Now the trial will be adjourned until the 18th May at 11 o'clock.

(COURT ADJOURNED AT 12.30 P.M. UNTIL MAY 18, 1937, AT 11 A.M.)

(2.30 P.M. COURT RESUMED PURSUANT TO ADJOURNMENT)

Mr. Lennie: I call Mr. Patterson.

HENRY STUART PATTERSON, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. What is your occupation, Mr. Patterson? A. Barrister and Solicitor of the Supreme Court of Alberta.

Q. And one of His Majesty's Counsel in the law, I understand? A. Yes.

Q. You reside where? A. In the City of Calgary.

Q. How long have you practiced in Alberta? A. I was admitted in Alberta in January, 1909 and I have practiced continuously since that time.

Q. Are you a member of the Bar in any other Province? A. In Nova Scotia. I was admitted in Nova Scotia in 1908.

Q. Did you attend any legal university?

Mr. Farris: I will admit that Mr. Patterson is a well-qualified lawyer.

Mr. Lennie: Will you tell us, then, what is the law of Alberta with regards to the rights of a widow to her husband's

estate? A. Well, that law is contained in "The Intestate Succession Act, 1928", chapter 17, section 6.

Q. Perhaps you had better read the Section? A. "If an intestate dies leaving a widow but no issue, his estate shall go to his widow." Then section 19 (1), which I assume is in issue here.

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

Q. Is that a uniform legislation? A. Well, that is, as I understand it, the uniform Act which was approved by the Committee on uniformity in 1925, and was enacted in Saskatchewan in 1930, and in New Brunswick at a somewhat earlier date, 1926.

Mr. Farris: It is already admitted that Act is the same as the Act of British Columbia, my lord.

The Witness: The provisions are the same as the Act of British Columbia.

Mr. Lennie: Q. The words are the same as the Act in British Columbia? A. Yes, the amendment of 1925 to your Administration Act.

Q. Are there any decisions under that Act? A. There are no decisions in Alberta except in Re Miller Estate which is reported in 1928, 3 W. W. R.

Q. Have you that here? A. Yes.

Mr. Farris: I don't know what my learned friend is seeking to do with this witness. Surely he isn't having this witness come and tell the Court the interpretation of the cases, of our Canadian cases. He has given evidence of what the Statute of Alberta is.

The Court: I think he is entitled to tell how—he is giving us the law of Alberta.

Mr. Farris: But if the law of Alberta is the same as British Columbia, then our laws are the same, because we have one common Court, the Supreme Court of Canada, which is the common court of all Provinces, and the Privy Council.

Mr. Lennie: But the law of Alberta isn't confined to The Statutes.

Mr. Farris: It must be. Surely it can't be anything else, and you pleaded a certain statute. That Statute means the same in Alberta as in the Province of British Columbia.

The Court: As it has been interpreted by the Courts of Alberta.

Mr. Farris: As it has been interpreted by the Courts of Alberta. Then my learned friend has the citation of those cases.

The Court: But it requires this witness, who is an expert, to say that is a decision of that Court, and in that way he introduces a fact what the law of the Province is on that point.

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Case

H. S. Patterson Direct Exam. May 18, 1937 (Contd.)

The Witness: This case, my lord, is a judgment of the Honourable Mr. Justice Walsh. The case refers to section 19, subsection 1, but does not interpret it because the learned trial judge decided that the husband had left the wife and that point therefore did not arise. That is the only Alberta case.

The Court: Q. What page is that? A. Page 643. He also dealt with the matter of adultery.

Mr. Lennie: Q. Have you been able to discover any decisions in any other Provinces that have adopted similar legislation.

Mr. Farris: Now, my lord.

The Court: Of course that wouldn't have anything to do with the law of the Province of Alberta.

Mr. Lennie: But it might be looked to for the purpose—

The Court: You can refer to that. It isn't going to strengthen it by referring to decisions of other courts.

Mr. Lennie: Very well, my lord.

Q. Then have you observed in any other jurisdiction a similar statute?

Mr. Farris: Now, my lord, surely—I don't know what the object of the question is, but my learned friend has proved a Statute and proved there is no Statute of Alberta on that—a Statute the same as ours.

The Court: I think that is not a question of fact, with regard to the law of Alberta.

Mr. Lennie: But I want to ascertain from the witness to what extent the Courts apply the laws of other jurisdictions relating to similar statutes.

The Court: That is a matter of argument, but they are not admissible in evidence.

Mr. Lennie: But I am entitled to show that the Courts of Alberta have adopted the decisions of other jurisdictions.

The Court: That is a different thing, if you can show that.

Mr. Farris: My lord, my learned friend surely cannot cross-examine this witness. This witness says there is only one decision of the Courts of Alberta, and that is the Miller case which he has referred to, and my learned friend can't go on to cross-examine his witness on a matter of law or even of fact.

The Court: He says he is going to show the decisions of other Provinces have been accepted by the Courts of Alberta.

Mr. Farris: This witness has shown there are no decisions on this point.

Mr. Lennie: Not necessarily other Provinces. Any jurisdiction I am referring to. To what extent will the Courts apply decisions on similar legislation in other jurisdictions. That is purely a question of fact: To what extent do they do it, or will they look at them, or are they governed by them, or do they give

them any effect. Surely that is admissible when attempting to prove what the law of Alberta is.

Mr. Farris: That, I submit with great respect, is absolute—I don't like to use the word "nonsense", but I can't think of any other word now. What one Judge may do even in our own courts, no witness can give evidence as to. Now he is asking what our Judges in Alberta, what decisions they will recognize. If he has a statute where they are bound by certain other decisions, then that is a different matter.

Mr. Lennie: That is just what I am coming to.

Mr. Farris: If there is another statute which does that, he had not pleaded it.

Mr. Lennie: I don't have to.

The Court: He is trying to get the evidence on decisions on similar statutes.

Mr. Lennie: That is it.

The Court: I do not think that will assist me. That is a matter of argument, but so far as this witness is concerned he swears what the law of Alberta is.

Mr. Lennie: But what I wanted to get was to what extent—how can we ascertain what the Alberta law is unless we know the courts which on occasions apply the law in other jurisdictions in coming to their decisions. I am not suggesting that it binds your lordship in any shape or form, because it is only really an inference and part of the argument, but if the Courts of Alberta do, as a matter of fact, in instances, apply the law of other jurisdictions where there is similar legislation, surely a witness ought to be able to say in what respect.

The Court: If the Court considers a decision of another Province and another jurisdiction on exactly the same statute—in other words, does the Court consider all the possible sources of authority.

Mr. Lennie: Still have I not got to show we are trying to prove the Alberta law. I could go so far as to ask him what is his opinion of the law of Alberta, based on the meaning of this Statute, but I prefer not to do that. I prefer to ask first if the Courts of Alberta will apply the law of other jurisdictions to similar language and to what extent.

The Court: Well, ask the question. It may shorten it.

The Witness: I might say that in the King vs. Magdall case —that is a case under the Code—in regard to previously chaste character, in the Supreme Court of Canada, 61 S.C.R.—

Mr. Farris: Surely, my lord, we do not have to have this witness come from Alberta to interpret the Supreme Court of Canada Reports.

The Court: He may perhaps ask if a Court carrying out

this idea of uniformity of legislation, if the Courts of one Province will follow the decisions of another Province.

Mr. Farris: The same thing applies here.

The Court: I think it does too.

Mr. Farris: And the decisions have just the same effect in British Columbia as in Alberta.

The Court: The Courts of Alberta may refuse to do that.

Mr. Farris: The Courts of Alberta may refuse to do that.

The Court: In this Province we do, with uniformity, follow the decisions of other leading Courts or Provincial Courts upon Statutes which are exactly the same.

Mr. Farris: We will in some cases. We don't always, because there is a provision of appeal to the Supreme Court of Canada. Surely this is just going, I think, a little beyond the limits my friend should go.

Mr. Lennie: My answer is, my lord—

The Court: I will hear it.

The Witness: I refer to the Supreme Court of Canada report because Mr. Justice Stuart in the Appellate Court—

Mr. Lennie: Who was Mr. Justice Stuart? A. A judge of the Appellate Division in the Province of Alberta at the time this judgment was given. It is quoted on page 93, and there seems to be no disapproval of it in the Supreme Court of Canada. He says: "As to question 3, my view is that, under the existing authorities and precedents especially in the American States whence the law has come, the case should have been withdrawn from the jury, and I would answer it in the affirmative." I take it Mr. Justice Stuart was prepared to look at the precedents in the American States from which this legislation came. I don't suggest he was bound by it at all, but he considered he should have looked at it, and having reviewed those precedents that the case ought not to have been taken from the jury.

Q. Have you discovered any case in other jurisdictions of a statute of a similar nature to this? A. Yes.

Q. Where? A. In Indiana, a similar Statute in terms, I think, identical, has been in force since 1892, at least there was a case in 1892 and a case in 1916, and I assume it was in force in the intervening period.

Q. Will you refer to that case?

Mr. Farris: Surely this is going beyond—we have got to go to American cases. I might say the Privy Council does not feel bound by American cases at all. In the case in which I was before them, that was the position. My learned friend surely can't ask this witness to come into this Court and tell us what the laws of other countries are.

The Court: He is entitled to give his opinion. He says the law of the Province of Alberta is this: "First of all based

on the statute there are no decisions in the Province of Alberta, but there are decisions on similar statutes, but if this question came up before the Court of Alberta in my opinion they would decide so and so.

Mr. Farris: Surely a witness can't give evidence as to what a Court may decide. He has already stated that the Courts of Alberta are not bound by this.

The Court: A barrister is entitled to give his opinion on what the law is.

Mr. Farris: But he can't give what the judge is going to do, and that is what he is seeking to do. That is the only thing. The Courts have not formed any decision on this.

The Court: Supposing you were asked to go to Alberta to give evidence on the law of British Columbia with regard to, say, a section of the Bills of Sale Act. You read the section and then say there are no decisions in British Columbia on that, but there are decisions in England, and say "Upon those in my opinion the law of British Columbia on that point is so and so."

Mr. Farris: I do not think the witness has any right to interpret what is a general and common law, I mean common to all the Provinces. There being no decisions in Alberta, the Statute being the same—this Indiana case may be quoted to your lordship in argument, but it certainly is not and can't be the law of Alberta any more than the law of British Columbia, and that is a matter of argument. I don't agree with my learned friend who is in the witness box that is the case. I don't think I should be asked to go into the box to give evidence on what the law of Alberta is. Being a member of that Bar and having been for a number of years, I would have a perfect right to go in and give the argument under oath. Surely such a procedure would be absurd.

The Court: Get Phipson.

Mr. Lennie: There is a case in 40 Chan. Div. p. 543 at 550. Concha v. Murrieta. This is the judgment of Cotton, L.J. "The question is what were the rights . . . proper meaning." In other words the evidence is to be given by experts, not governing the matter at all, but as being useful in pointing out to your lordship the basis of his opinion as formed.

Mr. Farris: My lord, this case has no bearing on this case. This is dealing with the law of a foreign country.

Mr. Lennie: This is a foreign country.

Mr. Farris: It is not a foreign country. The law of Alberta on this Statute must be the same as the law of every other Province in Canada.

The Court: I do not think so.

