IN THE COURT OF PROBATE.

IN THE ESTATE OF SARAH CROKER GIBERSON, DECEASED.

Appearances:

MR.M.B.ARCHIBALD, K.C., for T.H.Mundy, Executor.
MR.T.C.DOYLE.

MR.J.F.SHAW for Mrs.Lorna D.Abbott.

MR.ROY LAWRENCE for Blanchard Giberson.

MINUTES OF EVIDENCE.

JANUARY 25th.1937.

PROVINCE OF
NOVA SCOTIA.

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MR. ARCHIBALD: I submit there should be two sets of costs. We have two parties here who have not put up securities for costs; perhaps, this is not required. These proceedings have become an increasing drain on the estate.

MR. SHAW: The ordinary way in which a statute is proved is by consent of solicitors as to what the statute law of the Province is. It is done as an ordinary matter of consent.

THE COURT: I don't agree with you at all. If counsel knew what the law of the other province is they may very well consent to it. I want to know the New Brunswick law.

MR. SHAW: My submission is, if my learned friend acted reasonably, he would say: bring down the statute law of New Brunswick. All our evidence calls for is the production in court of the statute.

THE COURT: I am not dealing with the question of costs now. Have you any witnesses to call?

MR.SHAW: I submit the law of New Brunswick with respect to Wills. I want a ruling as to whether I am entitled to call witnesses or not or whether witnesses must be called by counsel for Mr.Giberson.

THE COURT: When the point was raised at this stage it was understood before you would have the right to prove the law in New Brunswick; I think you should be ready to do this.

MR.SHAW: I am prepared now. I wish it understood the evidence I adduce will also be taken in the Croker Estate, so called, as distinguished from the Giberson Estate.

THE COURT: It was agreed at the first hearing all evidence in the Giberson case would constitute the evidence in the Croker case.

MR. LAWRENCE: I do not need to call witnesses to prove the statute law of New Brunswick.

THE COURT: You do that at your peril. How do you intend to prove it?

MR.LAWRENCE: By producing in court what purports to be copies of the statutes of New Brunswick with reference to Solemnization of Marriage in 1914 and Wills in 1914. Revised Statutes of New Brunswick, 1903, as amended.

THE COURT: What about the statutes of 1927?

MR.LAWRENCE: I have those as well. This marriage took place under the laws existing in 1914. I am producing herewith Volume I Consolidated Statutes of New Brunswick containing Solemnization of Marriage. By that statute marriage is presumed to be valid. The section says it shall be valid unless

the parties were illegally authorized to enter into the marriage contract. Consolidated Statutes, 1903, as amended.

THE COURT: What statute and what section?

MR.LAWRENCE: Chapter 76, the whole statute (L/1). Consolidated Statutes, 1903: The amendments were Chap.35 Acts 1911; Chap.44, Acts 1911 New Brunswick as amended; Chap.36 Acts 1912 as amended; Chap.30,1914. Consolidated Statutes Province of New Brunswick,1927, chap.77. With respect to Revocation of Will by Subsequent Marriage, that law is set out in Consolidated Statutes 1903 and 1927. Document marked "A" is a true copy of the Act Respecting Wills, Revised Statutes,1927, and certificate from the King's Printer that the statute was in force in the Province of New Brunswick in the year 1914; Chap.173 of Consolidated Statutes, 1927, and it is found in Consolidated Statutes Province of New Brunswick in the year 1903 in Chap.160, entitled An Act Respecting Wills, which statute was in force during the year 1914.

Document marked "B" is a true and correct copy of an Act of the Legislature of New Brunswick as contained in Statutes Province of New Brunswick,1927, being Chap.173, An Act Respecting Wills, which Act was brought into force February 16th., 1928, which Act was in force at that date.

(Mr.Archibald objects.)

MR.SHAW: I was prepared to call expert testimony as to the law of New Brunswick this morning. Mr.Lawrence has tendered the Statutes of New Brunswick without the necessity of identification. I believe he has done that on the question of costs. I wish to go ahead and identify these statutes.

H.A.HANSEN, direct examination.

HORACE A.HANSEN, being duly sworn, testified as follows:

EXAMINED BY MR. SHAW:

Q You are a legal practitioner of the Province of New Brunswick?

A Yes.

Q Where do you reside?

A In the city of Fredericton, York County, Province of New Brunswick.

Q You practice in Fredericton?

A Yes.

Q Are you associated with a firm of legal practitioners?

A Yes, Hansen,Dougherty & West.

Q You are a member of the Bar of New Brunswick?

A Yes.

MR.SHAW: I submit I have qualified the witness this morning as one familiar with the laws of the Province of New Brunswick and one competent to give evidence.

MR.ARCHIBALD: I have nothing to say.

Q Have you the Statutes of the Province of New Brunswick relating to the Estate of Marriage in the Province of New Brunswick on January 24th.,1914?

A Yes; I have copy of Consolidated Statutes of 1903 together with amendments thereto down to and including the year 1914.

Q Will you produce this statute?

A They have already been placed in evidence. This is Consolidated Statutes of Province of New Brunswick,1903; Passed April 8th.,1904; Chap.76, An Act Respecting Solemnization of Marriage. The statute laws relating to marriage in New Brunswick are found in this Act. This Act has been amended four times up to and including 191 . The first amendment is contained in Acts of

H.A.HANSEN, direct examination.

New Brunswick, 1911, Chap.35, An Act to amend Chapter 76 of Consolidated Statutes, 1903, Respecting Solemnization of Marriage. In the same statute, Acts 1911, chap. 44, a further amendment to consolidated Statutes of 1903 is found, being Act to Amend Chapter 76 of Consolidated Statutes,1903, Respecting Solemnization of Marriage. A further amendment in the year 1912 is contained in Acts of Province of New Brunswick, as of that year, found in Acts Province of New Brunswick, 1912, chp.36, being an Act to Amend Chapter 76 Consolidated Statutes, 1903, Respecting Solemnization of Marriage. The Consolidated Statutes were further amended by chap.30 of Acts 1914, being An Act to Amend Chapter 76 Consolidated Statutes, 1903, respecting Solemnization of Marriage. The amendment in the year 1911, chap.35, was passed April 6th.1911; the amendment , chap.44,1911, was passed April 13th.,1911. The amendment to Chapter 76, 1912, was passed April, 1912. Amendment, chap.30, Consolidated Statutes, 1914, was passed April 6th., 1914. The Consolidated Statutes of 1903 together with the amendments constitute the statute law of New Brunswick respecting solemnization of marriage from the dates of their passing until they were enforced.

Q Are you prepared to interpret these statutes?

A Yes.

Q They are clear and unambiguous?

A In most instances, yes.

(Mr.Archibald objects to question.)

Q Will you read section 15 of the Consolidated Statutes, 1903, chap.76 respecting the solemnization of marriage.

A "All marriages heretofore solemnized in this province in good faith before any minister or teacher of any religious denomination, or any superannuated or retired minister, or minister placed on the supernunnary list, or before any minister or teacher who at any time previous to such a marriage, had been ordained, or had been in charge of a congregation and in the presence of

two or more witnesses, and where the parties so married have cohabited together as man and wife, shall be deemed to be and are hereby made valid notwithstanding any real or supposed want of legal authority in the minister or teacher to solemnize such marriage, and notwithstanding any want of license or of publication of banns under which marriages were had or any other legal objections thereto: provided that nothing herein contained shall have the effect of confirming or rendering valid any marriages between parties who were not legally authorized to enter into the marriage contract by reason of consanguinity, affinity or otherwise."

Q That particular section which you have read, is that section continued in the Act Respecting Solemnization of Marriage?

