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IN THE PROBATE COURT.

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IN THE ESTATE OF SARAH C. GIBERSON, DECEASED.

HALIFAX, MONDAY, JANUARY 18, 1937, 10am

Before ROBERT F. YEOMAN, K.C.,

Registrar.

MINUTES OF EVIDENCE.

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Before ROBERT F. YEOMAN, K.C.,

Registrar.

M. B. ARCHIBALD, K.C., } for the Salvation Army, Halifax, executor.  
T. C. Doyle, }

JOHN F. SHAW, for Lorna Doone Abbott.

ROY A. LAWRENCE, for Blanchard Giberson.

MR. ARCHIBALD: You will recall the other day that when Major Mundy was giving his evidence, I asked for the indulgence of the court, and I said we had a witness from abroad I wished to call, after he had identified one or two documents, and for the purpose of completing the record there are one or two formal questions that I should like to ask Major Mundy, and I wish to recall him for that purpose.

MAJOR THOMAS H. MUNDY, being recalled and further examined by Mr. Archibald:

Q. You are the Divisional Commanding Officer of the Salvation Army?

A. Yes.

Q. Of the Province of Nova Scotia?

A. Yes.

Q. Is that how it is designated?

A. Divisional Commander of the Salvation Army for Nova Scotia.

Q. You are the officer in command or control of the Salvation Army in and for -

A. For Nova Scotia.

Q. For the Province of Nova Scotia: and did you occupy that - when did you assume that position?

A. July, 1934, - since July, 1934.

Q. And continually since?

A. Since.

Q. And you occupied that position on the 6th June, 1936?

A. Yes.

- Q. And in accordance with these records - I think this is in evidence - you are the sole executor of the will of the late Sarah Croker?
- A. Yes.
- Q. Remember when you were appointed executor of the will?
- A. Just a little while after that - a little time after June 3rd last year.
- Q. And you took possession of Mrs. Sarah Croker's personal effects?
- A. Yes.
- Q. Where did you find them?
- A. At 203, Brunswick street.
- Q. Was anyone with you when you took over the effects?
- A. Yes, Mr. Doyle and the people who were moving the furniture away.
- Q. Mr. Doyle?
- A. Yes.
- Q. And you moved the furniture away from there?
- A. Yes.
- Q. Well, then, - you remember this, - the hearing in this application in September?
- A. I do, sir.
- Q. And on that occasion certain photographs were identified?
- A. Quite so.
- Q. And you examined the photographs that were introduced in the evidence that day?
- A. I did.
- MR. ARCHIBALD: The evidence of Mrs. Abbott, 11th September, 1936, starting at page 11.
- Q. There were some 31 photographs introduced at that time?
- A. Yes.
- Q. You examined them before they were introduced into evidence?
- A. Yes.
- Q. Where did you find those photographs Nos. 1 to 31 inclusive?
- A. In the belongings of Mrs. Sarah Croker at 203, Brunswick street, Halifax.
- Q. You found them all there?
- A. All there.
- Q. And in addition E/5, where did you find that?

Q. And in addition, E/5, where did you find that ?

A. That was with the others.

Q. At the same time ?

A. Yes.

Q. And same place ?

A. Correct.

MR. SHAW: I suppose I cannot anticipate to what my learned friend's evidence is leading, but it seems to me this was all gone into in the last hearing. Major Munday was examined as to these photographs, and that particular photograph.

THE REGISTRAR: I don't just remember that: that was some time ago, and the situation was quite different then; it was you who wanted to bring the photographs in evidence.

MR. SHAW: Yes.

THE REGISTRAR: Mr. Archibald in going over the evidence may have seen things that were not brought out at the time; the situation was quite different; anything you are objecting to can be argued.

MR. ARCHIBALD: The situation is, my learned friend subpoenaed Major Mundy, and he was asked to produce certain photographs, and then by agreement Major Mundy and the learned Registrar picked out certain photographs.

THE REGISTRAR: All the photographs that had a woman in them.

MR. ARCHIBALD: While we all know about it, and the Registrar, I didn't see where that was just tied up in the evidence to shew where they had come from, and that is my only purpose in recalling Major Mundy.

CROSS EXAMINED BY MR. SHAW:

Q. This particular photograph, E/5, 13/1/37, - this particular photograph was not among the collection which were picked out on the former hearing: have you a distinct - was this among the collection which you brought to the court on the last previous hearing ?

A. I would say, yes.

Q. You have a distinct recollection ?

A. I remember seeing it quite often.

MR. ARCHIBALD: I think the Registrar said only photographs with a woman were introduced.

want to call further evidence, which would lead to a great deal

MR. ARCHIBALD: Mr. Harris will be here in a few minutes; his evidence will complete my evidence except I want to produce some evidence in respect to the handwriting of Sarah Croker - a comparison of the handwriting of Sarah Croker and Sarah Davenport. I have not had an opportunity of comparing that. The expert is coming, and I think will be here about noon. I will finish my case today. A great deal depends on the evidence of the handwriting expert.

MR. SHAW: I don't know I can speak for Mr. Giberson's solicitor: I think we will be willing to admit the signature of the late Dean Crawford, and also that he was a regularly ordained minister of the Church of England, - if that is the evidence of R.V.Harris.

MR. ARCHIBALD: That is the evidence. As far as these parties are concerned that is all right, but I think that as Mr. Harris is in the court house, in the building, and available within the next hour or two, we should have the evidence in case some others may become interested later on.

MR. LAWRENCE: I would be quite willing to admit the Rev. E. P. Crawford was a duly ordained minister.

MR. ARCHIBALD: And admit his signature?

MR. LAWRENCE: Yes, I quite agree. I think he is a man of a reliable type - he must have been.

THE REGISTRAR: Do you admit this signature on the certificate?