Mr. Farris: How can it be otherwise? It can be temporarily, but supposing your lordship makes a decision in this Court

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which is contrary to the decision of the Alberta Court, does that make this the law of British Columbia. It is only the law so far as it is followed, but when it goes to the Supreme Court of Canada, the Courts or Provinces are bound by the decision of the Supreme Court of Canada.

The Court: That is quite clear, but what a judge of this Court decides is the law of this Province until it is reversed by the Court of Appeal or by a higher court. When a witness comes and gives expert evidence on the law of this Province, he is giving evidence as to fact, and he is here to say what is the law of that Province. He says "In that Province we have a statute. There are no decisions in the Province on that Statute but there are decisions in other jurisdictions which, if this question came up would be considered by the Courts, and in my opinion those cases would be applied, and the law of the Province would be so and so."

Mr. Farris: But this witness made it impossible for him to give that evidence. There is no decision in the Courts of Alberta in respect to this. We start with that. That being the case he suggests then that the Courts in Alberta listen to the decisions in other courts. Now, there is no particular law in the Province of Alberta different from the law of British Columbia, because the same state of affairs exists here. Your lordship will be listened to and hear decisions of others Courts. As I say, I couldn't go to Alberta and give evidence on what, on a review of these cases, the courts of Alberta are going to decide.

The Court: This witnesses' evidence is purely evidence of fact. I am not bound by it. I can look at any decision to which he refers and I come to the conclusion myself upon the facts which he has produced as to what the law of Alberta is, but he is at liberty to refer me and give his opinion to the cases upon which he bases his opinion. Although there are no decisions of any Province, perhaps no decision of the Supreme Court of Canada, there may be numerous decisions in England. We have to decide cases along decisions, not of any Province of Canada, but English decisions, and sometimes American decisions.

Mr. Farris: But the point I am making is, there is no difference between the law of Alberta and the law of British Columbia. The laws are identically the same, the statutes are the same.

The Court: Then would the evidence of a lawyer in British Columbia on our statutes be of any value as to what the law of Alberta is?

Mr. Farris: I would say no, my lord. A British Columbia lawyer having these facts before him, that there are no decisions

in Alberta on that Statute, that the Statue is the same as the British Columbia statute. A British Columbia lawyer is just as qualified to give an expression of opinion upon that Alberta Statute as is a lawyer from the Province of Alberta.

The Court: His evidence is of no value because he is not an Alberta lawyer.

Mr. Farris: Surely, my lord, an expert does not have to be an Alberta lawyer to give expert evidence. Anybody who knows and is familiar with the law, can qualify himself as an expert.

The Court: Here is the whole thing in Taylor, 12th edition, page 906: "For instance . . . part and parcel of his testimony." That is as far as this goes.

Mr. Farris: And that deals entirely with French law.

The Court: Namely foreign law.

Mr. Farris: And this isn't a foreign law.

Mr. Lennie: It is foreign to British Columbia.

The Court: The Province of Alberta is a foreign state so far as we are concerned on this question, just the same as it is a foreign state in regard to domicile. Go ahead.

Mr. Lennie: Go ahead.

The Witness: I find that similar legislation has been in force in the State of Indiana, and the case of Spade v. Hawkins—

Mr. Farris: I think, my lord, before my learned friend asks this witness as to the law of the State of Indiana, he should qualify himself as an expert.

The Court: He is not proposing to ask that. He is referring to that decision which, according to his opinion as a lawyer of Alberta, as to the law of Alberta.

Mr. Lennie: That is it.

The Witness: It is reported in 110 North Eastern Reporter p. 1010. The section of the Statute is found on page 1011 in the second column and reads, "If a wife shall have left her husband and shall be living at the time of his death in adultery, she shall take no part of the estate of her husband." There is a slight transposition as compared with our statute.

Q. You might just point that out? A. My lord, in this case there are two statements of fact, one at the top of page 1011. They are rather conflicting. The other is on page 1013. Reading from 1013: "Here for a period of two years . . . as far as the evidence reveals." The case as I understand it, my lord, is decided by the Court of Appeal. The Court of Appeal had apparently no power to draw inferences, and the Court below, instead of finding affirmatively or negatively that she was living in adultery at the time of her husband's death, found certain specific facts, and the Court of Appeal held those facts did not compel the inference that she was living in adultery at the time of death. While the Court of Appeal had no power to

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draw inferences, they had power where the facts seemed to compel there was only one conclusion to draw, and the case was sent back for a new trial. The various other judgments are discussed in the court of the judgment.

Q. And what was the result? A. Well, they held the facts here, which established a good deal of adultery at various times—

Q. During what period? A. Prior to the husband's death —that that did not compel the inference that she was living in adultery at the time of her husband's death, and the matter was sent back for a new trial. That is my understanding of the judgment.

The Court: That is not very helpful.

Mr. Lennie: It is to this extent, that it shows the evidence was admitted in that case from the time she left him until the two-year period before his death.

The Court: I think, of course, if you wish to lead evidence for a long period prior to his death, from which it might be inferred she was living in adultery at the time of his death, that is admissible evidence, as said. Your learned friend did not combat that at all. The court has to be in the position to draw an inference that at the time she was actually living in adultery. According to your views, this helps you?

Mr. Lennie: I can't see anything else to it.

The Witness: "It has been held that a single act of adultery . . . at the time of her husband's decease." (reading from page 1012). I don't suggest, my lord, that the courts of Alberta are bound to follow this judgment, or that your lordship is bound to. I think Mr. Farris misunderstood. What I mean to say is the courts of Alberta would carefully consider the information given in that judgment. There is another case in Indiana not so useful as that, because it was a fairly clear case in favour of the woman. It is Zeigler v. Mize, 31 Northeastern Reporter, page 945.

The Court: Q. What year is that? A. 1892. It is on the same statute. In this case there had been a separation for some 40 years before the death, and no evidence of adultery for a very considerable number of years prior to the husband's death, and the Court of Appeal held she was not living in adultery at the time of the husband's death, but the principles are not discussed as fully as they are in the Spade v. Hawkins case.

Mr. Lennie: Q. Having regard to these decisions and your general knowledge, what is your view about the section in question? A. Well, having in view the Indiana decisions, I would say that living in adultery was a state of life or a mode of life, that a woman might be committing adultery at the time of her husband's death and still not be living in adultery, that a number of isolated instances do not necessarily constitute a living in adult-

ery; but if the evidence is such that a jury could conclude that the woman in question had adopted a life of adultery as her ordinary life and one could infer that life continued at the time of his death, even if there were no evidence of immediate acts, that might be sufficient. That is, a jury would be entitled, I think, to make an inference from a well established mode of life within limitations.

Mr. Lennie: That is all.

Mr. Farris: Thank you for your assistance, Mr. Patterson.

(WITNESS ASIDE)

The Court: Is that the case?

Mr. Lennie: I have a witness I would like to call. I wasn't aware until just to-day as a matter of fact that she would be a witness of any value, but I would like to call her.

Mr. Farris: My lord, my learned friend undertook, and the case was adjourned at his request to hear this one witness only. Now that was made a very clear understanding, and on the strength of that I brought no witnesses here because I don't propose to call any evidence.

Mr. Lennie: I have the transcript here of what occurred, my lord.

The Court: What was said?

Mr. Lennie: My learned friend allowed certain questions on discovery to go in without objection. Then Mr. Farris says, "Now as I understand, so there will be no misunderstanding, my friend is adjourning to get the evidence of one witness only—a lawyer from Calgary—and that the date is being fixed on the 18th to suit his convenience of coming from Calgary, and that otherwise the Plaintiff's case is closed." And I say, "I think that is right, my lord." And so I did think. Now I have discovered this witness may be useful, and I would like to have her called.

Mr. Farris: My lord, I suggest that is a complete breach of faith on the part of my learned friend.

Mr. Lennie: No breach of faith at all.

Mr. Farris: I think it is a breach of faith to the court. My learned friend unquestionably—and the record shows that only one witness was to be called to-day. My learned friend's case was closed. Now my learned friend is trying to hedge, using that phrase, "I think." There was no doubt as to his intention, and I haven't any hesitation in saying that my learned friend in even urging it is acting in bad faith.

Mr. Lennie: I am rather surprised at my learned friend's suggestion that I am acting in bad faith. When we adjourned, I didn't at that time intend to call her; but I have discovered she might be useful, and I feel it is my duty on behalf of my clients

not to have the case closed without at least making an application to your lordship.

The Court: You say she might be?

Mr. Lennie: Yes.

The Court: Have you seen her?

Mr. Lennie: No. As far as I am concerned she is an adverse witness, and I am going to take a chance on her.

The Court: Do you mean you have not consulted her?

Mr. Lennie: No. I have been told what she will probably say; but she is the daughter, as I will show by her evidence, I think, of the Defendant. I feel it is my duty, as I say, having discovered this, on behalf of my clients, to submit her for examination. Her evidence may not be of any value. It may be of very great value. It is one of the sort of things that occurs occasionally. For example, if I didn't make this application now I would be precluded at any future time of having her evidence taken.

The Court: It amounts to this. You have not seen this witness, Mr. Lennie?

Mr. Lennie: No, my lord.

The Court: You do not know what she will say?

Mr. Lennie: No. I have been told what she will say. I want to be perfectly frank about it because I certainly thought, as I said at the conclusion of the case the other day, that was all the evidence I had, and I don't want my friend to get the idea this is being done in contravention of any statement at that time, because it isn't.

Mr. Farris: I would just point out this. If it were a closed case, if this adjournment hadn't taken place and he had that lawyer here that day, the case would have been closed then and the matter would be over, and to keep it in that position was the reason I asked for that understanding before the court adjourned. Now my learned friend in asking for this from the court should be in the same position that if he were to go before an Appeal Court even and say "I have discovered new evidence," your lordship knows full well the difficulty of getting a case opened up to put in new evidence. Now my learned friend should be just in exactly the same position as if he were applying to an appeal court to put in new evidence discovered after the trial. My learned friend, as I say, in this particular case ought to be in a stronger position than that, because he is acting, as I say, contrary to his understanding and undertaking given to this court.

Mr. Lennie: I may say I am very familiar with the practice of introducing fresh evidence in the Court of Appeal. As a matter of fact I was concerned in the case which established the principle in British Columbia, *Marino* v. *Sprout*. We had

to show there in order to get the evidence in that we were unable to discover it before, and then we had to show what the evidence was we intended to introduce. Here I am not in that position, but I am at the trial asking that I be allowed to do it. If the evidence is of no value it doesn't matter. If it is of value then it prevents the necessity later on of asking the Court of Appeal to allow it in case there should be an appeal. Now it seems to me under those circumstances your lordship should exercise your discretion in permitting the evidence and thus avoid the possibility or necessity of making an application to any other tribunal.

The Court: Is the witness in court?

Mr. Lennie: Yes, my lord, I have subpoenaed her.

The Court: Get me Law Reports, 4 Chan. Div. In this matter the Plaintiff closed his case with the exception of calling an expert witness. He now comes to the court and says that at that time he did not know of the existence of this evidence which he now proposes to call, which may or may not have some relevancy. If there had been an undertaking that he should not call any further evidence, it would be a different thing, but there was no such undertaking made by counsel at that time. That being the case, I think I am bound to hear any further evidence he has to offer, this case not being closed, which quite distinguishes it from cases where an undertaking has been given, or where all the evidence has gone in and judgment reserved.