A That particular section was continued up until the year 1914, and after, in the Consolidated Statutes of 1927, it appeared again with slight variations.

Q What were the variations?

A If I may read the statutes, I can point them out. This is chapter 77, An Act Respecting the Solemnization of Marriage, Revised Statutes New Brunswick, 1927, Vol.I, section 15:

"All marriages heretofore solemnized in this province in good faith before any minister or teacher of any religious denomination, or any superannuated or retired minister, or minister placed on the supernunnary list, or before any minister or teacher who at any time previous to such a marriage, had been ordained, or had been in charge of a congregation and in the presence of two or more witnesses, and where the parties so married have cohabited together as man and wife, shall be deemed to be, and are hereby made valid, notwithstanding any real or supposed want of legal authority in the minister or teacher to solemnize such marriage, and notwithstanding any want of license or of publication of banns or the absence of witnesses, under which marriages were had or any other legal objections thereto: provided that nothing herein contained shall have the effect of confirming or rendering valid any marriages between parties who were not legally authorized to enter into the marriage contract by reason of consanguinity, affinity or otherwise."

It is notable in comparison of these two sections that certain words in the Acts of 1903 are left out respecting witnesses to the marriage; the words are "and in the presence of two or more witnesses" not found in

the statute.

THE COURT:

Q That requirement has been dropped?

A Yes,

Q That requirement respecting the validity of marriage has been dropped?

A The Acts of 1927 have added these words: "or in the absence of witnesses".

MR.SHAW: I call the attention of the Court to the fact that there has been no substantial change in that section, due to doubt that might arise in respect to the word "heretofore".

Q Have you with you in the Statutes of the Province of New Brunswick an Act respecting Wills?

A Yes, I have.

Q Will you produce that?

A The first is in Consolidated Statutes of the Province of New Brunswick, 1903, being chapter 160, An Act Respecting Wills. These statutes were passed April 8th., 1904. I also have with me copy of the Wills Act, chap. 173 of Revised Statutes of New Brunswick, 1927; passed April 21st., 1927; in force February 16th., 1928. All these statutes are certified true copies of the laws of the Province of New Brunswick by the King's Printer of the Province of New Brunswick.

Q That is a statute purporting to be in force February 16th., 1928 - Have there been any amendments to that Act since?

A No, there have been no amendments.

Q Will you tell me what is the Common Law in New Brunswick, apart from statute law, respecting wills, the substance of the law in New Brunswick?

A The common law of New Brunswick follows the common law of England.

H.A.HANSEN, direct examination.

MR.SHAW: I take it is is germain to the Province of New Brunswick that the substance in New Brunswick is the Common Law of England; the Common Law of England is also followed in Nova Scotia.

THE COURT: You are dealing with the law of New Brunswick; that is all we are concerned with.

Q Does adultery constitute a crime in the Province of New Brunswick?

A Yes, under a pre-confederate statute and it is punishable under that statute and tried as an indictable offence under the general provisions of the criminal law of Canada: Rex vs. Strong, February 19th., 1915, establishes the proposition that adultery is a crime under the laws of the Province of New Brunswick. (Counsel reads headnote). Adultery is an indictable offence in the Province of New Brunswick, chap.125, sec.3, which has not yet been repealed by the Dominion Parliament.

Q Are prosecutions numbrous?

A It is not a dead letter. At the present time I happen to know an Indian woman is being prosecuted under that Act. In that connection I have examined the New Brunswick reports since 1915 and I find the Appeal Court has had to decide questions relating to that law. Rex vs. Foster, 8 Maritime Province Reports, 10. shows adultery is a crime.

Q Referring again to the statute An Act Respecting Wills is it provided that a will is revoked by subsequent marriage?

A Yes, there is a provision in the Acts of 1903 and this provision is carried right down until the present.

Q What section is that?

A At present the law is contained in section 12 of chapter 173, Revised Statutes of New Brunswick,1927. (Counsel

reads section.)

Q Was that the law in January, 1914?

A It was the law; it is contained in section 12, chap.160 Consolidated Acts New Brunswick, 1903. The wording of the section is identical with the present section.

THE COURT:

Q The provision in the Revised Statutes, 1927, is now in force and is the same as it was in 1903?

A Yes.

MR.SHAW:

Q By law in New Brunswick in regard to intestacy, does an illegitimate child inherit from its mother?

A I believe that is the provision contained in the Act respecting Intestate Succession. I have not looked at that for a month or more and I should like to refresh my memory.

MR.ARCHIBALD: I am wondering what is the relevancy of that question at this time.

THE COURT: Mr.Shaw's whole case might rest on that point.

Section 16 of chapter 174, Revised Statutes of New Brunswick, 1927, provides that illegitimate children and their issue shall inherit from their mother as if the children were legitimate and shall inherit through the mother real or personal property as if the children were legitimate. Section 17 provides with respect to succession to illegitimates.

MR.SHAW tenders certificates.

CROSS EXAMINED BY MR. ARCHIBALD:

Q When were you admitted to the bar of New Brunswick?

A November, 1935.

Q That was as attorney?

H.A.HANSEN, cross examination.

A Barrister and solicitor.

Q They have the two admissions there still?

A We are admitted as both at the same time.

Q At one time a solicitor was admitted first and a barrister admitted next year. You have been practicing since then?

A Yes.

Q You are a graduate from Dalhousie?

A Yes.

Q Have you had occasion to appear in court in many cases in interpreting the marriage law?

A No, this is my first in a foreign court.

Q I am asking in your own court.

A No.

Q Have you ever helped interpret section 15, Consolidated Statutes, 1903, with respect to interpretation of section 15 of Acts, 1903 and section 15 Revised Statutes of 1927? I understand you to say you have had no actual experience in the interpretation of those two sections in your own court?

A Not in the court; I have had experience in the office and consulted other members of the firm respecting that. We have had occasion to use that.

Q Are there any decisions in your court with respect to these two sections?

A None that I was able to find; I have consulted the Digest relating to New Brunswick. The first Digest is Stevens' and I have examined the law relating to marriage there. That section was not interpreted in any section I could find. It was interpreted in the Quarterly Digest which followed but I could find no section dealing with that.

Q When was this section first put on your statute books?

A I cannot recall that now; I remember I looked it up in

H.A.HANSEN, cross examination.

Fredericton but I don't remember the exact year.

Q You looked it up when dealing with this particular case?

A Yes. I could tell you very easily how far back it had gone by reference to the Acts of 1903.

Q Does that give its origin?

A 63 Victoria, chap.4, sec.14; that would be the previous statute.

Q As your statute respecting Solemnization of Marriage appears in 1903 it appears also in 1917 statute?

A Yes.

Q You have referred to that?

A I don't recall referring to the Acts of 1917.

Q Do you know if the Acts of 1917 are identical?

A I believe there is an amendment carried on in the Acts of 1927. I pointed out the difference in the Acts of 1903 and the Acts of 1927. In 1917 there is an amending statute.

Q What do you say as to whether Acts of 1903, 1917 and 1927 are consolidated in the statutes?

A The Acts of 1903 have the consolidated statute.

Q That is only declaring the law as it was at the last enactment.

A Yes, it declares the law as it was written in the statutes consolidated at that time.

Q It is not a re-enacting statute?

A I believe it is.

Q It re-enacts what is already in force?

A In the front of Statutes, 1903, vol.I, you will find these statutes were passed April 8th.,1904. The preamble reads:

"Whereas it is desirable to re-enact said Consolidated Statutes as so finally completed:
Be it therefore enacted by the Lieutenant Governor and Legislative Assembly as follows:
The said Consolidated Statutes as so finally completed, with the exception of said Index and said Schedule B, and deposited in the office of the Pro-

vincial Secretary, as aforesaid, are hereby enacted and shall come into force upon the making and publication of the Proclamation as hereinafter mentioned."

