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*June 5, 6, 7, 8.

*June 20

DOUGLAS G. H. WRIGHT.....APPELLANT;

AND

LAURA MAY WRIGHT and GUARANTY TRUST COMPANY OF CANADA .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mental Incompetency, jurisdiction to dispense with notice to alleged incompetent—Evidence required to establish incompetency and to support order for maintenance of dependents—The Mental Incompetency Act, R.S.O. 1937, c. 110, s. 5.

The respondent Laura May Wright, wife of the appellant, made an application under *The Mental Incompetency Act* to Barlow J. in chambers for an order declaring the appellant a mentally incompetent person, appointing a committee of his person and estate, and dispensing with service upon the appellant of the Notice of Motion and supporting affidavits. Barlow J. having found that personal service would be harmful to the appellant, dispensed with service upon him, declared him mentally incompetent, and referred the matter to the Master to appoint a committee, and to propound a scheme for the care and maintenance of the appellant and the management of his person and estate. The Master made a report whereby the respondent wife was appointed committee of the person, and the respondent trust company and herself committee of the estate and whereby he directed payment out of the estate of annual payments of $10,000 and $4,500 for the support and maintenance of the respondent wife and her invalid mother respectively. This report was confirmed by Barlow J.

Appeals taken from each of the Orders of Barlow J. were dismissed by the Court of Appeal.

Held: (Cartwright J. dissenting), that there was jurisdiction in Barlow J. to dispense with service upon the appellant of the Notice of Motion and supporting affidavits and, sufficient evidence to warrant the finding of mental incompetency.

Re Brathwaite 47 E.R. 1104; *Re Newman* 2 Ch. Ch. 390; *Re Webb* 12 O.L.R. 194.

Held: (Kerwin J. dissenting), that on the basis of the only evidence which the Master had before him the allowances granted to the appellant's wife and mother-in-law were excessive and the matter should be remitted to him for reconsideration.

Per: Cartwright J., dissenting,—Since the enactment of *The Lunacy Act,* 9 Ed. VII c. 37, power to dispense with service, if it exists, must be found in *The Mental Incompetency Act, The Judicature Act,* or in the rules made under one of such Acts, and since no express provision can be found in either Act, nor in any of the rules to which reference

*PRESENT:—Kerwin, Taschereau, Kellock, Estey and Cartwright JJ.

was made by counsel, it must be concluded that service of notice in such a case is imperatively required. If the Court had jurisdiction to dispense with service, the matter before it was insufficient to warrant the making of either an Order dispensing therewith or an Order of mental incompetency.

APPEAL by special leave from the judgment of the Court of Appeal for Ontario dismissing appeals from the orders of Barlow J. of December 8 and 22, 1950.

Lewis Duncan K.C. for the appellant.

J. L. McLennan K.C. and *R. D. Poupore* for Laura May Wright, respondent.

T. M. Mungovan K.C. for Guaranty Trust Co. of Canada, respondent.

KERWIN J. (dissenting in part):—Leave was granted by this Court to Douglas G. H. Wright to appeal from the judgment of the Court of Appeal for Ontario dismissing his appeal from the orders of Barlow J. of December 8 and 22, 1950. The first order intituled "In the Matter of *The Mental Incompetency Act*, being Chapter 110 of The Revised Statutes of Ontario, 1937, and In The Matter of Douglas Guy Hobson Wright, a supposed mentally incompetent person", was made upon the application of his wife and was based upon an affidavit made by her, one by Dr. Spence, and another by Dr. Boyer. After reciting, "it appearing that personal service of the notice of motion herein upon the said Douglas Guy Hobson Wright would be harmful to him", service upon him was dispensed with and it was declared that he, presently an inmate of Homewood Sanitarium, Guelph, Ontario, was a mentally incompetent person. It was referred to the Master to appoint a committee or committees of his person and estate, the Master was directed to propound and report a scheme for his maintenance and the management of his estate, and the order contained the other usual provisions. The order of December 22, 1950, confirmed the report of the Master dated December 14, by which Mrs. Wright had been appointed the committee of her husband's person, and Guaranty Trust Company of Canada and she had been appointed committee of the estate, the Trust Company being the

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accounting member of the committee and having the custody of the securities and cash. This order and report will be adverted to later.

The order of December 8 dispensing with service of the notice of motion and the accompanying affidavits and declaring the appellant a mentally incompetent person, is challenged on several grounds. We understand that substantially the same objections were raised in the Court of Appeal, although, since counsel for the appellant changed his position before us from time to time as to the meaning and effect of some of the rules of practice of the Supreme Court of Ontario under the Judicature Acts, it may be that the argument before the Court of Appeal did not take the same course as that followed here. There is nothing to prevent counsel changing his submissions on questions of law if no prejudice be caused, and the matter is mentioned merely in order to stress the fact that the appellant was unable to convince the Court of Appeal by anything that was there said. Laidlaw J.A., speaking for the Court, put it thus:—

> Counsel for the appellant has failed to satisfy us in respect of any grounds upon which he brings these proceedings before the Court. There was ample evidence before the learned Judge to support the order in appeal. The proceedings before the learned Judge were regular, and he properly exercised the powers given to him by section 5 of *The Mental Incompetency Act*. We can find no error in the proceedings nor in the order. The appeal should be dismissed.

Reliance was placed upon that provision of Magna Carta appearing in section 2 of An Act respecting Certain Rights and Liberties of the People, R.S.O. 1897, chapter 322, and which Act is now inserted in Appendix A to R.S.O. 1950, at page 1 of Vol. 5, and specifically upon the words:—

> No man shall be taken or imprisoned nor prejudged of life or limb, nor be disseized or put out of his freehold, franchises, or liberties, or free customs, nor be outlawed, or exiled, or any otherwise destroyed, unless he be brought in to answer.

This must mean in accordance with the law as is indicated by the succeeding words:—"and prejudged of the same by due course of law". The position of lunatics was dealt with at common law in an entirely different manner from any other subject and since the former law and practice of

inquest of office has been entirely superseded in Ontario, it is sufficient to refer to the history of the matter without detailing it.

The Legislature of Upper Canada in 1792 enacted that in all matters of controversy relating to property and civil rights, resort should be had to the laws of England. By section 5 of chapter 61 of the 1857 Statutes of Canada, it was provided that the Court might on sufficient evidence declare a person a lunatic without the delay or expense of issuing a commission, except in case of reasonable doubt. Chapter 65 of R.S.O. 1897, provided for an inquiry by commission, and an inquiry without commission, with, or without, the aid of a jury, and for the right of the alleged lunatic to demand that such latter inquiry be submitted to a jury. Rule 334 of the 1897 Rules of Practice of the Supreme Court of Ontario under *The Judicature Act* provided:—

> 334. Where it appears, upon the hearing of any matter, that by reason of absence, or for any other sufficient cause, the service of notice of the application, or of the appointment, cannot be made, *or ought to be dispensed with, such service may be dispensed with,* or any substituted service, or notice, by advertisement or otherwise may be ordered.