MR. ARCHIBALD: I think we had better - if my learned friends will admit the signature of Sadie Davenport is in the handwriting of the same person who signed the will, Sarah Croker -

MR. SHAW: I don't think I am prepared to admit that. It might have been another Sadie Davenport. I don't question the authenticity of the documents.

MR. LAWRENCE: I don't think I could either: I am so much at sea about this woman.

MR. ARCHIBALD: Subject to my calling the evidence of Mr. Harris, and the handwriting man, they may go on.

THE REGISTRAR: It should be distinctly understood before we take up the other case in rebuttal that you have particular witnesses: on the other hand, the situation might change, and that you might

want to call further evidence, which would lead to a great deal of confusion.

MR. ARCHIBALD: I will ask for an adjournment until later in the day.

(After an interval of a few minutes Mr. Harris arrived).

REGINALD V. HARRIS, being called and duly sworn, testified as follows :

Examined by Mr. Archibald :

Q. You are Chancellor of the Diocese of the Church of England, Province of Nova Scotia ?

A. Diocese of Nova Scotia.

Q. How long have you been residing in Halifax ?

A. 30 odd years; 35 years.

Q. Remember St. Luke's cathedral ?

A. It was called St. Luke's cathedral, and stood on the corner of Church and Morris streets.

Q. Do you remember that was burnt ?

A. Burnt about 1904 or 1905.

Q. Remember the last Dean of the cathedral ?

A. The last Dean was Rev. E. P. Crawford; he became the Dean of the new cathedral which was opened in 1910.

Q. Know him intimately ?

A. I knew him very well.

Q. Were you an officer of the -

A. I was church warden in the cathedral two years, I think, after it was opened in 1910.

Q. Do you know when the Rev. Mr. Crawford came to St. Luke's ?

A. It must be - I could only guess at it, but it must have been some time in the nineties.

Q. And he was incumbent in 1899 ?

A. He was.

Q. You have seen him officiate at the various ceremonies of the Church of England ?

A. Many times.

Q. Was he duly ordained ?

A. I would presume so; I was not present at his ordination; it

took place long before I was born.

Q. Are you familiar with his signature ?

A. I have seen him write a good many times.

Q. Look at E/1, and look at the signature.

A. That signature is his, in my opinion; and that signature is his: it is all in his handwriting except three or four signatures at the bottom.

Q. The whole document : look at the endorsement on E/3, in whose handwriting is the endorsement ?

A. It is all in his handwriting except the signatures apparently of the witnesses: I have no doubt about it.

Q. What about the signature E. P. Crawford on there ?

A. That is his signature, in my opinion.

Q. Dean Crawford was a resident of Halifax for a number of years?

A. Yes, he lived in Queen street.

Q. Queen street, city of Halifax ?

A. Just back of St. Luke's hall, on the corner of Morris.

Q. Know how long he resided there ?

A. Until he died in 1912 or 1913; he died just a few days before Christmas.

Q. I don't suppose you knew where his home was ?

A. He came from Ontario, Brockville; that is where he was rector before he came here.

CROSS EXAMINED BY MR. SHAW:

Q. It is 25 years since he died ?

A. Yes, about that.

Q. Have you seen much of his handwriting in the intervening years?

A. No.

Q. Your recollections are 25 years ago ?

A. Yes.

Q. In view of that, you would say which of this writing on that marriage register is his, and which is not.

A. All except these last four lines. My opinion the words, Mary Hall her mark, are written by him, but not the X probably; but those four lines are the exceptions to the whole thing being written by him. I may say when you asked me the question whether I had seen much of his handwriting in the last 25 years, my father was

secretary-treasurer of the Diocese, and I frequently assisted him in the past 25 years in the office affairs, and came across Dean Crawford's handwriting on various reports and documents and that sort of thing: I am also custodian of a good many documents, and among them there are documents written by him.

AND THEN THE WITNESS WITHDREW.

MR. ARCHIBALD: It may be impossible to identify these signatures.  
MR. ARCHIBALD: On Wednesday last I intimated I would substitute for E/3 a photostatic copy of the document; there is printing on both sides. I notice Mr. Hilchey has come in and I will ask him to identify these two certificates.

ALMON E. HILCHEY, being recalled and further examined by Mr.

Archibald: before 12.30 today. We may still save time, - that is

Q. You are already sworn. Do you recall the document E/3, which was put in evidence in this case on Wednesday last?

A. Yes. Limited to coupling the Satis Davaport referred to in

Q. Look at these two documents, both marked E/3, 13/1/37, and tell me what they are.

A. This E/3 is a photostatic copy, I would say, of the original marriage license. think that is quite reasonable, if it is limited

Q. Are the particulars the same, - look at them.

A. I had occasion to take them to the photographer, and I believe they are the same; I would certainly think they are the same exactly. If any new matter was brought up he would be recalled

Q. And the other E/3, 13/1/37.

A. Yes, I would say this is an exact photostatic copy of the endorsement.

MR. ARCHIBALD: It takes two documents to make the one -

there is a reverse side: this is of the marriage license;

that is the front, and that is the back; it is the back

part that has Dean Crawford's signature. case, and close it.

THE REGISTRAR: If Mr. Archibald's witness is not available until

AND THEN THE WITNESS WITHDREW.

later on, I think as a matter of convenience it will be advisable to go ahead, limiting him that he be allowed to give evidence on the one point that is in his mind; if you, in purpose,



THE REGISTRAR: You still have another witness ?

MR. ARCHIBALD: I have another witness, and it is with respect to the signature of Sadie Davenport on that marriage register and on the license.

THE REGISTRAR: Will that be your last witness ? Suppose the witness cannot give evidence satisfactory to you, will you want to put in another witness ? I want it understood at this stage whether you are closing your case or not.

