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IN THE PROVINCE OF NOVA SCOTIA

IN THE COURT OF PROBATE HALIFAX

IN THE ESTATE OF SARAH GIBERSON (CROKER) DECEASED.

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to hearing held on Sept 11.1936.

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In the Province of Nova Scotia,

County of Halifax,

In the Court of Probate.

In the Estate of Sarah Giberson deceased.

Hearing before MrR. F Yeoman, K C,, Registrar of Probate resumed, Friday September 11th, 1936, at 10 a m.

Mr M B Archibald K C., for Major Thomas Mundy, executor under the will of Sarah Croker, deceased

Mr J E Rutledge, K C.,

Mr John F Shaw and

Mr D R Bishop of the New Brunswick Bar for Blanchard Giberson and Mrs Lorna B Abbott,

Stenographer duly sworn.

Mr Rutledge: You will recollect that Counsel were to look into the point as to whether Major Mundy should shew to the Court the photographs in his possession, and we were to make a study of the authorities, and argue the matter this morning.

My position now is that this witness must shew these documents to the Court, that is to say, all the photographs which he has in court, and he cannot withhold them on his mere assertion that they are private, orthat they are not relevant , or that they were sought by a subpoena which was ineffective.

As the basis for the short argument which I intend to make, I wish to read an extract from Wigmore on Evidence, Vol 4, p.670:

> "It often happens, however, that the party desiring the evidence does not know precisely what documents exist in the hands of the witness, or what existing documents contain relevant material, or if the documents, if of a certain tenour would be privileged from disclosure on one or another ground.
>
> In such a situation it is obviously not for the witness to withhold x documents on his mere assertion that they are not relevant &c,"

That covers the general proposition, You will note that it does not deal with the specific objection raised by my learned friend, namely, that the application here is to do what it was originally sought to do under the subpoena which was found to be defective under the authorities.

But now that is the general rule.

I next refer the Court again in the light of that rule to Lee and Angus, 2 Eq. 59.

And, at the same time, to the Annual Practice, 1936, at p. 676: "A subpoena duces tecum ought in general to specify the documents required. But if a witness, served with a subpoena in general form, admits that he has in his possession the documents thereby referred to, he must procuce them. (Newland v Steer 13 W.R.1016. cf.Powis v Negus 1923, 1 Ch p 186(decision overruled in Seddon v Com.Salt Co Ltd. (1925(1 Ch.p.187) Lee v Angus L R 2 Eq. 59, and see Re Emma Silver Mining Co. L R 10 Ch. 194, where the company was ordered on motion to produce its books on the cross-examination of its secretary on his affidavit.)."

Now, what did Lee & Angus decide ? The case must be a good authority to be quoted in so late an edition of The Annual Practice. It decides that a solicitor, who was not a party to the suit at all, had toproduce all papers relating to all dealings and transactions between his firm, the solicitor's firm, and the plaintiff or defendant as the case may be for a period of 30 years, without specifying any of the documents required, and that was held to be too vague, so far as the subpoena was concerned, but the witness admitted that he had in his possession the documents required, and it was held that he must produce them.

I want to refer to that case particularly this morning, because it is the only authority that I have which deals with a plurality of documents. The other cases which are concise upon the point deal only with single, or specific documents. That is referred to also in Phipson. That case meets my submission so pointedly The Annual Practice also refers to the Emma Silver Mining Company. That case is not so useful, but it is authority for the proposition, 10 L R. Chancery Appeals, 194.

The Court in that case made an order under English Order 37 Rule 37, which is our Order 30 Rule 14, It shews how the Courts go at these things. We are not relying on the point at the present time I have to refer to it later. I will read the rule

"14 It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge thinks right; and the court may deal with such documents when produced in such manner as appears just pro-

A photograph is a document.

Words and Phrases Judicially defined vol.3 page 2153

"The word applies to.....photographs,pictures,maps and plans "

A number of cases are reported for that, several in the Federal Courts.

