31335 (6)
S.C.C. No. #3554

IN THE SUPREME COURT OF CANADA
(On appeal from the Court of Appeal for Alberta)

BETWEEN:

DON BRODER

APPLICANT
(Defendant)

and

CRAIG BRODER

NOT A PARTY TO
THIS APPLICATION
(Defendant)

and

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(Plaintiff)

APPLICATION FOR LEAVE TO APPEAL
Pursuant to s. 40(1) of the *Supreme Court Act*

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B.A. (Hon.), LL. B.

February 22, 2006
Our File No.: 5, 223 M

Via courier

Ms. Elizabeth MacInnnis
Weir Bowen LLP
#1600 Bell Tower
10104-103 Ave.
Edmonton, AB T5J 0H8

Dear Ms. MacInnis:

Re: ***Broder v. Broder***
Application for Leave to Appeal to the Supreme Court of Canada

Please find enclosed with this letter the Motion Book in support of Mr. Don Broder's Application for Leave to Appeal to the Supreme Court of Canada.

Please acknowledge service on the space provided.

I thank you for your attention in this matter. I remain,

Yours truly,
BERESH DEPOE CUNNINGHAM
Per:

Marvin Bloos, Q.C.
bloos@appeals.ca
MRB/mz

SERVICE OF THE APPLICANT'S MOTION BOOK ON APPLICATION FOR LEAVE TO APPEAL HEREBY ADMITTED this 22nd day of February, 2006

Elizabeth MacInnis

SUPREME COURT OF CANADA
FILED
FEB 24 2006
COUR SUPRÊME DU CANADA
DÉPOSÉ

S.C.C. No.

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Elizabeth M. MacInnis
Solicitor for the Respondents

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IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ALBERTA)

BETWEEN:

DON BRODER

APPLICANT
(Defendant)

-and-

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NOT A PARTY
TO THIS APPLICATION
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RESPONDENTS
(Plaintiffs)

NOTICE OF APPLICATION FOR LEAVE

TAKE NOTICE that the Applicant Don Broder will apply for leave to this Court pursuant to s. 40(1) of the *Supreme Court Act*, and amendments thereto for an order granting leave to appeal from a judgment of the Court of Appeal for the Province of Alberta pronounced December 23rd, 2005, or such further and other order that the said Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of such application for leave, namely the materials appended to the Application for Leave herein and such further or other material as counsel may advise and may be permitted.

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AND FURTHER TAKE NOTICE that the said application for leave shall be made on the following grounds:

1. The Court of Appeal erred in law in holding that the "relation back" doctrine may be applied beyond the expiration of the applicable limitation period whenever the action is one "brought for the benefit of the estate, which error of law raises issues of national and public importance which warrants determination by this Honourable Court; and

Dated at the City of Edmonton, in the Province of Alberta, this 22nd day of February, 2006.

Marvin R. Bloos Q.C.
Counsel for the Applicant
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To: **Maître Anne Roland**
Registrar
Supreme Court of Canada
Ottawa, Ontario
K1A 0J1

And to: **Elizabeth M. MacInnis**
Weir Bowen LLP
1600, 10104 – 103rd Avenue
Edmonton, Alberta
T5J 0H8
Counsel for the Respondents

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NOTICE TO RESPONDENT

Pursuant to subsection 23(13) of the *Rules of the Supreme Court of Canada* this application for leave to appeal will be submitted by the Registrar to the Court for hearing after the Respondents' Reply has been filed or on the expiration of the time period set out in subsection 23(11) of the said Rules (30 clear days after service of the application for leave), as the case may be.

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IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ALBERTA)

BETWEEN:

DON BRODER

APPLICANT
(Defendant)

-and-

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RESPONDENTS
(Plaintiffs)

CERTIFICATE OF COUNSEL FOR DON BRODER

I, Marvin R. Bloos, Q.C., counsel for the Applicant Don Broder, hereby certify that there is no sealing order or ban on the publication of evidence or the names or identity of a party or witness in this case.

Dated at Edmonton, Alberta, this 22nd day of February, 2006.

