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*Feb. 21
*June 28

TEODOR SEMANCZUK (also known as Theodore Semanczuk) (*Defendant*) APPELLANT;

AND

MARY SEMANCZYK (also known as Mary Semanczuk) (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Appeal—Evidence—Husband and wife—Real Property—Property claim by wife raised non-support issue—Relevancy of wife's behaviour—Admissibility of husband's evidence—Trial by judge alone—Question of Fact—Principles governing appellate court.

The respondent in an action against her husband alleged that certain lands had been purchased with moneys earned by their joint efforts under a parol agreement whereby she was entitled to a one-half interest; that they had married in 1931 and that he deserted her in 1941 and had since refused to support her. At the trial questions were put to her in cross-examination, which might tend to indicate that she had committed adultery and had been intimate with several men, which she denied. The trial judge rejected the evidence of the respondent, accepted that of the appellant and dismissed the action. The Court of Appeal for Manitoba by a unanimous judgment reversed the trial judge and held that the questions put the respondent in cross-examination were prohibited by s. 8 of *The Manitoba Evidence Act* and were irrelevant as the case was not one in which the character of the parties was involved: that the appellant was bound by the respondent's denials and his evidence in contradiction was improperly allowed in and that, as it was impossible to ascertain

*PRESENT: Taschereau, Rand, Kellock, Estey and Locke JJ.

to what extent the trial judge may have been influenced in his findings by the inadmissible and irrelevant evidence adduced, the advantage of his having seen and heard the witnesses was not sufficient to explain or justify his conclusion.

Held: 1. That the Statement of Defence put in issue the question of non-support and was so treated by both parties. The behaviour of the wife thus became a relevant matter to be considered and the appellant's evidence, admitted without objection, was properly admitted.

2. That upon this issue the respondent might properly be cross-examined as to her associations with other men, restricted however by the provisions of s. 8 of *The Manitoba Evidence Act.*

3. That even if the questions asked in cross-examination offended against the section it could not have affected the judgment of the trial judge in deciding upon the veracity of the parties in view of the husband's evidence and of the admitted fact that the wife had been living in adultery and had given birth to an illegitimate child.

4. That the questions were answered by the wife without objection and it was for her to claim the protection of the section. *Hebblethwaite* v. *Hebblethwaite* L.R. 2 P & D 29.

5. That the questions to be determined were questions of fact and there was nothing in the record to indicate that the trial judge in reaching the conclusion that the respondent's story was not worthy of credence acted upon any wrong principle or was influenced by irrelevant matter. *SS. Hontesroom* v. *SS. Sagaporack* [1927] A.C. 37 at 47; *Yuill* v. *Yuill* [1945] A.C. 15 at 19; *Powell* v. *Streathem Manor Nursing Home* [1935] A.C. 243 and *Watt or Thomas* v. *Thomas* [1947] A.C. 484 at 487-8 referred to.

Decision of the Court of Appeal for Manitoba (1954) 12 W.W.R. (N.S.) 1 reversed and judgment of trial judge restored.

APPEAL from a judgment of the Court of Appeal for Manitoba (1) which reversed the judgment of the trial judge, Campbell J., by which the claim of the respondent, the plaintiff in the action was dismissed.

David Levin, Q.C. and *Jack Chapman* for the appellant.

Maurice Arpin for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba (1) which reversed the judgment delivered at the trial by Campbell J., by which the claim of the respondent, the plaintiff in the action, was dismissed.

(1) (1954) 12 W.W.R. (N.S.) 1.

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The parties are husband and wife, having been married in Winnipeg in the year 1931. The Statement of Claim reads in part:—

2. That at the time of the said marriage and/or prior and subsequent thereto it was agreed between the Plaintiff and the Defendant that whatever money or property either or each of them had was to be the joint property of the Plaintiff and the Defendant and any property they subsequently acquired would be pooled and the same was to be the joint property of the Plaintiff and the Defendant in equal shares.

3. In the alternative to the foregoing paragraph the Plaintiff alleges that the Plaintiff and the Defendant at the time of their marriage entered into a Partnership Agreement whereby it was agreed between them that they would pool all their resources and any monies and/or property of any description which either the Plaintiff or the Defendant received from any source whatsoever, the same was to go into the partnership enterprise and become the joint property of both of them and the losses and profits were to be shared equally between the Plaintiff and the Defendant.

