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*May 28, 29
*Oct. 10

ADELAIDE CHRISTINE STANLEY and MARGUERITE VALENTINE MACLEOD ..... APPELLANTS;

AND

WALTER DOUGLAS, Executor of the last Will and Codicil of William F. Jardine, deceased ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Will—Admitted to probate in solemn form—Power of Supreme Court of P.E.I. in Banco to order new trial—The Probate Act, 1939, c. 41 and amendments, ss. 37, 42, 43—The Judicature Act, 1940, c. 35 and amendments, s. 26(1), O. 58 rules 1, 4 and 5.

The Supreme Court of Prince Edward Island sitting *in banco*, set aside the judgment of Palmer J. of the Court of Probate whereby he admitted to probate in solemn form the will and codicil of the late William Faulkner Jardine, and ordered a new trial before the Probate Court. An appeal was taken from that part of the judgment directing a new trial. As to that part which set aside the judgment of the Probate Court, the appellant contended that the Appeal Court having found the documents submitted not proved, and no other document of a testamentary nature having been offered for probate, this was a finding of intestacy and the Appeal Court had no power to direct a new trial and further, since the evidence clearly established testamentary incapacity, a direction for a new trial was unnecessary.

Held: By the majority of the Court, Rand J. expressing no opinion and Cartwright J. accepting the reasons of Kerwin J. (concurred in by Taschereau J.) and of Kellock J., the Supreme Court *in banco* had power to direct a new trial.

Held: also, Rand and Cartwright JJ. dissenting, that in the circumstances of the case, a new trial should be had.

Rand J. would have allowed the appeal and pronounced against both the will and codicil. Cartwright J. would have dismissed the appeal, allowed the cross-appeal and restored the judgment of the trial judge.

Per Kerwin and Taschereau JJ.—Section 43 of *The Probate Act* stating that if the appeal is allowed the Court of Appeal shall make such order as shall seem fit is sufficient for that purpose. If there be any doubt then

Per Kerwin, Taschereau and Kellock JJ.—Such authority is to be found in *The Judicature Act*, 1940, c. 35, s. 26(1); 0.58 r. 5 passed thereunder, and 1941, c. 16, s. 2.

Per Kerwin and Taschereau JJ.—Without deciding whether such evidence would be admissible or not, on the new trial to be had, no one appearing as counsel for any party should give evidence.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Cartwright JJ.

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Per Cartwright J.:—While the earlier English and Canadian cases decided that the fact of counsel acting as a witness on behalf of his client was in itself a ground for ordering a new trial, such evidence is now legally admissible in Canada, but agreement is expressed with he statement of Ritchie C.J. in *Bank of British North America* v. *McElroy*, 15 N.B.R. 462 at 463 that the tendering of such evidence "is an indecent proceeding and should be discouraged".

APPEAL from the judgment of the Supreme Court of Prince Edward Island in Banco (1) setting aside the Judge of Probate's judgment admitting to probate in solemn form the last will and codicil of the late William Faulkner Jardine, and ordering a new trial in proof of the said documents per testes or in solemn form to be held before the Probate Court.

K. M. Martin, K.C., for the appellants. This appeal is taken from that part of the judgment of the Supreme Court of Prince Edward Island *en banc* which directs a new trial and not from that part of the judgment which sets aside the judgment of the Probate Court. The appellants contend as to the latter that the Court found that the documents which the Probate Court declared were proved before it as the last will and codicil of a competent testator had not been so proved, and as no other document of a testamentary nature was offered for probate the judgment is a finding that the decedent died intestate and therefore no new trial could be directed. Under the law of Prince Edward Island and under the rules and practice relating to appeals to the Supreme Court thereof from a judgment or decree of the Probate Court allowing an instrument of a testamentary nature alleged to have been executed by a decedent, the Supreme Court after setting aside the Probate Court's judgment has no power to direct a new trial before the latter with respect to the same matter or question which the Probate Court had already decided; and (subject to any appeal that might be taken from the Supreme Court's judgment setting aside that of the Probate Court) the Supreme Court's judgment setting aside the Probate Court's judgment allowing the documents, is final. The evidence before the Court clearly established incompetence and testamentary incapacity and a direction for a new trial of proof in solemn form was unnecessary. The

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respondent's application in the Probate Court and the proceedings taken to prove in solemn form or per testes were proceedings *in rem* and not *inter partes*. After pronouncement of the Probate Court in such proceedings there is not and never has been any provision in the practice of the Probate Court of P.E.I. for a new trial of the matters dealt with in such application.