Down to 1909, the practice in Upper Canada and Ontario was uniform to dispense with service of notice of motion for a commission or a declaration where such service would be dangerous or harmful to the alleged lunatic: In *Re Patton* (1); In *Re Newman* (2); In *Re Mein* (3); In *Re Webb* (4). *The Lunacy Act,* chapter 37 of the Statutes of 1909, repealed prior Acts dealing with the same subject, and subsection 1 of section 36 enacted:—

> 36(1) The Supreme Court may make rules for carrying this Act into effect and for regulating the costs in relation thereto and except where inconsistent with the provisions of this Act, or such rules, *The Judicature Act* and Rules made thereunder shall apply to proceedings under this Act.

The rules were next revised in 1913 and Rule 334 was omitted. In the same revision, Rule 213 provided:—

> 213. Any application in an action or proceeding shall be made by motion, and notice of the motion shall be given to all parties affected by the order sought.

(1) (1868) 1 Ch. Ch. 192.
(2) (1869) 2 Ch. Ch. 390.
(3) (1869) 2 Ch. Ch. 429.
(4) (1906) 12 O.L.R. 194.

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In the 1928 revision of the rules, No. 213 was amended so as to read as follows:—

> 213. Any application in an action or proceeding shall be made by motion, *and unless the nature of the application or the circumstances of the case render it impracticable* notice of the motion shall be given to all parties affected by the order sought.

The decision of Mr. Justice Britton in *Re Morrison* (1) while made after the Lunacy Act of 1909, was given before the new Consolidation of the Rules, 1928. Furthermore, the application there made was refused on several grounds and it is the only reported case where any intimation is given that even at that time there was no power to order that service upon the individual of the notice of motion to declare him incompetent should be dispensed with. Counsel for the appellant did not deny that such a power has been exercised for many years at Osgoode Hall.

The actual decision in *In re McLaughlin* (2), does not assist in the disposition of the present appeal but it is important to note what is said by Lord Davey, speaking for the Judicial Committe, at page 347:—

> It must be remembered that this particular jurisdiction is one of some peculiarity and difficulty. It exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application.

This shows that the question of lunacy or mental incompetency has always occupied a separate position and, viewing the present rules of practice in the light of that underlying proposition, Rule 213, as it now reads, is on its proper construction applicable to such an application as was made here and is not confined to applications in an action or a proceeding already commenced. In any event the notice of motion dated December 7, 1950, was filed in the Registrar's office the same date in accordance with Rule 234 so that the application for an order dispensing with service may be said to have been made in a pending proceeding.

In view of this special jurisdiction, section 35 of *The Mental Incompetency Act,* R.S.O. 1937, chapter 110, as

(1) (1919) 15 O.W.N. 338. (2) [1905] A.C. 343.

amended by section 20 of chapter 55 of the 1941 statutes (replacing subsection 1 of section 36 of the Lunacy Act of 1909) and enacting:—

35. Subject to the approval of the Lieutenant-Governor in Council, the Rules Committee may make rules for carrying this Act into effect and for regulating the costs in relation thereto, and except where inconsistent with the provisions of this Act or such rules, *The Judicature Act* and rules made thereunder shall apply to proceedings under this Act.

does not prohibit that part of the first order of Mr. Justice Barlow, which dispensed with service of the notice of motion upon the appellant. On the contrary, the rules made under *The Judicature Act* justify it. The rules as thus interpreted are not inconsistent with any of the other provisions of *The Mental Incompetency Act*. Particular stress was placed upon sections 5 and 6. Subsection 3 of the former gives the alleged mentally incompetent person the right to appeal from any order made by the Court declaring him such. Section 6 deals with the directing of an issue. Subsection 1 thereof provides:—

(1) Where in the opinion of the Court the evidence does not establish beyond reasonable doubt the alleged mental incompetency, or where for any other reason the Court deems it expedient so to do, instead of making an order under subsection 1 of section 5, the Court may direct an issue to try the alleged mental incompetency.

Other subsections give directions as to the method and place of trial and give the alleged mentally incompetent person the like right to move against a verdict or to appeal from an order made upon or after the trial as may be exercised by a party to an action including the right of appeal. Section 7 gives the alleged incompetent the right to demand that any issue directed to determine the question of his mental incompetency be tried with a jury. The mere fact that provision is thus made for an appeal by the alleged incompetent and, if the trial of an issue is directed, for his right to demand a jury, indicates that there is no lack of jurisdiction in the Court hearing a notice of motion for a declaration of incapacity to direct that notice of motion shall not be given to the alleged incompetent, where the judge before whom the application comes is of opinion, as was the case here, that personal service would be harmful to the party involved. It was suggested that "impracticable" was confined to something that could not be put to use or practically dealt with but one definition of "practicable" in

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the Oxford English Dictionary and Funk and Wagnall's Standard Dictionary is "feasible". This means not only feasible in a physical sense since a thing or a proceeding may be said to be practicable from other points of view and, therefore, the opinions of the doctors as to the effect upon the appellant of the service upon him of the notice of motion and copies of the affidavits may be said to make such service impracticable.

On the second point raised by the appellant, without referring to any parts of the affidavits which under any argument presented by counsel for the appellant might be said to be hearsay, I find myself in agreement with Barlow J. and the members of the Court of Appeal, all of whom considered that the evidence submitted to the former was sufficient to "establish beyond reasonable doubt", as prescribed by section 6(1) of *The Mental Incompetency Act*, that the appellant was a mentally incompetent person. He was admitted to Homewood Sanitarium at Guelph on October 25, 1950; his wife's affidavit was sworn to December 1; that of Dr. Spence on December 2; and the affidavit of Dr. Boyer on December 6. Dr. Spence had seen the appellant on October 18 and he was one of the medical men upon whose certificate the appellant was admitted to the sanitarium. His opinion, based on the facts recited by him and his observations, was that on December 2 the appellant was unable to transact ordinary business matters or give proper consideration to the protection and conservation of his estate. Dr. Boyer examined the appellant on October 24. He pledged his oath that the appellant had at that time a manic reaction and in his opinion the appellant needed hospital and custodial care. He also gave his opinion from the facts set out by him and his observations that the appellant by reason of his mental condition was unable to transact ordinary business matters or to give proper consideration to the protection and conservation of his estate. In view of the opinions expressed by the doctors on December 2nd and 6th, respectively, and of the contents of Mrs. Wright's affidavit, sworn to December 1, the lapse of time between the last occasions upon which the doctors saw the appellant and the making of the order is not so great or so significant as to raise any doubt as to the soundness of the order.