The case of Fox v Sleeman 17 Ontario Pr Rep. p.492, so nearly meets the situation here in court that I will read the whole judgment; Headnote:

> In an action by certain persons,claiming to be the next of kin of a testator,the beneficiary under the will having predeceased him, against the administratrix with the will annexed,for administration of the estate, the defendant denied that the plaintiffs were the next of kin of the testator, and alleged that he had no relatives. By her affidavit of documents, she stated that she had in her possession, in her personal capacity, but not as administratrix, certain photographs of the testator which she objected to produce. The plaintiffs sought production with a view of establishing the identity of a relative of their with the testator.
>
> Held: that the photographs in question were 'documents' within the meaning of Rule 507,and were not provileged nor protected,and therefore must be produced. (Rule 507 is the same as our Rule XIV)

I do not think perhaps we should have to go beyond that case. That was a very strong Court, Armour, Falconbridge, and Street. They refer to Wharton and the other authorities and to the English case of Lyell v Kennedy (50 L T N S.730) which I have here. I think on the authorities,after reading them last night,the documents should be handed by the witness to the C ourt, and the Court should examine them with a view to determining whether in his opinion,they might possibly be relevant documents. If it appears to the Court that they are no assistance to the case, the witness should not be required to produce them to opposing counsel,but if it appears to the Court that they might be relevant and useful in determing what is after all,a very important issue the Court should then submit them to both counsel and counsel be allowed to call witnesses or to examine the witnesses in the box further on oath.

The Registrar: In this case,what you are speaking of apparent is photographs of Sarah Croker

Mr Rutledge: In those photographs I think will be found pic-

tures of Mrs Abbott,whom your honour might identify.
I gather that there are several photographs and some are in Court and some are not. I am not insisting on those which are not;photographs establishing identity I insist are useful.

Taylor p.1107 footnote:

> "Photography affords an easy mode of establishing identity. In matrimonial cases, however, except in very exceptional cases,the court has held there must be some other evidence"

The other cases on this point - the one I brought before Snellgrove and Stevens,referred to yesterday, 174 English Reports 611, is the same point,that the witness should produce the documents which he has in court. To the same effect as Lee and Angus, but it refers only to one specific document. This is the headnote:

> A witness being sworn to having in court additional documents in his possession is bound to produce it,if required though he have not received any notice to produce nor been served with a subpoena duces tecum."

> Cresswell J. "A witness here sworn to give evidence and having a document in his possession may be compelled to produce it. He is just as much under the control of the Court in this respect as if he had brought the document under a subpoena duces tecum."

My contention is that what is said there about a document, in the singular, applies to documents in the plural.

King v North one Cox Criminal Cases, 258, same rule was applied by the Court.

In the Criminal Court,in the Common Law Court,in the Probate Court in Ontario and apparently in the United States also, this has been held to be the law.

Farley v Graham, 9 U.C R. 438.

A suit for work and labour performed. Witness refused to produce;said he had not been subpoenaed. Held that witness was bound to produce.

Mr Archibald: If your honour pleases, I do not know that it is necessary for me to add a great deal to what was said yesterday, but in view of the numerous citations referred to by my learned friend,I should perhaps add a few comments.

In the first place, I should say that what has apparently been lost sight of in this case is that by the subpoena the applicant is attempting to establish his case;it is not the case of what the documents are relating to the transactions,or anything like that, it is to locate something which the witnesses can agree upon. It is very different from the principle in these other cases,where they were looking for various documents tying up certain transactions, in the hands of one party, with the transactions of the other party. The case nearest to it is where the administratrix made an affidavit of documents and after having made an affidavit of documents saying 'I have this and this' ,refused to produce certain of them. That is a different situation altogether.