Mr. Farris: In regard to the undertaking, as I recall it—I haven't got the evidence before me, but it was clear this was being adjourned at the request of my learned friend, to oblige him, on the understanding there was only one witness to be called. How there can be any greater understanding I can't see.

The Court: His statement is here.

Mr. Farris: The evidence is here. If my learned friend has it, I would like permission to see it. I didn't know it was coming up.

Mr. Lennie: Here is a transcript.

Mr. Farris: Here is the position I took: "Now, as I understand, so there will be no misunderstanding, my friend is adjourning to get the evidence of one witness only—a lawyer from Calgary—and that the date is being fixed on the 18th to suit his convenience of coming from Calgary, and that otherwise the Plaintiff's case is closed." I don't know how you could make an undertaking stronger.

The Court: At that time I believed all the evidence admissible.

Mr. Farris: But the point is this, surely, if his case was closed, and that was just the point I wanted, because I didn't

—he found he had a weak case and has a week or two weeks to dig up further evidence which he couldn't have done if the case had been over that day.

The Court: That is important. I do not see any way I can keep that evidence out. He hasn't closed his case.

Mr. Farris: Not only that, he comes in here to-day with a witness he hasn't even seen, and coming on a fishing expedition to open up—on a fishing expedition when he doesn't know what the witness is going to say.

The Court: He could have clearly done that before the adjournment, so the only question is whether he is barred by what took place.

Mr. Farris: It is more than that. It gives him the advantage of breaking up his case and adjourning three weeks to dig up something when I was prepared to get the case ended that day, and I was only prepared to get one thing, this expert witness, and he is taking advantage of the leniency of the court and of the courtesy of having this adjournment for a week to go back on the understanding he gave the court at that time, and endeavours to dig up evidence and then comes to the court and says he hasn't even seen this witness himself.

The Court: Do you want an adjournment, Mr. Farris?

Mr. Farris: I don't know until I hear the witness, but I want to go on record as saying that so far as my learned friend is concerned in all the years I have been practising I have never seen a greater breach of understanding with myself.

Mr. Lennie: Let me reply to that, my lord. Prior to the last sitting it was arranged with my friend that this witness from Calgary could not be here for the date fixed for the trial and we arranged his evidence would be taken a week later. That was the arrangement for the adjournment the other day, and I had no intention at that time, I admit frankly, of producing any more evidence. It is only because I have discovered this evidence since that I am offering it and I submit I am bound to do that on behalf of my client, in duty bound, and if my friend is in any way injured by reason of that and requires an adjournment immediately or anything of that sort, of course, your lordship can impose such terms as you like.

The Court: He does not require an adjournment now, but should he require an adjournment after—

Mr. Farris: The point is more than that. He has gone out and taken the opportunity after his case is closed to dig up further evidence and seek around and try and get further evidence.

Mr. Lennie: I haven't gone out at all. It has come to me.

Mr. Farris: Just the same thing.

The Court: Now, call your evidence.

Mr. Lennie: I call Miss Effie Huggins.

EFFIE HUGGINS, a witness on behalf of the Plaintiff, being first duly sworn testified as follows:

DIRECT EXAMINATION BY MR. LENNIE

Q. Where do you live now? A. 957 Hornby Street.

Q. You live with— A. With my girl friend Regina Menges.

Q. How long have you lived there? A. About four weeks —three weeks.

Q. Do you know Mrs. Mabel Burns? A. She is my mother.

Q. She is the Defendant in this action? A. Yes.

Q. How long did you live with her? A. All my life.

Q. Until you moved, as you have told us? A. Yes.

Q. Then you were living with her on 12th Avenue, was it? A. Yes.

Q. Do you know Mrs. Welch, Mrs. C. L. Welch who used to be a Mrs. Whiles? A. Yes.

Q. Did she live in that vicinity? A. Yes.

Q. Where did she live? A. Right in front of us.

Q. Right in front of you? A. Yes.

Q. Do you know a Mrs. Boyle, Sarah Ann Boyle? A. Not that I remember.

Q. Do you know the Casa Rey Apartments? A. Yes.

Q. Did you live there with your mother? A. I did.

Q. During what period? A. Right until three weeks ago.

Q. Who was the caretaker there? A. When I left it was Gus Tray, or something, was the name.

Q. Was Mrs. Boyle ever caretaker there? A. I believe there was a Mrs. Boyle caretaker. I am not sure, I think so.

Q. Were you here the other day when this case was being heard? A. No, this is the first time I have been here.

Q. Why did you move?

Mr. Farris: Now, my lord—

The Court: That is inadmissible, her reason for moving three weeks ago.

Mr. Lennie: All right. Do you know Mr. George Allan? A. Yes, I do.

Q. How long have you known him? A. I have known him for years.

Q. Where have you seen him? A. He is a friend of ours, used to come to the house.

Q. How frequently? A. I can't say just how frequently; just like an ordinary friend would come.

Q. How long would he stay when he was there? A. About an hour, two hours.

Q. What time of the day? A. Usually around seven and stayed until about nine.

Q. Was that during the period you were in the Casa Rey Apartments? A. I think he only came about once or twice to the Casa Rey.

Q. How long were you there, how many months? A. Lived there about a year and a half.

Q. Prior to that how often did he come to your place on 12th Avenue? A. Maybe twice a week.

Q. Have you seen him lately? A. No, I haven't.

Q. When did you last see him? A. I guess about three months ago.

Q. Where did you see him? A. He was visiting us.

Q. Where? A. At the Casa Rey Apartments.

Q. Was his wife with him? A. No.

Q. Do you know Mrs. Allan, don't you? A. Yes.

Mr. Farris: Don't suggest anything, please.

Mr. Lennie: Q. How long have you known her? A. I have known her the same length of time I have known him.

Q. Have you seen him during the last six months? A. Yes, I have seen him, sure.

Q. Where? A. He came to visit us a couple of times at the apartment.

Q. Is that all you have seen him? A. That is all I have seen him otherwise.

Q. During your residence on 12th Avenue who lived in the house? A. My brother and my mother and I.

Q. Anyone else? A. That is all.

Q. At no time. Wasn't there a child there? A. Yes.

Q. There was. A. Yes.

Q. How old was the child? A. About three—two or three. I am not sure.

Q. How long was it there? A. Not very long.

Q. Where is that child now? A. She is out boarding.

Q. Where? A. I don't know where.

Q. When did the child go to board? A. I don't know. My brother and I have always kept her.

Q. And when did she leave your mother's house?

Mr. Farris: Surely, my lord, I can't see what this had to do with the case.

The Court: I do not know yet. It may have something to do with it.

The Witness: About when my mother went in the hospital, I think.

Mr. Lennie: Q. Before your mother went to the hospital? A. Yes.

Q. And you say the child was three years old at that time?
A. Around that.
Mr. Lennie: I think that is all, thank you.
Mr. Farris: Thank you.

(WITNESS ASIDE)

The Court: That is your case.
Mr. Lennie: That is my case.
The Court: Any evidence, Mr. Farris?
Mr. Farris: Just before—I would like leave to withdraw the counterclaim in this matter as I understand the matter of the counterclaim which is to seek an accounting from the trustee, an application has been made before Mr. Justice D. A. McDonald and that was adjourned to permit an action being brought by my learned friend to set aside the administration given to Mrs. Burns. In view of the fact that is before his lordship Mr. Justice D. A. McDonald and can be properly dealt with, I would like to ask for leave to withdraw the counterclaim.
The Court: Any objection?
Mr. Lennie: Yes. Aside from the question of costs involved this action arises out of the application that was made by my friend to Mr. Justice McDonald. I didn't appear on that application.
The Court: You say this action was commenced as a result of that application?
Mr. Lennie: Yes. As a matter of fact he said, I am instructed, he would make the order unless we instituted this action. Now, the matter so far as Mr. Justice McDonald is concerned, I submit is finished, because your lordship is seized now of both claim and counterclaim and that would embody the application before Mr. Justice McDonald.
The Court: And he wants to withdraw his counterclaim.
Mr. Farris: I don't want to be in the position because it is only in the—if the counterclaim is dismissed that might be held to be tried and the issues gone into. As I understand from Mr. Miller, who is with me and was on the application, his lordship Mr. Justice McDonald gave this statement, that he would make the order, if this action were not commenced, to set aside the testamentary papers taken out and he said after the action was decided then to come back to him and he would make the proper order. I didn't know of that fact and I see no reason why we should proceed with the counterclaim. My friend can't be hurt any. It is just a matter of costs and no evidence directed to it and it hasn't any effect. Mr. McPhee, I think, acted on that for the estate and Mr. Miller for Mrs. Burns.
The Court: You say the position is the application before Mr. Justice McDonald was for what?

Mr. Farris: For an accounting. Mrs. Burns made an application as administratrix of the estate of James Francis Burns against Michael Burns for an accounting. Then in answer to that she said she is not his wife. That was the issue raised there, that she is not properly married to him. He said, "I am going ahead to make the order unless you start an action, and have an order setting that aside," and the matter went forward and is now before his lordship who will make the proper order depending on the result of this action. If your lordship sets aside the testatory letters, then, of course, he would dismiss the application for an accounting. It is purely a chamber matter and not one before the court and I don't see why we should not be given leave to withdraw it.

Mr. Lennie: I think my friend is not in quite as favourable a position as he would like to be. The counterclaim is before your lordship. It can't be withdrawn now even by consent and strictly speaking it must form a part of the decision in this case, the result of which I am entitled to take the benefit of. My friend has placed himself in that position and he is trying now, he says he is not going to give evidence on the counterclaim and for that reason he wants to withdraw. Now, I say, he is not in that position and your lordship under those circumstances will not permit him to do it.

The Court: Is the probate of the will filed?

Mr. Lennie: Well, no, our admissions—it is in this.

Mr. Farris: The reason I am asking for the withdrawal is I don't want to be in the position of having the matter before two courts at the same time. I may say as far as I am concerned in the matter of proving the counterclaim, my evidence is very short and I will just give your lordship what the evidence is. It is in the discovery of Mrs. Burns.

Mr. Lennie: My friend can't enter upon this until the present matter is disposed of.

Mr. Farris: All right.

The Court: I think the Plaintiff is entitled either to go ahead with the counterclaim or abandon it. In this case it will be dismissed.

Mr. Farris: The position I am in, my lord, is if I can protect the matter so it isn't res judicata before his lordship Mr. Justice D. A. McDonald, then—

The Court: Unfortunately I cannot say at this moment.

Mr. Farris: My lord, to protect myself I am asking for leave to withdraw the counterclaim.

The Court: Your friend objects to that and I refuse that application.

Mr. Farris: Then I am forced to proceed with the counterclaim, my lord?

The Court: Yes.

Mr. Farris: I put in the evidence of Michael Burns on discovery, question 1 to 6 inclusive, and 28 to 30, inclusive. That, my lord, is the case for the Defendant.

The Court: All right, argument.

(ARGUMENT BY MR. FARRIS)

The Court: You didn't put in that marriage certificate.

Mr. Farris: I would ask my learned friend to produce that.

(DOCUMENT MARKED EXHIBIT No. 4)

Mr. Farris: I ask for dismissal of the action and judgment on the counterclaim.