MR. ARCHIBALD: It may be impossible to identify these signatures. I don't know what the expert will say. The expert wont arrive until noon. If not, I can find the evidence, but it will mean evidence by commission in the United States, - but I can do it. I don't want to go to that trouble, and I think I will be satisfied with the evidence of the handwriting expert. He will be here shortly after 12 - before 12.30 today. We may still save time, - that is open.

THE REGISTRAR: Any further evidence that you would give would be absolutely limited to coupling the Sadie Davenport referred to in the marriage license with Sarah Croker, the testatrix ?

MR. ARCHIBALD: I am agreeable to that: there is some evidence here that calls for rebuttal, but in my case, yes.

THE REGISTRAR: I think that is quite reasonable, if it is limited to that narrow issue.

MR. LAWRENCE: I didn't understand my learned friend to say it was limited to that narrow issue; he said if -

THE REGISTRAR: If any new matter was brought up he would be entitled to call evidence in sur-rebuttal.

MR. LAWRENCE: There are no pleadings and it is difficult to testify to the issues -

THE REGISTRAR: It is exactly the same.

MR. LAWRENCE: My learned friends are repelling the validity of a marriage in 1914; they must put in evidence to your satisfaction; I want to know when they say they prove their case, and close it.

THE REGISTRAR: If Mr. Archibald's witness is not available until later on, I think as a matter of economizing time it will be advisable to go ahead, limiting him that he be allowed to give evidence on the one point that is in his mind; if you, in your case,

MR. LAWRENCE: I might be very stupid, but as I understand it, raise anything that has to be answered, that has nothing to do with his case in the first instance, naturally he will have to reply to that.

MR. LAWRENCE: The only evidence that I am presenting is evidence of a contradictory nature: once that is in, I am submitting that my learned friend cannot bring in evidence to rebut my contradictory evidence.

THE REGISTRAR: We will have to argue that as the point arises.

MR. LAWRENCE: We could be going for months back and forth.

THE REGISTRAR: If you brought out evidence there was a previous marriage to the Croker marriage, - I don't think we need argue that at this stage; that is remote; it may be argued. He has not completed his case because one witness is not available. Why is he not available?

MR. ARCHIBALD: I can state frankly: the witness is not available; I suppose I am to blame; I didn't subpoena him; he said he would be here at a certain hour this morning; owing to illness of another member of the staff he could not get relief until 12; he is here in the city, at the Maritime Business College, and arrangements had been made -

THE REGISTRAR: Do you think he can be depended on to arrive?

MR. ARCHIBALD: It is Mr. Stech of the business college.

THE REGISTRAR: I will reserve the right to you, Mr. Archibald, to give evidence limited to this one issue, the question of the identity of Sadie Davenport referred to in the marriage license with that of Sarah Croker, the testatrix.

MR. SHAW: And then he closes his case subject to that limited right.

THE REGISTRAR: Any proper evidence on that issue; that does not necessarily limit him to the handwriting expert; any evidence on that issue that he rests his case: naturally he has not closed if for any reason the handwriting expert - if he wanted to supplement that, that would be his privilege: you can only tell in the conduct of the case if it is complete; he might have to supplement something.

MR. LAWRENCE: I might be very stupid, but as I understand it, he has closed his case subject to his right to bring in evidence of handwriting experts.

THE REGISTRAR: No; he said he might apply for a commission as to identity. I don't want to prejudice you or Mr. Shaw in any way, and if that is not satisfactory to you, I will adjourn the matter until Mr. Archibald can complete his case, and then do it in the regular way.

MR. LAWRENCE: Quite frankly, I think the interests of my client would be better served once I know that Mr. Archibald says, and you agree, that he has closed his case; it is not my duty to come in here and tell him what he must prove.

THE REGISTRAR: Would you like it adjourned until this afternoon; I think it is a reasonable request.

MR. ARCHIBALD: I agree as to that.

THE REGISTRAR: I was looking at it more or less as to your convenience; if you feel you would rather not, in those terms, then in fairness to you I will grant an adjournment, because he should prove his case.

MR. LAWRENCE: My learned friend and myself might get into a dispute as to what time he did close his case.

THE REGISTRAR: I am afraid there may be confusion and I think it would be preferable to adjourn until this afternoon.

MR. LAWRENCE: I have certain ideas what the law compels him to prove.

MR. SHAW: I don't wish to do anything to embarrass my learned friend.

THE REGISTRAR: You will be prepared to call the witness on handwriting, or to call any other witnesses, by commission or otherwise, and you will intimate it before Mr. Shaw or Mr. Lawrence commence their case in rebuttal.

MR. ARCHIBALD: I would have asked in the ordinary course for an adjournment; my learned friend gave an indication there were some witnesses.

THE REGISTRAR: I will adjourn now, until 2.30 p.m. today.

COURT ADJOURNS.

2.30 p.m. COURT RESUMES.

WALTER A. STECH, being called and duly sworn, testified as follows:

Examined by Mr. Archibald:

Q. You live in Halifax?

A. I do.

Q. You are associated with the Maritime Business College in what capacity?

A. Vice Principal, that is all the official capacity.

Q. How long have you been with the Maritime Business College as teacher or - of the same person?

A. 25 years this month.

Q. In such capacity have you had occasion to examine and study handwriting?

A. I have for over twenty years.

Q. In your experience have you had occasion to compare signatures of handwriting?

A. That is part of the instruction work, in comparing, improving, and so on - comparison is part of the work.

Q. And studying the handwriting of others?

A. Yes.

Q. Have you been called as a witness in cases before the courts?

A. Yes, I have been, in several other cases.

Q. For this purpose?

A. For this very purpose.

Q. Of comparing handwriting?

A. Yes.

MR. ARCHIBALD: I submit that I have qualified the witness to give evidence - opinion evidence in respect to handwriting.