This is a case where one party to the action is by a subpoena to the other party to the action endeavouring to get the main facts for his case. That is the whole thing

The situation here is, as your Honour knows, 'We'd like to get at these photographs,and we'd find something there." That is all right;there is a way to go about it. I do not think I am being technical or unreasonable,or anything of the kind,when I say this must be done properly. I am not casting any reflection on my learned friend's client Mr Giberson,or Mrs.Abbott,when I suggest that the thing should be done properly,but I have every reason to think there will be procedure taken - whether it will come before your Honour - to decide what documents should be produced and then submitted to the witness. I am not quite prepared to say as to the proceedings. But I think it must appeal to your Honour that there is something decidely wrong when a subpoena can be issued to a witness and that witness must either risk contempt of court by refusing to comply with it, or make such production as he thinks he can in order to conply with it,and when he comes here, on a motion to set aside the subpoena, and the subpoena duces tecum is ineffective and is set aside, because that is what it is-- if when that has been done all can be accomplished that could have been accomplished if the subpoena had been regular. What is the use of the procedure/authorising the setting aside of the subpoena ?

I am suggesting that the case of Lee and Angus, which has been relied upon by my learned friend, is a very different thing altogether from this. There a witness was required to bring in documentsrelating to certain transactions;the transactions were there;the particular documents were not specified, and the witness, having brought the documents,the court said, Well now the evil complained of is gone any way. The reason why these documents are specified in the usual way is that the witness who is subpoenaed can withhold unreasonably demanded documents and pick out the documents which he ought to produce;but the witness having done it, then, as the court said,you have done it, you have them here;go ahead, But if the witness had protested when the subpoena was first served,it would have been set aside, as putting him to an unreasonable amount of trouble. Our case is different;the subpoena is served late at night "to bring in any documents" relating to these people. It is almost impossible for us to say what documents there are or what documents we have not.

My learned friend and his colleagues have the air of insinuating that there has been something sinister about the conduct of the executor in this matter There has been nothing sinister about the matter. If it had not been for the executor here these people would never have known of the will;but the executor went around the country chasing around to find these people, as a matter of courtesy.

I will just quote a few authorities:

Sankey v Fraser, 5 Weekly Reporter 341. Reads headnote. Quoted as an authority in Mews Digest and in the English and Empire Digest.

I also wish to refer your Honour to Newland Stitt 13 Weekly Report 1014. A suit to administer an estate of an intestate and the claimant subpoenaed the personal representative as a witness to produce all letters written by the intestate to him, He attended and delined to produce the documents;admitted that he had destroyed some.
It was held that the terms of the subpoena were too extensive and the application was refused with costs.

It is the same principle here. It would be almost impossible for Major Mundy. He had a whole host of documents down there, some of which were relevant and some of which were not, and the relevants ones only which he could be compelled to produce by discovery, would some of them relate to his own case and some to the other party, these being brought in here by an ineffective subpoena, and compelled to be produced. I submit to your Honour that that would be an abuse of the process of the Court which should not be tolerated, and I think the decision in that case, Sankey v Fraser, it is an old case, it is true, 1845, but it is still cited - should be applicable here.

The whole point is a party by subpoena attempted at the last moment to harass a witness to bringing everything into Court, to bring all documents relating to this enquiry. The witness supposed that if the Court asked him to bring into Court all the documents that he must do so; that witness wished to obey the court, and without time to go through them with his solicitor, or without opportunity to find out whether this item or that item was relative to the case, comes in and says 'I got what I could gather up' and if then, at that stage the Registrar, or presiding Judge says, 'Well, that subpoena is too extensive, that is not specific, but having come here with the documents you must produce them.'

The witness came to me, and I took the position, I think quite properly, 'You are the head of a large religious organisation in this Province; there is an order of the court; I don't see how you can comply with it; it is physically impossible, but you must do the best you can.' And he brought in what he could find which he thought were relevant, and because he attempted to obey a subpoena which you have found to be insufficient, he is compelled to produce those documents which he so brought.