The judge of Probate having issued a citation to all persons interested to show cause, having heard the evidence and found for the alleged will, his judgment thereupon became *res judicata* and final and conclusive with respect to the said application, except the right of appeal therefrom, and no further or other trial of the issues upon which the judgment was pronounced could afterward be directed either by the Probate Court itself or by the Court of Appeal. The Probate Court of P.E.I. has been the only court in which wills have been proved and filed since the Island was made a separate colony in 1769. It was and is entirely independent of the Supreme Court with a practice and procedure all its own. By c. 21 of the Acts of 1873 the Supreme Court of the Province became the Court of Appeal from the Probate Court and the practice and procedure in such appeal was therein set out. In 1939 the acts relating to the Surrogate and Probate Court were repealed by the present Act, c. 41, which Act with its amendments, and which Act alone regulates and governs appeals from the Probate Court to the Supreme Court.

The Act regulating the Supreme Court practice is *The Judicature Act,* 4 Geo. VI c. 35, 1940, and amendments thereto and the Rules of Court made thereunder. Neither the Act nor the rules enacted under its provisions purport to affect the practice with respect to appeals from the Probate Court, nor with the power of the Supreme Court on such appeals; all of which are matters dealt with and regulated by *The Probate Act* alone. Neither does *The Probate Act* adopt any of the provisions of *The Judicature Act* other than that by s. 37 it adopts the Supreme Court practice with regard to the manner of giving Notice of Motion when an appeal is taken. No where is the right given to the Court of Appeal to direct a new trial, except where that Court has directed an issue for the trial of a question arising upon the appeal. No such question arises

here. No issue was directed. No claim can therefore be made that the power of granting new trials given by s. 42 of *The Probate Act* was or could be exercised here. The questions arising under this appeal are the questions which were the issues which the Probate Judge decided and which upon such appeal the Supreme Court was called upon to decide and cannot for that reason be referred to some other court for decision. The power which the Supreme Court purported to exercise in making an order directing a new trial was a power which neither *The Probate Act* nor any other Act had given the Supreme Court, nor did it have any inherent power, it therefore acted without jurisdiction.

The right of appeal to the Supreme Court from the Probate Court, first granted in 1873 was a statutory right, and the powers given the Supreme Court re such appeals were statutory, to be found only in the Act regulating the practice and procedure of the Probate Court. Such a proceeding as a new trial by the Probate Court in a proceeding taken in that Court to prove a will in solemn form was unknown and although appeals have been taken from the Probate Court decisions many times, not once has a new trial been previously ordered.

The respondent's application in the Probate Court and the proceedings taken to prove in solemn form documents alleged to be the last will and codicil were proceedings *in rem,* not *inter partes*: after pronouncement of the Probate Court in such proceedings, there is not, and never has been any provision in the practice of the Probate Court for a new trial of the matters dealt with.

The difference between an action *in rem* and an action *in personam* or *inter partes* is material and has been emphasized in admiralty actions. *The Cella* (1888) P.D. 82 at 87; *The Longford* (1889) 14 P.D. 34 at 37; *The Burns* [1907] P. 137 at 149.