The third main submission on behalf of the appellant was that there was no evidence, or insufficient evidence, to justify paragraphs 5, 6(*a*), (*b*), (*d*), of the report of the Master of December 14, 1950. The Master found the value of the appellant's estate to be approximately $310,000 of which the annual income was about $10,000. According to an affidavit of Mrs. Wright, she owned the house and property in which she and the appellant had resided in Forest Hill Village, and personal estate to the value of about $160,000, which produced an annual income of $6,000. The cost of maintaining herself and the property was put by her at $9,600 per annum. While there is no record of any testimony having been given at the time, it is not disputed that Mrs. Wright and her solicitor and an officer of the Trust Company attended the Master who questioned Mrs. Wright in order to satisfy himself as to the nature of the scheme which he should propound.

In paragraph 5 of the report, which is the first to be objected to, the Master states:—

> 5. I further find that in addition to his wife, the said Laura May Wright, the said Douglas Guy Hobson Wright had dependent upon him Mrs. Mima Hughes, the mother of the said Laura May Wright now in her 84th year and a chronic invalid. I further find that the outlay by the said Douglas Guy Hobson Wright in respect of the maintenance of the said Mrs. Mima Hughes and for medical and nursing attendance during the past two years has been approximately $4,500 per year.

We were informed that Mrs. Mima Hughes died shortly after the making of the report and, while there is no evidence that she was dependent upon the appellant, there is no contradiction of the statement to the effect in the Master's report. I am not prepared to disagree with the Courts below and set aside paragraph 5 although under other circumstances a serious view should be taken of the fact that no sworn testimony was given relating to the matter.

Paragraph 8(*a*) directed that there be paid to the appellant's wife for her own support and maintenance the annual sum of $10,000. In the opinion of Barlow J. and of the Court of Appeal, this was justified by Mrs. Wright's affidavit. Paragraph 8(*b*) is the one providing for payment of the annual sum of $4,500 for the support, nursing and medical attendance of Mrs. Hughes. After reporting in

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paragraph (*c*) that the present arrangement for the appellant's care appeared to be satisfactory, the Master recommended that the committee of the estate be authorized to provide for the appellant's continued maintenance at the Homewood Sanitarium at the rate of $70 per week, together with any medical or nursing expenses that might be necessary, and to supply any clothes or comforts that the appellant might properly require. Provision was made that if the rate of maintenance be increased, the committee be authorized to pay the same with the approval of the Master. Then came paragraph 8(*d*) in which, after stating that the income from the estate would not be sufficient to cover the cost of the appellant's maintenance and the other allowances, it was recommended that the committee be authorized to encroach upon the corpus of the estate and for this purpose, with the Master's approval, to sell any of the assets.

The appellant and his wife have no children and the wife apparently considered it not improvident that part of the corpus should be used for the purposes mentioned. There is no rule that this may not be done and in fact in many cases it is impossible to provide for the proper maintenance of a mentally incompetent person without doing so. If it is found that that is not going to be satisfactory, the matter may always be brought before the Master again.

The appeal should be dismissed. No order should be made as to costs except that the costs of the wife and the Trust Company be paid by the committee forthwith after taxation thereof out of the assets of the appellant's estate which may be in the hands of the committee.

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

KELLOCK J.:—This is an appeal by special leave of this court from an order of the Court of Appeal for Ontario, dismissing an appeal from an order of Barlow J. of December 8, 1950, declaring the appellant a mentally incompetent person and directing a reference to the Master to appoint a committee of his person and estate, and propound a scheme for his maintenance and the management

of his estate. The appeal is also from the subsequent order of Barlow J. of December 22, 1950, which affirmed the Master's report.

In his original order, the learned judge had directed that service upon the appellant of the notice of the motion should be dispensed with. This order was made upon the basis of affidavits of two medical witnesses to the effect that personal service upon the appellant would be harmful to him in view of his condition of health. With respect to the order of December 8, the appeal is based upon the contention that the learned judge had no jurisdiction to dispense with service, and in any event, that the evidence did not justify any declaration of mental incompetency.

With respect to the first ground, it is contended that whatever may have been the situation prior to 1909, when the statute 9 Ed. VII c. 37 was passed, that statute, in providing by s. 36(1) that *The Judicature Act* and rules made thereunder should apply to proceedings under the Act except where inconsistent with the statute itself, had the effect thereafter of requiring either personal or substituted service of such notices of motion. In my opinion, this contention is not well founded.

Jurisdiction with respect to declarations of lunacy was, in England, until a comparatively late date, exercised by the Lord Chancellor as delegate of the Sovereign, and not by the Court of Chancery. When, however, the Court of Chancery was set up in Upper Canada in 1837 by 7 Wm. IV c. 2, the court was given "like power and authority as by the laws of England are possessed by the Court of Chancery in England" in all matters relating to idiots and lunatics and their estates, except where special provision had been or might be made with respect thereto by any law of the province.

Doubts subsequently arose as to the jurisdiction thus conferred, and in 1846 the statute, 9 Vict. c. 10, was enacted to remove these doubts and to extend the law. The statute recites that "by the laws of England, the custody, care and management of lunatics, idiots and persons of unsound mind and their property and estates does not of right belong to or form part of the jurisdiction of Chancery, but the same

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is conferred upon the Lord Chancellor or some other person or persons under and by the commission of the Crown, under the sign manual." It is therefore enacted

> that it was intended that the said Court of Chancery should have the like jurisdiction as given to the Lord Chancellor in England.

and that from and after the passing of the Act, the said court shall

> with a like power and authority as exercised by the Lord Chancellor in England, or such other person or persons which may be entrusted as aforesaid, have the care and custody of all lunatics, idiots and persons of unsound mind in that part of the province, formerly Upper Canada, and of their real and personal estates so that the same shall not be wasted or destroyed; and shall provide for their safe keeping and maintenance and for the maintenance of their families and education of their children out of their personal estates and real estates respectively.

This jurisdiction of the Lord Chancellor thus bestowed upon the court was "in its nature" an *ex parte* jurisdiction; *Re Braithwaite* (1), and was exercised under a commission granted by the Lord Chancellor and directed to certain persons to inquire, with the aid of a jury, into the alleged unsoundness of mind, the inquisition thereupon being returned into the Court of Chancery with the appropriate finding. Notice of the execution of the commission was not given to the alleged lunatic unless a caveat had been entered by him or unless an order were obtained on application to the court directing that reasonable notice be given to the alleged lunatic; *Shelford* p. 101; *K.* v. *Daly* (2). If lunacy were found, the person so declared had the right by petition to traverse the inquisition, and thereupon the court might direct a new trial which, in Upper Canada, took place before a judge of the Court of Chancery with the aid of a jury "according to the circumstances of the case and the situation of the parties."