It was alleged that three parcels of land had been purchased pursuant to the agreement referred to in paras. 2 and 3, that this had been done with moneys earned through the joint efforts of the parties, that they were the property of the parties in equal shares, and that, as to one half interest, the appellant was a trustee for the respondent. It was further alleged that the appellant had deserted the respondent in July of 1940, that they had not since lived together and that the appellant refused and neglected to maintain and support her. The prayer for relief asked a dissolution of the partnership, a declaration as to the respondent's interest and an accounting. Other than the allegations as to the marriage and as to the title to two of the parcels of land, all of the further allegations in the Statement of Claim were put in issue by the Statement of Defence.

The evidence given by the respondent as to the various agreements referred to in paras. 2 and 3 of the Statement of Claim was extremely vague. The parties are Ukrainians and both speak English imperfectly. While an interpreter was available and at times assisted in the taking of the evidence, most of it was given in English. The evidence of the respondent as to the alleged agreements may be summarized as follows. After saying that after their marriage she had worked for other persons in various capacities and had given the money to her husband, in answer to a question as to why she did this the respondent said:—

He asked me, he wanted money and he keep it, and after we buy something, we buy both together.

Then, asked if there had been any discussion between them before or after the marriage as to what would be done with the moneys earned by the two of them, she answered:—

> No. He say at the time we working both and we buy both and we got both.

When these conversations took place was not stated with any more particularity. In 1934, apparently by their joint efforts, they had planted a crop of potatoes on a piece of rented land in the Municipality of Fort Garry and the respondent said that she and her husband decided to trade the crop for a three acre parcel of land in the Municipality. As to this, she said:—

> He say we give him (the owner) crop and we buy property, the three acres of land and we put it in both names. I say we work both and we get it both.

The land referred to was the first of the three parcels of land referred to in the Statement of Claim and the respondent's story regarding it is supported by the evidence that, when title to the three acre parcel was obtained, the certificate showed both parties as owners.

It was shown that in 1935 the parties went to a mining camp at McKenzie Island, Ont. and while there were both employed, though the respondent did not live with the appellant continuously throughout this period, there being times when they were separated.

In August of 1937, according to the respondent, her husband insisted upon entering into a separation agreement and took her to a lawyer at Red Lake, Ont., by whom such an agreement was prepared. This document was not produced. At the same time, the respondent signed a transfer of her interest in the three acres at Fort Garry and received a sum of $515 from her husband. The receipt read "Re cash payment under separation agreement." Either then or prior thereto, the respondent also received a certificate for 400 shares of Frontier Red Lake Gold Mines Ltd. which she apparently regarded as part of the consideration for the transfer of her interest in the lands. Despite the making of the agreement, however, they resumed living together and the respondent claimed that she returned the $515.

Thereafter, the appellant purchased the two other parcels of land in the Parish of St. Vital; the certificate of title for the first of these, which was produced, bears date

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January 30, 1941, and for the second July 11, 1941, and in each the appellant appears as the owner. The respondent's evidence relating to her alleged interest in these parcels of land, other than that above quoted, was that while at McKenzie Island she gave her husband what money she earned and that when the first of the two mentioned properties, some six acres in extent, was purchased:—

> He said we have to take that property and we get a money order and we go to the Post Office mail money to Winnipeg, and I don't know what should be but I know we both buy that property.

and, when asked as to whether they had had any discussion as to whose property it was to be, she said:—

> He say all the time it was mine and his, both.

and that later he had told her he had bought the lands in the names of both of them. She then said that she and her husband had come to Winnipeg in 1940 and bought the second of these parcels some two or three years after the six acre parcel had been bought and that she had gone with him to the lawyer when the purchase was made, bringing $2,000 which her husband had withdrawn from funds in the bank which, she said, were their joint property and that, as to this purchase, he had said that we had "bought for both."

While the respondent did not explain in the course of her evidence the reason for the separation agreed upon in 1937, she gave affirmative evidence in chief as to disagreements between them at various times at McKenzie Island when, she claimed, he had struck her. In 1941, after they had come back from McKenzie Island, they had separated, the respondent saying that her husband had refused to live with her and had left.

It was in the course of the cross-examination of the respondent that questions were directed to her which, in the opinion of the learned judges of the Court of Appeal who gave reasons for judgment in this matter, should not have been permitted and affected the finding of the learned trial judge as to her veracity. Presumably for the purpose of explaining the disagreements between the parties, to which reference had been made by the respondent in her evidence in chief, and the undoubted fact that the parties had not lived together since 1941, the respondent was asked if she had had "an affair" with one Richko, shortly after they were married, and with one Benes at Red Lake. As to

Benes, she was asked whether it was true that her husband had come home from work one day and found Benes in bed in the house, which she denied. Asked as to whether there was a man by the name of Piliuk living on Schultz Street in the house where she was living in 1941, she said at first she did not know him but then admitted that she was living with him and that she had a child born in 1942 of which he was the father.