Q Does the same provision hold with respect to 1927?

A I have not examined the front of that. I don't see the same provision in front but I notice on front of the Wills Act (copy produced in evidence) the date on which the statutes were passed is set forth as April 1st.,1927, in force February 16th.,1928.

Q You don't know whether there was a provision with respect to 1927 Acts similar to 1903 Acts?

A I don't know whether there is.

Q What I would like you to tell me is this - whether or not sections such as 15, dealing with all marriages heretofore solemnized, which you find in the Acts of 1903, appear also in Acts of 1917?

A I believe they are there.

Q Do you know they are there?

A I remember looking at the Acts; the amendment, I believe, was relative to section 15.

Q You know that?

A Yes.

Q When was that amendment passed?

A I cannot recall the date.

Q And also substantially repeated in the Acts of 1927 and at least, in so far as you say, going back to Acts 93, Victoria - Is that merely a re-statement of the old law or does it continue that section in force right up to 1927?

A I don't understand just what point you are taking.

Q The Acts of 63 Victoria.

A The Act has been amended in 1917.

Q With that slight amendment, all prior to 1927 marriages are valid as to solemnization or as to minister?

A Yes, I think that.

Q That is your opinion?

A Yes.

THE COURT:

Q All marriages that come within the purview of the amendment?

A Yes, I am positive of that.

MR. ARCHIBALD:

Q All other regulations of the statute as to restrictions as to who may perform ceremonies during all these years, the gay nineties and back beyond that, go for nothing?

A No, they don't go for nought. The Act, sec.15, says these marriages shall be deemed to be valid; it does not penalize persons who have gone through the marriage ceremony; they have the status of husband and wife. There are certain penalties prescribed for ministers who have solemnized marriages without the necessary qualifications and authorization by the Provincial Secretary.

Q They are deemed to be valid until the contrary is shown?

A They are deemed to be valid, yes. The proviso at the end of the section shows wherein that presumption may be rebutted. The section is directed towards the validity of marriages performed in good faith.

Q What does that mean?

A It means where parties intended to contract marriage, where they intended to enter into the bonds of matrimony.

Q In what case was that interpretation?

A There is no case interpreting that in that manner.

Q There might be a good deal of bad faith and still the intent to contract a marriage.

A Situations might arise respecting these words "good faith".

Q Do you think a person who had been married theretofore and intended to marry again, with the first husband alive, acted in good faith?

H.A.HANSEN, cross examination.

A That comes in under the proviso; that would not be a valid marriage. If there were a prior marriage and that marriage continued to exist, then the parties married again. the second marriage would not be valid under the laws of New Brunswick. That comes under the proviso.

Q Just forgetting that clause for a moment, I am asking if there is good faith on the part of a person, legally not competent to marry under this section, intending to marry?

A I must ask you first what you mean by "persons not legally competent to marry".

Q That was a short way of saying a person married whose husband was living.

A That would not be in good faith.

Q There is an intention to marry a second time?

A The intention to go through the form of marriage, but there could be no marriage providing the former spouse were living.

Q It is a form?

A It refers to the form of marriage and, in substance, says those people are married. If anything is wrong with the form, nevertheless, those people are married.

Q No matter what irregularity there was, these people were married?

A Yes, it has the effect of curing irregularities.

Q The history is in the earlier days there was a good deal of irregularity, loss of records, things like that?

A Yes; I examined that part of the law quite thoroughly. I found many itinerary preachers in New Brunswick were going about performing marriages in good faith, and people married in good faith, and this enactment was to cure any defects in form and to make the marriage itself valid.

H.A.HANSEN, cross examination.

Q Subject to the proviso?

A Yes, of course.

Q It simply means, if the marriage were otherwise valid apart from the form, the irregularity in form does not affect the validity?

A That is the interpretation.

Q There is a requirement in the Acts of New Brunswick requiring ministers to be licensed for performing ceremonies?

A To be authorized; for a certificate from the Provincial Secretary-Treasurer certain requirements are necessary. Authority is by Proclamation in the Royal Gazette.

Q They are entered in a register?

A Yes, so far as I know; that is a matter of departmental routine.

Q Are there many of these marriages performed in New Brunswick by these itinerant clergymen?

A I don't know what the state is now but I do know from looking through the Acts of 1900 on there are many statutes passed relating to these itinerant preachers, and making a number of marriages valid. That did not add anything to the validity of marriages other than contained in section 15.

Q Is there any presumption of law in the province of New Brunswick that these various provisions of the Consolidating Act speak as from the time the earlier Act came into force? Taking the section"marriages heretofore solemnized" and continuing through the years is that interpreted as relating to the time of the passing of the original Act? Is there any such interpretation of the law in New Brunswick?

A Not that I know of. Reading the statute of 1903 in the year 1914, "heretofore" would refer to the year 1914. That is my impression. It would be applicable

to 1903 as well as 1914. In any event, this section appears in substance in 1927.

THE COURT:

Q We are not expected to deal with 1927. Are you seriously contending that in a statute providing certain methods of solemnization certain requirements of a preacher, passed in 1903, referring to "marriages heretofore solemnized" applied to marriages after 1903?

A It is my opinion the rule is always to be applied in this case.

Q That is your opinion?

A Yes. In any event, statutes of 1917 and 1927 cure it.

Q Your opinion is that the 1903 statute would be sufficient without the other statutes?

A That is my opinion.

Q That is the interpretation of your courts?

A I have not read any interpretation.

RE-EXAMINED BY MR. SHAW:

Q Section 15, as to whether the curative value of that section extended to anything more than the form of marriage, I would like to ask if, to your knowledge, there is anything in the law of New Brunswick by which a marriage delicto, not only as to form but as to capacity of parties for the holy ceremony, is not presumed?

A There is a decision of New Brunswick courts in 1885, 25 N.B.Reports,p.286. In this case the rule was laid down by Mr.Justice Allen, Chief Justice of the Court, following the case of Piers & Piers. Marriage in fact having been proved, presumption is in favor of validity. Again, in the judgment of Justice King, the rule is laid down,following the Privy Council case,Sastry Aronegary vs. Sembecutty Vaigable .

THE COURT:

Q That is English law.

H.A.HANBEN , re-examination.

A That is presumption of validity of marriage found in English law. I have examined to see if the law has been overruled but cannot find that it has been.

THE COURT: This question of validity of the New Brunswick marriage, it seems just a waste of time to argue that point. I think Mr.Atchibald is the one to be heard from on that point. I am satisfied fairly well, subject to the question of prior marriage, you have sufficiently proved the marriage in New Brunswick. I don't want to limit you in any way but don't you think it is just going over the ground?

MR.SHAW: Yes.

THE COURT: Mr.Archibald, I don't want to deprive Mr. Shaw of any rights; I think, as far as the New Brunswick marriage is concerned you have the laboring oar.

MR.ARCHIBALD: The situation was merely this: The Salvation Army had probated the will. Proceedings of probate had been attacked. There was application for revocation of probate and application made for the administration of the estate of Sarah Croker Giberson. That placed us substantially in the position of plaintiff and defendant. I am defending. My learned friend made his case. This interlude this morning was on a point left open. It has been pleaded irregularly and I have to adduce my evidence, and my evidence has all been to the effect that prior to the marriage of 1914 there was a marriage existing, a husband living and no divorce granted. My learned friend said they were going to call evidence in rebuttal.

THE COURT: I understand their case is closed.