Mr. Lennie: In connection with that, my lord, I would ask to have the estoppel plea contained in the reply apply to the counterclaim.

The Court: You mean you want to set up now—

Mr. Lennie: Just have it repeated it as part of the defence to the counterclaim.

The Court: I thought that was done. You are not objecting, Mr. Farris?

Mr. Farris: I did object very strenuously and your lordship allowed it in. Your lordship admitted the plea.

Mr. Lennie: I simply want now in defence to the counterclaim to repeat the allegations contained in paragraph 3 of the reply.

The Court: Any objection to that, Mr. Farris?

Mr. Farris: No further objections, my lord, other than what I had.

Mr. Lennie: My argument will be curtailed by the discussion we had during the case on the question of admissibility of evidence, but your lordship now has to determine as I understand it whether the objectionable questions on the examination for discovery are to be admitted or not, and it seems to me I should have a decision on that before proceeding with the argument.

The Court: Mr. Farris didn't object to it going in.

Mr. Lennie: That was a few questions at the end but there were the other questions he so strenuously objected to about the birth of the child in 1931. Maybe it was understood that should go in, but I want that made perfectly clear, because it is the discovery evidence to a very large extent I am relying upon.

Mr. Farris: The position was I understood that your lordship made a ruling that evidence unless connected up with some event at the time of the death of James Francis Burns was not admitted, but your lordship did give permission to my learned friend at the conclusion of his case to again apply to have those

questions put in if he had evidence to connect it up. He hasn't done so. I am a little wrong. This is what your lordship said, on page 58 of the transcript:

"The Court: I have very grave doubts about it, but it is a matter of cross-examination. What I propose to do is to reserve this until the conclusion of the Plaintiff's case. Then I will be in a better position to judge if it is admissible. What is occupying my mind at the present time is proving living in adultery some years before the death is not within the section of the Statute."

"The Court: It is understood this is reserved until the conclusion of the Plaintiff's case.

Mr. Farris: With leave to put this evidence in at that time?

The Court: Yes. That is questions 185 to 207.

Mr. Lennie: Question 216.

Mr. Farris: All these questions, your lordship will note, are dealing with the same period of time.

Mr. Lennie: This went in without objection.

Mr. Farris: It all, after that, was subject to that understanding and objection. I allowed you to go on; to save any further applications you were allowed to go on then and to ask all these questions, subject to the hearing of the trial.

The Court: Is that the same class of evidence?

Mr. Farris: Yes, it is all dating back to that period of time.

The Court: If that is so, that will be reserved with the other."

"The Court: I will reserve questions 216 to 223. I can see this question is going to have to be decided very shortly.

Mr. Lennie: Then question 231—that is all along the same line.

The Court: All right.

Mr. Lennie: Of course it puts me in this position, my lord, with regard to some of the witnesses I want to call, that you will probably want to decide that question before you hear their evidence.

The Court: It is coming down to that. You say there are cases on that. Mr. Cassidy referred to certain cases decided under an English Statute.

Mr. Lennie: That is part of my argument. I have several cases on that, my lord. I didn't want to argue them on the questions of admissibility of evidence.

The Court: Mr. Farris is objecting on the ground it cannot be admissible. I have got to decide that question now."

Mr. Farris: Then Mr. Lennie argues—

The Court: I think you withdrew your objection and it went in.

Mr. Farris: Yes, to part of it. Then at page 95:

"The Court: Well, I see no evidence at all to show any act of impropriety on the part of Mrs. Burns—at least for some years prior to her husband's death. There is no evidence at all of any association of any sort which would lead to that.

Mr. Lennie: Well, that may be—that does not dispose of the matter at all. There are certain questions which I think without any doubt should go in—from 233 to the end. There is no reason that I can see why these should not go in—

The Court: 233?

Mr. Lennie: 234.

Mr. Farris: What are the questions again?

Mr. Lennie: 234: 'What were you doing at Banff? A. Waiting table.' That has nothing to do with the objection that my friend has I don't think.

Mr. Farris: I take it, my lord, possibly to save any trouble, I will allow—I will let that go in.

Mr. Lennie: You won't object?

Mr. Farris: I won't object.

The Court: All right, 234—

Mr. Lennie: 234 to 239 then go in. And the rest of the matter I understand your lordship will deal with at the conclusion of the case."

Mr. Lennie: The important ones are the ones your lordship said you would deal with at the conclusion of the case.

The Court: Let me see those. 231 to 234 went in.

Mr. Lennie: Yes. If your lordship will look at 207 I think that is where it starts. No, it starts with the discussion on page 18. Then question 185:

"Q: Then we will proceed on that basis, Mrs. Burns. Had you any children after Mr. Burns and you separated and before his death? A. I had one."

These are questions Mr. Farris objected to my reading on the trial.

Mr. Farris: And now my learned friend is reading part of them into the record.

Mr. Lennie: I am reading them for the purpose of his lordship determining whether they should be admissible, that is all. The questions I have put in were questions from the discussion to 207 inclusive and then I asked for 216 to 223.

The Court: Is there anything in that evidence?

Mr. Farris: I can't see there is, my lord.

The Court: I think I am bound by the rule 370 which says, "Any part . . . opposite party." It does not say whether relevant or not. I suppose under that it may go in, all right.

(ARGUMENT BY MR. LENNIE).

The Court: I will reserve judgment and hand it down in a day or so.

(C.A.V.)

EXAMINATION OF THE DEFENDANT FOR DISCOVERY PURSUANT TO APPOINTMENT

R. S. LENNIE, ESQ., K.C., appearing for the Plaintiff.
W. B. FARRIS, ESQ., K.C., appearing for the Defendant.
MABEL BURNS, Sworn.

EXAMINED BY MR. LENNIE

1. Q. Mrs. Burns, you are the Defendant in this action? A. I am.
2. Q. And you have been sworn? A. Yes.
3. Q. You claim to be the wife of Francis Burns? A. James Francis Burns, yes.
4. Q. What is his name? A. James Francis Burns.
5. Q. When were you married to him? A. 1923, March 22nd.
6. Q. Where? A. In Vancouver.
7. Q. Did you know him previous to that? A. I did.
8. Q. Where? A. I had known him for years in Calgary before then.
9. Q. How many years? A. About three or four years.
10. Q. He was living in Calgary at that time was he? A. Yes.
11. Q. And were you too? A. Yes, I was in Calgary. Well, he wasn't there all the time, no; he was out on the ranch most of the time, and in Vancouver here.
12. Q. Well, in Calgary and the vicinity? A. Yes.
13. Q. How did you come to marry him? A. Well, that is a question—I will answer that. I was in Calgary and he was in Vancouver, and we were corresponding back and forth to one another, and Christmas time I then wrote him and told him I wasn't very well at the time, and Christmas Day I was sitting at my place and a knock came to the door, and there is Mr. Burns.

Mr. Farris: I do not see, Mr. Lennie, where this has anything to do with it. You are not, I understand, questioning that there was a marriage.

Mr. Lennie: No, I am not questioing he was married, no. The question is whether she was married before or not.

Mr. Farris: Yes, but you say how did she come to marry

him. I do not see how that is pertinent to this action.

Mr. Lennie: Oh, well, it is leading up to something else.

14. Q. However, were you married to him on the occasion of his visit or sometime later? A. No, quite a while after.

15. Q. And were you living in Vancouver at the time? A. At the time I married him?

16. Q. Yes. A. Yes, I was.

17. Q. For how long previous to that? A. Well, I had come here after Christmas right, in fact he seen that I come here to Vancouver that year to live, as I wasn't well, you see, and I come here and I stayed at Mrs. Remder's place up on 14th and Commercial Drive.

18. Q. Mrs. who? A. Mrs. Render.

19. Q. Render? A. Yes. And my children and I stayed there, and Mr. Burns returned there back on the ranch again.

20. Q. That is in Calgary? A. No.

21. Q. Which ranch? A. In Ladner or somewhere around here.

22. Q. At Ladner? A. Yes.

23. Q. That is Dominic Burns' ranch? A. Yes, he was there.

24. Q. He was there at the time you were married? A. Yes, that is where—No, he wasn't, I don't think I think he had left there and had went back to Calgary you see, to Calgary for a while, and then he wrote to me and said he was coming up and we would be married. And that was like in March.

25. Q. He came from Calgary to get married, did he? A. Yes, he came from Calgary to here to get married.

26. Q. Well, when was it that he was at Ladner? A. Well, he was there in 1922 and 1923 as far as I know.

27. Q. Well then you were married in March 1923? A. 1923, yes.

28. Q. Well, was he here then? A. He had left the ranch as far as I know.

29. Q. Which ranch? A. At Ladner; and went back to Calgary for the time being. It was after I come here to Vancouver at Christmas you see.

30. Q. Then after you were married where did you take up your residence? A. We had our residence in the Homer Arcade Apartments on Homer and Cordova Street.

31. Q. How long were was there? A. We stayed there I think about three or four months. I wouldn't just say how long.

32. Q. Was it a furnished place or did you furnish it yourself? A. No, it was a furnished place.

33. Q. Well then, what did you do after you left there? A. After we left there I got—we got our own home, you know, a place for ourselves.

34. Q. Where was that? A. That was on Broadway East.

35. Q. A rented place? A. Yes, a rented bungalow on Broadway East.

36: Q. Yes, and how long were you there? A. and St. Catherines. We were there about two years I imagine.

37. Q. Two years? A. Yes.

38. Q. Well, where was he during that time? A. Well, we were together and we wasn't together.

39. Q. Well, explain that? A. Well, he was travelling back and forth from Calgary to here.

40. Q. Calgary to here? A. Yes, travelling around with the cattle.

41. Q. With the cattle? A. Yes.

42. Q. And how long did that continue? A. Of course, now you are getting, you are asking me a question there that is getting a little bit ahead of our story.

43. Q. Just answer the question. How long did that continue?

Mr. Farris: Living in that house on Broadway.

Mr. Lennie: Yes. A. We lived there a couple of years.

44. Q. A couple of years. When did you leave it? A. We left there about 1925 or 1926. I left there at the time the court case was on.

45. Q. The which? A. The court case.

46. Q. Well, you see we haven't got anything about the court case yet. You lived there in 1926, did you? A. About 1925 or 1926, somewhere around there.

47. Q. And then where did you go from there? A. From there I took an apartment on Williams Street.

48. Q. Where? A. On Williams Street. I was only in that for a couple of months and then I took a house across the way from there.

49. Q. A rented house? A. A rented house, yes.

50. Q. Was he with you at that time? A. No.

51. Q. Was he with you at any time subsequent to 1926? A. No.

52. Q. Did you know where he was? A. I knew he was in Calgary.

53. Q. In Calgary? A. Well, except the times that he would be out of Calgary with the cattle; but that was his home there in Calgary.

54. Q. But you had not lived together from 1926 until the day he died? A. No.

55. Q. When did he die? A. 1935.

56. Q. 31st of December 1935? A. 1935.

Mr. Farris: 31st of December 1935. That is the date agreed by all parties.

Mr. Lennie: 57. Q. Well, now, you had a couple of children during that period, didn't you?

Mr. Farris: What period are you referring to?

Mr. Lennie: 1926 to 1935? A. No, I didn't have a couple.