It seems to me my learned friends do not know whether there is anything there that is helpful or not. It is properly termed a 'fishing excursion' I am surprised that my learned friend has not some photographs. The explanation given by Mr Giberson that the photographs were burned but the marriage certificate escaped the blaze seems significant. I understood there were photographs around in the possession of some of my learned friends' clients.

Mr Rutledge. I have no instructions on that point.

Mr Archibald: There is another thing.

A number of these cases-- you have this case of Lee & Angus, It is certainly distinguishable because the writ of subpoena was issued to a solicitor who was not a party to the suit. That is the first thing.

The Fox and Sleeman case was very different. The proper proceedings were taken to get at the photograph, and the affidavit was made as to what documents there were, and then, after the end of these proceedings the administratrix refused. The difference there was in the procedure;the proper procedure was before this enquiry came on to take proceedings by discovery,or otherwise,to see what documents were necessary;then,if Mundy had refused,we'd be at the place where Fox and Sleeman is applicable, No proceedings have been taken by my honourable friend until this subpoena was issued. The claimants counsel should have taken the proper proceedings to find out what documents were there.

We will suppose that there are five photographs in there which they allege are material; we could ascertain about those photographs we'ld be in a position to cross-examine people about those photographs we could ascertain the time they were taken, and the place, and other circumstances. We are in no position here to do that. We could ask for an adjournment for cross-examination but a number of these witnesses are going back to Fredericton.

I say it is entirely improper.

If there had been an affidavit of documents and a notice to produce AB and C on the basis of discovery, then we would produce. I must point out that the case of Fox and Sleeman is not this case; it is not the case of going into court for the first time . Supposing my learned friend had taken certain proceedings and said, I want you to produce so-and-so,and I had said We won't produce it. Then we would be with Fox and Sleeman.

Mr Rutledge: The case which my learned friend is relying upon is quite different. That case proceeded on the principle that in trade matters one party ought not to be supplied with a list of the c stomers; that would appear to underlie the decision.

This is not a tradesman's case in Court;this is not a case between two rival firms, each seeking to get customers.

The Salvation Army has no customers to lose, at any rate by shewing these photographs. I should like to say in reply that my learned friend's only object in this cas boils down to this: There should have been an affidavit of documents,that is what it boils down to. We may assume that in the affidavit of documents he would disclose every document that is now in court. All therefore, that he seeks to do is to hold the court back;to delay the parties. I am not going too strong, when I say that is all that he wants. Here I have witnesses here all the way from New Brunswick;he knows that if an order for affidavit of documents is made it will mean that I shall have to send to New Brunswick to bring back Mrs Greene,who knew the deceased well, bring back her daughter and perhaps the husband also, and his whole motion is simply for delay.
There can be no other merit. Surely he cannot have any objection to shewing these things to the Court,and letting it decide which ones are relevant and which ones are not relevant. I need not mention the great expense and inconvenience to which the witnesses will be put if this motion is not granted.

Mr Archibald: There is as you knownvery much mor e than that. It is all right for my learned friend to say that in the ordinary courtesies extended between solicitors in order to save time on enquiries a lot of things are done,but my learned friend is asking us to produce awhat is necessary for his case. We have here a bundl of fifty photographs. I don't know what they are,and he is to be qu at liberty to go through those 50 photographs and try to make his case,to decide which ones he can use to make his case.
I hold that I am correct;this is not the proper procedure and regardless of expense,which has been brought on them by themselves, a practice such as this should not obtain in this Court; otherwise, why do we set up elaborate rules for discovery and admission of documents? I do not think it is right. It not that we are unwilli to disclose anything.

I am not prepared to say that a photograph is a "document" notwithstanding the Ontario case,

The Registrar:? I will rule that the witness must produce the photographs to the Court.

Mr Archibald: I object.

The Registrar: I think if we take precautions that there can be no converring among the witnesses the ends of justice will be met.

Mr Shaw: My client has not seen these photographs since her mother's death,and as I understand it she believes that among her mother's effects is a certain picture which she wishes to have produced for her inspection.

