1926
*May 4.
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FREDERICK C. MORTON (PLAINTIFF) . . . APPELLANT;

AND

MICHAEL WILKINSON BRIGHOUSE (DEFENDANT) . . . . . } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trust—Trustee—Accounting—Moneys received by nephew of deceased—Evidence of intention to make gift to nephew—Applicability of Strong v. Bird (L.R. 18 Eq. 315).

One S. B. was owner of a large tract of land and other assets and, being a bachelor and having no relatives in this country, brought out in 1888 from England his nephew, the respondent. The latter lived with his uncle, assisted him in his business and eventually was allowed a very large measure of control over his affairs. In 1906, S. B. made his will leaving the bulk of his estate to the respondent; and in 1907 he executed a power of attorney, under which the respondent was formally given powers to act for him in the management of his affairs. In 1908, S. B. went to a hospital, and shortly thereafter left for England where he died in 1913. While there, in 1912, S. B. changed his will in favour of some of his English relatives, but still left a substantial part of his estate to the respondent. In an action by the executor of the will of 1912 to compel the respondent as trustee for the estate of his uncle to account for rentals, profits and moneys received by him during the lifetime of his uncle, for, as alleged, the benefit of the latter, the defence was set up that the deceased evidenced his intention to permit the respondent to retain said moneys free from any condition that he should be regarded as a trustee with respect thereto. The language of the deceased, as reported by the respondent in his evidence, imports a declaration of a then present intention by the deceased to give all his real and personal property to the respondent; and that the respondent was to do as he pleased with it and was to be under no obligation to account for it. The trial judge held the respondent was not accountable on the ground that there had been a gift to him of these moneys, that the intention to give had remained unaltered down to the time of his death and that his judgment must be governed by the decision in *Strong* v. *Bird* (L.R. 18 Eq. 315). The judgment of the trial judge was affirmed, the Court of Appeal being equally divided.

Held, that the principle laid down in *Strong* v. *Bird* was not applicable to the circumstances of this case and that the respondent was accountable for all moneys of the deceased received by him since 1907, excepting those in respect of which the intended gift above mentioned was completed within the lifetime of the deceased.

Judgment of the Court of Appeal (36 B.C. Rep. 231) reversed.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Newcombe and Rinfret JJ.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming on equal division of the court the judgment of the trial judge and dismissing the appellant's action. The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

C. W. Craig K.C. for the appellant.

E. P. Davis K.C. and *E. F. Newcombe* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret J.J.) was delivered by

DUFF J.—This is one of those cases in which there is, perhaps, some risk of sympathy with a claimant's disappointment in his legitimate expectations leading one into a departure from the sound application of legal principles. The respondent's claim against the estate of Sam Brighouse is substantially stated in the sixth paragraph of the statement of defence, in these words:—

> In the alternative and in further answer to the whole of the said statement of claim this defendant says that he was told by the said Sam Brighouse at or about the date of the said alleged power of attorney that he this defendant was to consider all the real and personal property of the said Sam Brighouse as his own and that he was to do as he pleased with it and that he was to be under no obligation whatever to account for any moneys collected under the said alleged power of attorney.

and this claim ultimately rests upon this passage in his own evidence given at the trial:—

> The witness: I had been doing his business right along, and he told me to take everything, and use it in any way I pleased, his property, I could sell it if I wanted to for cash, or use it for my own use, and for himself, and even if I wanted to go into business, I could sell his property in order to do that. He said he had given instructions to Chaldecott —I had been up to the office the day previous, and he had read his will to me, this was 1906, and said everything was coming to me, and he said he had given authority to Chaldecott to make out a power of attorney, and the reason he did that was so if I did sell this property, I would have power to put it in the Registry Office, and against other people. It was not as a power of attorney for me to use it, because I had been practically doing that right along.
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> Mr. Davis: Q. Now had you any conversation with him at this time which you speak of after leaving Chaldecott's office, at the time you say he read the will and so on?—A. Yes, that same conversation which I have just mentioned now.

(1) (1925) 36 B.C. Rep. 231; [1925] 3 W.W.R. 412.