The authorities show that proceedings which are, or are equivalent to, proceedings *in rem,* as in this case, are regulated by rules of procedure differing materially from those of the Common Law courts with respect to actions *inter partes,* and that the Court appealed from erred when it directed such latter procedure to apply to the Probate Court in its direction for a new trial. In England it is neither the practice of the Admiralty Court nor the Court of

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Chancery to allow a new trial. *The Constitution* (1864) 2 Moo P.C. N.S. 453 at 461; *Dollman* v. *Jones* (1879) 12 C.D. 553 at 555.

The Court of Chancery had power to direct issues, as under s. 42 of the P.E.I. Probate Act the Court of Appeal might have done, but the Court directed no issue. The order made was that the judge of the Probate Court should try over again issues he had already decided, a direction not in accordance with the practice and beyond the powers of the Supreme Court.

Besides the objections taken to the direction for a new trial on the ground of lack of jurisdiction and upon the ground that the order made directed a mode of procedure unknown to the Probate Court in the proving of wills, the Appellants say that the Supreme Court had before it uncontradicted evidence of an incontrovertible nature which proved conclusively the testator's lack of testamentary capacity; that it was the duty of the Court to evaluate and pass upon such evidence and the law applicable thereto, and that the evidence was such, had it been given effect to, as would have resulted in the will and codicil being disallowed. It was incumbent upon the respondent when the evidence in the Probate Court showed the testamentary capacity was open to grave question, to adduce evidence to show the testator knew and understood the extent of the property of which he was disposing and the claims to which he ought to give effect. The respondent failed to do so. There was a still graver defect, not touched upon at all, except by way of inference by the Court of Appeal and that was evidence of the deceased's incapacity by reason of his lacking the moral sense, the sense of moral obligation and of moral responsibility, the lack of which disqualified the testator and rendered him incapable of making a will. *Banks* v. *Goodfellow* (1870) L. R. 5 Q.B. 549 at 563 per Cockburn C.J. at 563.

Cartwright J. "This might apply to the codicil but how would it apply to the will where he makes provision for the granddaughter?"

There were circumstances of suspicion inviting inquiry as both Courts below admit. It was the duty of the proponent of the will and codicil to adduce evidence to remove such suspicion. *Leger* v. *Poirier* [1944] S.C.R. 152; *Fulton* v.

Andrew L.R. 7 H.L. 448; *Tyrell* v. *Painton* [1894] P. 151. This finding of suspicious circumstances by the Court of Appeal, should have been the finding of the trial judge whose judgment it set aside. The appellants submit that the respondent having failed to discharge the *onus probandi,* this Court should declare the documents referred to not well proven and that the deceased died intestate.

J. A. Bentley K.C. and *Malcolm McKinnon K.C.* for the respondent. The judgment of the Appeal Court cannot be divided into separate parts and that part, which directs that the pronouncement for the Will and Codicil be set aside, cannot be regarded as a judgment in itself without the order for a new trial. The Appeal Court did not set aside the will and codicil but left them for further proof *per testes* and in solemn form before the Judge of Probate by a new trial and that was the only finding it made. *The Judicature Act* and the Rules of Court made thereunder govern all appeals to the Appeal Court including appeals from the Probate Court, and the Appeal Court acted within its jurisdiction in the present case.

The Judicature Act, 1929, and rules of Court made in pursuance thereof, were consolidated and revised in 1940 by c. 35 and came into force on Jan. 2, and Feb. 3, 1941 respectively. Section 37 of *The Probate Act* (1939) allows appeals from the Probate Court regulated by *The Judicature Act,* 1929 and Rules of the Supreme Court. These rules, including the rule to grant a new trial (0.58 r. 5), were confirmed in 1941 after the passing of *The Probate Act* (1939) and sub-sec. (*f*) added to sub-sec. 1 of s. 26 of *The Judicature Act* expressly made the Supreme Court Rules apply to appeals from the Probate Court. Whether or not no new trial has ever before been directed in such a case as the present one, the Appeal Court has had the power to so direct since 1939 and acted under s. 37 of *The Probate Act* and in the manner prescribed by 0.58 r. 5 of *The Judicature Act* relating to appeals. The Respondent asks that the appellants' appeal be dismissed with costs of this Court and of the Court of Appeal below.