The only other evidence given on behalf of the respondent in an effort to support the allegations as to the agreements was that of one Mary Verstraete, a neighbour in Fort Garry, who said that the appellant had told her at the time that he was going to buy the three acre property for himself and his wife.

The appellant's evidence was a complete contradiction of that of his wife as to the alleged partnership agreement, or any agreement before or after their marriage, as to the joint ownership of property. As she had worked with him in the raising of the crop on the rented property in 1934, he had, however, taken title to the three acre parcel in their joint names and had bought out her interest at the time the separation agreement was made in 1937. In answer, apparently, to the respondent's version of the cause of their disagreements, he gave evidence as to various difficulties he had had with her over her relationship with other men, commencing with Richko who, he said, had been attentive to his wife shortly after their marriage. Explaining the disagreement in 1937 at McKenzie Island, he said that Benes had been going around with his wife and that he had found him in bed with her and had got into a fight with him, in consequence. While they had resumed living together after entering into the separation agreement, they again quarrelled and the respondent left his house and, according to the appellant, was supported for a period by Benes. All of this evidence was given without objection, as well as an account of a discussion he had had with his wife within a year before the trial when the latter was accompanied by her child which, she informed him, was not his. Speaking further of her relations with Benes, he said that in 1939 this man had left McKenzie Island and gone to Winnipeg and his wife had followed him and had not returned until the Fall of the year. As to the purchase of the properties in

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1941, the appellant said that the moneys used were his own, nothing being contributed to their purchase by his wife, and he denied any agreement that she should have any interest in either of them, or that she had returned any part of the $515 to him. According to him, on August 10, 1941, he returned to his home in Winnipeg after an illness and, having decided to move to other quarters, asked his wife to accompany him and she refused. From that date onward, they had lived apart.

The respondent was not called in rebuttal and, other than the denials given by her in cross-examination to the questions asked regarding a suggested affair with Richko in 1931 and as to her being friendly with Benes and as to his having been found in bed in her husband's house, there was no denial of the evidence of the appellant that she had left his home shortly after the making of the separation agreement and been supported for a period of time elsewhere by Benes, that she had left her husband for several months in 1939 and gone to Winnipeg after Benes had moved there, and as to the conversation when, allegedly, she had told him that he was not the father of her child.

Campbell J. found that there never had been any agreement made between the parties, as alleged in the Statement of Claim, and said that he did not believe the respondent's evidence regarding any of the matters in dispute and accepted that of her husband. The learned judge referred to the fact that the respondent had been too friendly with a number of men and that the break-up of the home was attributable mainly to Benes. It was, no doubt, because the respondent had pleaded that the appellant had refused to maintain her and had tendered evidence in support of that claim (though no substantive relief had been claimed in respect of it) and that the appellant had given evidence as to the reason for their separation that the learned judge dealt with this aspect of the matter.

In the Court of Appeal, reasons for judgment were delivered by Coyne and Beaubien JJ.A Both of these learned judges were of the opinion that the questions asked in cross-examination in regard to Richko and Benes should not have been permitted, or the evidence regarding them given by the appellant received. As they considered the subject matter of the cross-examination to be irrelevant, it

was their opinion that the appellant was bound by the answers made. Beaubien J.A., with whom the other members of the Court agreed, considered that the questions to which I have referred were prohibited by s. 8 of *The Manitoba Evidence Act* (R.S.M. 1940, c. 65), which reads:—

> No witness in any proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

That learned judge, after referring to a passage in the judgment of Lord Thankerton in *Watt* v. *Thomas* (1), in which certain of the circumstances justifying an appellate court in reversing findings of fact at the trial are mentioned, said in part:—

> It being impossible to ascertain to what extent he, in his finding that "there never was any agreement between the parties", may have been influenced by the inadmissible and irrelevant evidence adduced, I must, with great respect, say I am not satisfied "that any advantage enjoyed by" him "by reason of having seen and heard the witness" is sufficient to explain or justify his conclusion within the meaning of the rules laid down by Lord Thankerton.

After considering the evidence, Beaubien J.A. reached the conclusion that the proper inference to be drawn from it was that an agreement of the nature referred to in para. 2 of the Statement of Claim had been made.

The formal judgment of the Court of Appeal declares the parties to be the owners of the three parcels in equal shares.