Mr Rutledge: All the photographs which Mr Mundy has are not personal to him,or to the Salvation Army;they belong to this estate.

The Registrar: I think the proper procedure would be for the Court to take the responsibility of looking at the photographs and deciding which are relevant.

Mr Archibald renews his objection.

The Registrar: My ruling is that Major Mundy must produce all the photographs which are in his possession and are in Court.

Mr Mundy re-called, produces a bundle of photographs.

Counsel and the other witnesses then withdrew while the Registrar went through all the photographs with Mr Mundy, putting aside all those which did not contain the likeness of a woman.

All those photographs which did contain the likeness of a woman were put in a separate parcel,

Counsel were then re-called to examine the photographs which were to be produced and shewn to the other witnesses for identification.

Mr Archibald objects to the production of the photographs.

The Registrar: I have taken the responsibility of deciding as to which of the photographs in Court might be relevant to the questions at issue and such photographs are to be marked as having been produced by Major Mundy to the Court

Mrs Lorna E Abbott re-called:

Mr Rutledge:

Mrs Abbott, the Registrar will hand you,one by one, a number of photographs produced by Major Mundy. Would you please look them over, and tell us if you identify any of the photographs as being Mrs.Croker, as the same are passed to you.

Mr Rutledge: I submit that the witness should be handed these photographs,one by one, and be asked whom they portray.

Mr Archibald: Surely the question is of the identify of Mrs Croker only.

The Registrar: My ruling is that at this stage of the proceedings, the only purpose of the examination of the photographs is to identify Mrs.Croker as being Mrs Giberson, and in view of the fact that the photographs will be available at all times in connection with any other issue that may be raised, the witness must be restricted to answering here, whether any of these photographs are those of Mrs Cr oker.

Mr Archibakd: I suppose itnwill be reserved to me on the argument - the admissibility of the photographs. I should like to reserve the question of production of the photographs.

To Mrs Abbott by Mrs Rutledge:

Q. No.1. Is that a photograph of Mrs Croker ?

A No.

Q No 2?

A Mrs Croker is in the chair with the child.

Q Who are the other persons in photograph No 2?

Mr Archibald objects to evidence being given,on the groun that the enquiry is directed only to the identity of Mrs Croker.

The Registrar: I think that in photographs where Mrs.Croker appears, the witness can properly be asked who the other persons appearing in the photographs are, for the purpose of identification.

Q Who are the other persons in photograph 2?

A My youngest girl and me.

Q Where is the photograph taken ?

A 9, North Park Street, Halifax.

Q No, 3?

A That is my mother, father and myself, taken in the Old Country, in England.

Q 4?

A That is my mother, Mrs.Croker.

Q Taken where ?

A I don't just know where that was taken.

Q No. 5 ?

A Mrs Croker does not appear.

Q No. 6 ?

A Mrs Croker does not appear.

Q No. 7 ?

A Mrs.Croker does not appear.

Q No. 8? A That is Mrs Croker.

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Q Do you know where that was taken ?

A No.

Q No. 9?

A I don't know who that is.

Q No.10 ?

A I don't know who that is.

Q No. 11

A That is my mother, and my baby taken at North Park Street.

all agree on this one

Q When ?

A About five years ago.

Q No.12 ?

A Mrs.Croker is not in that one .

Q No 13

A Mrs Croker is not in that one.

Q No.14 ?

A Mrs Croker is not in that

... Streetabout 5 years ago.

Mrs Abbott re-called.

Q No.15 (tin-type)?

A I am not sure.

Q. No.16 ?

A That is not my mother

Q No.17?

A That is my mother. I don't know who the child is and I don't know the dog.

Q No.18?

A I don't know who they are.

Q No.19 ? (a tintype)

A Don't know.

Q No.20?

A That is my mother.

Q Do you know where that was taken ?

A I ammalmost sure it was taken (Objected to).

Q Have you seen that picture before ?

A Yes.

Q Where ?