Marvin R. Bloos

Marvin R. Bloos Q.C.
Counsel for the Applicant
Don Broder
300 MacLean Block

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To: **Maître Anne Roland**
Registrar
Supreme Court of Canada
Ottawa, Ontario
K1A 0J1

And to: **Elizabeth M. MacInnis**
Weir Bowen LLP
1600, 10104 – 103rd Avenue
Edmonton, Alberta
T5J 0H8
Counsel for the Respondents

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ACTION NUMBER: 9703 12949

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

PLAINTIFFS

- and -

DON BRODER AND CRAIG BRODER

DEFENDANTS

AND BY WAY OF COUNTERCLAIM:

DON BRODER

PLAINTIFF BY COUNTERCLAIM

- and -

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

DEFENDANTS BY COUNTERCLAIM

BEFORE THE HONOURABLE MME. JUSTICE M.B. BIELBY LAW COURTS BUILDING EDMONTON, ALBERTA	)	ON JANUARY 19 TO 23, 2004, INCLUSIVE WITH REASONS FOR JUDGMENT ISSUED ON THE 9TH DAY OF MARCH, 2004

JUDGMENT ROLL

AT THE SITTINGS of this Honourable Court held on January 19, 20, 21, 22, and 23, January, 2004, at the City of Edmonton, in the Province of Alberta; HAVING READ the pleadings herein, AND UPON hearing evidence adduced on behalf of the Plaintiffs, and the Defendant, Don Broder, AND UPON HEARING submissions made on behalf of the Plaintiffs and the Defendant,

Don Broder; AND UPON the Court allowing the Defendant, Don Broder's son, Craig Broder, to assist his father at trial; AND UPON the Court rendering its Reasons for Judgment on March 9, 2004, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Personal Representatives of the Estate of Ed Broder, Deceased are entitled forthwith to possession of and directed to sell the World's Record Non-Typical Mule Deer Trophy (the "Trophy").

2. The Personal Representatives of the Estate are directed to attend within 30 days of obtaining possession of the Trophy before either the Honourable Madam Justice M.B. Bielby or the Honourable Mr. Justice R.P. Marceau for directions in relation to the mode of sale of the Trophy. Ample notice of bringing of that application is to be given to the Defendant, Don Broder, who is at liberty to attend and make representations.

3. The claim of all other Plaintiffs, including those of Doris Bibaud and George Broder in their personal capacity, are dismissed.

4. The Trophy is to forthwith be made available to George Broder and Doris Bibaud.

5. The Defendant, Don Broder, is to receive the sum of $21,995.00 as a first charge on the Trophy sale proceeds, net of the cost of sale, in respect of his counterclaim if he also delivers the replicas, life-sized mount and backdrop so that they may be sold in conjunction with the Trophy. If the Defendant, Don Broder, does not deliver the replicas, life-sized mount and backdrop so that they may be sold in conjunction with the Trophy the Defendant, Don Broder, is to receive the sum of $1,995.00 as a first charge on the Trophy sale proceeds, net of the cost of sale, in respect of his counterclaim.

6. If the trophy is ultimately sold to Don Broder the amount he has been awarded pursuant to

the Counterclaim may be attributed towards his purchase price.

7. The Defendant, Don Broder, is also to receive his equal share of all Estate assets when distributed, including his share of the balance of the net sale proceeds of the Trophy.

8. Each party shall bear its own costs..

JUSTICE OF THE COURT OF QUEEN'S BENCH OF ALBERTA

for Bielby J

APPROVED AS TO ~~JUDGMENT GIVEN~~ Form and Content:

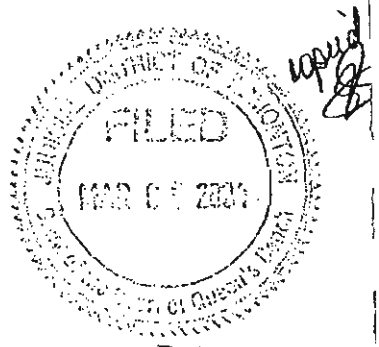
LACOURCIERE CERVINI

GUY LACOURCIERE
SOLICITORS FOR THE DEFENDANT
DON BRODER

ENTERED THIS 12 DAY OF ~~JULY~~ Aug, A.D. 2004.