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Q. That was the time?—A. That was the time. Of course that has happened often, but this was more particular, because he said he was giving up everything, he wanted little for himself, just a little to eat, wear and drink, and little of that, and the balance I could do as I liked with. He was giving up all, and leaving the whole thing to me.

We need not concern ourselves with any other part of the evidence. Brighouse made a will in 1906, by which, after leaving annuities of comparatively trifling amount, he bequeathed his residuary estate to the respondent. In 1907, he executed a power of attorney, under which the respondent was formally given most ample powers to act for him in the management of his affairs. The respondent himself says under this power of attorney he managed the property of Brighouse, executed leases of the real property, received the rents and made investments. In all this, he says, he acted as the representative of Brighouse. In passing, there is a remark which, I think, ought not to be omitted. In reading the evidence of the respondent, I have been impressed by his obviously straightforward desire to state the facts as he remembers them.

In 1908, Brighouse had a serious operation, after which, according to the evidence of the respondent, his mental powers suffered a decline, and, as a result of which, he eventually became demented. In 1911, Brighouse executed a codicil to the will of 1906, making unimportant alterations in the particular legacies, but leaving the respondent still the beneficiary of his residuary estate. In 1912, Brighouse left Vancouver for England, and in the same year he executed a new will, the effect of which will be fully stated. In 1913 he died. The question with which this action is immediately concerned is whether the respondent is liable to account, at the suit of the executors and trustees of the will of 1912, for moneys collected by him on behalf of Sam Brighouse from the year 1907 on. The learned trial judge held he was not accountable, on the ground that there had been a gift to him of these moneys, and that the intention to give had remained unaltered down to the time of his death, and that his judgment, therefore, must be governed by the decision in *Strong* v. *Bird* (1). In the Court of Appeal, Mr. Justice Martin accepted the conclusion of the learned trial judge, and

(1) L.R. 18 Eq. 315.

Mr. Justice M. A. Macdonald agreed with him in a judgment based in principle upon the authority which the learned trial judge applied, while the learned Chief Justice and Mr. Justice Galliher thought that the respondent had failed to establish his claim, and that the judgment of the trial judge should be reversed.

It will be convenient first to consider whether the principle of *Strong* v. *Bird* (1) can be applied in this case. In substance, Sir George Jessel, in *Strong* v. *Bird* (1), held that a testator, having manifested an intention in his lifetime to forgive an existing debt, an intention which continued unchanged down to his death, and having appointed the debtor his executor, the debt having by this latter act become extinguished at law, equity would regard the gift as complete. In a later case, the rule was applied to the gift of a specific chattel, it having been proved that the intention to give continued down to the testator's death. Is the principle of these decisions applicable to the circumstances of this case? The claim, as stated in the pleadings, is that the respondent was, by the declaration of Brighouse, to consider the real and personal property of Sam Brighouse as his own, and that he was to do as he pleased with it, and was to be under no obligation to account for it. As the respondent, in his testimony, says, he was to take everything, and more particularly "he," Sam Brighouse,

> was giving up everything, he wanted little for himself, just a little to eat, wear and drink, and little of that, and the balance I could do as I liked with. He was giving up all, and leaving the whole thing to me.

The language of Brighouse thus reported by the respondent imports plainly a declaration of a present intention to give all his real and personal property to the respondent, and that is the basis upon which the claim is rested in the pleadings. The foundation of the claim is a present gift of his real and personal property.

As regards personal property, immediately reduced into possession by the respondent, the gift was no doubt effective. But, in attempting to apply the principle of *Strong* v. *Bird* (1), we encounter difficulties of a most serious nature. First, is there evidence of an intention to give continuing down to the death of Brighouse? This seems

(1) L.R. 18 Eq. 315.

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difficult to maintain, in view of the will of 1912. That will was dated the 13th of November, 1912. By it, Michael Wilkinson, the respondent, is the beneficiary under a specific devise of the farm at Vancouver. That specific piece of property is segregated from the estate, and given to the respondent. All the rest of the property, real and personal, the testator gives to his trustees, to be divided among others. There can be no possible doubt as to the meaning of the testator's language. When he speaks of the "remainder of my real estate," he refers to the real estate still standing in his name, of which he was still in law and in equity the owner, notwithstanding the incomplete gift of 1907. So, with regard to his personal estate. This disposition of his property it is at least difficult to reconcile with the notion that he at that time considered he had divested himself by a gift *inter vivos* of all his property in favour of the respondent; with the intention, that is to say, that the gift of 1907, deposed to by the respondent in the passages above set out, should stand and have effect.