Q. I am going to ask you to look at exhibit E/1, the signature of Sadie Davenport, the third line from the bottom of the certificate; and I am also asking you to look at the signature Sarah Croker to the copy of the which which is on file in this court; it is not marked as an exhibit, - it is the original will; also the signature Sarah Giberson, to the deed marked as exhibit L/3. Now, what do

say with reference to the handwriting of these three signatures ?

A. Well, I would say from the evidence there to the best of my knowledge that the three would be the same.

Q. The writing of the same person ?

A. I would say so.

Q. That is your opinion ?

A. That is my opinion.

Q. And I would ask you to look at the cheque L/5 and the signature Sarah Croker there: what do you say about that signature?

A. I would say that also was the same signature.

Q. The writing of the same person ?

A. Yes.

Q. In comparing the signatures of Sadie Davenport and Sarah Croker and Sarah Giberson, what particular features of similarity do you notice there ?

A. The S in each case is almost identical; and the R's are made practically identical in every instance; and the other letters are not - that is, the letters that are common to both signatures, are enough alike to say they were done by the same person; several of the letters there are practically identical, that is, in their general formation of the letters.

Q. Looking particularly at the signature Sadie Davenport and Sarah Giberson, in addition to the s's and r's, are there any other letters there that particularly impress you, in those two ?

A. The o is somewhat on the same principle again, general formation: the a is slightly different, but the general formation of the letter is the same, I judge; the difference in that particular letter is simply due to the difference in age of the person signing it; but the others are -

Q. Does the letter n appear ?

A. Yes, they are very much alike; the general formation in the two letters is very much the same.

MR. LAWRENCE: Is the photostatic copy of the marriage license in the Giberson case in evidence ?

MR. ARCHIBALD: Yes.

CROSS EXAMINED BY MR. LAWRENCE:

Q. I am shewing you L/2, will you look at the signature Sarah Croker, the third line from the bottom, - do you see that signature?

A. Yes.

Q. Would you say it is written by the same person as wrote the signatures in E/1, and the original will, and in L/3?

A. Yes, I would say so, on the brief study I have had of it.

Q. What do you mean, brief study?

A. That you have just put them before me this minute and have not given me time to go into the thing in detail.

Q. You mean you have studied the signature on the others?

A. Yes, previously.

MR. SHAW: I can't. AND THEN THE WITNESS WITHDREW.

MR. LAWRENCE: No. I was speaking in a member - who was a member of the bar of New Brunswick, some time ago; as a matter of

MR. ARCHIBALD: That is the case for the executor, Major Mundy.

I am tendering the various exhibits and documents.

MR. SHAW: In the previous hearing, September 11, when I closed my case for Mrs. Abbott, it was reserved to me, and I might say to us, to prove the law of New Brunswick at a later date. I want to ask for the right to do that: I am not prepared to do it today. Page 20 of the record of September 11th. There may be a further question due to the appearance of the alleged Mr. Croker - it may be, - I am not saying or admitting, that Mrs. Croker so-called is domiciled in England, in which case it might possibly - opponents of the will.

THE REGISTRAR: How does the question arise as to that?

MR. SHAW: As to the law of England in respect to her capacity in 1912 to make a marriage - to make a will - as the wife of an Englishman.

THE REGISTRAR: That is more or less taken for granted; however, it might not be; it is for the court.

MR. SHAW: I don't see the necessity of proving the law of England, but I do raise that point. There should be an opportunity for me to shew the law of New Brunswick.

THE REGISTRAR: Why the law of England: a will is valid if made in the place of domicile, the place where the will is made. Are

you going to offer some evidence as to the law of England ?

MR. SHAW: It may be that I would want to offer evidence as to the state of the law of England at that time.

THE REGISTRAR: Now will be the time, otherwise you will be too late. How do you propose to prove the law of New Brunswick ?

MR. SHAW: If given the opportunity, by a copy of the statutes of New Brunswick.

THE REGISTRAR: Does that prove them ?

MR. SHAW: Under the seal of the King's Printer identified by one familiar with the laws of New Brunswick.

BY THE REGISTRAR: Are you going to call a member of the New Brunswick bar ?

MR. SHAW: I can't.

MR. LAWRENCE: No. I was speaking to a member - who was a member of the bar of New Brunswick, some time ago; as a matter of fact he is a judge: I have not communicated with him recently as to when he will be down here, or if at all: the last conversation he told me -

THE REGISTRAR: You have to deal with that now.

MR. ARCHIBALD: The first hearing in this case was July; we cannot allow this matter to drag on.

MR. SHAW: I may say up to the present any dragging has not been caused by my parties.

THE REGISTRAR: We don't want any in the future.

MR. SHAW: All the dragging has been from the opponents of the will.

THE REGISTRAR: You had the same time to prepare your case as they had; all this time while they were apparently locating Mr. Croker you had time to prepare your case, and you knew it was coming on on January 13th; I want it handled expeditiously now. I wont shut you out, but I require you to move quickly.

MR. SHAW: What time would your Honour be prepared to give me to prove it ?

THE REGISTRAR: Have you any witnesses today on other matters ?

MR. SHAW: I have none.

MR. LAWRENCE: I have witnesses but I expect an argument before these witnesses can testify. Now that our opponents have closed

their case my contention is that they are repelling - I should like

THE REGISTRAR: I was asking you a question; I don't want you to argue it now. You could have a man here by tomorrow night probably.

MR. LAWRENCE: Yes, I am going to try and ask for some witnesses to be heard this afternoon. Your Honour thinks.

THE REGISTRAR: What about proving the law of New Brunswick? You should know at this time, - are you going to bring this judge to Halifax? I think you should have your man here to know the law.

MR. LAWRENCE: I wrote him the other day. He will probably be here.

THE REGISTRAR: How can a judge be free to come here to say about that? The position of the law here by the provisions of

MR. LAWRENCE: Possibly he cannot.