MR.SHAW: I think that is understood. If we can establish at a later date --

THE COURT: I understood the case was closed and now ready for argument, if you wish to argue this point, but you indicated fairly clearly your line of argument as to the question of the New Brunswick marriage and at the present moment, from the little I know of authorities, I am convinced that your attitude is right. What is the sense of asking you to re-argue. When we come to the question of the Croker marriage that is another matter.

MR. LAWRENCE: We are making an investigation to find out if this Croker is a married man. If we find that is so --

THE COURT: I was told the case was closed; I am trying to handle the case in a proper way; I am not interested if Croker married five times; it is wasting the time of the court to discuss it. I wish while Mr Shaw is being asked to argue he would not be interrupted. Mr.Shaw is now before the court for his argument. Mr.Shaw, if you like to argue with respect to the New Brunswick marriage you can do so. I accede to your argument as to the New Brunswick marriage. Do you want to go over the ground or confine yourself to other matters?

MR.SHAW: I have submitted evidence of the New Brunswick marriage, prima facie marriage, and I think I can refrain from arguing the validity of that marriage. I would like to know if you expect argument of the whole case or the point Mr.Lawrence raised at the last hearing. At this point I say Mr.Lawrence is prepared to argue this case on behalf of his client.

THE COURT: Are there to be two arguments covering the

same point?

MR.SHAW: No, I am prepared to have Mr. Lawrence argue this case.

MR.LAWRENCE: I want, if I find or it comes to my notice, that Croker is a married man, then I submit I am entitled to bring that in as rebuttal evidence. I want that on the record so an appeal court may see it.

MR.ARCHIBALD: I cannot understand this bringing in of further evidence when the case is closed. The sole proposition is - A woman made a will and probate of that will was granted. Two applications were made: (A) to rescind the grant of probate; and (B) to grant new letters of administration to the woman's daughter.

MR.LAWRENCE: Revocation was asked for on the grounds that testatrix entered into a marriage subsequent to 1912, the date she made the will. The whole issue is - Was the marriage prior to 1912 a valid marriage. You say prima facie on evidence produced we have proved a marriage valid under the law of New Brunswick. Now then, the law in New Brunswick, the law in Nova Scotia and England say it raises the presumption it is a valid marriage. That presumption of validity extends to the past. Herot, 18 Corpus Juris, p.53. It is presumed she had capacity when she married Giberson, ~~ENGLISH~~ English Reports 612. To rebut that presumption my learned friend must come in and show her incapacity; he must show she had a husband living in 1914. Secondly, there is a presumption against crime. They must rebut the presumption that Sarah did not commit bigamy when she married Giberson. The third presumption my learned friend must rebut is against the testatrix having committed the crime of adultery. Giberson swears he had normal intercourse with her. These presumptions they must rebut in order not to impute crime to a dead woman. Superimposed

is the presumption of death, death of Croker. You might say they rebut that presumption. Superimposed to these four presumptions is this presumption - that because this executor has probated the will the onus is upon him to show capacity. A grant of probate makes no difference. 1927,Robins vs. National Trust, A.C.512. I suggest these five presumptions they must rebut if they are going to assail the marriage of 1914.

In rebutting the presumption of validity of the marriage, they say: Here we have a man who went through a form of marriage with this woman in 1899. They have produced a man whose identity I do not admit. They have not produced one scintilla of evidence that the marriage of 1899 existed in 1914. I refer to Piers & Piers and the case of Robins vs. National Trust, 519, 1927 Appeal Cases. That is my authority for saying the onus of proving her testamentary capacity devolves upon my learned friend. Her testamentary capacity is affected by the validity of the 1914 marriage.

THE COURT: You say they have to prove she had capacity in the 1899 marriage?

MR.LAWRENCE: No, I abandon that. The presumption of validity applies to both marriages. The issue they must prove is not that she went through the form of marriage in 1899 but must prove that marriage existed in 1914.

THE COURT: They have brought aman who proved the marriage according to proper methods of proof. He says he never received notice of any divorce.

MR.LAWRENCE: It is a straight question of fact. It is to be noted the House of Lords say, when a man is trying to assail the presumption of a valid marriage, this presumption of law is not to be rebutted in the same way as rebutting any other presumption of law. They say the

sanctity of marriage is something on which society rests for protection of the home. The reason for the rule is obvious. Suppose this woman had six children by Gibersen it would not do to put the stigma of illegitimacy on these children. They say you must bring certain kinds of evidence in rebuttal; this evidence must be of a particular kind. The description of the kind of evidence they want is: they must come in and disprove every reasonable possibility that would tend to uphold the validity of marriage. They say they must show any reasonable possibility that would tend to support the validity of marriage. They must, if they do not disprove it entirely, show it is entirely improbable by clear, cogent, satisfactory and conclusive evidence. There are four adjectives describing the evidence that must be brought in to invalidate the marriage of 1914. There are other cases. There is presumption against crime. You must presume this woman did not intend to commit a crime.

THE COURT: The presumption against crime has fallen away if she went through a form of marriage.

MR. LAWRENCE: I submit Croker's evidence is not cogent; it is not conclusive; it is not satisfactory. Have they discharged the presumption, having in mind the quantity of proof required? Croker says: I went through a form of marriage in 1899. Q. You are Harry Croker? A. I am he. That, I am submitting, is not conclusive. The man's own statement is not satisfactory. If I were going to prove such a proposition, I would have done my utmost to bring some one from England who could identify him.

THE COURT: You had people in Halifax who could identify him.

MR.LAWRENCE: The onus is not on us. It was their duty to prove the marriage of Croker. What evidence was adduced?

There was a birth certificate. I submit this was inadmissible, of no weight whatever. I could go and get a birth certificate of your Honor and I could pass myself off as your Honor. This man could have got that birth certificate in England. What other? There was a piece of paper not in his own handwriting. We objected to admission of it at the time. This man could very easily have taken it from a man who was Harry Croker. Would you call that cogent, satisfactory and conclusive evidence? I would not. Then the question of photographs, the second in a little book supposed to set out the wanderings of this man on certain ships. There is no proof of whose writing is in the book. Could not any one have taken that book?

THE COURT: I am not going to be influenced by that fact. We have the man's own evidence that he was Harry Croker, and, while he gave his evidence, we had in court here the woman who claimed to be his daughter and lived with him.

MR.SHAW: You will recall her evidence that she left England as a very young child. Her memory was not at all clear. She could not be expected to know the man.

THE COURT: There is the man's own evidence, if believed. There is no evidence that he is not.

MR.LAWRENCE: He refused to tell us where he stayed when here. When questions were put to him he shed crocodile tears and wanted the protection of the court. I don't call that satisfactory. It is a straight question of fact for your Honor. I might add, if I were going about to prove this thing, I would have put in cogent, conclusive and satisfactory evidence or made an attempt to do so. There is that possibility that they have not disproved that this man is not the man; they have not proved that.

Then we come to the question of whether or not they have proved the 1899 marriage existed in 1914, which

is very essential to their case. We have the woman here; she had heaps of money and I contend it is a reasonable possibility, when you consider she remarried and would lay herself open to two crimes in New Brunswick, they were divorced and the marriage dissolved. I wish to refer to Corpus Juris,vol.38, p.1328, sub-sec.104. Rex vs.Twining, 2 B. & A., 407 English Reports. The facts of that case were a woman, a pauper, married a man who went away and was gone little more than a year, fourteen months, when she remarried. It was under some section involved in the Poor Law. She was a pauper so there were few possibilities of divorce. This was more on the issue of the question of death.

THE COURT: You say the marriage might be dissolved without him knowing anything about it?

MR.LAWRENCE: Yes. This man was away at sea. He said aftershe left him he lived in a place for twenty-seven years except when he was on the Mercantile Marine. The books show he was in the Mercantile the year after the year 1918.