But there are other difficulties. As already mentioned, the gift relied upon is a present gift of everything. It could not legally take effect, except in the limited way I have mentioned. It is at least very questionable whether the language actually imports any intention to give after acquired property, the produce of the property presently given, because that would be logically inconsistent with the assumption that everything was passing *in presenti*. Assuming, however, an intention to give after acquired property to be implied, a gift of after acquired property would, of course, be inoperative. After acquired property can be transferred where the transfer is for valuable consideration—to which equity will give effect as a contract; but a gift of after acquired property cannot have such effect. In principle, *Strong* v. *Bird* (1) would appear to have no application in such a case, and that appears to be in substance the view taken by that great master of law, Mr. Justice Parker, *In re Innes* (2). A gift of after acquired property could have no meaning except as a promise to give on a future occasion, and that, Parker J. says,

(1) L.R. 18 Eq. 315.

(2) [1910] 1 Ch. 188, at pp. 192 and 193.

would be outside the principle of *Strong* v. *Bird* (1). The whole passage is valuable as an exposition of that principle, and I cite it in full:—

That part of my decision turns really upon a question of fact, but another point which is raised is one partly of fact and partly of law. It has been held in the case of *Strong* v. *Bird* (1) that where a testator has attempted to forgive a debt by telling his debtor that the debt is forgiven, though that cannot at law operate as a release, yet there is a present intention of giving, which, if the debt is subsequently released, may be effectual, and that the appointment of the debtor subsequently as an executor is a sufficient release at law to give validity to the gift which was otherwise imperfect. That is a decision of Sir George Jessel in 1874, and it has been acted upon, I think, ever since, and recently has been somewhat extended by a decision of Neville J. in *In re Stewart* (2). The way in which the principle enunciated by Sir George Jessel has been extended is that it had been made, according to Neville J's. decision, applicable not only to the release of a debt, but in order to perfect an imperfect gift of specific property. In the case of *In re Stewart* (2), the testator had given his wife certain bonds and other securities, as to which there was no doubt, and these securities had been enumerated in a document at the foot of which the testator had written, in pencil, "Coming in next year £1,000," and on the evidence Neville J. construed those words as an announcement of the intention to give a further £1,000 to his wife the next year. It appears that one of the bonds which had been handed over was paid off, and £500 came, in respect of it, into the hands of the testator. In reinvesting that next year he added rather over £1,000 to it and bought three further bonds. He took the contract note for those three further bonds to his wife, and he handed it to her in an envelope with the broker's letter announcing the purchase, and he said, "I have bought these for you." Neville J. held that that was a present intention to give which would have operated as a gift but for the fact that certain things remained to be done which were not done, so that the gift was imperfect. But the testator subsequently died, having appointed his wife his executrix, and Neville J. held that the principle of *Strong* v. *Bird* (1) was applicable, and that, there having been an actual attempted gift, imperfect though it might have been, the subsequent appointment of the lady as executrix perfected that gift by vesting in her the legal interest in the property which was the subject of the action.

It is attempted here to extend the doctrine of those cases still further. In the first place it is attempted to extend it to what, if there was a gift at all, was a gift of money without that money being identified, or sufficiently identified to enable it to be separated from the rest of the estate of the testator; and in the second place it is attempted to extend the principle of the earlier cases not only to an actual attempted gift which as a matter of fact is imperfect, and therefore will not take effect unless it is subsequently perfected; but to a mere promise to give on a future occasion.

In my opinion the principle of *Strong* v. *Bird* (1) and *In re Stewart* (2) and other similar cases ought not to be so extended. What is wanted in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded.

(1) L.R. 18 Eq. 315. (2) [1908] 2 Ch. 251.

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There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him. It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though falling on technical considerations may be subsequently perfected.