THE REGISTRAR: Mr. Rutledge suggested Mr. Rand should be here.

MR. LAWRENCE: What understanding there is between Mr. Rutledge and Mr. Rand, I don't know.

MR. SHAW: As far as that point is concerned, the evidence as to the law can be brought in very quickly; I assume, rightly or wrongly, your Honour might take some time to consider your decision, so that I don't think it would put you out. I think in a fortnight it might be brought.

THE REGISTRAR: I would not start to consider my decision until the evidence was all in; apparently your evidence would not shake me one way or the other: I would rather not consider it until all the evidence was in. Is there any short cut to the law of New Brunswick? I will decide the other way.

MR. ARCHIBALD: I don't know about short cut. My learned friend Mr. Bishop was going to give evidence about that, but apparently he didn't. That was in July. There was an adjournment until September, and a further adjournment until October, and we are now in January. I don't see the difficulty in proving this point. I object to any adjournment at this stage; I don't think it is one of the matters on which there should be an adjournment. New Brunswick is not far away; there are a lot of practicing barristers and solicitors, and any number of experts.

THE REGISTRAR: I think you should decide if you are going to apply for a commission now, or bring a barrister here. I think he



MR. SHAW: I don't intend to apply for a commission. I should think a fortnight would be enough.

THE REGISTRAR: You could have a man here by tomorrow night probably, why a fortnight?

MR. SHAW: Any time your Honour thinks.

MR. LAWRENCE: The nearest practicing barrister of New Brunswick is Mr. Davison of Sackville.

THE REGISTRAR: I think you should have some one that we know something about, just not any barrister at all. Probably it is all contained in the Revised Statutes of New Brunswick.

MR. LAWRENCE: The section of the Act says by the production of a copy, or what purports to be a copy, under The Nova Scotia Evidence Act, Chapter 225, section 3. (section read). There is a case, - what is the production of a copy, and my recollection is a copy certified by the King's Printer, and merely producing it and calling some one competent to say it is the statute and the law of New Brunswick and tendering it in evidence: it is a very simple matter to do.

MR. ARCHIBALD: The statutes are interpreted by the courts.

MR. LAWRENCE: That would be done by the witness called.

THE REGISTRAR: While one of you is conducting the case could one of you get in contact with Mr. Inglis and find if there is a New Brunswick barrister practicing here. I think you might go ahead with the witnesses which you have, and before we finish today we will decide the other matter.

MR. LAWRENCE: I have to ask for a ruling on the law before I am entitled to call these witnesses. My submission is that there is a prima facie presumption of a valid marriage in 1914. My submission is, as a matter of law, that the executor in order to successfully rebut that presumption must shew that the incapacity of the testatrix in 1899 is not reasonably possible and highly improbable. I am submitting that the law compels them to go that far in rebutting this presumption. On the evidence given here, as to whether or not it is probable that testatrix was a spinster in 1899 when she married Croker, - the only evidence on that is the statement by Croker himself that it is highly - I think he

said it is highly improbable that she was a married woman when she married him in 1899 - that is the gist of his statement; page 54, I will start at the second question from the bottom of the page -

THE REGISTRAR: I would rather you start from the fourth or fifth question, page 53.

MR. LAWRENCE: I asked him, bottom of page 52: "I put the question to you, - you swore that she was a spinster in 1899? A. Yes. I am asking you today, was Sarah Croker an unmarried woman when she married you in 1899? A. To the best of my knowledge, yes: to the best of my knowledge, yes, sir.

THE REGISTRAR: That is definite.

MR. LAWRENCE: That is his answer there. "Q. Would it surprise you to know that she was married? A. Absolutely it would surprise me. Before I married her? That is the question you put to me? "Q. That she was a married woman when you married her? A. It would surprise me; yes, sir. Q. Why would it surprise you? A. Because I have no other reason to believe otherwise than she was a spinster. "Q. That is not the question: why would it surprise you? A. I don't know I can give a better answer than the one I gave you: if I could find a better one I would give it to you. Q. What one was that? A. I have no reason to suspect other than she was a spinster. "Q. Why have you no other reason to suspect other than she was a spinster? A. I saw no indication of her being anything else; she had no wedding ring. Q. Why would you be surprised to hear she was married when she married you? THE REGISTRAR: He said she had no wedding ring; any other reason? Q. Any other reasons? "A. There is no other reason, sir. Q. Other than she didn't carry a wedding ring? A. She didn't wear a wedding ring. Q. That is the sole reason why you believed in 1899 she was a spinster.

THE REGISTRAR: Of course, I said then, and I do now, that your cross <sup>(worn)</sup> examination of this man was quite unreasonable because nobody could swear to a thing of that kind, any more than he swore. He said she was a spinster when he married her: all he could swear to was his belief that she was a spinster, and that is all anybody could swear to in dealing with another person's status.

MR. LAWRENCE: The reason I put the question was because I conceive the law to be that, in rebutting that presumption the learned counsel

for the executor must prove not that she had capacity in 1899, but they must prove that it is not reasonably possible and highly improbable that she had not capacity in 1899 when she married Croker. On the question of probability, he admitted eventually - the witness did admit it is possible, but not probable, were the words he used.

THE REGISTRAR: I would not give any value to that at all. It is obvious to anybody when a man marries that his wife may have been married before, but he is marrying a decent person and takes it for granted she was not a bigamist, and he may be morally certain, but it cannot be established to 100 % in any case.

MR. LAWRENCE: When I asked him when he took her courting, - he had too much respect for the dead, he told me.

THE REGISTRAR: It has no significance that she was not a decent woman so far as the record was concerned, I presume she was.

MR. LAWRENCE: In rebutting that presumption our opponents must shew her incapacity was highly improbable.

THE REGISTRAR: What do you say is necessary to prove the marriage?