While the usual course followed by appellate courts when setting aside judgments on the ground of the improper admission or rejection of evidence is to order a new trial, since no mention is made of that subject in the reasons for judgment delivered, I assume it was not discussed in the argument in the Court of Appeal.

While both of the learned judges who delivered reasons in this matter were of the opinion that the questions directed to the respondent on cross-examination, to which reference has been made, were of the nature of those prohibited by s. 8 of the *Evidence Act*, and that the question of the conduct of the respondent was irrelevant to any issue in the action, no mention is made in either judgment of the claim

(1) [1947] A.C. 484 at 487-8.

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advanced in para. 14 of the Statement of Claim that the parties had lived separate and apart since the year 1940 and "that the defendant has refused and neglected to maintain and support the plaintiff", which was put in issue by the Statement of Defence. As I have said, the respondent gave evidence in chief as to alleged acts of cruelty on the part of her husband while they were at McKenzie Island and of the circumstances under which she claimed he had deserted her and of the fact that since they separated he had not contributed to her support. While no substantive relief was claimed by way of maintenance, the circumstances which gave rise to the separation and the consequent refusal of support were treated as matters in issue by both parties at the trial and the appellant directed evidence to them. The main cause of the ultimate separation, as found by the learned trial judge, was the relations of the respondent with the man Benes, who appears to have caused trouble between the parties on various occasions between the years 1937 and 1941. On that issue, it is my opinion that the behaviour of the respondent with Benes was a relevant matter to be considered and that the appellant's evidence as to the occurrences at McKenzie Island and elsewhere, to which I have referred and which were admitted without objection, was properly admitted. I am further of the opinion that upon this issue the respondent might properly be cross-examined as to her association with other men, restricted, however, by the provisions of s. 8 of the *Evidence Act*.

If it be assumed that the question asked in cross-examination regarding Benes offended against s. 8, I think the fact that it was asked or answered cannot have affected the judgment of the learned trial judge in deciding upon the veracity of the parties. In view of the evidence of the husband as to the respondent's relations with Benes at McKenzie Island and of the admitted fact that, at the time of the trial and for at least ten years previously, the respondent had been living in adultery with the man Piliuk and had given birth to an illegitimate child, I find it impossible to believe that the questions to which so much importance has been attached affected the matter in any way.

It is to be noted that the question addressed to the respondent regarding Benes was answered without objection on her part. It was for the witness to make the claim to

the protection afforded by the section (*Hebblethwaite* v. *Hebblethwaite* (1). Had she admitted that she had committed adultery, the effect of the section would not have been to render the evidence inadmissible (*Allen* v. *Allen* (2): *Welstead* v. *Brown* (3)). Here the question which has been construed as asking her if she had been guilty of adultery with Benes was answered in the negative. Had the fact that that question, and the other questions directed to her regarding Benes, had been asked been made the basis of an application for a new trial, the appeal, in my opinion, would have been rejected on the ground that there had been no "substantial wrong or miscarriage of justice" within the meaning of s. 28 of *The Court of Appeal Act* (R.S.M. 1940, c. 40).

The questions to be determined in this case were questions of fact. The issue depended upon the judge's finding as to the truth or falsity of the evidence given by the parties. I can find nothing in the record to indicate that, in reaching the conclusion that the respondent's story was not worthy of credence, the learned trial judge acted upon any wrong principle or was influenced by any irrelevant matters. He had the great advantage, which the Court of Appeal had not and we have not, of hearing these parties give their evidence, observing their demeanour and judging as to their veracity, with this assistance.

In *SS. Hontestroom* v. *SS. Sagaporack* (4), Lord Sumner said in part (p. 47):—

> Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

In *Yuill* v. *Yuill* (5), Lord Greene M.R., referring to cases where the question was one of the veracity of the witnesses, said that it could only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. To the

(1) (1869) L.R. 2 P. & D. 29.
(2) [1894] P. 248 at 255.
(3) [1952] 1 S.C.R. 23.
(4) [1927] A.C. 37.
(5) [1945] P. 15 at 19.

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same effect is the judgment of the House of Lords in *Powell* v. *Streatham Manor Nursing Home* (1), and that of Viscount Simon in *Watt* v. *Thomas,* above referred to, at p. 486.

In my opinion, the judgment at the trial in this case should not have been set aside and I would allow this appeal, with costs throughout.

Appeal allowed, judgment of trial judge restored with costs throughout.

Solicitor for the appellant: *David Levin.*

Solicitors for the respondent: *Greenberg & Arpin.*

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(1) [1935] A.C. 243.