CLERK OF THE COURT

F10



Court of Queen's Bench of Alberta

Citation: Broder v. Broder, 2004 ABQB 175

Date:
Docket: 9703 12949
Registry: Edmonton

Between:

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam and Doris Bibaud and George Broder, personal representatives of the Estate of Edmund Broder, also known as Ed Broder, deceased

Plaintiffs

- and -

Don Broder

Defendant

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

DECISION

[1] The Personal Representatives of the Estate of Ed Broder are entitled to possession of and directed to sell what is said to be the World's Record Non-Typical Mule Deer Trophy. While they took no action to recover the trophy for almost 25 years after their brother removed it without permission, their cause of action did not begin to run until 1997 when it came to their attention, for the first time, that he was claiming the trophy to be his own and thus engaging in an act inconsistent with the estate's right to it.

[2] The Statement of Claim was issued prior to the appointment of the Personal Representatives by some of the beneficiaries of the estate. The Personal Representatives were not appointed until after the expiry of the limitation period then applicable in an action for replevin.

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This action is nonetheless not statute-barred, nor a nullity through application of s. 61(1) (b) of the *Limitation of Actions Act*, R.S.A. 1980, c. L-15 (" the *Limitation of Actions Act*") or, alternatively, through application of the principle of "relation back". While the principle of "relation back" is normally available only in regard to actions taken in advance of the granting of letters of probate by parties named by will as executors, it applies in this case to save the action because that action was commenced in advance of the granting of Letters of Administration for the purpose of preserving estate assets.

[3] Laches does not operate to bar the claim notwithstanding the long delay in the absence of any action by the Personal Administrators or any beneficiary amounting to waiver and in the absence of any evidence of reliance on the delay by the Defendant other than in relation to monetary expenditures made by him. Those expenditures are compensated by granting to him the right to recover the first $21,995 of the net sale proceeds from the trophy.

FACTS

[4] Ed Broder shot a deer in 1926 which yielded what is said to be the World's Record Non-Typical Mule Deer Trophy. Ownership of that trophy forms the subject matter of this litigation.

[5] The parties are his seven children, the Defendant being his eldest son and the Plaintiffs his other sons and daughters. He died in December, 1968, his wife having died the previous year. No formal application for Letters of Administration was sought or obtained for Ed Broder's estate until 2001, well after this litigation had commenced. The Plaintiffs considered that he had died intestate. No suggestion was made of a possible will until the month preceding the commencement of this trial, 6 and one-half years into this litigation when the Defendant produced a purported holograph will pursuant to which he alone was made beneficiary of his father's personal possessions.

[6] Ed Broder left relatively few personal effects. Aside from the trophy which had hung on the wall of the family home since it had been built in the 1940s his estate primarily consisted of an old Model T car, chaps and a saddle, some firearms and miscellaneous small personal effects. The family home had belonged to Mrs. Broder who by will permitted the Plaintiff Richard Broder to purchase the house from the estate which he did.

[7] The parties agree that an informal meeting of all 7 living siblings was held a few months after their father's death, at a date I find to have been in April 1969 when the disposition of his effects was discussed. George Broder was chosen by consensus to be in charge with Don Broder to assist him. Those present agreed that an effort should be made to find a buyer for the trophy and to place an advertisement in Field & Stream magazine for that purpose.

[8] A letter was sent, signed by George and Don Broder, requesting each of the siblings to contribute $40 to the cost of the magazine advertisement relating to the trophy. Each one contributed that sum with the ad being placed and running in the October 1971 issue of Field &

Stream. While 19 replies to the advertisement were received and some correspondence ensued, no offer to purchase was ultimately received and no sale ensued.

[9] Subsequently the other assets, aside from the car, saddle , chaps and firearms were divided into 7 piles with lots drawn by each child which allowed him or her to select a pile to keep. The car, saddle, chaps and some of the firearms remained in the family home, now occupied by Richard. The car remains there to this day, with the balance of these items eventually passing into the hands of other of the siblings for safe-keeping.

[10] The trophy remained on the wall of the family home until 1973. Don Broder had approached his brother George for permission to remove the trophy to place it in a sportsman's show in Calgary. After that permission was refused Don Broder nonetheless entered the house at a time when his brother Richard was absent and removed the trophy. He has retained it since that day.