MR. LAWRENCE: I say it is not a question of what is necessary to prove the marriage, but what is necessary to rebut the presumption of marriage in 1914.

THE REGISTRAR: Why should the marriage, the one you are relying on, have any preference over the previous marriage; you are attacking the proceedings, and I think they - there is no burden that it would be casting on you.

MR. LAWRENCE: We have proved a marriage.

THE REGISTRAR: You have proved a ceremony, but you have not proved a marriage.

MR. LAWRENCE: And cohabitation.

THE REGISTRAR: Unless you have evidence in rebuttal, you have failed to prove a marriage.

MR. LAWRENCE: I take it your Honour does not hold me on that law.

THE REGISTRAR: I don't want to make a snap decision; that is my opinion at the moment.

MR. LAWRENCE: I put it this way: that one of the legal requisites incumbent upon our opponents to prove is that Mrs. - they must

shew that Mrs. Croker's incapacity to marry Croker in 1899 was not reasonably possible and they must shew it was highly improbable.

THE REGISTRAR: Why ?

MR. LAWRENCE: Because the law says so.

THE REGISTRAR: I don't believe any law says so.

MR. LAWRENCE: Perhaps it does not, but I tender that submission.

THE REGISTRAR: Are you going to cite authorities for such an extraordinary proposition ?

MR. LAWRENCE: Yes: I have not got them right here.

THE REGISTRAR: I don't see that proving this marriage is any different from any other marriage.

MR. LAWRENCE: I have not the authorities here. I can give you some of the citations: Piers v. Piers, 9 Eng. Rep. 1128. That is the only case that I can remember right off the bat.

THE REGISTRAR: What is the nature of the evidence ? Have you any objection to stating the evidence you want to produce now ?

MR. LAWRENCE: I have no objection. The nature of the evidence I propose to call in rebuttal is, statements made by the deceased that she married when she was a very young child in Fredericton; that is one of the witnesses.

THE REGISTRAR: On what ground do you offer such evidence ?

MR. LAWRENCE: I am contending for its admission on the ground it is a declaration against her proprietary interests, because when a woman admits she has been a married woman it affects her title to land so far as the rights and courtesy is involved. That is one ground.

THE REGISTRAR: It is a very ingenious one; I am not inclined to agree with it. Have you any authorities ?

MR. LAWRENCE: No, I can't name any right off the bat. That is one of the exceptions to the hearsay rule.

THE REGISTRAR: Have you any text book authority that proof of marriage -

MR. LAWRENCE: On the admission of this statement ? Yes, statement against interest. I take that for granted. That is an exception of the hearsay rule.

THE REGISTRAR: The statement of a woman that she had been previously

been married is a statement that comes within that rule ?

MR. LAWRENCE: A married woman holding land, her right of courtesy. It we have - we must certainly have! we had a man here,

THE REGISTRAR: Her dower & we had an attending witness.

MR. LAWRENCE: No, right of courtesy; the husband's right of courtesy. Supposing she held land and says I was married in Fredericton when I was 16; if she holds land then, or has ever held land, and a husband crops up and claims his right of courtesy in that land, that would be a statement against her interest.

THE REGISTRAR: She would be affecting a subsequent husband's rights; it may be Mr. Croker or Mr. X. Opponents are repelling

MR. LAWRENCE: Do I understand your Honour to rule that does not - that such statements are not admissible on the ground that they are statements of deceased's declarance against her proprietary interests? in rebutting, and it is debatable whether you can

THE REGISTRAR: Yes, I rule that. presumption. In this case the

MR. LAWRENCE: Then if my first premise of law is right they must prove that her incapacity when she contracted the 1899 marriage was not reasonably possible and highly improbable. those children.

THE REGISTRAR: Get that book and look for it now. 110, say the

MR. LAWRENCE: Assuming that I am right in that law, that the repelling of this presumption puts the burden on my opponents that I contend it does, then I submit these statements are directly admissible because they are evidence on the probability that she didn't have capacity. a presumption of this sort in favour of

THE REGISTRAR: Are you contending this case of the two marriages - - suppose there was not a matter of the second marriage in question, supposing you were dealing with the marriage in 1899 - validity

MR. LAWRENCE: The burden of proof is on those who assail the presumption it was a valid marriage, and it states the sort of evidence. It sounds to me as if they was against you. I

THE REGISTRAR: The presumption is the Croker marriage would be a valid marriage and you are going to assail that ?

MR. LAWRENCE: No, that is where we differ; we set up the 1914 marriage, and our opponents rebut that presumption. marriages are

THE REGISTRAR: If you prove the 1914 marriage that might be so;

but you have not proved the 1914 marriage.

MR. LAWRENCE: With the exception of proving the law of New Brunswick I submit we have - we most certainly have: we had a man here, and he said, I married her; and we had an attesting witness.

THE REGISTRAR: Before the matter of that kind could be decided another witness is produced.

MR. LAWRENCE: That man went in the box and said, I married Sarah Croker, and she was a widow when I married her, and the man says, I saw them go through the form, and here is the official record: then this presumption came into play, and it was a valid marriage and the law presumes it to be such. Our opponents are repelling that presumption: are they entitled when they merely come in and prove a marriage was solemnized previously - they contend we are now entitled to the presumption, and I submit they are not, because their evidence is rebutting, and it is debatable whether you can rebut a presumption with a similar presumption. In this case the marriage took place in 1811; and the same two persons went through a form of marriage in 1835; they had children in the interim between 1811 and 1835, and the question was the legitimacy of these children. The 1811 marriage - those who contended it was not valid, say the priest who performed the marriage didn't have a license from the bishop -

THE REGISTRAR: We are dealing with the 1811 marriage?