In 1857 and again in 1865, alternative modes of proceeding to that by way of inquisition under a commission, were provided. In 1857, by 20 Vict. c. 56, it was provided by s. 5 that the court might, on sufficient evidence, declare a person lunatic without the delay or expense of issuing a commission, "except in cases of reasonable doubt," and any person who, before the Act, had the right to traverse an inquisition might move against such order or appeal therefrom, as the case might require, subject to the same

(1) 47 E.R. 1104. (2) (1749) 1 Ves. 268.

rules as to time to which the right to traverse was subject. The statute of 1865, 28 Vict. c. 17, provided that where a commission of lunacy would have theretofore been necessary or proper, the court in lieu thereof, with or without a jury, might hear evidence and inquire into and determine the alleged lunacy. In such case the alleged lunatic had the right to demand that the inquiry be submitted to a jury, or the court might order that the inquiry be had before any court of record. Section 6 provided that in any such case, no traverse should be allowed, but the court, if dissatisfied with the finding of a jury, might, at the instance of any party who would be entitled to traverse an inquisition under a commission, direct a new trial upon application therefor made to the court within three months of the verdict. These alternative proceedings were continued side by side down to the passing of the statute of 1909 when the procedure by inquisition under a commission was dropped.

While this was the jurisdiction of the Court of Chancery and its successor, the Supreme Court of Ontario, nevertheless, at a comparatively early date, the court in ordinary cases would direct notice of the application to be given to the alleged lunatic, but the jurisdiction to dispense with notice in appropriate cases remained and was, from time to time, exercised as occasion required.

In *Re Patton* (1), Spragge V. C., in giving directions on an application pending before him, said that

> I should incline also to require that the alleged lunatic be notified.

When it subsequently appeared that the officials at the asylum where the alleged lunatic was confined would not allow him to be served with the petition, as he was suicidal and to permit it might prove dangerous to him, Vankoughnet C. made the declaration without service. An example of the normal practice of requiring notice to be given to the alleged lunatic is to be found in the decision of Spragge V. C. in *In Re Miller* (2). Britton J. in *Re Morrison* (3), was not laying down any new practice in what he there said. Illustrations also of the exercise of the jurisdiction to dispense with service are to be found

(1) (1868) 1 Ch. Ch. 192. (2) (1868) 1 Ch. Ch. 215.
(3) (1919) 15 O.W.N. 338.

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in *In Re Main* (1); In *Re Newman* (2), and *Re Webb* (3), the last mentioned case being a decision of Mabee J. in 1906.

The jurisdiction conferred by 9 Vict. c. 10 was continued down through the various revisions of the statutes and no change in this jurisdiction was made or intended by the statute of 1909, which in s. 3 reads as follows:

> Subject to the provisions of *The Act respecting Lunatic Asylums and the custody of Insane Persons*, the Court shall have all the powers, jurisdiction and authority of His Majesty over and in relation to the persons and estates of lunatics, including the care and the commitment of the custody of lunatics and of their persons and estate.

While by s. 36, the rules under *The Judicature Act* are to apply in lunacy proceedings, they are to apply "except where inconsistent with the provisions of this Act." The jurisdiction conferred upon the Court by s. 3 to make *ex parte* orders, renders application of the ordinary rules requiring service quite inconsistent therewith.

In my opinion, the provision made by s. 36 with respect to the rules did not change the situation previously existing, as the Consolidated Rules of 1897 were already applicable to all proceedings in the Court by reason of s. 122 of *The Judicature Act*, R.S.O. 1897 c. 51. The same had also been true of the earlier rules. It is the fact that Rule 334 of the 1897 rules contained a provision enabling service to be dispensed with in cases to which it applied, and this rule goes back to Order 34, s. 5, of the Chancery Orders of 1853. However, both *In Re Patton* and *Re Newman* appear to have been proceedings under the amendment of 1857 (*Re Newman* is expressly so) and not proceedings by way of inquisition upon commission, and in neither does it appear that the jurisdiction to dispense with service was based upon the rule. On the contrary, the order in *Newman's* case was expressly placed upon the basis of the jurisdiction of the Lord Chancellor as set forth in Shelford on Lunacy.

Rule 334 was not continued in the revision of the rules in 1913, and until 1921 the rules did not contain any provision authorizing service of any notice of motion to be dispensed with. In *Re McNab* (4), a decision of Masten J.,

(1) (1869) 2 Ch. Ch. 429.
(2) 2 Ch. Ch. 390.
(3) (1906) 12 O.L.R. 194.
(4) (1921) 20 O.W.N. 398.

as he then was, there were affidavits of two medical men to the effect that it would be dangerous to serve notice of the application upon the alleged incompetent, one of the affidavits stating that service upon a Mrs. Austin, who was in charge of the private sanatarium where the alleged incompetent was being cared for, would accomplish more than could be effected by personal service. Examination of the file does not disclose any evidence of service, and there appears to have been no order for substituted service. The formal order recites only the affidavits already referred to and the affidavit of the medical superintendent of the sanitarium, which the report shows the learned judge required before his order was to go, and while it contains no express provision dispensing with service, it appears to have been made without notice to the incompetent, in the same way as that made in *Patton's* case. The declaration made by the order was under s. 36 of the Act of 1914, and was not a declaration of lunacy. An order in such a case without notice could only have been properly made by analogy to the jurisdiction with respect to the making of a declaration of lunacy. Masten J. was a very eminent and a very careful judge, and in my opinion, would not have made such an order except on the basis of the jurisdiction which I have discussed.

When the statute of 1909 was passed, a number of the provisions of the British Lunacy Act of 1890, 53 Vict. c. 5, were incorporated into the Ontario statute. The significant thing, however, is that while the English statute, by sub-s. 2 of s. 90, requires notice of the application to be given to the alleged lunatic if within the jurisdiction, this provision was not incorporated in the Ontario statute, although s. 3 sub-s. 2 of the latter, which authorizes the making of declarations, is taken from s. 108 sub-s. 2 of the English Act. At the same time, sub-s. 1 of s. 3 of the Ontario statute continues the former jurisdiction. In my opinion, had it been the intention of the provincial legislature in 1909, with the English statute before it, to affect the existing jurisdiction to make declarations of lunacy without notice, such an important change would have been effected by some express provision, such as had been enacted in Eng-

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land, rather than by leaving the matter to implication, if such an inference could be found in the general frame of the statute as, in my respectful opinion, it cannot be.

There is a further consideration. The Judicial Committee in *Re McLaughlin* (1), per Lord Davey, said:

> "It" (i.e. the jurisdiction in lunacy) "exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application."

Although the legislation in question in that case was not the same as in the case at bar, the above was said in connection with the very subject matter here under discussion, namely, the question as to service of notice upon the alleged lunatic of an application for a declaration of lunacy.