A Different places.

Q 21?

A No,that is not my mother.

Q 22?

A She is not there.

Q 23?

A No.

Q 24?

A I am not sure.

Q 25?

A I am not sure.

Q 26?

A I don't think so.

Q 27?

A No.

Q 28?

A No.

Q 29?

A Is the same as one previously shewn;my mother,my self and my baby. Taken at North Park Streetabout 5 years ago.

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Q 30?

A That is my mother, taken at North Park Street, about 5 years ago.

Q 31?

A No.

And then the witness withdrew.

Mr Giberson re-called still under oath. examined by Mr Rutledge:

Q Do you usually wear glasses ?

A Yes,but I didn't bring them with me.

Q Can you see photographs ?

A I can see some of them.

Mr Archibald: Q Ordinarily you use glasses for reading ?

A I have to.

Q How long have you been using glasses ?

A Fifteen years.

The Registrar rules that the witness will not get any indulgence because he has not his glasses with him

Mr Rutledge: The Registrar will hand you a number of photographs,one by one, will you look them over and tell us if you identify any one of them as being Mrs Sarah Giberson .

Q 1 ?

A No.

Q 2?

A No. Mrs abbot said yes.

Q 3?

A No. Mrs abbott said yes

Q 4?

A I would say that was her. Mrs Abbott said the same

Q 5?

A No,

Q 6?

A Too bad I haven't my glasses.

Q 7?

A No.

Q 8?

A That is her. Mrs. abbot said yes

5 Mr Giberson

Q 9 ?

A Don't know.

Q 10?

A She is not there

Q 11 ?

A I think so. Mrs Abbott said yes.

Q 12?

A I would not see her looks in that one.

Q 13?

A I would not be sure.

Q 14 ?

A No.

Q 15? (tin-type)

A I don't see anything of her there.

Q 16 ?

A No. Mrs abbott said yes

Q 17 ?

A No, I cannot see her looks in that one. Mrs. Abbott said yes.

Q 18 ?

A No.

Q 19 ?

A No.

Q 20 } Mrs. Abbott said yes.

A No. }

Q 21?

A No.

Q 22?

A No.

Q 23 ?

A No.

Q 24 ? Mrs Abbott said she was not sure

A No.

Q 25? Mrs. Abbott said she was not sure

A No.

Q 26?

A I don't know. I see one woman there.

Q 27?

A No.

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Mr Giberson
Melissa Green recalled.

Q 28?

A No.

Q 29?

A No--it looks like some lady I have seen . } This is the one Mrs Abbott identified as herself. Mrs C. and body.

Q 30 ?

A No. } another which Mrs Abbott said was not

Q 31?

A No.

Melissa Green recalled, by Mr Rutledge.

Mrs Green the Registrar will hand you a number of photographs one by one, Will you look the over and I will ask you, as you go along,if in any of them you recognise the woman whom you spoke of during your testimony yesterday as Mrs Sarah Giberson

Q No 1 ?

A No.

Q 2?

A I am not sure. I could not say.

Q 3?

A I don't know; I never saw that that I know. I can't remember back 8 years. I can't tell.

Q 4?

A I won't say about it.

Q Can you see them well ?

A No.

Q 5 ? no.

6 ? A No.

Q 7 ? A No.

Q 8? A No.

Q 9? A No.

Q 10? A I would say this was Mrs Croker or her niece. It would be her uncle's girl,or some relation of Mrs Croker. I am not going to say whether this is Mrs Croker or not.

Q 11 ? A That is Mrs Croker herself. They all agree on this one.

Q 12? A I don't know.

Q 13? A No.

Q 14? A No.

15. An old tin type? A No.

7 Mrs Green

Q 16? A No.

Q 17? A No.

Q 18? A No.

Q 19? A No.

Q 20? A No.

Q 21? A No.

Q 22? A No.

Q 23? A No.

Q 24? A No.

Q 25? A No.

Q 26? A No.