I was at one time inclined to think that up to a certain point the respondent's case might be supported in this way, namely, that the conduct of Brighouse down to the time of his departure for England, if not down to the time of the will of 1912, could be taken as establishing a gift *inter vivos* from time to time of all property reduced into possession by the respondent during that period as and when that may have occurred; but a close examination of the record, I regret to say, convinces me that this view cannot be sustained. In the first place, the claim is not based on any such ground in the pleadings, and a claim of this kind, made against a deceased person's estate, ought to be put forward clearly. In the second place, the notion of a continuous gift by conduct of the proceeds of property, is not easily reconcilable with the fundamental basis of the claim. If Brighouse had really intended, as the respondent and other witnesses as well represent him as saying that he intended, to divest himself at a stroke of all his property, one does not easily think of him applying his mind to the subject from day to day thereafter and intending *de die in diem* a gift of the produce of the property. It is hardly necessary to say that the reduction into possession by the respondent of Brighouse's funds pursuant to a previous gift (which could only operate as regards such funds as an unenforceable promise to give) would confer upon the respondent no title to such funds. Lastly and most important of all there really is no evidence directed to substantiating any such basis of claim; and when one considers the views as to the state of Brighouse's health held by the respondent himself, whose candour and honesty are beyond praise, one understands the difficulty the respondent's advisers must have felt in advancing such a claim. In truth counsel for the respondent

at the trial put his case squarely upon *Strong* v. *Bird* (1), and upon that principle alone, and the appellants were never called upon to meet any other case.

The appeal must therefore be allowed. There should be a declaration that the respondent is accountable for all moneys of the late Sam Brighouse received by him since the 26th day of February, 1907, excepting moneys in respect of which the intended gift mentioned in the pleadings was completed within the lifetime of the said Sam Brighouse. The respondent will, of course, be entitled to all just and proper allowances for expenditures made by him, and for all costs, charges and expenses incurred by him in or in relation to or in connection with the affairs of the said Sam Brighouse. Further directions will be reserved to the Supreme Court of British Columbia. The course of the litigation has been signalized by much difference of judicial opinion, and, having regard to that as well as to the exceptional circumstances, we think this is a case for an exceptional order as to costs. The costs of all parties as between solicitor and client, as well as all other charges and expenses of or incidental to the action or the appeal to the Court of Appeal or to this court, properly incurred, will be paid out of the estate.

IDINGTON J.—This appeal arises out of an action brought by appellant, under the direction of the court, suing, in his capacity as administrator and one of the trustees of the estate of the late Sam Brighouse the respondent Michael Wilkinson Brighouse, for an account of moneys and properties belonging to the said Sam Brighouse and received by said respondent under and by virtue of a power of attorney dated the 6th of February, 1907 under the following circumstances:

Said Sam Brighouse had been born and brought up in England, and migrated to Canada and settled in Lulu Island in British Columbia, where I infer he became a very prosperous farmer and later on acquired valuable properties in Vancouver, all of which on account of his health needed someone to assume the management thereof.

On a trip to England in 1888 he had brought back with him one of his nephews—the said respondent, then a lad

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of twenty-four years of age—who continued to live with him on said farm, and helped him in many ways.

The said Sam Brighouse was a bachelor and had no relatives of his own in this country. Hence, as was quite natural, he became accustomed to rely upon and trust said nephew (now respondent) as if his own son, which resulted in the making of a will on the 7th November, 1906, whereby, in the second paragraph thereof, he appointed said respondent and others as follows:—

I appoint Michael Brighouse Wilkinson, Charles Edward Hope and Joseph Richard Seymour, all of the city of Vancouver (hereinafter called my trustees) to be executors and trustees of this my will.