On the cross-appeal the respondent objected to the Court of Appeal ordering a new trial and submitted that the respondent having proved the capacity of the testator and the due execution of the will and codicil to the satisfaction

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of the judge of Probate was under no further onus, and that the learned Chief Justice had misconstrued the trial judge's pronouncement as to the preponderance of evidence of capacity. The learned Chief Justice had quoted Viscount Dunedin in *Robins* v. *National Trust* [1927] A.C. 519, but respondent submitted there was no even balance in the instant case and the Probate judge had held the onus was fully met by the propounders of the will so that the ruling of Viscount Dunedin at 520 was squarely in favour of no interference with the pronouncement of the trial judge. *Colonial Securities Trust Ltd.* v. *Massey* [1896] 1 Q.B. 38 Re Uz King (1931) 3 M.P.R. 367 at 371. The appellants failed to meet the onus resting on them of proving undue influence. *Badenach* v. *Inglis* 29 O.L.R. 168 per Riddle J. at 192; *Craig* v. *Lamoureux,* 50 D.L.R. 10 at 14; *Riach* v. *Ferris* [1934] S.C.R. 725; [1935] 1 D.L.R. 118.

The respondent did not dispute the authority of the Court to order a new trial but submitted that there was no evidence of incapacity sufficient to warrant such an order. *Faulkner* v. *Faulkner* 60 S.C.R. 386, followed in *Manges* v. *Mills* 64 D.L.R. 1; *Re McGuire* [1935] 3 D.L.R. 734.

The judgment of Kerwin and Taschereau, JJ. was delivered by:

KERWIN J.:—This is an appeal against a judgment of the Supreme Court of Prince Edward Island *in banco* (1) setting aside the judgment or pronouncement of the Judge of Probate which had declared that two certain documents were the last will and codicil thereto, respectively, of a competent testator, the late William F. Jardine, and ordering a new trial in proof of the said documents *per testes* or in solemn form be held before the Probate Court. The appellants are two of the heiresses at law and next of kin of the deceased, and the respondent is the executor of the said will and codicil.

William F. Jardine died January 2, 1949, and on January 5 of that year the appellants filed a caveat in the Probate Court requiring proof of the will to be made before the Court *per testes* or in solemn form of law. On the same day the respondent filed a petition in pursuance of which a citation was issued citing all the heirs and next of kin

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of the deceased and all persons interested in the estate to appear before the judge of the Probate Court on February 17, 1949, to show cause, if any they could, why the said will and codicil should not be proved *testes* and in solemn form and why probate should not be granted. The trial took place at a subsequent date when the only appearances were on behalf of the executor and the present appellants. This procedure was adopted under s. 50 of *The Probate Act*, c. 41 of the Prince Edward Island Statutes of 1939, and s. 50*a*, added thereto by c. 15 of the Statutes of 1942. Since there was no allegation of undue influence or fraud, under Probate Rule 10 the respondent as the propounder of the will proceeded and was in the position of a plaintiff in a civil action and the caveator was in the position of a defendant.

It was in pursuance of s. 37 of *The Probate Act* that the respondent appealed "to the Court of Appeal by Notice of Motion in the manner prescribed by *The Judicature Act*, 1929, and Rules of the Supreme Court". By s. 2(*c*) the "Court of Appeal" means the Supreme Court sitting *in banco*. S. 43 provides in part as follows:

> 43. If the appeal is allowed, the Court of Appeal shall make such order, touching the same, and the costs thereto, as, under the circumstances of the case, shall seem fit; . . .

The appellants contend that the Supreme Court *in banco* could dismiss the appeal, or could allow the appeal and declare that it had not been proved that the documents were the last will and codicil of a competent testator, but that it could not order a new trial. For the respondent it is argued that s. 43 of *The Probate Act* quoted above, either by itself or when taken in conjunction with certain provisions of *The Judicature Act* and the rules passed thereunder clearly establish such right. In my view both of the respondent's contentions are correct. S. 43 of *The Probate Act* in stating that if the appeal is allowed the Court of Appeal shall make such order as shall seem fit is sufficient for that purpose. If there should be any doubt on that score, then the power is conferred under *The Judicature Act* and Rules.