Q 27? A No, I don't know.

Q 28? A. No.

Q 29? A That is the one you shewed me before; it might be Mrs Croker but I would not say so.

Q 30 ? A No, I don't know.

Q 31? A No.

Mr Rutherford:

That is all the evidence that Mrs Abbott and Mr Hiberson intend to call,and that completes the case.

I might add that I am renewing my application for the ad mission into the evidence the exhibits which have been identified by the witnesses we have called, and I should also like to point out to the Court that it has been held that a photostatic copy is a copy of a public document;that was held in the case of Kennedy v Husband 1923 1 D.L.R 1069. I mention that because there was some question yesterday, as to whether the photostatic copy attached to Dr.Warren's certificate was in fact a copy. I now submit that it is authoritatively a copy,and not a mere copy,but an extraordinarily good copy,in as much as it is much better than an ordinary typewritten or handwritten copy.

The Registrar: I will reserve judgment on your application for the admission of the various documents.

Mr Archibald: The only thing that I have to say about the documents - I repeat what I said yesterday,that the document

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which was accepted here for the witnesses to compare handwriting has been taken away and is not with the Court, neither with you, your Honour, nor with any other tribunal, should they want to see it. The point may not be so important, but it may have a very distinct bearing, and I think it puts us in a very unfair position. I realise that this young lady cannot, and it would be most unfair to accuse her of a breach of faith, between my learned friend and the Attorney General of New Brunswick, but I feel that if my learned friend had intimated at the outset, then he was proving the marriage, that the document was to be used for identity and then withdrawn, I would have objected at that time. It was produced first to prove the marriage and then it was used for another purpose. I am having that objection noted. I think it should be on the record, as it may affect the evidence relating to that.

The Registrar: I think we should have it distinctly understood at this stage that your position is well-founded, in my opinion, to this extent; that if you intend at a later stage to call hand-writing experts, in connexion with any signature, you must be given an opportunity to have that document either produced here in Court, in the first place; or, secondly, made available on commission, for evidence being taken in New Brunswick on commission. One party to the action cannot have an exhibit put in for their purposes; and I think you will be safeguarded if I accept the document on that understanding, and if anything happens that none of these conditions can be fulfilled then I cannot ..

Mr Rutledge: I will do everything in my power to have it produced again.

Mr Archibald: And if there is anything like a commission required, I think that it should be at the cost of the Applicant.

The Registrar: We'd have to reserve the question of costs.

Mr Rutledge: I am not insisting on the documents being removed from this Court So far as the parties are concerned, I want it distinctly understood that we are not moving that it be sent back to New Brunswick.

The Registrar : My understanding was that this document was put in evidence; that it was only put in as I understand it, by the courtesy of the Province of New Brunswick - through that it was made available.

Mr Rutledge: I know my learned friend would much have pre that I put in a typewritten copy, but a typewritten copy wou have proved the point.

The Registrar: I have provided that it shall be available.

Mr Archibald: You said there were two purposes for which it might be available I think there should be added this as to production: that the document should be available at the request of the Court, it may be on appeal they might want further evidence, and they might want to go into that. I think that is fair. Very often the Judge on appeal wants to see the original documents.

The Registrar: I think Mr Rutledge you should undertake, that, if this document is required for Mr Archibald's purposes, you will take the same means to have it here as you did for your own purposes.

Mr Rutledge: I will give that undertaking. I will use just as much endeavour to have it here.

Mr Archibald. I am not calling any witnesses at this stage.

I am suggesting that we should have this evidence transcribed. I assume there will be an argument on the evidence, as to whether a prima facie case will be established. I want to look into that a bit and argue that ppint, whether a prima facie case has been established. There is certainly room for legal argument in that respect as to the genuineness of the marriage. I would suggest that we adjourn this for a week or ten days hence when this evidence is transcribed and that there then be an argument before your Honou The law in New Brunswick with regard to marriage has not been proved It has not been proved here.