Then he devised and bequeathed as follows:—

I give all my plate, linen, china, glass, books, pictures, prints, furniture and household effects and all my farming stock, horses, cattle, sheep, pigs and other animal, and all my wagons, carriages, harness, farming machinery, implement and other farming accessories and things to the said Michael Brighouse Wilkinson absolutely. I give to my executors Charles Edward Hope and Joseph Richard Seymour the sum of two hundred dollars each provided they prove my will and act in the trusts hereof. I give Francis Miller Chaldecott the sum of two hundred and fifty dollars. I give Alfred Pearson (half brother of said Michael Brighouse Wilkinson) the house and one acre of land more or less now occupied by him, being part of my farm at Lulu Island, for life, so long as he shall occupy same, and if he shall cease to occupy and reside there, then said house and land shall revert and form part of my farm as dealt with below. I give my farm at Lulu Lsland, being situate between roads numbered two and three containing about seven hundred acres more or less and consisting of sections 5, 6, 7, and 8, block 4, north range 6 west, and section 32, block 5, north, range 6 west being all my farm lands situate as aforesaid and bounded on the south by the right-of-way of the Vancouver and Lulu Island Railway, on the west by no. 2 road, and on the north by the Fraser river and on the east by no. 3 road, in trust for the said Michael Brighouse Wilkinson (subject to all mortgages and existing charges at the time of my decease, and to the above life tenancy of one acre aforesaid to Alfred Pearson) for life, so that he shall not have power to dispose of the same in the way of anticipation but with power nevertheless for the said Michael Brighouse Wilkinson to appoint by deed or will in favour of his issue and in default of appointment and so far as such appointment shall not extend in trust for all the children of the said Michael Brighouse Wilkinson who being sons, shall attain the age of twenty-one years or being daughters shall attain the age of twenty-one years or marry, in equal shares and if there shall be only one such child the whole to be in trust for that one child, but so that no child who or any of whose issue shall take any share under such appointment as aforesaid shall participate in the unappointed part of the said moiety without bringing the share or shares appointed to him or her to his or her issue into hotchpot and accounting for same accordingly unless the said Michael Brighouse Wilkinson shall by such appointment direct to the contrary. Provided always that the above bequest of a life interest in the

said farm with power of appointment to the said Michael Brighouse Wilkinson is conditional upon his adopting the surname of Brighouse in lieu of Wilkinson within the period of two years from my death, and in default of his so doing, I devise and bequeath my said farm to the eldest living son (at the time of such default) of my late brother Radcliffe Brighouse.

I may mention the fact that he gave annuities of $260 each to a brother and two sisters and a friend, and another of $130 to a friend and the residue after paying for all those and the liabilities, to the respondent.

I copy this to make quite clear the actual facts so much in conflict with the statements of others concerned, including the respondent, and his co-called corroborating witnesses.

The said farm made ultimately nearly the half of the whole estate, or, according to the version of the respondent, a third or thereabout.

It will be observed, that so far from the testator having given him everything he had given him absolutely only a small fraction, I imagine, of his personal estate and a life estate in the farm and otherwise as a trustee the power of appointment in favour of his children and all that, only conditionally upon his adopting within two years after the testator's death, the surname of Brighouse instead of Wilkinson.

And that clearly involved the need of respondent surviving the testator before he could acquire anything; and yet the courts below have held that an interpretation and construction must be put upon the conversation, which respondent testifies to, and which I am about to quote, that would give him the absolute right to all the moneys and properties of the testator of which he got possessed meantime.

The conversation I refer to and upon which said courts rest is as follows:—

Direct examination by Mr. Davis:

Q. You live where, Mr. Brighouse?—A. At the present time in Vancouver.

Q. How long have you been in the province?—A. Since 1888.

Q. What relation was the late Sam Brighouse to you?—A. He was my uncle.

Q. Who brought you out here?—A. My uncle.

Q. And how old were you at that time?—A. About 24.

Q. From that time on, with whom did you live, or with whom did he live?—A. With him.

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Q. Was he a married man?—A. No. My mother kept house for him most of the time.

Q. Your mother was his sister?—A. Yes.

Q. So that he had no family. Had he any other relations here outside of yourself and your mother?—A. A brother and a half brother who came later.

Q. In order to get at some of these dates, what was the date when he went to the hospital?—A. Between Christmas and New Year, 1908.

Q. And February, 1907, was the date of the power of attorney from Sam Brighouse to you?—A. Yes.

Q. Why was that power of attorney given, for what purpose and how to be used?

Mr. Smith: Surely the power of attorney speaks for itself.

The court: Why it was given would not appear from the document.

Mr. Smith: The powers that are given in it would show why it was given.

Mr. Davis: I am not referring to the powers given in it.

Mr. Smith: I think that is all my friend is entitled to show.

The witness: He gave me a reason himself, Mr. Smith.

Mr. Davis: What reason did he give you?

Mr. Smith: I object.