The guiding principle being as stated, it would surely require very clear statutory direction to take from the court the discretion conferred upon it in 1846 and to render obligatory in every case that notice be served upon an allegedly mentally incompetent person, notwithstanding that in the opinion of professional witnesses, to do so would be inimical to the interests of "the unhappy subject of the application." Yet this is the substance of the argument put forward on behalf of the appellant.

It is argued for the appellant that, in any event, the evidence upon which Barlow J. proceeded in dispensing with service was insufficient. It is, of course, beyond question that in making orders of this kind, the court ought to require very clear evidence that the normal course should not be followed. In the case at bar, however, the evidence was sufficient, both in the view of the learned judge of first instance and the Court of Appeal, and in these circumstances I do not think a case has been made out for interfering with the order on that ground.

It is next contended on behalf of the appellant that the evidence was not sufficient to establish the mental incompetency of the appellant beyond a reasonable doubt at the date of the order in question, or at any date subsequent to the month of October 1950. It is clear, however, upon the material, that the appellant was suffering from a mania of a nature which had not developed over-night nor would

(1) [1905] A.C. 343 at 347.

pass over-night. His condition toward the end of October had become such that he required custodial care for himself, and he was confined in a private sanitarium upon the certificates of two medical men pursuant to the *Private Sanitaria Act*, R.S.O. 1950 c. 290. He was also quite incapable of caring for his property, having in fact physically destroyed part of it in quite a violent way. Such a condition is not one of a mere passing nature. There can, I think, be taken from the affidavit of the wife, the fact, at least, that the condition had been of some standing or had been developing for some time. In fact, the appellant remained in the institution until March 10, 1951, when we were advised by his counsel he was then released, which release, as appears from the order of the Master of the 13th of March, 1951, was made pursuant to the provisions of s. 54 of the *Private Sanitaria Act*, which provides that if the superintendent of the sanitarium considers it conducive to the recovery of a patient that he should be entrusted for a time to the care of friends, that official may allow such patient to return on trial to his friends upon receiving an undertaking in writing by one or more of them that an oversight will be kept over him. The appellant was in this instance released into the care of a brother. Counsel for the committee applied, under the provisions of the second paragraph of s. 68 of the Supreme Court Act, to place the order of the Master in evidence, and in my opinion, it should be admitted. In the circumstances thus disclosed, in view of the concurrent findings below, I think that any lacuna, if there be one, in the material is sufficiently filled in. In my opinion, therefore, the appeal fails with respect to the order of December 8, 1950.

It is further contended on behalf of the appellant that there was no evidence, or, in any event, insufficient evidence to justify the findings of the Master that the mother-in-law of the appellant, since deceased, was a dependent of his, or to justify the annual payments for her maintenance and for that of the wife of the appellant of $4,500 and $10,000 respectively, in addition to the outlay for the care and maintenance of the appellant himself, resulting in substantial encroachment upon the corpus of the estate. The only evidence before the Master upon which these directions were based showed that the appellant's estate was worth

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some $310,000 producing an annual income of approximately $10,000, while the wife herself has a personal estate of some $160,000 from which she derives an annual income of $6,000. The latter's affidavit states that the annual cost of maintaining herself and the city residence of the appellant and herself will be approximately $9,600. We were told that additional oral statements of fact were made to the Master in connection with the matters before him, but that the witnesses were unsworn. These statements were not in a form to which the Master was entitled to have regard, and on the basis of the only evidence which the Master had before him, I think that these allowances were excessive, and that the matter should be remitted to him for reconsideration.

I would therefore allow the appeal with respect to paragraphs 5 and 8 (*a*), (*b*) and (*d*) of the order of the Master of the 14th of December, 1950, and so much of the order of Barlow J. of the 22nd of December 1950 and the order of the Court of Appeal as relates to the said paragraphs, and direct that the matters covered by the said paragraphs be remitted to the Master for further consideration. The costs of all parties here and below should be taxed and be paid out of the estate in the hands of the committee.

CARTWRIGHT J. (dissenting in part):—This is an appeal, pursuant to leave granted by this court on the 10th of May, 1951, from an order of the Court of Appeal for Ontario pronounced on the 6th of April, 1951, dismissing the appeal of Douglas Guy Hobson Wright from two orders of Barlow J. made on the 8th and 22nd days of December, 1950, respectively, the first declaring the appellant a mentally incompetent person and directing the usual reference to the Master and the second confirming the Master's report.

Both orders are attacked on several grounds. In the view which I take of the matter it is necessary to consider only the first order as I have reached the conclusion that it cannot stand and the second order falls with it.

The first objection advanced against this order is that it was made without service upon the appellant of notice of the application, and that consequently the proceedings were *coram non judice* and void.

We were assisted by counsel by a full and able argument in which the history of proceedings in lunacy in England and in this country was explored but I do not find it necessary to go at length into the historical aspect of the matter. The reasons of my brother Kellock, which I have had the advantage of reading, satisfy me that following the enactment of Chapter 10 of the Statutes of Canada, 1846, 9 Victoria, the Court of Chancery exercised the like jurisdiction in regard to persons of unsound mind as was conferred upon the Lord Chancellor in England by a Commission from the Crown under the Sign Manual which at that time included a jurisdiction to proceed *ex parte*.

That such jurisdiction was exercised with great caution appears from many reported cases. In Shelford on Lunacy (1833) the matter is dealt with as follows at page 60:—

> The English constitution has with much care provided protection for persons who are represented to be of unsound mind; and has been extremely cautious to prevent the power of the Crown, or of individuals, to interfere with such persons, from being assumed in any case where it is not required for the safety of the public and of individuals; because it is difficult to exert such power without depriving the subject of that liberty, and power of dealing with his property, which ought to be unrestricted, unless the necessity for restraint be clearly proved.
>
> It has, in the first place, made it necessary, before a commission of lunacy is issued, that a petition should be presented to the person who is delegated to exercise this authority of the Crown, and imposed on such person the duty of considering whether there is ground for an inquiry or not. It does not allow that individual to declare, that the person is of unsound mind; it calls on him to look through the case which is brought before him, to decide whether or not there is ground for further inquiry; if he finds that there is, the matter then goes to a jury of the country. Lord Chancellor Eldon laid it down as unquestionable, that the Crown has not, in England, the power of taking upon itself the care of any individuals, either as to their persons or their property, on the ground that they are of unsound mind, without the verdict of a jury.

It appears that the supposed lunatic had a right to be present at the execution of the commission. The law is so stated in Shelford at page 100 and, in *ex parte* Cranmer (1), The Lord Chancellor, Lord Erskine, in directing the issue of a commission said:—

> The party certainly must be present at the execution of the Commission. It is his privilege.