[11] All of his siblings knew he had the trophy yet none asked him to return it at any time prior to 1997. Various of the siblings visited Don Broder's home through the years and saw the trophy there but the ownership of it, or the right to retain it was never discussed. George and Earl Broder each attended a sportsman's show at the Edmonton Exhibition grounds in the early 1990s to see the trophy. Earl remained as Don's guest at the sportsman's dinner that night. Don Broder's right to retain the trophy was never raised.

[12] In 1994 Grace Parotta-King, an Edmonton lawyer was retained by the Plaintiffs to try to find a buyer for the trophy, at Earl Broder's instigation. He did not advise Don Broder of this step nor tell Ms. King of that fact. Rather, Earl Broder represented to her that all of the Broder siblings supported this initiative. He provided her with retainer funds which had formed part of a bequest to all the siblings, from an aunt's estate, a bequest in which Don Broder had an interest. Earl Broder did not advise Don Broder that he was using the funds in this way.

[13] Despite a comprehensive search by Ms. King's office, no buyer was located.

[14] To this point I find, and indeed there is no reliable evidence to the contrary, that the Plaintiffs all knew the Defendant had had the trophy in his possession since 1973 and had shown it at various sportsman shows yet had never asked for its return or raised the issue of the Defendant's right to retain the trophy. No consideration was given, at any time prior to the commencement of this litigation, to have any of the parties apply for the right to administer Ed Broder's estate.

[15] The first demand for the return of the trophy followed shortly on the heels of an article in the Edmonton Sun newspaper of March 4, 1997 which read, in part: "[Craig] Broder and his father share ownership of the trophy".

[16] Earl Broder read this article and, incensed by the suggestion that the Plaintiffs were not also owners of the trophy, retained Ms. King to write a letter, dated March 6, 1997 demanding

the return of the trophy. That letter was followed by the issuance of a Statement of Claim on July 8, 1997 on behalf of all the Plaintiffs in their personal capacity, which sought to replevy the trophy as well as obtain a declaration that it was jointly owned by all the Broder siblings. Don Broder raised a limitations defence, among other things in his Statement of Defence. In March 2001 Master Quinn adjourned an application for an order striking out the Statement of Claim on the basis the Plaintiffs had no standing. The adjournment was expressly granted to allow the Plaintiffs to apply for Letters of Administration of the estate of Ed Broder.

[17] George Broder and Doris Bibaud were subsequently appointed as personal representatives of the estate on May 24, 2001. In the course of dismissing a subsequent appeal from Master Quinn's decision Justice Clarke of this court added the personal representatives as Plaintiffs to this action, on September 18, 2001. The Alberta Court of Appeal dismissed a further appeal noting that the issue of the limitations period was reserved for the trial judge.

[18] On February 7, 2002 Justice Veit, in comprehensive written reasons dismissed an appeal from the order appointing George Broder and Doris Bibaud as administrators of Ed Broder's estate. Don Broder had asserted before her that he had been given the trophy by his father during his father's lifetime, a claim which was not advanced at trial. She also held that while no action had been taken to administer the estate in 30 years, that was only because there was no need to do so; the need only became apparent in 1997 when, presumably, the Plaintiffs first had notice that Don Broder was claiming sole ownership of the trophy via the article in the Sun. Justice Veit stated at para. 36:

> It is true that the first action they took was not properly perfected, but they have since taken the necessary steps to perfect their status and to take advice concerning the way in which the property must now be administered.

[19] She went on to conclude that the issue of delay was irrelevant to the application for the appointment of administrators as delay did not by itself remove the necessity of obtaining administration.

[20] The pleadings have subsequently been amended to raise the issues of an accounting of all monies earned by Don Broder from the showing of the trophy and an order returning the trophy. A counterclaim has been filed which includes an alternative claim for monies spent by Don Broder to restore, preserve and promote the trophy while he has had it in his possession.

[21] No good evidence was led of the current market value of the trophy although apparently all parties believe it may have substantial value. No evidence was led as to the sum of money, if any, which Don Broder has earned as a result of displaying the trophy.