The witness: I had been doing his business right along, and he told me to take everything and use it in any way I pleased, his property, I could sell it if I wanted to for cash, or use it for my own use and for himself, and even if I wanted to go into business, I could sell his property in order to do that. He said he had given instructions to Chaldecott—I had been up to the office the day previous, and he had read his will to me, this was 1906, and said everything was coming to me, and he said he had given authority to Chaldecott to make out a power of attorney, and the reason he did that was so if I did sell this property, I would have power to put it in the Registry Office, and against other people. It was not as a power of attorney for me to use it because I had been practically doing that right along.

Mr. Davis: Q. Now had you any conversation with him at this time which you speak of, after leaving Chaldecott's office, at the time you say he read the will and so on?—A. Yes, that same conversation which I have just mentioned now.

Q. That was the time?—A. That was the time. Of course, that has happened often, but this was more particular, because he said he was giving up everything, he wanted little for himself, just a little to eat, wear, and drink, and little of that, and the balance I could do as I liked with. He was giving up all, and leaving the whole thing to me.

Q. Was any one else present at that time?—A. No, only he repeated the same thing in my office when Mr. McPherson was there and I think Mr. Currie. Mr. McPherson is dead.

Q. And you think Mr. Currie. Is that the Mr. Currie who gave evidence here?—A. Yes.

This cheery interpretation of that conversation is sadly in conflict with the actual facts then existent and, if possible, more so with the words of the power of attorney then in contemplation and, I have no doubt at all, in due course of being written according to the literal instructions of t

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testator and that he did not in fact change his mind and convey to the respondent any other or different meaning.

That power of attorney accords with common sense and is not limited to mere purposes to be served in cases of registration as respondent and his counsel would have us believe.

The first part of it reads as follows:—

Know all men by these presents, that I, Sam Brighouse of Lulu Island, British Columbia, for divers good causes and considerations, me thereunto moving have nominated, constituted and appointed, and by these presents do nominate, constitute and appoint Michael Brighouse Wilkinson, of Vancouver City, British Columbia, my true and lawful attorney for me and in my name and on my behalf and for my sole and exclusive use and benefit to demand, recover and receive from all and every or any person or persons whomsoever all and every sum or sums of money, goods, chattels, effects and things whatsoever which now is or are, or which shall or may hereafter appear to be due, owing, payable or belonging to me whether for rent or arrears of rent or otherwise in respect of my real estate or for the principal money and interest now or hereafter to become payable to me upon or in respect of any mortgage or other security, or for the interest or dividends to accrue or become payable to me for or in respect of any shares, stock or interest which I may now or hereafter hold in any joint stock or incorporated company or companies or for any moneys or securities for money which are now or hereafter may be due or owing or belonging to me upon any bond, note, bill or bills of exchange, balance of account current, consignment, contract, decree, judgment, order or execution, or upon any other account. Also to examine, state, settle, liquidate and adjust all or any account or accounts depending between me and any person or persons whomsoever. And to sign, draw, make or endorse my name to any cheque or cheques, or orders for the payment of money, bill or bills of exchange, or note or notes of hand, in which I may be interested or concerned, which shall be requisite. And also in my name to draw upon any bank or banks, individual or individuals, for any sum or sums of money that is or are or may be to my credit or which I am or may be entitled to receive, and the same to deposit in any bank or other place, and again at pleasure to draw for from time to time as I could do. And upon the recovery or receipt of all and every or any sum or sums of money, goods, chattels, effects or things due, owing, payable or belonging to me for me and in my name and as my act and deed to sign, execute and deliver such good and sufficient receipts, releases and acquittances, certificates, reconveyances, surrenders, assignments, memorials, or other good and effectual discharges as may be requisite.

This I copy so far not only to shew that the basic element of its entire character was that respondent was to act for and on behalf of the testator, as it expresses

for me in my name and on my behalf and for my sole and exclusive use and benefit to demand, etc.,

but also in a great variety of cases not confined, as pretended, to the needs of registration.

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And the remainder of the said power of attorney continues to specify a great variety of commercial dealings not necessarily needing any registration to become effective.

In fact the necessity for using the power of attorney in case of registration never arose until the testator had left this country in 1911 for England.