58. Q. How many did you have?

Mr. Farris: Well, now, I am objecting to these questions. What materiality has this? It is not alleged in your pleadings.

Mr. Lennie: Well, it is in the statute that we are relying on.

Mr. Farris: That is, at the time of his death she was living in a state of adultery?

Mr. Lennie: Yes.

Mr. Farris: Well, I don't object to you asking any questions at the time of his death, but I object to answer any questions prior to that.

Mr. Lennie: Well, will you decline to answer prior to that?

Mr. Farris: Yes.

Mr. Lennie: 59. Q. Well, I will put the question. Did you have a child in 1929? A. No, I didn't.

Mr. Farris: I instruct you not to answer it.

Mr. Lennie: 60. Q. Did you not, did you say? A. I didn't have a child in 1929.

61. Q. Did you have at any time after that?

Mr. Farris: I instruct you not to answer that question.

A. My lawyer will answer that for me.

Mr. Farris: On the advice of counsel say you refuse to answer.

Mr. Lennie: 62. Q. Did you have a child in 1931?

Mr. Farris: The same thing. Say on the advice of counsel I refuse to answer.

Mr. Lennie: Well, let me get this clear now. I understand you object to answer any questions in regard to her having any children at any time after she left Mr. Burns in 1926. Is that right?

Mr. Farris: Well, I don't know what your questions are, Mr. Lennie. You can go on until the proper time. Certainly the questions you ask now certainly have no bearing on the action.

Mr. Lennie: 63. Q. Did you have any children by Mr. Burns? A. No.

64. Q. At no time? A. No.

65. Q. Were you in the Vancouver General Hospital in 1929?

Mr. Farris: Refuse to answer that.

Mr. Lennie: 66. Q. Were you in the St. Paul's Hospital in 1931? A. No—

Mr. Farris: Refuse to answer that. A. I wasn't in—

Mr. Lennie: 67. Q. What?

Mr. Farris: Just refuse to answer the question on the advice of counsel.

Mr. Lennie: 68. Q. Before you were married to Mr. Burns, as you allege, had you been married before? A. No, I wasn't.

69. Q. What is that? A. No. I wasn't married.

70. Q. You were not married? A. No.

71. Q. Did you have any children? A. Yes.

72. Q. How many? A. Two.

73. Q. What are their names? A. Effie and Richard.

74. Q. Who were their parents—the father? A. Melvin Stuart Huggins.

75. Q. Where is he? A. As far as I know he is up at Dollarton, B.C.

76. Q. He is still alive? A. Yes, as far as I know.

77. Q. Where were those children born? A. My boy was born in Chicago, Illinois.

78. Q. Chicago, Illinois? A. Yes.

79. Q. In what year? A. 1915, March 27th.

80. Q. Where was the daughter born? A. In Calgary, Alberta, May 19, 1916.

81. Q. Where are those children now? A. Right with me.

82. Q. You maintain a home here? A. I do.

83. Q. For how long? A. I have had my home here for fifteen years, now, fourteen years, fifteen years since I came here in 1923.

84. Q. Well, ever since you and Mr. Burns separated? A. Yes.

85. Q. In 1926? A. Yes.

86. Q. You say you were not married to Melvin Stuart Huggins? A. No, I was not.

87. Q. Well, do you remember stating that you were, in some court proceeding? A. Yes, I remember that distinctly.

88. Q. That was a proceeding by you to have him provide for you under the Deserted Wives Maintenance Act wasn't it?

Mr. Farris: Now, just a moment. You mean Mr. Burns, not Huggins.

Mr. Lennie: 89. Q. That was a proceeding by you to have Mr. Burns provide for you under the "Deserted Wives Maintenance Act"? A. Yes.

90. Q. That was in the year 1926? A. Yes.

91. Q. That proceeding was dismissed wasn't it? A. Yes, it was dismissed that we would settle out of court.

92. Q. Well, I don't know whether it is necessary to say that or not, but the case was actually dismissed out of court, wasn't it? A. Yes.

Mr. Farris: It was settled.

Mr. Lennie: 93. Q. It was dismissed? A. Well, it was dismissed at that, that we would make a settlement.

94. Q. Well, afterwards you made a settlement? A. Yes.

95. Q. Were you living with Mr. Huggins in Calgary? A. Just for a short time like.

96. Q. For a short time? A. Yes.

97. Q. Did you have a home there? A. I had like, furnished rooms.

98. Q. Furnished rooms? A. Yes, right by his people all the time.

99. Q. Did you live there together as man and wife? A. Yes.

100. Q. And I presume you carried on the usual marriage relations together? A. Well, we did while—Of course he went overseas.

101. Q. Until he went overseas? A. Yes.

102. Q. When did he go overseas? A. I wouldn't say for sure. I think around 1916, something like that.

103. Q. How long was he away? A. He got back—He was on his way home when armistice was signed.

104. Q. When the armistice was signed? A. Yes.

105. Q. And after he returned to Calgary—He did return to Calgary, did he? A. Yes.

106. Q. Did you resume your association with him as man and wife then? A. I did for a short time, yes.

107. Q. Where were you living at that time? A. We were living in Calgary.

108. Q. With whom? A. Right by his people.

109. Q. Right by his people? A. Yes.

110. Q. Not with them? A. Not with them, no. Excuse me, for interrupting here, but the last time I was examined I was kind of put out and I did make a mistake in saying I was living with his people, but I was by his people all the time; you know, not distant, and there every day like.

111. Q. And they recognized you as man and wife? A. They did.

112. Q. How long did that continue? A. After he returned, do you mean?

113. Q. Yes. A. That was about between five and six months.

114. Q. And why did you leave him, or he leave you? A. Because he got another woman.

115. Q. Another woman. And was it that that caused you to move to Vancouver? A. No, it wasn't that that caused me to move to Vancouver.

116. Q. How long afterwards did you come to Vancouver? A. Oh, it was either three of four years afterwards. Well, from 1919 till 1923, beginning of 1923.

117. Q. And during that time had you any relations with him at all? A. No, none whatsoever.

118. Q. None whatsoever? A. In fact he was ordered out of town shortly after we parted.

119. Q. Now, before he went overseas how long did you live in Calgary as man and wife? A. Well, I didn't go in Calgary until away on in 1915.

120. Q. 1915? A. The boy was about four or five months old before I went to Calgary.

121. Q. Then how long had you been living with him as man and wife in Chicago? A. From 1914.

122. Q. 1914? A. Yes, about the middle of 1914.

123. Q. And you say you were never married? A. No.

124. Q Now, in these court proceedings that you referred to, in 1926, you were asked these questions:

"Q. When were you married the first time? A. 1914.

Q. Where? A. In Chicago.

Q. What was your husband's name? A. Melvin Huggins.

Q. Is he dead? A. No, sir.

Q. What became of him? A. I don't know."

Do you want to retract that? A. Well, I didn't know what became of him right after we parted, you know. I didn't take any notice what he did then.

125. Q. Well, will you retract that you were married to him in 1914? A. Yes, I retract that. I said that, but I did it to protect the ones that were dear to me.

126. Q. Well, never mind. You said it anyway? A. I said that.

127. Q. And it isn't true, you say now? A. It isn't true.

128. Q. Then again you were asked:

"Q. Did you get a divorce from him? A. I did.

Q. You got a divorce? A. I am free from him, yes, sir.

Q. I asked you if you got a divorce? A. Yes, sir.

Q. Where did you get it? A. In Chicago.

Q. When? A. In 1919."

Is that correct? A. No. I said that, yes.

129. Q. You said it? A. But I said it at the time to protect the ones that I had to protect.

Mr. Farris: 130. Q. You are referring to your children I presume? A. Yes, I am.

Mr. Lennie: 131. Q. Then again you were asked—the last question I asked you was:

"Q. Where was your first husband at the time that you got a divorce in Chicago? A. He was in Canada.

Q. What was he doing here? A. I don't know what he was doing, sir.

Q. What was he doing in Chicago? A. I wasn't in Chicago, sir. I had my people fight the case there.

Q. Where were you? A. I was in Calgary at the time, sir.

Q. You were in Calgary? A. Yes.

Q. Was that before you and your husband were in Calgary when you got your divorce in Chicago? A. Yes, he agreed to have it done because he had got another woman, and for that reason I can give you, Chief Ritchie knows my circumstances.

Q. Now, let me be clear about that, Mrs. Burns. You were married in 1914? A. Yes.

Q. To Huggins? A. Yes."

Do you recall making those statements? A. I don't quite remember making that statement.

132. Q. Well, do you remember making the statement that you had your people fight the case in Chicago? A. Well, I remember making a statement that I had a party in Chicago that was going to come and fight here, fight in Calgary at the time, for me.

133. Q. So that this statement is not correct. Is that right? A. That is right.

134. Q. So you never intended at any time to say that you had your people in Chicago to fight the case there? A. No; I had no people.

135. Q. Now, let us get that clear. The subject of these questions was your divorce from Huggins, and you say that you never made the statement that any person was going to fight that case for you in Chicago?

Mr. Farris: She said she didn't state that. She said she didn't recollect.

Mr. Lennie: 136. Q. Do you recollect? A. I don't remember stating those words at all.

137. Q. Well, did you have anybody in Chicago fighting the case for you? A. I had nobody. I got nobody.

138. Q. Did you ever have a divorce from him? A. No, just absolutely parted.

139. Q. What is that? A. I just absolutely left him.

140. Q. And you took no proceedings for a divorce whatever? A. Nothing. There was no proceedings to take.

141. Q. And yet you told the Court at that time that you had? A. For the reason to protect the children.

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142. Q. That was your reason? A. Yes, that was my reason.

143. Q. Then again, this was a question put to you:

"Q. Do you and he agree between you the best thing to do was to get a divorce? A. Yes.

Q. And you took it up with your people in Chicago? A. Yes, sir.

Q. And they put through the divorce proceedings in Chicago? A. Yes, sir.

Q. And you never went there? A. No, sir.

Q. Did you go there to give evidence? A. No, sir, it was just written through letters.

Q. And that is the only divorce there is so far as you know? A. Yes, sir. We were married by the Justice of Peace, sir.

Q. Where was that? A. In Chicago.

Q. There is no question that was a good marriage as far as you know? You had a license? A. Yes, sir, we had a license.

Q. As far as you know that is a perfectly valid marriage? A. Yes."

What have you got to say about that? A. Well, I have got the same thing to say. I said all that stuff just to shield my children, and I done it for that reason.

144. Q. And it was absolutely untrue? A. Yes.

145. Q. It was. A. I had to shield my children at the time and I did.

146. Q. Then again you were asked:

"Q. And you married him and both came back to Canada? A. Yes, sir, after living there a year.

Q. You decided you would sooner live in Canada? A. Yes.

Q. And did he? A. Yes, sir.

Q. Were these papers, divorce proceedings, served on your husband? A. Yes, sir."

Is that true? A. Well, I am not going to say yes or no.

* * * *

Mr. Lennie: 160. Q. Did you ever tell Mr. Burns prior to your marriage that you had been married to anyone else? A. I didn't tell him I was married to anyone else, no.

* * * *

Q. 184.

* * * *

Mr. Farris: Just before you close, Mr. Lennie, I want to make it clear that in regard to the objection that I have taken as to the specific questions you asked with regard to the children being born—in 1929 and 1931, was it?

Mr. Lennie: Yes.