The present *Judicature Act* is c. 35 of the 1940 Statutes, which with the exception of s. 11, was proclaimed as coming into force on January 2, 1941. The Rules of Court made in pursuance of s. 26 of that Act came into force on February 3, 1941. By s. 3 of *The Judicature Act*, the Supreme

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Court of Judicature of Prince Edward Island as constituted before the Act a Court * * * possessing original and appellate jurisdiction is to continue. By s. 10, the jurisdiction of the Court includes the jurisdiction which immediately preceding the coming in force of the Act was vested in, or capable of being exercised by all or any one or more of the judges of the Supreme Court of Prince Edward Island. By s. 29:

> 29. In all cases of appeal to the Court from the decision, judgment, order or decree of any Court or tribunal in the Province over which the Court has appellate jurisdiction, the appellant may proceed by notice of motion pursuant to the provisions of "The Rules of the Supreme Court" respecting appeals; * * *

By s. 2 of c. 16 of the Statutes of 1941, it was provided:

> 2. The Rules of Court made and published under Section 26 of the Judicature Act are hereby confirmed, and, insofar as any of the said Rules of Court purport to deal with substantive law, the same are hereby ratified and confirmed and declared to be within the jurisdiction of the Judges and Lieutenant-Governor-in-Council, as mentioned in said Section 26 of the Judicature Act.

By virtue of this section, even if the rules had not been confined to what was authorized under s. 26 of the Act as amended in 1941 and had dealt with substantive law, such rules were ratified and confirmed. Under rule 1 of order 58, all appeals to the Supreme Court shall be by way of rehearing and under rule 4 the Court has power *inter alia* to make such further or other order as the case requires. Rule 5 provides:

> 5. If upon the hearing of an appeal it shall appear to the Court that a new trial ought to be had, it shall be lawful for the said Court, if it thinks fit, to order that the verdict and Judgment be set aside and a new trial shall be had.

While on an appeal, strictly so called such a judgment can only be given as ought to have been given at the original hearing per Jessel M.R. in *Quilter* v. *Mapleson* (1), wider and more extensive powers are conferred when an appeal is by way of rehearing. Under rule 1 of order 58 appeals to the Supreme Court are by way of rehearing. When one adds to this the power conferred by rule 5 of order 58, it appears to me that the Supreme Court *in banco* had the jurisdiction and power to order a new trial in the present case as an appeal from the Probate Court is included in the expression "all appeals" in rule 1 of order 58.

(1) (1882) 9 Q.B.D. 672 at 676.

The appellants attempted to draw an analogy with proceedings in the Court of Chancery and referred to the statement of Lord Justice James in *Dollman* v. *Jones* (1). "In the Court of Chancery there was no such thing as a motion for a new trial * * * I should be sorry to establish a rule which would make every case in the Chancery Division subject to a motion for a new trial." This was said at a time when rule 1 of Order 34 of the English Rules referred to actions in the Queen's Bench, Common Pleas or Exchequer Divisions. This is quite apparent from the decision in *Krehl* v. *Burrell* (2), upon which the subsequent decision in *Dollman* v. *Jones* was based. The rules in England have been amended several times since then and in reading the older cases the distinction must be borne in mind between appeals and motions for a new trial, which latter were to be made to a Divisional Court.

Similarly the decisions under the Admiralty practice must be read in the light of the jurisdiction and procedure provided for at the time. The decision of the Privy Council in *"The Constitution"* (3), was given before *The Judicature Act* was enacted. In *"The Fred"* (4), Sir Francis Jeune was apparently of the view that the High Court had power to grant a new trial if it appeared that the parties never had a clear decision of the trial judge.