THE COURT: 1918 is not relevant.

MR.LAWRENCE: Is there any evidence, even accepting Croker's evidence, bywhich they have disproved the possibility there was a divorce, either he from her or she from him?

He wasasked:

"Q. She sold all your belongings, the furniture and all that?

A. When we parted.

Q. Know if she had any money?

A. Heaps of it; heaps of it; I wish I had it now.

Q. Were divorce proceedings - did you ever know anything about any divorce proceedings?

A. I never heard of them."

The answer is not satisfactory, not cogent. "I never heard of them". It might be he did not hear at the time they were going on. That is not my idea of satisfactory, cogent and conclusive evidence.

"Q. No documents from the Divorce Court were ever given you?

A. I never saw any."

He does not say they were never issued by the Divorce Court at all; he says he never saw them. The onus would be on our learned friends to prove there had been no divorce proceedings. I suggest they have not disproved the possibility that she divorced him or he divorced her. My inference is from this man's testimony the other day he is now living with a woman who is his wife. We have to get confirmation of that. There is no evidence she did not divorce him; they have adduced no evidence. It is highly probable she divorced him. They have not produced evidence to show that he divorced her.

THE COURT: The question is did he prove he was alive and still married to her. I presume Mr.Archibald contends he is still alive.

MR.LAWRENCE: I contend he has a wife living to-day and he is entitled to the presumption of innocence. The evidence would point that he did divorce her.

THE COURT: They might each think the other was dead.

MR.LAWRENCE: Dissolution by Act of Parliament, by act of God or decree from the Court in Westminster. The mere fact that he did not see any papers from the Divorce Court is not cogent evidence that she did not get a divorce from him.

THE COURT: A man would be apt to know if proceedings were launched against him in the Divorce Court. How could

a man live in the same place right along and not know?

MR.LAWRENCE: If he had lived there all that time it would not take six months to find him. My learned friend had to go over and find him in four days. I contend this man went on the stand here and just said enough for us to draw the inference he has a wife living.

THE COURT: I think there is a reference to his"present wife" in the evidence.

MR.LAWRENCE: On page 29 he is asked:

"Q. Did you live at more than one place on Redmans Road?

A Yes, when I joined up for hostilities I was caretaker of a Jewish school there; well, when I went back into the navy, of course they wanted somebody; they wanted a man, and of course we moved to two doors away from the school, and that was where Mr. Doyle found me."

Who does he mean by "we"?

THE COURT: There is a place where he refers to his 2present wife".

MR.LAWRENCE: I am reading from page 43:

"Q. Whom did you give as the names of your next of kin when you joined the navy the second time; if you died, who was to get any allowance or gratuity?

A. My present wife.

He is not thinking of Sarah Croker.

"Q. You named her then?

A. Yes.

Q. What address did you give for her?

A. The job where I was caretaker, I took it to this school, 61 Redmans Road, naturally.

Q. Did you give the names of your father and mother at that time?

A. No, not the next of kin.

Q. Mention your sister Ada?

A. Dead as far as I know.

Q. Your brothers, Dave?

A. No.

Q. You did not mention them at all?

A. No.

Q. And where did you think your wife was then?

A. Are you referring to Sadie Davenport?

Q. Yes.

A. My mind was a blank."

Assume he had a wife living in 1914. He comes over and swears he married a woman in 1899. He says he had a wife living in 1914, the inference being he married some one else over there. He is entitled to the presumption of innocence until found guilty, therefore, as a corollary to that presumption he did not commit bigamy. The only way he could not have committed that crime was either by the death of Sarah or divorce from her. How can they say they have disproved the possibility that the marriage was dissolved. The situation is, we have a man who may be a bigamist, coming over here calling a dead woman an adulteress and pointing the finger of illegitimacy at a living woman all for the benefit of twenty thousand dollars under the will. The burden of showing the validity of the first marriage is on the party asserting it. When there has beena normal marriage, according to legal requirements, the law will presume competency of the parties to enter into the contract. On the basis of that rule, who is the innocent party here, the man who now tells us he is happily married in London, or the man who married her in good faith and made himself liable to the laws of New Brunswick for adultery and bigamy. Counsel quotes from Piers & Piers.).

THE COURT: I have to accept Croker's evidence in whole.

MR.LAWRENCE: Remembering the presumption of innocence.

MR.ARCHIBALD: I have an abstract of the evidence here rather carefully made out. So far as the evidence is concerned, I don't think I need comment very much on the Giberson marriage of 1914. It is necessary for me to make a statement with respect to the facts of this case, particularly in view of the violent attack made on the evidence given by Croker. Your Honor has the main facts in mind; they are all a matter of record.

Mrs.Croker died in June, 1936; a will dated 1912 was duly proved and Major Mundy, the officer in command of the Salvation Army in Nova Scotia, was appointed executow of the will. Mrs. Croker, who died June 3rd.,1936, was identified as the lady who made the will. She was identified by the evidence of my learned friend's client Mrs. Abbott. Mrs. Abbott had seen her in recent years and identified her signature as that of her mother. It is further tied up by the other documents. That question has not been raised.

The proceedings to revoke probate and petition for administration in the Estate of Sarah Giberson were founded on the allegation that Mrs. Croker had married in January, 1914, Blanchard Giberson. Very considerable evidence was given on that point and hearings were protracted. I am quite content to agree with a good deal of what my learned friend said regarding presumptions. There is a presumption first in favor of the will; a presumption established in favor of the Giberson marriage; a presumption in favor of the Croker marriage. All presumptions in respect to this proceeding are rebuttal and I am contending - assuming the New Brunswick marriage between Giberson and Sarah Croker has been duly proved - we have rebuttal in the presumption in favor of that marriage.

My learned friend went to some pains to indicate that Harry Croker is not the Harry Croker who married Sadie Davenport. I may say it has been shown conclusively in

evidence that Sadie Davenport, Sarah Croker and Sarah Giberson are one and the same person, the same person who made the will in 1912 the estate of which is in question. I felt there would be some suggestion about Croker's own evidence, saying it was just his statement. His statement was not contradicted; his evidence is here. I would say, in the absence of anything very suspicious about the man, the evidence of Croker must stand. There has been no contradiction and under cross examination no breaking down and I point out that I think it very rarely in our court does a witness come who is more worthy of belief. His manner of giving his evidence was entirely convincing. My learned friend suggests he is married. The fact that he cam e out to Canada to give evidence in this case is a pretty good indication of his good faith in the matter. When he was asked questions on the history of this case you have there his own evidence. Going back over a period of thirty-six or thirty-seven years you cannot expect a man to remember every little detail. He was very clear on the main facts, the outstanding features, and as such make his evidence all the more convincing.