ISSUES

[22] The following are the issues before the Court:

a. is the holograph will valid?
b. when did the limitation period start to run?
c. is the action barred due to laches?
d. is the action out-of-time because the Personal Representatives of the Estate were added to the action more than 2 years after the cause of action arose?
e. notwithstanding the provisions of the *Limitation of Actions Act*, did the limitation period start to run only upon the granting of the Letters of Administration?
f. do the personal Plaintiffs have a cause of action independent of the Personal Representatives of the estate?
g. should the Counterclaim succeed?

ANALYSIS

a. is the holograph will valid?

[23] Each of the parties who testified agreed that Ed Broder had, at most, a grade 2 education and had a very limited ability to write. All agreed that his wife took care of all those things which involved writing at least from the time the family moved into the city from the farm in the mid-1940's to the date of her death in 1967. Doris Bibaud testified that her father could not spell or write. If something was written out for him he could copy it. She gave a graphic example with her autograph book in which her father had inscribed his signature and a message when she was a child. She testified that she wrote out the message " By gum I'm stuck" on a separate piece of paper which he copied into the book and then signed it "Ed Broder". Don Broder testified that "you could put the total amount of handwriting [his] father did in his lifetime on one page of a scribbler".

[24] The purported will was written in script in pencil, and reads:

> Dec 21 1968
> I give all my personal belongings to my Son Don Broder to divide up as he sees fit. Ed Broder (illegible second signature).

[25] None of the witnesses were able to identify the text or signature as being in Ed Broder's hand. Even Don Broder testified that he could not swear the document was in his father's hand.

[26] A handwriting expert, Leslie Pearce, testified that he had examined the purported will against several known examples of Ed Broder's signature. No examples of Ed Broder's other handwriting had been located to provide to him. In his opinion there is only a remote likelihood that the signature on the purported will was that of Ed Broder. He was 80% certain that this was the case or, expressed another way, his opinion was 4.5 out of 6 that the signature was not authentic.

[27] Mr. Pearce testified that had the document been written in ink, current technology would have allowed him to date it accurately if it had been produced within the last 2 years. As it was written in lead pencil such an approach was not available.

[28] As stated, the purported will was first produced within a month of the start of the trial. It had not been included in the Affidavit of Records nor the possibility of its existence raised at any time during the prior 6 year history of this litigation. All steps up until December, 2003 had been taken by all parties on the basis that Ed Broder died intestate. In particular, Don Broder had not raised the possibility of a will at any time in his attack on the validity of the grant of the Letters of Administration before Justice Veit, described above.

[29] At trial he testified that he first located the purported will last December when he was looking through his 1968 income tax return as he was curious to see how much his income had been that year. He did not explain how it came to be written, nor did he testify to a positive memory of being given the document by his father. Rather, he agreed that his father was in the hospital on December 21, 1968 suffering from his final illness. He speculated that his father must have given it to him when he was in the hospital visiting and that he stuck it in his pocket, forgot about it, and probably left it on the table when he went home with the result that it got mixed in with his income tax materials which were in the course of preparation.

[30] The purported will appears to have been written on the back of one of three sheets of pencilled score-keeping for a game of some type, on which scoring appears under the names of "Dad" and "Don". Don Broder testified that he did play cards with his father in hospital but could not identify the handwriting in which this score-keeping appears. None of the Broder siblings who testified could make such an identification nor link the score-keeping to one of the few types of card games their father was known to enjoy.

[31] Don Broder failed to appear for an Examination for Discovery scheduled by agreement with his then counsel to take place in the week prior to trial upon which he was to have been examined in regard to the purported holograph will.

[32] While Don Broder was unrepresented at trial, he had been represented throughout by counsel until a week or so prior to the start of the trial. That counsel appeared on the first day and provided the Court with a book of authorities upon which he had intended to rely prior to the termination of his retainer. That book of authorities had been prepared at the direction of the case management judge, as was a companion book prepared by Plaintiff's counsel.

[33] I allowed Don Broder's son, Craig Broder, to assist his father at trial. His father applied to be allowed that assistance given his advanced age. In fact, Craig Broder conducted his father's entire defence, cross-examining witnesses, leading evidence from defence witnesses, testifying himself and proffering read-ins from the Examinations for Discovery of the various Plaintiffs as well as arguing fact and law at the conclusion of the trial.