Mr. Farris: That I am objecting to those on the ground that that has no bearing that the witness was living in a state of adultery at the time of the death of her husband James Francis Burns on December 31st, 1935, and I am not objecting to any questions which would show at the time of his death that she was living in adultery.

Mr. Lennie: Well, you are as I understand it then, limiting your objection up to the time of his death?

Mr. Farris: Yes.

Mr. Lennie: Well then, I do not see any reason why she should not answer the questions.

Mr. Farris: Because that was four years before he died, and what happened four years before he died has no bearing on what happened at the time of his death.

Mr. Lennie: Well, I think you will find that we will very seriously contend at the trial that it does.

Mr. Farris: Yes, that will be the issue.

Mr. Lennie: That is your objection. In that case you object to any evidence being given by her showing that she had any children by anyone during the period that she was separated from Mr. Burns.

Mr. Farris: Yes, unless you are prepared to show that at the time, that has some connection with the state that she was living in at the time of Mr. Burns' death.

Mr. Lennie: I, of course, don't agree with that idea at all, but if we can possibly have the questions answered subject to objection, we can deal with that at the trail instead of making a motion.

Mr. Farris: All right; that will be fine. That is the reason. You will see my position and I am allowing the questions to be asked.

Mr. Lennie: And I understand the objection.

185. Q. Then we will proceed on that basis, Mrs. Burns. Had you any children after Mr. Burns and you separated, and before his death? A. I had one.

186. Q. You had one. What was it, a boy or a girl? A. Girl.

187. Q. Where did you have that? A. In Vancouver.

188. Q. Whereabouts? A. General Hospital.

189. Q. Vancouver General Hospital? A. Yes.

190. Q. On what date? A. On the 21st day of June, 1931.

191. Q. What is that? A. 21st day of June, 1931.

192. Q. 1931. Who was the father of that child?

Mr. Farris: I don't think that is material. Don't answer that question.

Mr. Lennie: Well, it is material in this way—

Mr. Farris: She admits she wasn't living with Burns. I certainly object to that. I see no reason for that at all.

Mr. Lennie: 193. Q. Do you decline to answer on the advice of counsel? A. I don't want to answer that question.

194. Q. Was it a man named Clark?

Mr. Farris: Same answer. A. I don't know Mr. Clark.

Mr. Lennie: 195. Q. Was it a man named Mr. Allen?

Mr. Farris: Well now, just take the same position. She answered the other one, perhaps she will answer that.

Mr. Lennie: Yes, she answered the other one; why not answer this one.

196. Q. You know Mr. George Allen? A. Yes, I know Mr. George Allen.

197. Q. Is he a friend of yours? A. Yes.

198. Q. Of long standing? A. In fact a friend of Mr. Burns as well.

199. Q. Never mind that. That doesn't answer my question. Have you known him for some time? A. Yes.

200. Q. For how long? A. Ever since I come to Vancouver.

201. Q. You have known him quite intimately haven't you? A. Yes, as friends.

202. Q. And you had a good deal to do with one another?

Mr. Farris: Now, when are you referring to?

Mr. Lennie: Well, during that time.

Mr. Farris: During what time?

Mr. Lennie: During the time she knew him.

Mr. Farris: Well, the whole of the time?

Mr. Lennie: Yes, the whole of the time.

The Witness: I don't think I will answer that. I will leave that to my lawyer.

Mr. Farris: You can answer that. A. I have been friends with him always.

Mr. Lennie: 203. Q. Friends with him always? A. Not always. I wasn't speaking to Mr. Allen from November of 1934 until June of 1936.

204. Q. I don't care about that. Were you on intimate terms with him prior to 1931?

Mr. Farris: Well now, I object to that question.

Mr. Lennie: 205. Q. And in 1931?

Mr. Farris: I object to that. Don't answer that.

Mr. Lennie: 206. Q. Do you refuse to answer on the advice of counsel? A. I am taking my lawyer's advice.

207. Q. You say that is the only child you had? A. Yes.

* * * *

216. Q. Did you ever live in the premises owned by Mr. and Mrs. Gosse on 12th Avenue? A. Yes.

217. Q. For how long? A. About five or six years.

218. Q. What years? A. I think we lived there—I won't say for sure but I think that was 1928.

219. Q. 1928. And you were there for five years? A. And it was 1934 when I took sick, so that is when the place was given up.

220. Q. Were you living in the Casa Rey Apartments? A. I am living in the Casa Rey right now.

221. Q. When did you go there? A. I have been there over two years.

222. Q. You went there from the Gosse place, did you? A. No. I was in the hospital seven months.

223. Which hospital? A. I don't think I need to answer that question. That is something I don't care to recall.

* * * *

231. Q. You were working in Macleod's Cafe for a while? A. Oh, yes.

232. Q. Where else? A. When I first come to Vancouver I worked only a couple of months in the Trocadero as cashier, and then I went to Mrs. Macleod's.

233. Q. I am talking of in between the time of your marriage to Mr. Burns. A. Well, I was married when I was working at the Trocadero, and I left the Trocadero and went to Mrs. Macleod's. I worked for Mrs. Macleod about eight or nine years. During that time I had went to Banff to work.

234. Q. What were you doing at Banff? A. Waiting table.

235. Q. What year was that? A. I went there about 1924 or 1925. My husband was still together—my husband and I were together at that time.

236. Q. You went to Banff from Vancouver, did you? A. Yes. That would be about 1924, 1925, until in November.

237. Q. What are the ages of your children now? A. My boy is 22 next Saturday the 27th of March; my girl is 21 on the 19th of May.

238. How long have the children been working? A. Well, my boy is not working at present.

239. Q. He was? A. Yes, he worked about seven or eight years for the Allan Drug. And my girl is cashier in the Colonial Theatre for over four years now.

RECORD

In the Supreme Court of British Columbia

Defendants' Case

Michael Burns Direct Exam.

EXAMINATION OF THE PLAINTIFF FOR DISCOVERY PURSUANT TO APPOINTMENT

R. S. LENNIE, ESQ., K.C., appearing for the Plaintiff.

W. B. FARRIS, ESQ., K.C., appearing for the Defendant.

MICHAEL BURNS, Sworn.

EXAMINED BY MR. FARRIS

1. Q. Mr. Burns, you are the Plaintiff in this action? A. Yes.

2. Q. You have been duly sworn? A. Yes.

3. Q. You are the administrator of the estate of the late Dominic Burns? A. Yes.

4. A brother of his? A. Yes.

5. Q. Your solicitor produced a marriage certificate, certified copy of marriage certificate dated the 18th day of December, 1936, being a marriage between James Francis Burns and Mabel Ball on the 22nd of March 1923. That James Francis Burns is the James Francis Burns who was the husband of Mrs. Burns, the Defendant in this action, and who was employed and died in Calgary? A. Died in Calgary.

6. Q. On December 31st, 1935. And the bride, Mabel Ball, is the Defendant in this action, who is here. That is right? A. Yes.

(COPY OF MARRIAGE CERTIFICATE MARKED No. 1 FOR IDENTIFICATION)

* * * *

28. Q. I produce to you the certificate of the administration.

Mr. Lennie: He does not know anything about it. I will admit it as being a record of the Alberta Court.

Mr. Farris: And that administration was granted and was resealed in British Columbia?

Mr. Lennie: Yes.

Mr. Farris: The late James Francis Burns had an interest in the estate of the late Dominic Burns?

Mr. Lennie: Yes.

Mr. Farris: That is admitted?

Mr. Lennie: Yes.

Mr. Farris: 29. Q. And Mrs. Burns as administratrix of James Francis Burns, has made demand upon you for an accounting of this interest. That is right, is it? A. Yes.

30. Q. And you have refused to give that accounting. That is correct, is it? A. Yes.

No. 9

BURNS
vs.
BURNS

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE ROBERTSON

The Plaintiff is Administrator of the estate of Dominic Burns who died on June 19, 1935, leaving him surviving a nephew, James Francis Burns, who died, without issue, on December 31, 1935 at Calgary, Alberta, which, as is admitted, was his place of domicile. In 1923 the Defendant married James Francis Burns. She obtained administration of his estate in the Province of Alberta. Later, on September 22, 1936, the Letters of Administration were sealed under the Probates Recognition Act of this Province. It is clear James Francis Burns was entitled to an interest in the estate of Dominic Burns. In 1936, the Defendant demanded an accounting from the Plaintiff of the administration of the assets of the estate of Dominic Burns. This was refused. The Defendant then applied under sec. 91 of the Trustee Act. The application stood over pending the determination of an action to set aside the sealing. The Plaintiff then brought this action, asking that the "sealing" should be revoked and administration of the estate of James Francis Burns be granted to him as next of kin. The Plaintiff puts his case upon two grounds. He says that at the time of the alleged marriage of the Defendant to James Francis Burns, she was already married to one, Huggins, who was living at the time of the alleged marriage, and that that marriage had not been dissolved; and, therefore the Defendant was not the wife of James Francis Burns and had no interest in his estate or right to apply for administration. Alternatively he relies on s. 127 (1) of the Administration Act as amended by sec. 4 of Cap. 2 of Statutes of B.C. 1925, which provides as follows:

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

Referring now to the first point: The evidence shows, as a matter of fact, that the Defendant was not married to Huggins. The Plaintiff's Counsel, however, submits that the Defendant is estopped either in pais, or quasi of record, from saying that she was not married to Huggins. He led evidence from which it appears that the Defendant and her husband separated in 1926; that in that year she took proceedings against him under the Deserted Wives' Maintenance Act; that in those proceedings she swore, falsely, that she had been married to Huggins in 1914; that she did not know whether he was alive or dead; that she had got a

divorce from him in Chicago in 1919 and that she was "free from him." As the very evidence relied upon, as creating an estoppel, shows the Defendant was free to marry. I cannot see how it assists the Plaintiff. Then it is said there is an estoppel by record, the record consisting of the certificate of the Magistrate who heard the charge under the Deserted Wives' Maintenance Act. The effect of this certificate is stated in s. 45, cap. 245 R.S. B.C. 1924, "to be a bar to any subsequent information or complaint for the same matter against the same Defendant." The Plaintiff has put in part of the Defendant's discovery in which she says, speaking of the charge:

"It was dismissed that we would settle out of Court." They would tend to show that the dismissal was not on the merits. However, giving full effect to the certificate I do not see how it assists the Plaintiff. No reasons are given in the certificate for dismissal. Under the Deserted Wives' Maintenance Act an order may be refused for various reasons. It does not follow at all that the petition was dismissed because the Defendant said she had been married to Huggins. In fact it would not follow because she said, at the same time, she had been divorced from him, prior to her marriage to Burns. Further, in my opinion, estoppel in pais does not arise because the Plaintiff has not shown facts establishing the "essential factors" giving rise to an estoppel which are set out by Lord Tomlin in *Greenwood* vs. *Merchants Bank* (1933) A.C. 51 at p. 57 when he delivered the unanimous opinion of the House of Lords as follows:

> "(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation whether actual or by conduct by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission."