We have the evidence my learned friend, Mr. Shaw, is discrediting because of the tender years of the witness at the time she was testifying of, Mrs. Abbott. I would refer first to the evidence of Mrs. Abbott. Her maiden name was Croker, page twenty; her mother's name was Davenport; her father's name - the man referred to throughout the evidence as her father - Harry Croker; her age given as forty the 16th. June last. Croker's evidence is in 1900 she was about four years of age. She was asked respecting her earliest recollection; she thought she had been in Fredericton. She was then a child of three years. Croker's evidence is that he never was in Fredericton. She says "We left when I was four years old for the old country, my father, mother and I" (page 21) . Mrs. Abbott is a witness on whom my learned friend is relying. That

corresponds exactly with the evidence of Croker. "We went on a big boat to the old country because that was my father's home. It was an Allan Line boat; I don't remember the name of the boat." The only variation between Croker and her - they returned on an Allan boat. She goes on to say that Croker was an Englishman and after her arrival she lived at Brixton, Portsmouth and Liverpool, and, under cross examination, recalled she lived in London. Croker said he was a little hazy about living in Liverpool. They lived at Brixton for two years, a part of London, and then moved to Lambeth Road, also part of London, and lived in Coronation Building. On page 22 Mrs. Abbott says "I remember one place we lived called Coronation Buildings". Croker gives evidence that they lived about two years in Coronation Building. Mrs.Abbott says "We used to hang clothes on the roof". Croker says the roof was constructed in such a way that children could play there and the women hang clothes there. She also says she remembers her father's brothers, William and David, Croker says his mother married again and he had two step-brothers,William and David, who lived at the house occupied by his mother and stepfather. He says he had a sister, Ada, no sister Edith but his brother married a girl whose name was Edie. She says, on page 23, "Harry Croker had a good job in the post office". Croker's own evidence is, after returning to England he worked in the post office as a porter and produced a photo showing him beside a van, a number of porters about and identifies himself as one of them. She says Croker was in the naval reserves, page 23. The only variation is Croker says he belonged to the fleet reserve and had to do one week's training each year. She says she lived in England about four years, page 23, She says her mother sold all the furniture and came back to Halifax. That is exactly what Croker says - she gathered everything up and sold it and that she had the proceeds.

I say that is very strong corroboration of identity, which applies materially to other points. Her mother's married name was Croker, page 26. She identifies the signature on the will as the signature of her mother,page 29. She tells you she identified the body of her mother. Then b there is on page 30 the statement that her father was fond of her, and he testified here as to his affection for her. She testified, when in Halifax he used to wear a uniform. There is some discrepancy in the testimony. He says he came to Halifax on the "Proserpine" and bought his discharge while serving on that boat. On page 31 she describes Coronation Building. On page 35 she tells that her mother bought a house. Croker says she came back to Canada with lots of money. As between the two of them, without going into detail with respect to Croker's evidence, there is ample corroboration there. He comes in and gives his evidence. Your Honor is in a position to see him, observe everything he said and in a position to judge as to his truthfulness in his evidence. It was not a case of their giving evidence the same day. Mrs.Abbott gave her evidence away back in 1936; Croker gave his evidence a few weeks age. The records have what they are worth. The name of the ship corresponds; you have the additional identification of the photos. One photo, produced September 11th. was aphoto of a man, woman and little girl. It was #3 of the photographs. Mrs. Abbott says "That is a photo of my mother, my father and myself, my mother being Sarah Croker and my father Harry Croker." Croker comes along and the photo is shown and he says the same thing "That is Sadie, Lorna and myself". There is #27 photo; Lorna says "I don't recall who that is". His evidence is clear, "That is Ada, my sister". These photos were in the possession of Mrs. Croker. In addition there is a photo of a young sailor which was in Mrs. Croker's belongings, and that photo is the same photo which is attached to Croker's

record of service, taken in the same place in Bermuda. There is also a photo taken in Halifax when he was here. My learned friend suggests with respect to these various records that this man who gave evidence might have picked them up. He picked up a number of distinguishing marks if he picked these up. He bared his arm to show a lizard or alligator and challenged my learned friend "Do you want me to undress and show the rest?" and told what those marks were.

THE COURT: How do these tattoo marks identify him?

MR.ARCHIBALD: On his record they gave them as identification marks. I submit there is weight there. I am suggesting this is additional to anything else. My learned friend kept away altogether from Mrs. Abbott's testimony. I am bringing up points where their own witness' evidence corresponds clearly with the evidence of Croker. If you read the evidence of the two together, there is no point on which they vary to any remarkable extent.

In the course of the hearing there seemed to be some suggestion that Sadie Davenport was not Sarah Croker. I suggest that has been completely covered by the things I have pointed out. We have the evidence first adduced of Mr. Purchase and McIsaac on behalf of my learned friend that the handwriting attached to cheques, the will, attached to the marriage record in New Brunswick in 1914, and appearing also in Deed L/3 from Sarah Giberson and Blanchard Giberson to LeMerchant in New Brunswick was written by the same person. You have the evidence of Walter Stech, a well qualified expert witness, to say the signature of Sadie Davenport appearing in the marriage register in 1899 is the same person who signed the others, also corroborating my learned friend's witnesses in regard to the signatures of Sarah Croker and Giberson.

Now, my learned friend has dwelt at length on

the burden placed on us. Assuming that the marriage to Giberson was valid in form, and proof of law has been amply shown by the evidence of Mr.Hansen this morning, whose evidence was very satisfactory indeed and it is a credit to him, but I don't think some of his conclusions were correct. The marriage, assuming Giberson married her, that marriage having taken place in January, 1914, I am free to say at once the burden shifted to me. There was a burden on my learned friend to prove the marriage because of the earlier presumption in favor of the will. Having proved that marriage, the burden has shifted to me.. My learned friend says we have to go to extreme lengths - there has to be evidence of prior marriage and as to capacity of marriage. I suggest that is not the law at all. I will indicate what we proved in respect to the earlier marriage of Sadie Davenport. There is the evidence produced by Hilchey, showing the record of a marriage between Sadie Davenport and Harry Croker. The evidence gives the address of Harry Croker as H.M.S.Proserpine. The names of his parents correspond with what he has given in evidence. Mr.Hilchey produces those documents, the application for marriage license, the marriage license itself with the signature of the Lieutenant Governor on it, the marriage register and certificate. The marriage was performed by the late E.P.Crawford who was Dean of St.Luke's Cathedral. Mr.Harris, Chancellor of the Diocese and assistant to his father for a great many years, is entirely familiar with Mr.Crawford and his signature. I think that evidence must be taken. You have in addition the evidence of Croker himself. I submit there is nothing to warrant disbelief that they went to St.Luke's church, they were married and they left as man and wife. There is the evidence Mrs.Croker lived in 1904 in England. As to this question of whether or not there was a divorce, I don't think I have to go so far as

to prove that. I asked Croker the question if he ever heard of any divorce and he said, no, he never heard of it; no divorce documents were ever given to him. There is no question of what his evidence was. I submit I have discharged any burden that was on me with respect to the three things: that the marriage took place in 1899 between Croker and Sadie Davenport; that Croker was alive; that Sadie Davenport in the marriage of 1899 was the Sarah Croker referred to here and no divorce proceedings were taken.

Let us go back; there are certain circumstances which your Honor is bound to give consideration to. I suppose it has struck us all as rather peculiar, including my learned friends here, that Mrs.Croker, after leaving her husband in England in 1904 and coming back to Halifax and residing here until some time between 1912 and 1914, going to New Brunswick and going through a form of marriage with Giberson, through all these years has kept the name of Croker. Even Mrs. Green, my learned friend's witness, said she had known her to use the name of Croker as much as Giberson after she married and was living in New Brunswick. The daughter, in communication with this woman every second year, said she did not know the name of the second husband in New Brunswick. She signed cheques and was known as Sarah Croker here. I am only pointing this out as an element which your Honor must take into account when they are talking about prevarication.

THE COURT: It sounds reasonable she may have thought she had a right to marry him, but why resume the name of Croker is hard to explain.

MR.ARCHIBALD: My learned friend talked about some other presumption overriding all these others, the presumption regarding proving a will; he referred to the question of capacity.