We were told that no record could be found of any case in the Island where a new trial had been ordered on an appeal from the decision of the Probate Court allowing, or rejecting an alleged testamentary document but in *Riding* v. *Hawkins* (5), the Court of Appeal granted a new trial on the ground of surprise at the trial of a probate suit to establish a will and codicil.

Circumstances must arise from time to time as in my opinion they did in this case, where the proper disposition of an appeal is to order a new trial. Since in my view this appeal should be dismissed, I do not propose to go over the evidence or what occurred at the trial. I am content to agree with the Chief Justice of the Island that for the reasons given by him a new trial should be had. I would add only that, without deciding whether such evidence

(1) (1879) 12 Ch. D. 553.
(2) 10 Ch. D. 420.
(3) (1864) 2 Moo. P.C. N.S. 453.
(4) (1895) 7 Asp. M.C. 550.
(5) (1889) 14 P.D. 56.

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would be admissible or not, on such new trial no one appearing as counsel for any party should give evidence. The appeal and the cross-appeal should be dismissed but under the circumstances without costs.

RAND J. (dissenting):—In the presence of uncontradicted evidence which, in my opinion, raised a grave suspicion of the competency of the testator, there rested upon the proponents the onus of satisfying the conscience of the Court that the documents were those of a man capable of appreciating the nature and extent of his property, not in piecemeal as in a dissociated mind but substantially in its entirety and of appreciating in the same manner those nearest him whose claims to his bounty, as it is described, are normally influential upon men. This I think they did not do and I would allow the appeal and pronounce against both the will and codicil. As the matter is to go to a new trial, however, I refrain from any examination of the facts.

KELLOCK J.:—The first and main contention of the appellants is that the court below, in directing a new trial, was without jurisdiction so to do, and that that part of the order, from which alone appeal is taken, must be deleted, with the effect of declaring that the testator died intestate.

It is not necessary to consider whether there is to be found within the four corners of *The Probate Act* itself any provision conferring such power upon the Supreme Court. S. 26(1) of *The Judicature Act*, c. 35 of the Statutes of 1940, authorizes the making of rules not inconsistent with the Act,

> (*b*) For regulating the pleading, practice and procedure in the Court;
> (*c*) Generally for regulating the conduct of the business coming within the cognizance of the Court for which provision is not expressly made by this Act.

Subsequently, and effective from February 3, 1941, Order 58, Rule 5 was passed. This reads as follows:

> If upon the hearing of an appeal it shall appear to the court that a new trial ought to be had, it shall be lawful for the said court, if it thinks fit, to order that the verdict and judgment be set aside and that a new trial shall be had.

In 1941, by 5 Geo. VI c. 16, assented to on April 10th of that year, it was enacted by s. 2 that

> The Rules of Court made and published under s. 26 of the Judicature Act are hereby confirmed, and, insofar as any of the said Rules of Court purport to deal with substantive law, the same are hereby ratified and

confirmed and declared to be within the jurisdiction of the Judges and Lieutenant-Governor-in-Council as mentioned in said s. 26 of the Judicature Act.

It is therefore no objection that the rule, when passed, may not have been within the power conferred by either paragraph (*b*) or (*c*) of s. 26(1) of the Act of 1940. Accordingly, in my opinion, the court below had authority to direct a new trial. I think, however, that the trial was so unsatisfactory as to render the direction with respect to a new trial the proper direction. The appeal and cross-appeal should, therefore, be dismissed with costs.

CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Supreme Court of Prince Edward Island *en banc* setting aside the decree of the Judge of the Probate Court whereby a will bearing date October 14, 1948, and a codicil thereto bearing date November 3, 1948, were admitted to probate as the last will and a codicil thereto of William Faulkner Jardine who died on the 2nd January, 1949, and directing a new trial. The appellants, two daughters of the testator, ask that that part of the order of the Supreme Court *en banc* which directs a new trial be set aside and that in effect it be declared that the testator died intestate. The respondent, the executor named in the will, cross-appeals and asks that the judgment of the Court of Probate, upholding the will and codicil, be restored.