[34] Craig Broder did not argue that the purported will was valid or that it raised a defence. Plaintiff's counsel, on the other hand, argued that it was invalid or alternatively was ambiguous with the result that the estate should be treated as an intestacy.

[35] She first relied on the plethora of suspicious circumstances surrounding the production of the purported will, so late in the day in this bitter and protracted litigation. She relied on the opinion of the handwriting expert Leslie Pearce as evidence that the will was invalid. She argued that Don Broder had not met the onus upon him as the person propounding a holograph will to prove the signature of the testator; even he himself could not positively attest to the validity of the signature; see ***Dugas v. Amiot***, [1929] S.C.R. 600.

[36] I agree. The Defendant has not met the onus of proving the validity of his father's signature on the holograph will. In fact, all the evidence supports the conclusion that it is highly likely that the document was not created by or at the direction of Ed Broder.

[37] As such, it is not necessary to consider the optional argument that the will failed as it created an ambiguity by the use of the phrase "to divide up as he sees fit". I note that a similar phrase was held to create a trust which failed for uncertainty of object in ***Re Madison Estate***, [1997] A.J. No. 51 (Q.B.) (QL).

b. when did the limitation period start to run?

[38] The *Limitation of Actions Act* applies to this action as it was commenced prior to March 1, 1999; see *Limitations Act*, R.S.A. 2000 c. L-12, s. 2(1). The former *Act* provides:

> S. 51 ... an action for...
>
> (g) the taking away, conversion or detention of chattels, may be commenced within 2 years after the cause of action arose, and not afterwards.

[39] L.N. Klar, et al set out the elements of conversion and detinue in ***Remedies in Tort*** (Calgary: Carswell, 1987-) at 4-14:

> i) the property must be specific personal property; ii) the plaintiff must have a possessory interest in the chattel; and iii) the defendant must commit an intentional and wrongful act in respect of the chattel. In an action for conversion, the wrongful act may take the form of any intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession. In an action for detinue the wrongful act consists of the wrongful withholding of the chattel.

[40] Where the defendant's possession originates lawfully, there must be a demand and refusal before an action for conversion will lie (at 4-22).

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[41] Feehan J. stated in ***Barberree* v. *Bilo*** (1991), 84 Alta. L.R. (2d) 216 (Q.B.) at 219:

> Counsel for Silo also posits that Barberree's right of action against Aslin has expired under s. 51(g) of the *Limitation of Actions Act*, R.S.A. 1980, c.L-15. The limitation period for commencing an action in conversion begins to run from the time a demand to turn over the chattel is made and refused. (See ***Davis* v. *Henry Birk and Sons Limited***, [1981] 5 W.W.R. 559; affirmed, [1983] 1 W.W.R. 754 (B.C.C.A.)). The period runs for two years from the date of the refusal.

[42] The parties all agree that Don took possession of the trophy without permission at the onset but the Plaintiffs admit they did nothing timely as a result, in reliance upon his status of one of the two brothers informally charged with caring for and trying to sell the asset. If this action is characterized as an action for conversion, the wrongful act which triggers the running of the limitation period must take the form of any intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession. The Plaintiffs argue that the first such act arose upon the publication of the newspaper article in which he claimed ownership in March 1997.

[43] If the action were characterized in detinue, the result is roughly the same; the limitation period would normally start to run from the time the demand to turn over the chattel was refused which was in response to a demand letter in June 1997. Under either characterization the 2 year limitation period expired in 1999 well before the amendment to the Statement of Claim adding the personal administrators as parties was issued in March 2001.

[44] As stated the Plaintiffs argue that the limitation period did not start to run until there was an act which was inconsistent with the understanding, testified to by each of George Broder, Doris Bibaud and Earl Broder that Don Broder was safe-keeping the trophy on behalf of all of the family until the day when, sooner or later, it was to be sold. That understanding was not said to be based upon any express agreement reached with Don Broder at any time after he took the trophy in 1973. No Plaintiff testified that any express agreement to that effect was reached. Rather, they argue that such an agreement should be implied from the circumstances of his taking the trophy and keeping it, as well as the fact that he had informally been appointed as a "helper" to assist George Broder in gathering and distributing estate assets at the family meeting in April 1971.