(1) (1806) 12 Ves. Jr. 446 at 455.

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Notwithstanding the existence of the safeguards mentioned above and of the right of traverse, Shelford, in a foot note at page 101, expressed himself as follows:—

> It is a subject of surprise, that such a rule as this should still prevail in matters of lunacy, and that a commission should be granted without requiring any notice to be given either to the party to be affected by it, or to some of his relations which are not concerned in the application; and that it is practicable for a comparatively secret tribunal to sit in judgment upon the actions and state of mind of a party, without his having an opportunity of preparing for his own vindication, and defending himself against the imputation of insanity. Notwithstanding the right to traverse, it is submitted, with great deference, that it would be proper to make a general order of Court, requiring reasonable notice in all cases to be given to the party, or to some of his relations or friends who are not concerned in the application, of the intention to apply for a commission of lunacy against him. Such notice, if the party possessed any reason, would enable him to oppose the application in the first instance, and would be no obstacle against the issuing of a commission in cases of absolute necessity.

In 1853 by Chapter 70 of the Statutes of the United Kingdom, 16 and 17 Victoria, section 40, it was provided, in part:—"Where the alleged lunatic is within the jurisdiction he shall have notice of the presentation of the petition for Inquiry." In such case the alleged lunatic had the right to demand an inquiry before a jury. Section 45 of the same Act provided:—

> Where the alleged Lunatic is not within the Jurisdiction the Inquiry shall be before a Jury, and no further or other Notice shall be necessary to be given to him than he would have been entitled to receive if this Act had not been passed.

It was conceded by counsel that in England since 1853 the alleged lunatic has been entitled to notice if within the jurisdiction.

There appear to be comparatively few reported cases in Ontario in which the power of the court to dispense with service on the alleged lunatic and the circumstances under which such power should be exercised are discussed. Counsel referred us to the following:—*Re Miller* (1), *Re Patton* (2), *Re Newman* (3), *Re Mein* (4), *Re Webb* (5), *Re Morrison* (6).

(1) (1868) 1 Ch. Ch. 214.
(2) 1 Ch. Ch. 192.
(3) 2 Ch. Ch. 390.
(4) (1869) 2 Ch. Ch. 429.
(5) (1906) 12 O.L.R. 194.
(6) (1919) 15 O.W.N. 338.

Re Miller was a decision of Spragge V. C. on an application to declare a person a lunatic. The judgment reads as follows:—

> The affidavits are very strong, and leave no reasonable doubt as to the alleged lunatic being of unsound mind; but he ought to have notice, and any persons, counsel or others, whom he may desire to see in reference to this application must have free access to him.

Re Patton was a motion to declare a person a lunatic made before Spragge V. C. who declined to make an order without personal service and adjourned the application taking the view that the material before him was insufficient. The application was renewed before Vankoughnet C. supported by an additional affidavit of another medical man and by evidence that the officers at the asylum would not allow service as the lunatic was suicidal and it might be dangerous to serve him. The Chancellor made the order without service on the alleged lunatic.

Re Newman and *Re Mein* were decisions of the Secretary following *Re Patton*. The respective headnotes accurately summarize the decisions and are as follows:—

> *Re Newman*—On an application to declare a person a lunatic without commission, an affidavit by an officer of a lunatic asylum that the alleged lunatic is in such a state of mind as that service on him would be dangerous and prejudicial to him, will not be held sufficient to dispense with personal service on him.
>
> Where, however, such affidavit was corroborated by others, and it was evident the party was a dangerous lunatic, personal service on him was dispensed with.
>
> In *re Mein*—Notice of a motion to declare a person a lunatic and to apply the estate of an alleged lunatic to his maintenance, &c., in a lunatic asylum, should be served on the lunatic personally, if it is practicable to do so, without danger to his health or state of mind. Where, therefore, a notice of such a motion had not been served on the ground that doing so would be useless in consequence of the state of the alleged lunatic; the Secretary directed that some medical man, other than the physician of the asylum, should visit the asylum and give evidence as to the state of the lunatic, and whether service could be effected on him.

In *Re Webb*, Mabee J. followed *Re Newman* and *Re Mein* and made an order dispensing with personal service on the alleged lunatic, but confirming an order for service on the Superintendent of the Asylum, on evidence that service "might dangerously excite the patient."

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It will be observed that all these cases were decided prior to 1909. Counsel for the appellant argues that since the enactment, in that year, of Chapter 37 of the Statutes of Ontario, 9 Edward VII, the power to dispense with service, if it existed theretofore, has ceased to exist. It is pointed out that with the passing of this Act the practice of Inquisition by Commission (which had continued up to that time, appearing last in R.S.O. 1897, Cap. 65) disappeared and that thereafter with immaterial verbal changes the practice by which a person may be declared a lunatic has been that now prescribed in *The Mental Incompetency Act*, R.S.O. 1950, c. 230 and particularly sections 5, 6, 7, 8 and 35 thereof.

Section 5 is as follows:—

5(1) The court upon application supported by evidence may by order declare a person a mentally incompetent person if the court is satisfied that the evidence establishes beyond reasonable doubt that he is a mentally incompetent person.

(2) The application may be made by the Attorney-General, by any one or more of the next of kin of the alleged mentally incompetent person, by his or her wife or husband, by a creditor, or by any other person.

(3) The alleged mentally incompetent person and any person aggrieved or affected by the order shall have the right to appeal therefrom.

(4) The practices and procedure on the appeal shall be the same as on an appeal from an order made by a judge of the court.

Section 6 provides that "where in the opinion of the Court the evidence does not establish beyond reasonable doubt the alleged mental incompetency" the Court may direct an issue and deals with the method of trial.

Section 7 reads as follows:—

7. An alleged mentally incompetent person shall be entitled to demand, by notice in writing to be given to the person applying for the declaration of his mental incompetency and also to be filed in the office of the Registrar of the Supreme Court, Toronto, at least ten days before the first day of the sittings at which the issue is directed to be tried, that any issue directed to determine the question of his mental incompetency shall be tried with a jury, and, unless he withdraws the demand before the trial, or the court is satisfied by personal examination of the mentally incompetent person that he is not mentally competent to form and express a wish for a trial by jury and so declares by order, the issue shall be tried by a jury.

Section 35 reads as follows:—

35. Subject to the approval of the Lieutenant-Governor in Council, the Rules Committee may make rules for carrying this Act into effect and for regulating the costs in relation thereto, and except where inconsistent with this Act or such rules, *The Judicature Act* and rules made thereunder shall apply to proceedings under this Act.