The Supreme Court set aside the decree of the Court of Probate on the ground that the cumulative effect of three considerations led them to the conclusion: "that the evidence, as presented in this case, was not in a satisfactory form to enable the trial judge to assess the factual elements at their real value, or to enable an Appellate Court to decide whether or not the pronouncement of the Court below was a proper one."

After consideration of all the evidence and of the reasons for judgment of the learned trial judge and bearing in mind the advantage which he enjoyed of seeing and hearing the witnesses I have formed the opinion, although not without hesitation, that an Appellate Court could not say that he had reached a wrong conclusion. I am further of opinion that the considerations which moved the Supreme Court, weighty though they be, were not sufficient to warrant the setting aside of the judgment admitting the documents to

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probate; but as the majority of this Court are of opinion that the order directing a new trial should be affirmed I will refrain from discussing the evidence.

I do, however, wish to say something about the third consideration which moved the Supreme Court to direct a new trial lest it should be inferred from the disposition which I think should be made of the appeal that I do not regard it as serious. The senior counsel for the respondent had been the draftsman of the testator's will and codicil. He was called as a witness in support of the will. His evidence was of importance. Notwithstanding the objections of counsel for the appellants he continued as counsel thereafter, cross-examining several witnesses and giving evidence in reply. This was not one of those cases which occasionally, although very rarely, arise in which some quite unexpected turn of events in the course of a trial makes it necessary to hear a counsel in the case as a witness. It must have been obvious at all times that the counsel in question was an essential witness and it was "irregular and contrary to practice"—to use the words of Humphrey J., concurred in by Singleton and Tucker JJ. in *Rex* v. *Secretary of State for India* (1)—that he should act as counsel and witness in the same case. The fact that one of the counsel for the appellants followed the same course does not render what was done less objectionable.

There is no doubt but that the earlier cases in this country and in England decided that the fact of counsel also acting as a witness on behalf of his client was in itself a ground for ordering a new trial. It was so held by Patteson J. in *Stones* v. *Byron* (2) and by Erle J. in *Deane* v. *Packwood* (3), 395 n, although in the latter case it appears from the report in 8 L.T. (O.S.) 371, that counsel conceded that a new trial must be granted on the authority of *Stones* v. *Byron*. A similar view was expressed in New Brunswick in *Shields* v. *McGrath* (4) and in Ontario in *Benedict* v. *Boulton* (5) and *Cameron* v. *Forsyth* (6). It may be that in England the matter is still in doubt. I have found no case there which expressely over-rules *Stones* v. *Byron*. With great respect for the contrary view expressed by Harrison C.J. in *Davis* v. *The Canada Farmers Mutual*

(1) [1941] 2 K.B. 169 at 175.
(2) (1846) 4 Dow. & L. 393.
(3) 4 Dow. & L. 395 Note (6).
(4) (1847) 5 N.B.R. 398.
(5) (1847) 4 U.C.Q.B. 96.
(6) 4 U.C.Q.B. 189.

Insurance Co. (1), at page 481 it appears to me that *Cobbett* v. *Hudson* (2), may not be of general application as in that case the plaintiff who, it was held, should have been allowed to testify was acting as his own advocate. In Halsbury 2nd Edition, Vol. 2 at page 523 the learned authors say:

> It is doubtful whether a person who appears as counsel can give evidence in the same proceeding; such a course is very unusual.

In *Eastland* v. *Burchall* (3) there is a dictum of Lush J. concurred in by Mellor J. indicating that in the view of those learned judges such evidence is admissible but it was clearly *obiter*. The form of expression employed by Humphreys J. in *Rex* v. *Secretary of State for India* (*supra*) would appear to shew rather that counsel ought not to give evidence than that such evidence is legally inadmissible.

However the matter may stand in England, it appears to me that such evidence is at present legally admissible in Canada.