In the meantime the testator had himself personally, and not by his said attorney, executed two instruments, being all I can find trace of herein, needing registration, whilst he was in this country.

Indeed the respondent says he never used the power of attorney for registration purposes until the Burns lease which would be on or after 1st August, 1912.

The following evidence was given by the respondent on cross-examination:—

Q. I think you told me on the examination for discovery, that the power of attorney was made to you after the conversation in regard to everything being yours?—A. He instructed Chaldecott to make out the power of attorney—I don't think I saw the power of attorney until I needed it to sign the deed to Burns.

Q. Just to make it clear. I will read your examination. Question 965, "Well, was there ever any one else present with you at any time he spoke to you about it?—A. I don't think so.

Q. The conversation that you referred to, when all those people were present, MacPherson, Currie, Sam Brighouse and yourself, in your office, was prior to the time you got the power of attorney?—A. I don't think I had received the power of attorney then, because I don't think I took the power of attorney out of the office until I needed it to make the Burns lease."—A. That is correct.

Q. It hadn't been delivered to you at that time?—A. No.

Q. Now, there was no one present at that conversation except the two of you?—A. Except when it was reiterated, as I say in my own office.

In this there are incidentally two illustrations of what sort of memory the respondent has, for, in fact the first use made of the power of attorney for registration was not the Burns lease, but a lease of 1st January, 1912, to one Hinton and others—seven months before the Burns lease.

And again Currie, whom he names as present at one of the interviews on which he rests his case, does not seem to have been there. At least Currie does not mention it, as certainly he would have been glad to do if he could have recalled it, for he also goes, it seems to me, very far, as I will presently shew, to help his friend.

The respondent would seem from his story, if believed, never to have bothered his head about the power of attor-

ney, although, as he admits, his uncle the testator had expressly told him that Chaldecott, the solicitor, was preparing it. The absurd nature of the story that he never saw it until five or six years later should, I submit, go far to discredit him.

Are we to credit the memory of such a man when testifying in September, 1925, more than eighteen years later, as against such a written document expressing clearly what the testator intended, and believe that the latter, a very successful business man, expressed himself so very differently to the respondent.

Then it is pretended that such an inherently incredible story was corroborated by Currie and others.

Let us consider the story of Currie presented first. He tells of walking with the testator in November, 1908, when he told him as follows:—

Mr. Brighouse was with me. We were all together, but we were behind the others; and Mr. Brighouse made the statement to me—we were talking about things in general—and Mr. Brighouse made the statement to me that everything he had was Michael's to use, and do with as he liked, and he had made a will to that effect.

Q. What was the date of that?—A. November, 1908.

Q. No, you mention another occasion, when was that, and where, and what were the circumstances?—A. Another occasion that I remember distinctly was after Mr. Brighouse had returned to his home from the hospital after being there for several months, in his own house at Lulu Island, he made a statement to the same effect.

Q. Who were present at that time?—A. Just himself and me.

Q. Where was he at the time?—A. He was in bed at the time.

Q. What did he say at that time?—A. He said at that time that everything he had was Michael's to use and do with as he liked; that he had kept his estates together, and it was his.

Up to that time no will which we know of, had been made by the testator, except that of November, 1906, which I have dealt with above and submit that its contents absolutely destroy this story.

That however is accepted by the learned trial judge and, I most respectfully submit, that his doing so is a grave error. He refers (apparently as a reason for so finding) to the fact that these and other witnesses were not seriously cross-examined as to their credibility. The most successful way, I have often found, of dealing with preposterous statements, as I submit some of these are in light of the facts, is to leave those uttering them alone or lead such wit-

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nesses on. In doing so herein I submit counsel was well advised.

Jorgenson is the next witness the learned trial judge names, and he testifies as follows:—

Q. You cannot tell what other persons told, but just Sam Brighouse himself.—A. Yes, Brighouse himself told me not once, but told me several times, that Michael Wilkinson had everything and done what he wanted with the money and property, and if it had not been for Michael, he would have lost it anyway.

Q. How often have you had that sort of conversation with him, or heard those statements from him?—A. I can't recall how many times, but quite frequently.

Can this evidence in light of the actual facts be at all corroborative of anything likely to be the truth when we know the actual facts as above recited?