MR. LAWRENCE: Yes, the one they sought to impeach. Lord Campbell says: my opinion is that a presumption of this sort in favour of marriage can only be negatived by disproving every reasonable possibility: I do not mean to say you must shew the impossibility of any supposition which can be suggested to support the validity of the marriage, but you must shew that this is most highly improbable and that it is not reasonable possible. 9 Eng. Rep. 1128.

THE REGISTRAR: It sounds to me as if that was against you. I merely suggest in this case before me there is a presumption that both marriages are valid.

MR. LAWRENCE: That comes right down to the thing.

THE REGISTRAR: And there being a presumption both marriages are valid, there is a burden probably on anybody who wishes to upset

that presumption, but necessarily the prior marriage is in a stronger position than the later one. The case you cite is a case of marriages in 1811 and 1835; somebody was attacking the first marriage. It sounds to me as if that case was rather against you.

MR. LAWRENCE: Then I say if your Honour thinks that is not an issue, that our opponents onus is discharged the moment the marriage is solemnized, and you say we must attack that presumption, then I am prepared to say this, that we have reasonable grounds for believing that there was a marriage prior to 1899.

THE REGISTRAR: Are you still speaking on the point of the further evidence? I disallowed your right to call evidence on the ground it was against interest.

MR. LAWRENCE: You contend the only evidence we can bring in is evidence that will rebut this presumption that the 1899 marriage was valid - is that right?

THE REGISTRAR: Well, -

THE REGISTRAR: It is not a fair question to your Honour; your Honour has not given a decision in respect to either of these marriages, and you are asked for a decision.

MR. LAWRENCE: If that is what we have to do, then it has to be done. If we have to bring in evidence that will at least raise a presumption of a marriage by Sarah Davenport to somebody else prior to 1899 then we have to get to work.

THE REGISTRAR: You want to set up evidence of a marriage prior to the Croker marriage.

MR. LAWRENCE: I want to see if there is sufficient evidence to warrant that attack: we have two witnesses here; one who gives a statement by the testatrix that she was married when 16; that is one ground, and personally I think it is quite reasonable; it is not unreasonable to them at all.

THE REGISTRAR: I don't see how you will get the statement of a deceased person in. Will you cite me some authority for that.

You stated, as against interest, - I have ruled it is not against interest. Have you any other ground.

MR. LAWRENCE: If our opponents must prove the testatrix's incapacity in 1899 was something not reasonably possible and highly improbable,

then this evidence -

THE REGISTRAR: It is not a matter of you calling evidence, but a matter of Mr. Archibald's case being defective. That is not a question of further evidence.

MR. LAWRENCE: Supposing there was a marriage prior to 1899?

THE REGISTRAR: Then you produce evidence of that, but not by hearsay statements which I have ruled are not against interest.

MR. LAWRENCE: And you say they are not admissible until the probability of incapacity - you say that is not in issue?

THE REGISTRAR: I didn't say that: I refuse to be asked to rule on a very abstruse point on the spur of the moment; it sounds to me like an argument of the whole case: you should be prepared to offer any evidence you have on the ground you propose to offer it.

MR. LAWRENCE: There are very good reasons; one is, I never knew until today, that it was possible she was married before 1899 - not until recently, that she made these statements to these people, and that she stated she had a daughter, and the law presumes it is a legitimate child: there is every reason why that should be explored.

THE REGISTRAR: I don't want to shut you out of any rights you have.

MR. LAWRENCE: If you say that where there is smoke there must be fire -

THE REGISTRAR: It does not follow.

MR. ARCHIBALD: I may say that on the 13th or 14th September my learned friend knew that there was a belief that Harry Croker was living; that early in October there was an application to the court based on an affidavit which I made myself for a long adjournment, which outlined particulars as to where he had been in 1914, and three months have gone by. I suggest my learned friends have had ample time to have their evidence in shape.

THE REGISTRAR: I think there was an affidavit filed by you on the 13th October.

MR. ARCHIBALD: I think the Friday before the 13th.

THE REGISTRAR: You filed an affidavit which led one to believe Harry Croker was alive; you had three months to answer that suggestion.

gets into court first and produces a marriage, that that person



MR. LAWRENCE: How could we tell last October they would bring a man in here and prove a valid marriage?

THE REGISTRAR: Because it was sworn to by an affidavit filed here.

MR. LAWRENCE: That there were reasonable grounds for believing he was alive in 1914, quite true.

THE REGISTRAR: I don't wish to exclude this evidence if it can be admitted, as to the so-called presumption.

MR. ARCHIBALD: I have a copy of the affidavit here.

THE REGISTRAR: October 9th. (read).

MR. LAWRENCE: That is one thing: the possibility of proving he was validly married to Sarah Davenport in 1899 is another; there was no duty on us to act until the onus was put on us.

THE REGISTRAR: As to the presumption, it is a very difficult legal point: I am not going to shut you out from offering this evidence, if there is any chance of you being right in your contention as to the presumption. I don't think there is any chance, but I will look at it with an open mind. I think the law would be most unreasonable if it allowed any technical rule to say that, in proving the earlier marriage, which is the most important marriage, then in proving the later marriage.

MR. LAWRENCE: That is one of the problems.

THE REGISTRAR: Piers v. Piers is not clear at all. I think it is rather against you; they are upholding the earlier marriage.

MR. LAWRENCE: If I am right in my contention we are on the offensive and my learned friends on the offensive.

THE REGISTRAR: They are obviously not; you are attacking, and the burden is on you.

MR. LAWRENCE: I say, supposing this happens, that evidence of a marriage subsisting in 1899, or evidence of a marriage contracted by the testatrix prior to 1899 is adduced, something that goes to make the 1899 marriage invalid, it can come in at any time.

THE REGISTRAR: You wish to argue the point at this stage?