I repeat what I said at the first hearing: there are vario classes of cases dealing with marriage. In certain cases where legitimacy and other things are involved the presumption is strongly in favour of the marriage, In cases where any cri minal case is involve such as bigamy, it requires very strict proof. Unless it was require that a marriage should be proved strictly the way would be open to fraud in other cases. Here is the situation, you are sitting as Registrar of Probate Every day wills are coming in to you for probate. I think that the practice of the Court should require a very strict proof of marriage. I have not had an opportunity of looking up whether there have been any decisions on the amendments to

Evidence Act.

Mr Rutledge: So far as the law of New Brunswick is concerned I may need to have a witness here to testify as to the law of New Brunswick.

The Registrar: Mr Rutledge may have a witness here to prove the law of New Brunswick, if necessary. I think he should have an opportunity to put in evidence as to the New Brunswick law relating to marriage, but this is not intended to give him the right to call further evidence generally, or to enlarge the scope of the evidence He should have the right to give evidence as to the New Brunswick law relating to the solemnisation of Marriage, and also the effect of a subsequent marriage on the will of a testator or testatrix. To try to get this thing on a proper basis.

The only thing we are concerned with is the question of the marriage and if there was a marriage and it would have the effect of revoking the will, then the Letters Testamentary will be revoked and a grant of administration will be made to the applicant or her nominee When we come to deal with that estate in due course, and the estate is administered and a decree for distribution is asked for, then the question as to who should participate must be decided in Nova Scotia but the distribution may be made according to New Brunswick law.

Mr Rutledge: Here is a lady,according to the evidence, who had a domicile in England,apparently. She left England ; she came to Nova Scotia and she made a will;she then,according to the evidence, becam domiciled in New Brunswick and married there. Amarriage over in New Brunswick has the effect of revoking a will just the same as here. There was according to the evidence an act of revocation,by marriage. That might have to be proved by the state of the law in New Brunswick, because it was in New Brunswick that the revocation, if any,took place, and not in Nova Scotia. I think therefore I should call evidence to prove the New Brunswick Wills Act,as a matter of fact. It strikes me that the revocation took place over there, and not here. If so, I want a witness here to prove that.

The Registrar: You might have to prove that,according to New Brunswick law , the will was revoked by marriage.

Mr Rutledge: I might want to call a witness to prove that.

Mr ARchibald: I think I can fairly well assume that you will

11 find there is a prima facie case.

I would ask for an adjournment of a month, with the privilege of renewing the application for adjournment If I can point out to the Court that the enquiries have been carried out in a reasonable way, but are not completed.

Mr Rutledge: I wish to point out now, because I am expecting applications for further adjournments later on, that he has had the same time to investigate his case as we have had for prosecuting ours. He has investigated in New Brunswick and probably elsewhere, and he says that he is making investigations in England, and I am hoping that the case will be ready at the end of the thirty-day period.

Mr Yeoman: I suggest that you, Mr Archibald, as representing the executor, are in a better position than the others are to pay for investigations.

Mr Archibald: In so far as this particular enquiry here is concerned, in respect to New Brunswick, we did make investigations, but we have not spent a dollar in investigations in England. It has just been through our organisation.

The Registrar: I think if we adjourn this matter for approximately a month, that a week before the date of the court agreed upon, if you are not prepared to go on, you should have an affidavit stating your grounds for asking for a continuance and Mr Rutledge should be furnished with a copy of that affidavit.

Mr Rutledge: Or Mr Shaw; I may not appear in the matter again.

Mr Archibald: I do not want to go into my case too much in that affidavit.

The Registrar: Oh no, if you put up a proper case we will further adjourn.

There will be an adjournment then, until October 12th, Monday at 10 a.m., with the understanding that if Mr Archibald is not prepared then to proceed with his case and desires to continue it, that he will file an affidavit not later than Friday, the 9th October, stating his reasons why he is asking for a further adjournment.

S W A Almon,

Acting Court Stenographer