Then turning to the second branch: 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 was living in adultery, say for two years, before the death of her husband. It is not sufficient to show isolated acts of adultery committed 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. Several of the Provinces have exactly the same legislation on this point. Counsel have not been able to find any Canadian authorities upon the section. They have however found two American decisions of the Courts of the State of Indiana based upon a very similar Statute which I think support the view which I have taken. The first is *Ziegler* vs. *Mize* (1892) 31 N.E. 945. In that State, a statute prohibited a wife "who shall have left her husband, and shall be living at the time of his death in adultery" from sharing in his estate. The facts were that the wife had separated from the husband shortly after their marriage and had, later, lived in adultery with a man for several years until his death, which occurred several years prior to the death of her husband. The Court held that this was not a bar to her right under the Statute. The other case is *Spade* vs. *Hawkins* (1916) 110 N.E. 1010. In that case the facts were the husband had died October 9th 1912. The trial Judge had found that "since about October 1906 and up to and including October 9, 1912, appellant lived from time to time in the practice of adultery with persons whose names are not disclosed by the evidence." The court ordered a new trial. At p. 1012 Mr. Justice Caldwell, who delivered the judgment of the Court, said:

> "Nothing can be added to a special finding by presumption, inference, or intendment, and when a special finding is silent upon a material point, it is deemed to be found against the party upon whom rests the burden of proof. *Donaldson* v. *State* 167 Ind. 553, 78 N.E. 182; *Garretson* v. *Garretson* 43 Ind. App. 688, 88 N.E. 624. However where the primary facts found lead to but one conclusion, there is no occasion for a statement of the ultimate facts.
>
> It is just as reasonable to conclude from such facts that while Appellant now and then between the dates named was guilty of adultery, there may have been an absence of a continuous purpose and inclination to do wrong, and that previous to her husband's death Appellant had reformed and that at that time she was living innocently."

In other words what he was saying was: It must be clear that at the time of the death of her husband, the wife was living in adultery. Again at p. 1013 he says as follows:

> "It is true that where a woman is proven to have been unchaste or to have been guilty of specific acts of adultery at a certain time, a presumption of continuance to a subsequent time is, under such circumstances, indulged. It is only reasonable, however, that there be a limit to the application of this rule. If in a given case there is in fact such

RECORD

In the Supreme Court of British Columbia

No. 9
Reasons for Judgment
Robertson, J.
May 26, 1937
(Contd.)

a continuance for a long period of time, it is reasonable that there will be some visible overt act, some open manifestation of the fact. Here for a period of two years there is no evidence that Appellant was guilty of a single act of indiscretion or of any lascivious conduct or of any suspicious actions, nor were there any incriminating circumstances, as that she met or associated with men at questionable times or places, or in the midst of improper surroundings, or that her associates were persons of bad repute. Divorce her from her past, and during the two years she environed herself with the indicial of chastity as far as the evidence reveals. Under such circumstances, it is doing violence to mental processes to presume that she was living in adultery at the time of the decease of her husband."

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 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.

At the conclusion of the Plaintiff's case, the Defendant applied to withdraw the counterclaim. The Plaintiff would not consent. The Defendant then put in evidence to show the Plaintiff's reason for wishing to withdraw was, that, the relief asked for in his counterclaim, was that asked for in the pending application under sec. 91 to which I have referred. I think the matter should be dealt with in Chambers as sec. 91 provides. I therefore dismiss the Counterclaim, but, under the circumstances, without costs.

"Harold B. Robertson, J."

26th May 1937.

RECORD

In the Supreme Court of British Columbia

No. 10
Judgment
May 26, 1937

No. 10

JUDGMENT

BEFORE THE HONOURABLE MR. JUSTICE ROBERTSON } On Wednesday the 26th day of May A.D. 1937.

This Cause coming on for hearing first on the 10th day May, A.D. 1937 and continuing on the 11th day of May, A.D. 1937 and then being adjourned to again come on for hearing on the 18th day of May, A.D. 1937 before the Honourable Mr. Justice Robertson on which 18th day of May, A.D. 1937 it pleased the Court to reserve decision herein and decision herein together with reasons being handed down this day AND UPON Mr. R. S. Lennie, K.C. appearing with Mr. G. F. McMaster of Counsel for Michael Burns, Administrator of the Estate of Dominic Burns, Deceased and Mr. Robert Cassidy, K.C., appearing for Michael Burns, all of Counsel for the Plaintiff, and Mr. Wendell Farris, K.C., appearing with Mr. G. Stanley Miller of Counsel for the Defendant AND UPON reading the pleadings and proceedings herein and hearing the evidence adduced from the witnesses herein;

IT IS THIS DAY ADJUDGED that the Plaintiff's claim herein be and the same is hereby dismissed.

IT IS THIS DAY FURTHER ADJUDGED that the Defendant do recover against the Plaintiff costs, to be taxed. Said costs to be paid out of the estate of Dominic Burns, deceased.

IT IS THIS DAY FURTHER ADJUDGED that the Defendant's Counter-claim herein be and the same is hereby dismissed, without costs.

BY THE COURT.

Entered
June 23/37.

"H. Brown,"
Dep. Dist. Registrar.

RECORD

In the Supreme Court of British Columbia

No. 11
Notice of Appeal
July 10, 1937

No. 11

NOTICE OF APPEAL

TAKE NOTICE that the Plaintiffs in this action intend to appeal and hereby appeal to the Court of Appeal at its sittings to be held at the Law Courts, in the City of Vancouver, B.C., on Tuesday, the 2nd day of November, 1937, at the hour of 11.00 o'clock in the forenoon or so soon thereafter as the said appeal may be heard, against the judgment delivered the 26th day of May, 1937, and entered on the 23rd day of June, 1937, whereby it was adjudged that the Plaintiff's claim as set forth in the Writ of Summons and Statement of Claim be dismissed.

AND TAKE NOTICE that the said Plaintiffs will move the said Court of Appeal on the 2nd day of November, 1937, at the hour of 11.00 o'clock in the forenoon, or so soon thereafter as Counsel may be heard, at the Law Courts in the City of Vancouver aforesaid by way of appeal from the said judgment delivered on the 26th day of May, 1937, and entered on the 23rd day June, 1937, for a Judgment or Order reversing and setting aside the said judgment and for judgment in the terms of the claim contained in the Endorsement on Writ and Statement of Claim therein.

AND TAKE NOTICE that the said Appeal will be based upon the following among other grounds:

1. That the judgment is against the law.

2. That the judgment is against the evidence and the weight of evidence.

3. The Defendants gave no evidence in answer to the prima facie case made by the Plaintiffs.

4. The trial was abortive because the trial judge did not deal with it as under the laws of the Province of Alberta which alone were applicable to the estate of James Francis Burns (deceased) who admittedly was domiciled in Alberta at the time of his death and for years prior thereto.

5. The learned trial judge made no finding of fact as to whether the Defendant Mabel Burns had left her alleged husband James Francis Burns (deceased) or whether she was living in adultery at the time of his death, both of which findings of fact were necessary to the establishment of the Plaintiff's case.

6. The learned trial judge rejected portions of the evidence of the Defendant Mabel Burns on discovery or failed to admit

such evidence and direct that the said Defendant answer the questions objected to by Counsel and be further cross-examined for discovery before concluding the trial of the action.

7. The learned trial judge erred in holding or finding:

(a) That after the alleged marriage of the said Defendant to the said James Francis Burns (deceased) that there was no evidence that the said Defendant left him.

(b) That there was not sufficient evidence to establish the fact that the said Defendant was living in adultery at the time of his death.

(c) That it is not sufficient to prove that a person was living in adultery for two years before the death of her husband.

(d) That it is not sufficient to show isolated acts of adultery committed a long time prior to her husband's death.

8. That the learned trial judge should have found:

(a) That the said Defendant left the said James Francis Burns (deceased) her alleged husband, and was living in adultery which had not been condoned at the time of his death.

(b) That the evidence of the Plaintiffs' witnesses and the discovery evidence of the said Defendant and exhibits filed, establish that the said Defendant left her alleged husband James Francis Burns (deceased) subsequent to their alleged marriage and was living in adultery at the time of his death:

OR IN THE ALTERNATIVE: On the expert evidence of H. S. Patterson, Esq., K.C., there was sufficient evidence from which the Courts in Alberta could and might draw the inference that the said Defendant was living in adultery at the time of her alleged husband's death, which the trial judge should have done:

OR IN THE ALTERNATIVE: That in the absence of any evidence from the Defendants, there was no escape from the conclusion in the circumstances that the said Defendant should take no part of her husband's estate.

9. The learned trial judge should have held that the said Defendant was estopped from claiming to be the lawful widow of the said James Francis Burns deceased on the facts, by record and at law.

RECORD

In the Supreme Court of British Columbia

No. 11
Notice of Appeal
July 10, 1937
(Contd.)

AND FURTHER TAKE NOTICE that on the hearing of this Appeal, the Plaintiffs in the alternative will on the foregoing and other grounds apply for a new trial and the said Defendant be ordered to answer the questions objected to by Counsel on her examination for discovery and submit to further examination for discovery at her own expense and that such examination be available as evidence for the Plaintiffs on such new trial.

DATED at Vancouver, B.C. THIS 10th day of July, 1937.

"G. F. McMaster,"

Solicitor for the above-named Plaintiffs. 10

No. 12

COURT OF APPEAL

BURNS
v.
BURNS

JUDGMENT OF THE HONOURABLE MR. JUSTICE SLOAN

On the hearing of this appeal I formed the opinion that the learned Trial Judge had reached the right conclusion and further consideration has confirmed my view. I would therefore dismiss the appeal.

(Sg.) Gordon McG. Sloan,
J.A.

VICTORIA, B.C.,
11th January, 1938.

RECORD

Court of Appeal

No. 13
Judgment
Jan. 11, 1938

No. 13

COURT OF APPEAL

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, housewife,

(Defendants) Respondents.

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HONOURABLE MR. JUSTICE McPHILLIPS:

THE HONOURABLE MR. JUSTICE SLOAN:

VICTORIA, B.C., the 11th day of January, 1938.

THE APPEAL from the Judgment of the Honourable Mr. Justice Robertson pronounced on the 26th day of May, 1937, coming on for hearing on the 12th day of November, 1937 and UPON HEARING Mr. R. S. Lennie, K.C. and Mr. G. F. McMaster of Counsel for the Appellant and Mr. W. B. Farris, K.C. and Mr. G. Stanley Miller of Counsel for the Respondent and UPON READING the appeal book,

THIS COURT DOTH ORDER AND ADJUDGE that the said appeal be and the same is hereby dismissed with costs to be paid by the Appellant to the Respondent forthwith after taxation.

BY THE COURT.

"H. Brown,"
Dep. Registrar.

Minutes filed

ENTERED
Apr. 1, 1938.
Order Book, Vol 11 Fol. 44
Per A.L.R.

B.C.L.S.
$1.10
Vancouver Registry
April 1, 1938

Court of Appeal
Seal

No. 14

RECORD

Court of Appeal

No. 14
Conditional Order for Leave to Appeal
Mar. 1, 1938

COURT OF APPEAL

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, housewife,

(Defendants) Respondents.

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HONOURABLE MR. JUSTICE McQUARRIE:

THE HONOURABLE MR. JUSTICE O'HALLORAN:

VANCOUVER, B.C., the 1st day of March, 1938.