If a will is attacked, then certain burdens shift to the testator. My learned friend referred to the kind of evidence that was necessary to rebut the presumption; he says, having proved the marriage in 1914, it must be clear, cogent, satisfactory and conclusive. I have had an opportunity of reading a number of these cases. It is true Lord Campbell in Piers & Piers does give some suggestion of the necessity of proof, excluding the strong probability. No, my learned friend says the nature of the evidence must be clear, cogent, satisfactory and conclusive. As I read the decisions - and this is from Piers & Piers - I am submitting Piers & Piers is very strong support in favor of the first marriage. The presumption must be met by strong, distinct and satisfactory proof, and these words are referred to again and again in cases, strong, distinct and satisfactory proof. One of the Judges refers to the word "conclusive", and they don't know if to ~~xxx~~ include the word "conclusive". I submit we have strong, distinct and satisfactory proof, that we have cogent and conclusive proof; we have enough to satisfy Lord Campbell and all the rest of them with respect to proof.

I have a number of authorities. I am going to make this observation first: all the arguments raised by my learned friend are simply the well known presumptions of English law - the presumption in favor of marriage, the presumption against the committing of crime, whether bigamy or anything else. None of these presumptions are rebuttal. We have met the presumption of identity; we have met the presumption against death, the presumption he had died; the presumption there had been a divorce. We have certainly placed my learned friends in the place where the burden is theirs in respect to the marriage in New Brunswick. They are surely not going to suggest that a person who takes a bride to the altar last is going to

have any preferred presumption there. I may add this in respect to these cases, there is an indication running through the vast majority of them that there was an effort made to uphold a common law marriage or some marriage by repute, particularly in the Ontario cases. There is a case in Ontario, Hedge v. Morrow, 20 Dom.Law Reports,p.561. It is also reported in Ontario Law Reports but I have not the number. That case was not unlike this. The headnote reads (Counsel reads headnote).

THE COURT: That case only deals with one marriage. That is just the general law.

MR.ARCHIBALD: They are endeavoring to set aside a will, much on the same grounds, maintaining the will is revoked by subsequent marriage. It was answered that there was no marriage because Johnson had a wife living when he went through the form of marriage. 32 Ontario Law Reports,218. I submit that case is entirely in my favor. I refer to Piers & Piers,1133, 9 Eng.Reports. If the first marriage is valid, the second marriage is no marriage at all. I submit that all these provisions which Mr. Hansen referred to in respect to solemnization of marriage in New Brunswick only go to put in the statute presumption which would exist in favor of that marriage and all these other elements are left open.

THE COURT: Even if we had not the evidence of New Brunswick law, these people were not bona fide married.

MR.ARCHIBALD: There is the case of DeThornes & Attorney General, where a man got a decree of divorce but married before the time of appeal was up, which at that time was an impediment. The marriage was declared all right as soon as the impediment was removed. That was a case of Scotch law. There are a vast number of cases referred to in C.D.,vol.4, under the heading "Marriage Presumptions" page 776 but runs from 765 on. Vol.4.C.D., section dealing

with husband and wife, where this case Hedge is. I will look up the citation for your Honor. Coming back to page 776,vol4, in the note "X" it refers to a number of these cases. (Counsel reads). I am submitting that is exactly the situation here. You have a conflict of presumptions and the whole thing before you becomes a question of fact.

THE COURT: Possibly, if there was not any evidence at all and conflicting presumptions, the case of Rex vs. Twining, New Jersey cases, would be conclusive. It boils down to if I believe Harry Croker's evidence and if it goes far enough. Possibly, it depends on whether I believe Harry Croker. The evidence given, if believed, would override presumptions.

MR.ARCHIBALD: The worst that can be said for the executor is that the evidence of Harry Croker has shifted the burden entirely to my learned friends, if you are going to argue on the question of presumption, but that is the worst position we could be in. I submit it is now down to a question of fact. Under the authorities which my learned friend has referred to, I have had occasion to look into them. There is this fact: Where this earlier marriage of 1899 is brought before the court and proved with the proof we have, any further attack or presumption with respect to the parties being dead or alive, the marriage dissolved by Act of Parliament, are things for the other side. It is not for us to prove a negative to that extent. We have established the marriage and that Croker is alive.

THE COURT ADJOURNED UNTIL 2.30 P.M.

THE COURT RESUMED AT 2.30 P.M.

MR. ARCHIBALD: The last thing I said was, if Croker's evidence is to be believed, the burden on the executor has been discharged. The various authorities which my learned friend has referred to are, I submit, authorities with respect to the various presumptions, but my learned friend is trying the wrong case. The evidence to which he referred a week ago, Piers vs. Piers, is I submit in our favor rather than his. The validity of the first marriage was being attacked and the various judgments indicate the strength of the presumption in respect to that marriage. I say it would be intolerable and entirely incorrect to say that the second marriage is clothed with any protection. This is not a prosecution for bigamy. I am submitting to your Honor that the first presumption that enters into this case is a presumption in favor of the will, a very strong presumption and, in respect to that presumption, notwithstanding the Giberson marriage, the testatrix must be assumed to know the law. The will was made in 1912; apparently, retained in her possession and delivered to the Salvation Army a few days before her death.

MR. SHAW: Is that in evidence?

MR.ARCHIBALD: I think so; it is the will propounded; no doubt it is the will referred to. Her whole conduct is consistent with her belief that the will was valid. The will could be valid if there was no valid marriage made after the making of that will. She is presumed to know the law with respect to it.

I don't think I need refer your Honor to the various comments made with reference to Croker's crocodile tears and so on. I submit, on the whole, Croker's evidence is worthy of belief, that it is corroborated in many parts by the evidence of Mrs. Abbott, by the handwriting experts

and it is not contradicted in any particular. My learned friend made a lot of play about him coming over here for twenty thousand dollars. I am not suggesting your Honor worry about that. The man, Giberson, went to considerable trouble and came to this province with the thought of the twenty thousand dollars, that it was worth looking after. With Croker it was not a personal matter. As to the inference that we should have been able to find him within six months, I don't think we are called upon to explain why it took so long to find him. As far as the evidence goes, there was no question of the man hiding or anything like that. If my learned friemd wants to go to London and find a man whose address has been lost and t hinks it an easy job he is welcome to the job at any time.

Now, my learned friend made some complaint that the man was hidden after he came here. I am going to suggest that we were under no obligation to put this man in the post office where they could find him. There is no indication his whereabouts were unknown. They never asked me where he was. My learned friend well knows Croker was at my office and he had an opportunity to interview him there. As to this question of the second marriage of Croker, the record is all there; the man did not hide anything. There was a second marriage; he gave his evidence which they both heard; there were two people to cross examine him and nothing was said or done about it.

I am submitting the evidence in the Ontario case which we referred to, Hedge & Morrow, or rather the decision there is directly and decidedly in support of the contention I have made. In all these various cases referred to and some referred to on page 76 Vol. C.C.B. there were many marriages sought to be upheld and there were marriages in dispute. In our case the burden was discharged so far as the executor is concerned when he proved that

Sarah Croker went through the form of marriage, as Sadie Davenport,with Harry Croker, in 1899.

My learned friend made play about evidence of divorce. You saw Croker there and his evidence is the evidence he would naturally give. This woman left him in 1904 and he never heard of her until after her death. He said "I never heard of any divorce". There is only one meaning; there was no divorce as far as he knew. It is further evidence of Croker's credibility. He was living in England and this woman here. There might have been a divorce as far as he knew but he never heard of it. The same with the other things, dissolution by Act of Parliament. My learned friend has made quite a lot of play about your Honor considering probabilities and possibilities. He wanted you to read the evidence and then conclude there might be a possibility, a probability and liability of divorce. I submit from the case of Hedge & Morrow, Piers & Piers and other authorities, when we have established a marriage and the spouse living, all these other things are things for my learned friends to show. It is for them to prove there was a divorce. The burden is on them to go into this question of incapacity. If Piers & Piers is anything, it is authority that the earlier marriage will requirevery strong evidence of incapacity before it can be set aside.