In *Brett* v. *Brett* (4) Ewing J. after careful consideration, and under special circumstances, admitted such evidence. His judgment was affirmed (5), in a unanimous judgment of the Court of Appeal for Alberta delivered by Harvey C.J. who said at page 372:

> Much criticism is offered to the evidence of Mr. Goodall, who acted as counsel throughout the major part of the trial, which evidence was received only as the result of an application made after the evidence was all thought to have been concluded. The plaintiff appeals from the order allowing the evidence to be given but it was clearly a matter for the discretion of the trial Judge, and he quite properly considered that the matter of first importance was the right of the litigants which should not be jeopardized by any oversight or mistake on the part of solicitor or counsel. Certainly the trial Judge should, and no doubt did, examine the evidence with much care, but the weight to be given to it was entirely for his consideration and if he thought proper to accept it as truthful, as he did, we would not be justified in differing from him.

In *Ward* v. *McIntyre* (6), Hazen C.J. delivering the unanimous judgment of the Court of Appeal for New Brunswick approved the following statement from Wigmore on Evidence:

> There is then, in general, no rule, but only an urgent judicial reprobation forbidding counsel or attorney to testify in favour of his client.

(1) (1876) 39 U.C.Q.B. 452.
(2) (1852) 1 E. & B. 11; 118 E.R. 341.
(3) (1878) 3 Q.B.D. 432 at 436.
(4) (1937) 2 W.W.R. 689.
(5) (1938) 2 W.W.R. 368.
(6) (1920) 56 D.L.R. 208 at 210.

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Cartwright J.

To the same effect is the judgment of the Court of Appeal for Ontario in *Davis* v. *The Canada Farmers Mutual Insurance Co.* (*supra*) in which, at pages 477 to 483, Harrison C.J. reviews the earlier cases in England and this country.

In *Major* v. *Higgins* (1), Howard J. after a full review of the authorities concludes at page 283:

> But, although it is widely acknowledged and authoritatively asserted to be contrary to the ethics and against the best interests of the profession for an advocate to testify on behalf of his own client in a case which he is conducting, I can find no rule of law that forbids him to do so. A canon of legal ethics, no matter how strongly approved by the members of the profession, and by the public too for that matter, has not the force of a rule of evidence and cannot be applied as such.

In Prince Edward Island in *Grady* v. *Waite* (2) Arsenault V.C. reaches a similar conclusion.

While these decisions bring me to the conclusion that the evidence of counsel in the case at bar was legally admissible, each of them contains, as indeed does every case which I have read in which the matter is discussed, a clear expression of judicial disapproval of counsel following such a course. Nothing would be gained by quoting these expressions at length. An example is that of Ritchie C.J. in *Bank of British North America* v. *McElroy* (3):

> It is the privilege of the party to offer the counsel as a witness: but that it is an indecent proceeding, and should be discouraged, no one can deny * * *

If such expressions of judicial opinion extending over a century, coupled with the repeated pronouncements of the representatives of the Bar to the same effect, have not availed to prevent counsel following such a course it is perhaps idle to hope that a further similar expression will prove effective and I shall only say that I am in agreement with the statement of Ritchie C.J., quoted above.

Having formed the opinion that the judgment of the learned trial judge should be restored it becomes unnecessary for me to decide whether the Supreme Court of Prince Edward Island had power to direct a new trial, but the reasons of my brothers Kerwin and Kellock satisfy me that it has such power.

(1) (1932) 53 Que. K.B. 277. (2) (1930) 1 M.P.R. 116 at 121.
(3) (1875) 15 N.B.R. 462 at 463.

I would dismiss the appeal, allow the cross-appeal and restore the judgment of the learned trial judge including his order as to costs. The respondent should have his costs of this appeal, of the cross-appeal and of the appeal to the Supreme Court of Prince Edward Island out of the estate and there should be no other order as to costs.

Appeal and cross-appeal dismissed without costs.

Solicitor for the appellants: *K. M. Martin.*

Solicitor for the respondent: *Malcolm MacKinnon.*