I fail to see how that sort of stuff can form such corroboration of anything which the law requires in such a case as this.

Cocking came next in the list the learned trial judge specifies. The gist of his evidence is as follows:—

Q. What was the substance of what he said to you with respect to Michael, as to how things were carried on between them?—A. The time which is most clear to my mind now is the time I took him to the hospital. He was going to the hospital to be operated on, and, knowing him as I did, I said: "Mr. Brighouse, how have you got things fixed? Have you made a will?" and he told me he had. He told me Mr. Chaldecott, I think it was, made his will. He said, "Anyway, everything I have got is Michael's," and that Michael could use anything he had got as though it was his own. Also, that anything that was transacted, anything that Michael said was all right.

Again the only will made up to that time was the will above dealt with.

How can anyone read the cases deciding what is meant by "corroboration" recognized by the statute in question herein and hold there is anything useful in such stories as witness tells.

The contribution of Saurberg, also called to corroborate but not named by the learned trial judge, is, if possible, illustrated best by the following:—

A. I went to work for him in June, 1908. I was interested in fancy chickens, and I worked up some prize laying hens, and I made up my mind I was going into the business, and buy a few acres on Lulu Island, and raise chickens, so I went to Mr. Brighouse and wanted to buy three acres, and he said, "You had better go and see Michael about it, everything I have belongs to him. He has made everything for me, and kept the estate together. If it had not been for him I would have had hardly anything left.

Burdis, another who witnessed a codicil of the testator on 13th January, 1911, speaks as follows:—

Q. Did you ever have any conversation with Sam Brighouse with reference to the relations between him and his nephew Michael, the defendant?—A. Scores of them.

Q. To what effect?—A. The general situation existing between Mr. Wilkinson Brighouse and himself.

Q. What was the substance of those conversations?—A. Oh, at various interviews over long periods, it is very difficult to define any particular occasion, but it shewed the close association which existed between his nephew and himself.

Q. Well, what was that, as shown by his conversation?—A. He trusted Michael Wilkinson absolutely. He said on many occasions the property would not have been held intact if it had not been for the influence and care of his nephew, Michael Wilkinson.

Q. Anything else?—A. He always called the property "ours." It was very seldom he talked about his property. He always talked about our property, and he refused to deal with business matters, but referred everything to his nephew. He said Michael had authority to do anything he liked, whatever Michael did was right, because he knew when he died—Michael knew and he knew, when he died, everything would go to Michael Wilkinson.

I agree with the reasons assigned by the Chief Justice in the Court of Appeal below, and with Mr. Justice Galliher, but have thought better to quote as I have done rather than act on the condensed abbreviation of the evidence adduced, and relied on.

I fail to find anything in all the said evidence or anything else in this case, which I have read and considered carefully, that can bring it within the authority of the case of *Strong* v. *Bird* (1), or any of the other cases relied upon.

The characteristic of each of such cases in maintaining gifts of one sort or another is that in each of them there happens to be an important circumstance, inherent in each of said cases, maintaining the like claim whereas in the case presented by the respondents herein the circumstances are overwhelmingly against the respondent, in my humble judgment.

Therefore in my opinion this appeal should be allowed with costs throughout and judgment directed giving the relief the appellant prayed for in the action in question.

I may be permitted to add that the last will of the testator, made in England, is in all its essential features such a reasonable disposition and distribution of his pro-

(1) L.R. 18 Eq. 315.

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perty as any reasonable person should expect, in the circumstances in which the testator was placed, and remedies what the first will, I imagine, discloses a seeming want of generosity on the part of the testator, possessed of so large an estate, when dealing with the amounts left to his brother and sisters, unless of course they were each and all wealthy people.

On such assumption the last will, I submit, clearly should not be invaded and nullified by such evidence as respondent gives and produces to help him when he is getting such handsome treatment as it gives him.

Of course I think he is in his accounting to be entitled to any reasonable commission and expenses for work done under the power of attorney as if a stranger doing it thereunder and liable for interest on that he is found accountable for from the date of the testator's death.

Appeal allowed.

Solicitor for the appellant: *W. D. Gillespie.*

Solicitor for the respondent: *Ghent Davis.*