I want you to consider this is not a prosecution for bigamy, not a prosecution for adultery. These various negatives, death of one spouse, divorce of the parties, are things for my learned friends to prove not to guess at. The burden is not on us.

I am quite satisfied to rely on the evidence of Croker, corroborated so strongly by my learned friends' own witness, Mrs.Abbott. I am not going to delay with discussion of these various authorities. I think they are authorities for a principle we all very well know but

which cannot be applied against the executor in this case.

Just one other word with respect to the second marriage of Croker, which my learned friend brought up. It is another element in his credibility. There was nothing dragged out of him or anything else. In the face of possibilities of such evidence and cross examination in respect to same, he was willing to come here and give evidence. As he is not personally interested in the estate, it is an indication of his credibility.

Then consider the conduct of parties - Mrs.Croker's own method of living, using the name Croker with respect to herself, signing that name, making a will and keeping the will all indicate very clearly circumstances, which with others are cumulative; indicate the marriage of 1899 was valid and was existing in 1914 at the time this will was in existence.

As to the burden of my learned friends, in the case of Piers & Piers,1136-1137, a very clear rule is to be found. In DeThorne's case and in the Vanberg Peerage case, one of these decisions quotes extracts from the decision of Lord Westbury in the case. You will find in Hedge vs.Morrow the burden is on those attacking the will to prove matters of divorce and dissolution of marriage after a prima facie case has been made out. My learned friend shakes his head but it must be as obvious to your Honor as it is to us there would never be such a thing as a prosecution for bigamy, never such a thing as a bigamous marriage if it is left to prove to the extent my learned friend says the various negatives. It goes far beyond the question of reasonable doubt even in criminal cases.

I don't think there is anything more that I can add. With respect to the marriage in New Brunswick, we do not need to know the law of New Brunswick in some respects, but my learned friend's witness this morning indicated, if there was a marriage existing at the time, the

second marriage was a nullity; it was not a marriage and does not come within the marriages to which good faith refers.

I think that the conduct of the executor in this case has been correct. The only course for the executor to take when the marriage of 1914 was alleged was to make these enquiries in England and, if necessary, go to England in respect to it. It is not the case of worrying about twenty thousand dollars. I don't think that should come into it at all. It is not only a case of precaution but it was his duty. I don't think there is anything more I have to add.

MR. SHAW: My learned friend has laid some stress on the corroborative effect of the evidence of Mrs. Abbott, one of the parties in this action, on the evidence of Harry Croker. He also brought out the point that the evidence was taken after a long space of time and not on the same day. I recall quite clearly, when our witnesses were before the court some were excluded before they gave testimony so they could not pick up the story of the witnesses.

THE COURT: Certain intimate questions were asked Giberson about them living together; for just a few moments they were excluded.

MR.SHAW: I am willing to admit the evidence of Croker to a large extent duplicates that of Mrs. Abbott. He had had an opportunity to see the previous witness' testimony and to identify himself. Word for word follows the testimony - little things like hanging out washing on the roof; there is a clear effort on the part of the witness.

I may say he impressed me favorably up to a point. I would point out that he failed to add anything to what previous witnesses had said as to his relatives.

He did not know who his grandparents were. He did explain that his brothers were stepbrothers; the object was to explain everything inconsistent. With reference to the witness Harry Croker, it appears to me from looking at the evidence that his evidence was given in a very guarded way; he very carefully considered each answer that he gave. His asking protection of the court, demanding British justice, asking for justice and saying he was here in the interests of justice --

THE COURT: Quote the evidence on each point.

MR.SHAW: When the witness was asked if he thought he had any interest in the estate he said he was here only in the interests of justice. My learned friend referred to him coming here and, starting that as a point, went on to show his credibility. It only points to one thing in my mind, that he weighed the thing over carefully before he crossed the ocean.

THE COURT: He does not stand to get anything out of the estate whether you or the other party succeeds.

MR.SHAW: The fact of his asking the protection of the court indicates a previous contact with the law.

Some capital was made out of the fact that Mrs.Croker continued to use the name Croker after she was married to Giberson and Mrs. Green's testimony showed she knew her just as much by the name of Sarah Croker bas Sarah Giberson. I suggest, if there was any question as to whether she was already married, when she entered into the marriage with Giberson she would wish to drop the name Croker as quickly as possible and bury all reference to the name Croker.

THE COURT: I could give you half a dozen reasons why she should use the name Croker but it would only be guessing. I don't think the fact that she resumed the name Croker would be sufficient to indicate she did not consider her

marriage to Giberson a proper legal marriage.

MR.SHAW: I would say her using the name strengthens her innocence to continue on and let herself be known as Croker.

THE COURT: Not necessarily. She might find Croker was still alive and more or less protect herself by using her former name, but that is guessing.

MR.SHAW: My learned friend refers to Hedge vs. Morrow, Supreme Court, Ontario. That is an interesting case but it is not an all fours with this case. In that case the party guilty of contracting the second marriage while the first party was alive was the party seeking to set aside the will.

THE COURT: The executor under the will was the one to institute proceedings.

MR.SHAW: The case arose from the fact that the man, Mohnson, after the death of his wife, or presumed death of ~~it~~ his wife, acted under power of attorney in disposing of certain lands. The executor also endeavored to deal with the same lands. The contest was between the various grantees and the question of the validity of the will was incidental. The point is possibly dealt with in the judgment of the court but I don't think it is a satisfactory case to cite in this regard. The case of Piers & Piers was used to show the first marriage was valid. The man had married a woman in Montana and only the next year he married another woman in Alaska. In the following year the woman disappeared and the man was subsequently indicted for murder. He was a scamp and a rogue.

THE COURT: The parties discovered the fact that the clergyman, supposed to be residing at a particular place, actually did not reside there and there was no such clergyman at that address and the inference was it was a bogus marriage. The

court held they had gone through a de facto marriage. This woman believed she was going through a marriage ceremony. It is true the first marriage was not validly solemnized.

MR.SHAW: I refer to the case In Re Shephard (1904) 1. Ch.456. In that case the court went so far as to say the marriage was not valid and yet held the marriage to be valid because that was a case between the same parties who had gone through an unnecessary form of marriage.

THE COURT: There are cases of people getting married again when the court would have upheld the first marriage.

MR.SHAW: The presumption of the validity of marriage in 1914 attaches equally to the marriage solemnized July 1st.,1899. I can, therefore, remove any burden that rests on my side of this case by balancing the presumption in favor of the first marriage with the presumption in favor of the second marriage. In saying the burden is upon me, not only to prove a valid marriage existed and was created in July,1899 but continued to exist in 1914, I suggest my learned friend has not discharged his responsibility since that burden is imposed on him. In effect, he is attacking the second marriage. It would be a simple thing to prove no divorce was granted. It is not hard to prove those things. It is easier for the opponents of the will who know Croker and who know his background. He was thrown at us with no opportunity to check up on his career. I submit they have not discharged that. I refer to Williams vs. East Indian Co. 3 East, 192. 102 Eng.Reports,571. Where the law presumes the affirmative of some fact the negative must be proved by the parties at variance. I submit the presumption of bigamy is in favor of Giberson. Giberson is an innocent party. The presumption that pertains in this case is the same as if it were a criminal proceeding.

MR.LAWRENCE: They are trying to rebut the validity of the 1914 marriage on the ground that Sarah Croker was

a married woman when she went through with that marriage in 1914. Croker says they went through the form of marriage in 1899 and he states he never heard of any divorce. I say they have to disprove that marriage was dissolved. I submit the law requires clear, distinct, cogent and satisfactory evidence.

THE COURT: I reserve my judgment.