UPON READING the Petition of the Plaintiffs (Appellants) dated and filed herein the 31st day of January 1938; AND UPON hearing Mr. R. S. Lennie, K.C., of Counsel for the said Plaintiffs (Appellants) and Mr. C. L. McAlpine, K.C., of Counsel for the Defendants (Respondents):

THIS COURT DOTH ORDER that subject to the performance by the Plaintiffs (Appellants) of the conditions hereinafter mentioned, and subject to the final Order of this Court upon the due performance thereof, leave to appeal to His Majesty in Council against the Judgment of this Honourable Court be granted to the Plaintiffs (Appellants):

AND THIS COURT DOTH FURTHER ORDER that the said Plaintiffs (Appellants) do within three months from the date hereof enter into good and sufficient security to the satisfaction of this Court in the sum of £500/0/0 sterling for the due prosecution of the said Appeal and the payment of all such costs as

RECORD

Court of Appeal

No. 14
Conditional Order for Leave to Appeal
Mar. 1, 1938
(Contd.)

may become payable to the Defendants (Respondents) in the event of the Plaintiffs (Appellants) not obtaining an Order granting them final leave to appeal or of the appeal being dismissed for non-prosecution or of His Majesty in Council ordering the Plaintiffs (Appellants) to pay the costs of the appeal of the Defendants (Respondents):

AND THIS COURT DOTH FURTHER ORDER that the Plaintiffs (Appellants) do within three months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Record and the dispatch thereof to England:

AND THIS COURT DOTH FURTHER ORDER that the Plaintiffs (Appellants) shall upon compliance with the aforesaid conditions be at liberty, within three months from the date hereof, to apply for a final order for leave to appeal:

AND THIS COURT DOTH FURTHER ORDER that execution of the Judgment of this Honourable Court in favour of the Defendants (Respondents) be stayed pending the Appeal herein.

BY THE COURT.

"J. F. Mather,"
Registrar

Minutes filed
Approved

Entered
Mar. 18, 1938
Order Book, Vol 11, Fol. 31
Per A.L.R.

B.C.L.S.
$1.10
Vancouver Registry
Mar. 18, 1938.

No. 15

COURT OF APPEAL

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, housewife,

Defendants (Respondents).

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH COLUMBIA

THE HONOURABLE MR. JUSTICE MACDONALD

THE HONOURABLE MR. JUSTICE SLOAN

VICTORIA, B.C., the 22nd day of April, A.D. 1938.

UPON READING the Notice of Motion of the Plaintiffs (Appellants) dated the 20th day of April, 1938, and the Order made herein on the 1st day of March, 1938, and the Certificate of the Registrar dated the 19th day of April, 1938, AND UPON hearing Mr. W. H. Bullock-Webster of Counsel for the Plaintiffs (Appellants) and Mr. W. B. Farris, K.C. of Counsel for the Defendants (Respondents):

THIS COURT DOTH ORDER that final leave to appeal to His Majesty in Council from the judgment pronounced herein on the 11th day of January, 1938, be and the same is hereby granted to the said Plaintiffs (Appellants).

BY THE COURT.

"H. Brown,"
Dep. Registrar

B.C.L.S.
$1.10
Vancouver Registry
Apr. 23, 1938

(SEAL)
Court of Appeal
British Columbia

ENTERED
Apr. 23, 1938
Order Book, Vol. 11, Fol. 50
Per "A.L.R."

RECORD

Court of Appeal

No. 16
Registrar's Certificate as to Security Apr. 19, 1938

No. 16

REGISTRAR'S CERTIFICATE

In pursuance of the Order made herein and dated the 1st day of March, 1938, I have been attended by the Solicitors for the Plaintiffs and Defendants and find as follows:

1. The (Plaintiffs) Appellants have provided a Bond by The Canadian Surety Company an approved surety company in the sum of £500.0.0 sterling as security for the due prosecution of the Appeal to His Majesty the King in his Privy Council by the said (Plaintiffs) Appellants from the Judgment dated the 11th January, 1938, and for the payment of all such costs as may become payable to the (Defendants) Respondents in the event of the (Plaintiffs) Appellants not obtaining an Order granting them leave to appeal, or of the Appeal being dismissed for non-prosecution or of His Majesty in Council ordering the (Plaintiffs) Appellants to pay costs of the Appeal of the (Defendants) Respondents.

2. The said (Plaintiffs) Appellants have taken out all necessary appointments and done all other acts for the purpose of settling the Transcript Record on such Appeal, and enabling me to certify that the said Transcript Record has been settled and that the provisions of the said Order on the part of the (Plaintiffs) Appellants have been complied with.

ALL of which I humbly certify to this Honourable Court.

DATED at Vancouver, B.C., this 19th day of April, 1938.

"J. F. Mather,"

Registrar

(SEAL)

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Exhibit No. 2 Certificate of Dismissal Aug. 24, 1926

EXHIBIT (2)

FORM OF CERTIFICATE OF DISMISSAL

Canada

Province of British Columbia

County of Vancouver

City of Vancouver

I, the undersigned, J. A. FINDLAY, ESQUIRE, Stipendiary Magistrate in and for the said City of Vancouver, certify that on the 24th day of August in the year of our Lord One Thousand Nine Hundred and twenty-six at the City of Vancouver, aforesaid, FRANCIS BURNS, being charged before me for that he, the said Francis Burns, at the said City of Vancouver, on the 25th day of March, A.D. 1926, at the said City of Vancouver, being a husband and under a legal duty to provide necessaries for his wife, did unlawfully fail to provide such necessaries, the said wife being in necessitous circumstances, contrary to the form of the Statute in such case made and provided.

I did, after having tried the said charge, dismiss the same.

GIVEN under my hand and seal, this 24th day of August in the year of our Lord One Thousand Nine Hundred and Twenty-six at the City of Vancouver aforesaid.

SEAL

"J. A. FINDLAY,"

Stipendiary Magistrate in and for the said City of Vancouver

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Exhibit No. 3 Oath of Administration Apr. 11, 1936

EXHIBIT (3)

OATH OF ADMINISTRATOR IN THE DISTRICT COURT OF THE DISTRICT OF SOUTHERN ALBERTA

IN THE MATTER OF THE ESTATE OF JAMES FRANCIS BURNS, DECEASED

I, MABEL BURNS, of 1765 Broadway West in the City of Vancouver, Province of British Columbia, make oath and say:

1. That I am the person applying for administration of the property of James Francis Burns late of the City of Calgary, Province of Alberta, Cattle Buyer, deceased.

2. That the said deceased died on or about the 31st day of December, A.D. 1935, at the said City of Calgary, and that he had at the time of death a fixed place of abode at the City of Calgary in the said Judicial District; and that during the six years next preceding his death resided at the following places:

1212 Fifth Street, East, Calgary, Alberta.

3. That the deceased at the time of his death was 41 years of age, leaving him surviving his lawful widow and relict, Mabel Burns, your affiant.

4. That I am the lawful widow and relict of the said James Francis Burns, deceased.

5. That I have made or caused to be made diligent or careful search in all places where the deceased usually kept his papers and in his depositories in order to ascertain whether the deceased had or had not left any Will, but have been unable to discover any Will, Codicil or Testamentary paper whatsoever, and I verily believe that he died without having left any Will, Codicil or Testamentary paper whatsoever.

6. That the value of the property of the said deceased which he in any way died possessed of or entitled to and for and in respect of which Letters of Administration are to be granted is under Eight Thousand Dollars. That the value of the Personal Estate and effects is under Three Thousand Dollars, and of the real property is under Five Thousand Dollars and that full particulars and a true appraisement of all said property to the best of my knowledge, information and belief so far as I can at present ascertain are set forth in the Inventory and Valuation hereunder written.

7. That I will faithfully administer the property of the deceased by paying his just debts and any taxes and duties payable in respect of the estate and by distributing the residue (if any) of his estate according to law and that I will exhibit under oath a true and perfect Inventory of the property of the deceased and render a just and true account of my administration whenever required by law so to do.

8. That I will surrender to this Court the grant to be issued to me whenever so required by the Court or a Judge thereof.

9. That to the best of my knowledge, information and belief no other application for a grant of Letters of Administration or of Probate of any Will of the deceased has been made.

10. That I am of the full age of twenty-one years.

11. That the said deceased left no children him surviving and that no infants are interested in the estate and that I his widow am the person solely entitled thereto.

THE INVENTORY AND VALUATION ABOVE REFERRED TO

General description of Property	Valuation or Amounts
Money secured by life insurance	3,000.00
1/40th Interest in Estate of Dominic Burns, deceased late of Vancouver, B.C.	4,927.93
TOTAL	7,927.93

SWORN at the City of Vancouver in the Province of British Columbia, this 11th day of April A.D. 1936, } Mabel Burns

Before me

John Douglas Forin

A Notary Public in and for the Province of British Columbia.

RECORD

In the Supreme Court of British Columbia

Defendants' Exhibit No. 4 Marriage Certificate Dec. 18, 1936

EXHIBIT (4)

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

VITAL STATISTICS ACT

36/B-257.

CERTIFICATE OF MARRIAGE

THIS IS TO CERTIFY that the following particulars of Marriage are on record in the office of the Registrar of Births, Deaths, and Marriages:

BRIDEGROOM

Full Name.....James Francis Burns.....
Age.....28 Years Occupation .....Cattleman.....
Condition.....Bachelor Religious Denomination.....Catholic
Residence——369 Cordova Street, Vancouver, B.C.....
Place of Birth.....Winnipeg, Manitoba.....
Name of Father.....Thomas Burns.....
Maiden Name of Mother.....Hanha Durey.....

BRIDE

Full Name.....Mabel Ball.....
Age.....28 Years Occupation.....Waitress.....
Condition—Spinster Religious Denomination.....Presbyterian
Residence.....107 Homer Arcade Apts., 369 Cordova St., Vancouver, B.C.
Place of Birth.....Chicago, Illinois, U.S.A.....
Name of Father.....
Maiden Name of Mother.....

Date of Marriage.....22nd March, 1923.....
Place of Marriage.....St. Andrew's Church, Vancouver, B.C.....
Witnesses.....Mrs. Mary Huggins, Calgary, Alberta.....
Richard Fanning, Marshall Rooms, Hamilton, St., Vancr., B.C.
Licence or Banns.....Licence No. 79362.....
Minister or Clergyman.....John A. Logan.....

Marginal Notations—

SEAL

Given under my hand at.....VICTORIA, B.C., this .....EIGHTEENTH.....day of .....DECEMBER....., 1936.....

"H. B. FRENCH"
Deputy Registrar, Births, Deaths and Marriages

No. 5988

EXHIBIT (1)

RECORD

In the Supreme Court of British Columbia

Plaintiffs' Exhibit No. 1 Letter G. F. McMaster to G. S.Miller May 6, 1937

Suite 416, Pacific Building
744 West Hastings St.
Vancouver, B.C.
May 6, 1937.

Mr. G. F. McMaster, Solicitor,
901 Vancouver Block,
Vancouver, B.C.

Dear Sir: *RE*: *Michael Burns* vs. *Mabel Burns.*

Relative to the admission of facts in confirming your telephone conversation that you beg to advise that items one to seven inclusive are admitted by the Defendant and item fifteen is also admitted by the Defendant.

The other items, namely, eight to fourteen, both inclusive, are not admitted in any way.

Yours truly,
"G. Stanley Miller"
G. STANLEY MILLER.

GSM/RH.