MR. ARCHIBALD: I don't think I do. I submit the presumption in favour of the 1899 marriage/<sup>it</sup> is pretty far fetched to say whoever gets into court first and produces a marriage, that that person

should have some special protection thrown around his marriage. Granting for the moment there was some presumption in favour of the 1914 marriage to Giberson, if my evidence is complete, which I submit it is, any presumption in favour of that marriage has been rebutted by the evidence respecting the marriage in 1899, and there is as strong a presumption attaching to that marriage as there was to the other marriage formerly, and it is for my learned friends to rebut that presumption. That is the position I am taking.

THE REGISTRAR: I almost feel sure enough of that to make a ruling on it, but I don't know if I should in fairness to myself, on a point of that kind, give an off hand ruling. Have you any other authorities on that point?

MR. LAWRENCE: Yes, I have. I have the case of *De Thorens v. Attorney General*, 1 A.C. 686.

THE REGISTRAR: As between two marriages?

MR. LAWRENCE: Yes. I think briefly the facts in that case are the man obtained a divorce from the court at Westminster, Mr. Wall, but the decree was only nisi, and it did not become absolute until a year later. Before the year was up he went through a form of marriage with a Miss Ogg, both parties honestly believing there was no obstacle to their marriage. That was before the decree absolute. He must have been an English domiciliary and obtained his divorce in England; he went through the form of marriage in Scotland. They afterwards resided together constantly as husband and wife and were treated as such in Scotland, Ireland and England until the death of Mr. Wall in 1867; between Wall, the man, who was divorced, and Sarah Ogg. There were three sons born. In May, 1872, or after the death of the man, the sons, praying they were the legitimate sons of W. A. and Sarah Wall, asked a declaration of the court that their father and mother was validly married. (The judgment of Lord Cairns was then read). They were debating the validity of the marriage of the man married while he had a wife living.

THE REGISTRAR: And Scotch law.

MR. LAWRENCE: Yes, habit and repute; but that is the law of England as well. *Pierre v. Piers* was cited, followed and applied.

THE REGISTRAR: Those cases are not terribly helpful: they simply state what we know is the law.

MR. LAWRENCE: I say if this is law, a presumption of a valid marriage presumes the capacity, that the parties were capable of contracting a marriage - then I cite that.

THE REGISTRAR: I think your authority is all right but you are stretching it a little too far; I think the same presumption attaches to the Croker marriage.

MR. ARCHIBALD: It is begging the question altogether.

THE REGISTRAR: I think so.

MR. LAWRENCE: That presumption extends to the presumption of capacity; when we say the marriage of 1914 was valid it is presumed Mrs. Croker had capacity.

THE REGISTRAR: I don't think you can prove in a left handed way, calling witnesses to -

MR. LAWRENCE: If at any time Giberson wants to come in and prove a marriage by cohabitation and reputation in New Brunswick or otherwise that was subsisting in 1899, I submit he can do it.

THE REGISTRAR: Are you offering evidence that they were generally reputed to be married?

MR. LAWRENCE: I cannot say.

THE REGISTRAR: You must say. Then I take it for granted you cannot say.

MR. LAWRENCE: The statements made by these witnesses are reasonable grounds for giving us sufficient time.

THE REGISTRAR: These witnesses will testify as to a statement made by deceased.

MR. LAWRENCE: That is right. The statements made by the deceased are sufficient to warrant a reasonable adjournment to look into that matter.

THE REGISTRAR: I don't think so. I cannot give an adjournment for that purpose.

MR. LAWRENCE: And in view of the fact it is on the record Mrs. Croker had a daughter who was as legitimate as I.

THE REGISTRAR: I will reserve that question as to the law relating to presumption because I believe that has to do with the final

decision in the matter. So far as allowing you to call witnesses to prove these things you say you wish to prove, I don't think it is proper evidence, and I am not allowing it on that ground, but I am not deciding that point finally. I am deciding you cannot put in evidence statements of the deceased lady that she was previously married before she married Croker, it is inadmissible; that is all I am deciding now. The other point will be dealt with on the argument, and if you succeed in it Mr. Archibald will fail because he has not gone far enough; it is not a matter for further evidence.

MR. LAWRENCE: You think we are not entitled to an adjournment to make enquiries as to whether or not Sarah Croker was a married woman in 1899?

THE REGISTRAR: No, - because you have had from October 9th to make the same enquiries; Mr. Archibald and you had the advantage of that adjournment to prepare your own case and I don't think you are entitled to an adjournment on that ground. As to the question of the New Brunswick law, that has to be decided right now one way or the other. There is another point that was reserved, and if you are ready to complete your case you must call the witness now or say when you will call.

MR. SMITH: I ask for an adjournment of one week to call a witness, or three or four days.

MR. LAWRENCE: Supposing it turns out in a month's time that we have ample evidence of a marriage subsisting in 1899?

THE REGISTRAR: You may have some other proceeding open to you; but we cannot keep this open indefinitely. These proceedings were started last June.

MR. LAWRENCE: I cannot see the point of the haste now; I would be very leary to advise the executor to pay out money -

THE REGISTRAR: So far as advising the executor -

MR. LAWRENCE: I would think twice before advising him to pay out the money; and not only he but the court would want to know it.

MR. ARCHIBALD: I think we can be responsible for any action we take.

THE REGISTRAR: I will adjourn the matter until Monday, January 25th

at 10 a.m.

MR. LAWRENCE: Just for that purpose. I want it on the record I reserve Giberson's right to bring in evidence as to a marriage subsisting in 1899.

THE REGISTRAR: I don't think I could shut you out if you brought proper evidence in that time; I certainly would not do that.

MR. LAWRENCE: Statements made by truthful and honourable people are the ground: I have these people right here.

THEN THE COURT ADJOURNED UNTIL MONDAY, JANUARY 25th, 1937

at 10 a.m.

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*Reeles*  
Official Reporter.