In my view, since the enactment of 9 Edward VII, c. 37, power to dispense with service, if it exists, must be found in *The Mental Incompetency Act,* in *The Judicature Act,* or in the rules made under one of such Acts. I can find no express provision in either Act which, in my opinion, permits an order of mental incompetency to be made without service of notice on the person whose status and property are to be affected. An examination of all the rules to which reference was made by counsel brings me to the conclusion that service of notice in such a case is imperatively required.

Reference may first be made to Rule 2(*m*) and Rule 11(1):—

2(*m*) In Rules 12 to 31 the words "Writ of Summons" and "Writ" shall include any document by which proceedings are commenced, and shall also include all proceedings by which a person not a party is added as a party either before or after judgment, e.g., proceedings in the Master's office and garnishee and third party proceedings.

11(1) When by any statute a summary application without the institution of any action may be made to the Court or a Judge in a manner therein provided, such application may also be made by originating notice but any security required by such statute shall be given.

There can be no doubt that the notice of motion to declare a person mentally incompetent is "a document by which proceedings are commenced" and, therefore, is included in the words "Writ of Summons" or "Writ" wherever such words appear in Rules 12 to 31.

Rule 16 is imperative in its terms. It requires the notice to be served personally in the absence of an acceptance of service by a solicitor who undertakes to appear. It permits substituted service in a proper case, but in the case at bar no order for substituted service was asked for or made, and I do not pursue the question whether such an order could properly have been made. It is necessary to consider the effect of the opening words of Rule 16 "Save as hereinafter provided." I can find no provision in any following rule which is apt to authorize the court to dispense with

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service on a person whom it is sought to have declared mentally incompetent, although a number of rules in certain circumstances vary the provisions of Rule 16. Examples are Rules 18, 21, 23, 24 and 101.

Rules 21 and 22 require consideration. They read as follows:—

> 21. Where a mentally incompetent person or person of unsound mind not so found by inquisition or judicial declaration, is a defendant, service on the committee of the mentally incompetent person or on the person with whom the defendant of unsound mind resides, or under whose care he is, shall, unless otherwise ordered, be deemed good service.
>
> 22. After service of the writ no further proceedings shall be taken against a defendant who is a mentally incompetent person and has no committee, or no committee except the Public Trustee, or against a defendant of unsound mind not so found, until a guardian *ad litem* is appointed.

It is argued for the appellant that the definition section of *The Judicature Act* should be resorted to in interpreting the word "defendant" in these rules. "Defendant" is defined by section 1(*g*) of *The Judicature Act* as follows—

> 1. In this Act * * *
>
> (*g*) "defendant" includes a person served with a writ of summons or process, or served with notice of, or entitled to attend a proceeding;

The Interpretation Act, R.S.O. 1950, c. 185, provides by section 32 that "the interpretation section of the Judicature Act shall extend to all acts relating to legal matters," and by section 31(*a*) provides that "Act" shall include enactment. It may be suggested that a rule duly passed is an enactment but I am not prepared to differ from the view expressed by Orde J. A. in *Bendjy* v. *Munton* (1), at 137 that the interpretation section of *The Judicature Act* is not by implication to be extended to the Rules of Practice. But even if it be held that Rules 21 and 22 are applicable only to actions brought against a person mentally incompetent whether so found or not, I think that by virtue of the concluding words of Rule 1:—"As to all matters not provided for in these Rules, the practice shall be regulated by analogy thereto" they furnish a strong indication that the rules do not contemplate that a person alleged to be of unsound mind shall be judicially so found, without notice

(1) [1932] O.R. 123.

to anyone on his behalf and without the Court having the assistance of someone in a position to oppose the application.

It was urged on behalf of the respondent that Rule 213 gives the court jurisdiction to dispense with notice in such a case as the one at bar. This rule reads as follows:—

213. Any application in an action or proceeding shall be made by motion, and unless the nature of the application or the circumstances of the case render it impracticable notice of the motion shall be given to all parties affected by the order sought.

In my view the words "application in an action or proceeding" are more apt to describe interlocutory proceedings than the commencement of a proceeding. The service of originating notices is specially dealt with in Rules 16, 215 (2), 601 and 602. The history of the precursors of Rule 213 does not, in my opinion, support the view that such rule was intended to permit the Court to deal, on originating notice, with matters affecting the rights of a party in a position analogous to that of a defendant in a manner as sweeping as would be possible in any action, without any notice to such party. I have particularly in mind the fact that from 1913 to 1928 the words "unless the nature of the application or the circumstances of the case render it impracticable" did not appear in Rule 213 and that from 1897 to 1913 the provision corresponding to such words was Rule 357, reading as follows:—

357. If satisfied that the delay caused by proceeding by notice of motion might entail serious mischief, the Court or a Judge may make any order *ex parte*, upon such terms as may seem just.

This rule replaced Rule 527 of the Consolidated Rules of 1888 which was substantially the same.

If it can be said that the words of Rule 213 are sufficiently general to appear to include all motions, the fact remains that the service of originating notices is specifically dealt with by Rule 16, which, as I have indicated, imperatively requires service thereof, either personal or substituted, and the general words of Rule 213 would yield to this special provision. *Generalia specialibus non derogant.*

It remains to be considered whether there is anything in the *Mental Incompetency Act* which by necessary implication shews that it was contemplated that proceedings to

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declare a person mentally incompetent could be taken *ex parte*. The scheme of all the relevant sections of the *Mental Incompetency Act* seems to me to contemplate that the alleged mentally incompetent person shall have the right to resist the application brought to so declare him. Such a right is implicit in the express statutory right given to such person to demand trial by jury (section 7) and to appeal (section 5(3)). It appears to me to be unthinkable that the legislature would expressly give the alleged mentally incompetent such rights unless it contemplated that he, or some one on his behalf, should have notice of the proceedings. These rights are not given conditionally upon his hearing by chance that the proceedings are afoot. They would be illusory indeed if the whole proceedings could be carried on in secret so far as the alleged mentally incompetent was concerned. If the matter appeared to me to be doubtful I would resolve the doubt in favour of requiring that notice be given to a person of proceedings the result of which may be to alter his status, to deprive him of liberty of action and to remove all his property from his control. To establish an exception to the elementary rule *"audi alteram partem"*, clear and unambiguous authority is required and I can find none. As is said in Broom's Legal Maxims, 10th Edition, at page 67:—

> "The laws of God and man," said Fortescue J., in *Dr. Bentley's Case*, "both gave the party an opportunity to make his defence, if he has any." And immemorial custom cannot avail in contravention of this principle.

In the only reported case since 1909 to which we were referred by counsel, *Re Morrison* (1), the note reads, in part, as follows:—

> Britton J. in a written judgment, said that an application to have a man declared a lunatic or incompetent to manage his business should at least be upon notice to the supposed incompetent of intention to make the application. Service of this notice should be proved.

To permit a person's rights to be dealt with in a judicial proceeding unless he has had an opportunity of being heard is contrary to the fundamental principles of the law, and appears to me particularly undesirable in a case such as this in which, if the order in appeal is upheld, the appellant who has been deprived, unheard, of his status and property is left without remedy except such as is afforded

(1) (1919) 15 O.W.N. 338.

by section 9 of *The Mental Incompetency Act*. Except by leave of the Court he can not even be heard until a year has expired from the date of the order declaring him incompetent and, when he does obtain a hearing, instead of it lying upon those who question his competency to prove their case beyond a reasonable doubt he must assume the burden of satisfying the court that he has become mentally competent and capable of managing his own affairs. I find this prospect particularly disquieting in the case at bar where the appellant has no control over any of his own property and, for reasons which do not appear in its oral judgment, the Court of Appeal has not permitted recourse to be had to such property for the purpose of paying the appellant's costs of taking the appeal which the Statute expressly authorized. The way of a suitor is not easy when all his assets are in the hands of those who oppose his suit.

I have reached the conclusion that Barlow J. had no jurisdiction to entertain the motion without service of notice upon the appellant or properly authorized substituted service and that the order of December 8, 1950, must be set aside.

If I had found that the court had jurisdiction to dispense with service of notice of the proceedings I would, with the greatest respect, have been of opinion that the material before Barlow J. was insufficient to warrant the making of either an order dispensing with service or an order of mental incompetency. The learned Judge had before him three affidavits. The affidavit of the applicant was sworn on December 1, 1950. It does not deal with the question of service nor does it indicate that she had seen the appellant since the month of October when she describes the conduct on his part which is described in the affidavit of Dr. Spence. In considering the affidavits of Dr. Spence and Dr. Boyer it is necessary to bear in mind the provisions of Rule 293:—

> 293. Affidavits shall be confined to the statement of facts within the knowledge of the deponent, but on interlocutory motions statements as to his belief, with the grounds therefor, may be admitted.

The affidavit of Dr. Spence offends against this rule. In paragraph 2 he speaks of the appellant having "a history of having had one depression during my absence with the

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Canadian forces overseas." Even on an interlocutory application such a statement would be inadmissable unless the source of the deponent's information was given. Paragraph 4 of the affidavit is hearsay. In it Dr. Spence deposes to information given to him by one of the doctors at the Sanitarium where the appellant was a patient. When those parts of the affidavit which are inadmissible are disregarded what remains is a statement that the deponent examined the appellant on the 18th of October, 1950, and then found him disturbed mentally and under delusions as to the proximity of the North Koreans and "that everything about him was atomic sensitive and had to be de-ionized which was accomplished by hitting the objects with an old cavalry sword" and that he was acting in a violent manner and had done much damage to the contents of the dwelling house. There is nothing in the affidavit to indicate with any certainty that the deponent saw the appellant on any occasion subsequent to the 18th of October. His affidavit was sworn on the 2nd of December, 1950.

The affidavit of Dr. Boyer was sworn on the 6th of December, 1950. He tells of having examined the appellant on the 24th of October, 1950. He states that the appellant "was friendly but arbitrary and undoubtly psychotic," that he "was quite delusional but that there was no constancy in any delusion except the effect of electrical influences". He expresses the opinion that the appellant "has a manic reaction, the cause of which is not apparent" and "that he needs hospital and custodial care." There is nothing in the affidavit to indicate that the deponent saw the appellant on any date other than the 24th of October, 1950.

Both doctors state in their affidavits that in their respective opinions the appellant "is by reason of his mental condition unable to transact ordinary business matters or to give proper consideration to the protection and conservation of his estate" and that "it would be inadvisable to serve on the said Douglas Guy Hobson Wright the notice of motion for the appointment of Committees of his person and estate and supporting affidavit. To do so would in all probability exaggerate his disturbed mental condition and be harmful to him."

It is to be observed that neither doctor expresses the opinion that service of the papers would be attended with danger to the appellant or that he lacked the mental capacity to understand the nature of the proposed proceedings and to determine whether or not he wished to instruct counsel to oppose them. If one contrasts this material with that which was before the court in the cases of *Re Patton*, *Re Newman* and *Re Mein* (*supra*) it at once becomes apparent how far it falls short of what was required in those cases.

There are other matters as to which it was, I think, necessary for the court to have information which are not dealt with in the affidavits at all. The physical health of the appellant is not referred to. The cause of the alleged mental trouble is not given. Nothing is said in the way of prognosis. The court is left without information as to whether the recovery of the alleged incompetent is probable or otherwise and if probable, within what interval of time it is likely to occur. Nothing is said as to the ability or otherwise of the appellant to understand the nature of the proposed proceedings or to instruct counsel. The lack of any admissible evidence as to the condition of the appellant at any time subsequent to the 24th of October, 1950, was in itself, in my opinion, a sufficient reason for refusing to make any order.

It is scarcely necessary to say that if an application of this sort is to be allowed to be made *ex parte* it is the duty of the court to be extremely cautious to protect the person whose status and property are being dealt with without his knowledge and without his having any opportunity to make answer. Even if the statute did not, as it does, expressly require as a condition of making an order that the court be satisfied that the evidence established beyond a reasonable doubt the fact of mental incompetency, I would have regarded the evidence as falling far short of the minimum necessary to justify the making of an order.

In view of the conclusion which I have reached as to the order of December 8th it becomes unnecessary for me to deal with the order of December 22nd which would fall with the earlier order, but as I understand that I have the misfortune to differ from the other members of the court

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as to the order of December 8th, I desire to add that if I had been of opinion that such last-mentioned order should stand I would have agreed with my brother Kellock for the reasons given by him, that paragraphs 5 and 8 (*a*), (*b*) and (*d*) of the report of the Master of December 14, 1950, and so much of the order of Barlow J. of the 22nd of December, 1950, and of the order of the Court of Appeal, as relates to such paragraphs, should be set aside and that the matters covered by the said paragraphs should be remitted to the Master for further consideration and I would have agreed with the order as to costs proposed by my brother Kellock.

For all the above reasons I would allow the appeal and set aside the order of the Court of Appeal and the orders of Barlow J. of December 8, 1950 and December 22, 1950, *in toto*. As the other members of the Court are of a different opinion nothing would be gained by my discussing the question as to the order which should be made as to costs in the unusual circumstances of this case.

Appeal from the judgment of the Court of Appeal in so far as it dismissed the appeal from the order of Barlow J. of Dec. 8, 1950, dismissed; in so far as it dismissed the appeal from the order of Barlow J. of Dec. 22, 1950, allowed.

Solicitors for the appellant: *Duncan & Bicknell.*

Solicitors for the respondent, Laura May Wright: *MacDonald & MacIntosh.*

Solicitors for the respondent, Guaranty Trust Company of Canada: *Mungovan & Mungovan.*