[45] The Defendant argued that the limitation period commenced to run in 1973 when, to the knowledge of all of the Plaintiffs, he took the trophy and kept it; nothing having been said or done in regard to his retention of the trophy for almost 25 years they should have logically deduced, at some point, that he was claiming the trophy as his sole property. Alternatively he argues that the limitation period commenced running when he had his lawyer write to George Broder in 1975 to assert his ownership claim to the trophy.

[46] Don Broder did not testify that he asked permission of anyone prior to taking the trophy, other than of George who refused permission. He did not testify that anyone expressly told him he could keep the trophy as his own thereafter. Rather, he asked a friend, who was also his lawyer, Randy Benjamin, to write George Broder, which he did. Mr. Benjamin testified that he sent a letter addressed to George Broder dated June 26, 1975 which read:

> Mr. Don Broder has asked me to write to you with is instructions for the disposition of his father's personal belongings.
>
> He indicated to me that a few days prior to his passing on December 26, 1968, his father gave him his personal belongings.
>
> His instructions to you is that he is keeping the Non Typical Mule Deer Trophy, and you may divide the rest of his personal belongings with your brothers and sisters.
>
> Yours truly,
>
> "R.R.A. Benjamin"

[47] George Broder testified that he did not receive this letter. Mr. Benjamin testified that he never got a reply to this letter. Don Broder testified that he and George Broder never discussed the letter or its contents. I find that George Broder never received this letter, nor any express notice that Don Broder was claiming an interest in the trophy before 1997 other than as beneficiary of his father's estate.

[48] The Defendant further argued that a conversation took place among him, George and Earl Broder from which the latter two should have inferred that he considered the trophy to be his own. His friend, Don Durand testified to a conversation which occurred among the three brothers when Don, George and Earl Broder visited Don Broder's hunting camp in about 1988. Mr. Durand was present and overheard the conversation. He testified that Don Broder offered his brothers the opportunity to borrow the trophy if they ever wished to do so. From the use of the word "borrow" the Defendant argues that his brothers should have understood he intended to keep the trophy as his own.

[49] Neither George nor Earl Broder recalled this particular conversation. No record was made, of course, of exactly what was said or what words were used. I do not conclude that even if the word "borrow" was used that term was inconsistent with Don Broder maintaining the trophy for safe-keeping rather than asserting ownership to it.

[50] On the other hand, I do not find that Don Broder made any representation to his sister Doris Bibaud which supported her understanding that he was retaining the trophy merely for safekeeping when, as she testified, he showed her a vault he had built in his garage in which to store the trophy for the family. He denied describing the trophy as a family possession during this

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visit. Again, the event occurred many years ago, no record was made as to exactly what was said, the words purportedly used were ambiguous and subsequent recollection has been colored by the high degree of animus which exists between brother and sister at this time.

[51] Nothing can be made of the fact that Earl Broder retained Ms. King to attempt to locate a buyer for the trophy in 1994 or that Luella Adam, recently deceased, made inquiries in 1992 about a possible sale to a collector of trophies when she visited Texas as Don Broder was not made aware of either of these initiatives by his siblings. While the failure to involve him as safe-keeper of the trophy in these sale efforts raises the suspicion that the Plaintiffs expected difficulty in getting the trophy from Don Broder to sell it, those suspicions do not translate into an act by him of such a nature as to trigger the running of the limitation period.

[52] Don Broder's evidence contained a variety of inconsistencies as between that to which he testified at trial and earlier at examination for discovery. There were also inconsistencies between statements made by him in testimony at certain points of the trial with what he stated at other points in his evidence. For example, he first stated that he was not sure whether he ever talked to George Broder about possession of the deer head after Mr. Benjamin sent the June 26, 1975 letter. He next stated that he discussed it with George when they were hunting together in 1988 or 1989. He had testified at Examination for Discovery that he never discussed this issue with George after the June 26, 1975 letter was sent.

[53] In another example he stated that he did not know if any of his other siblings told him he could keep the trophy. He then changed that to stating that it was just that he didn't write them about it, then to that there was no communication of any type on the issue and finally that he believes he told his siblings of his claim on many unspecified occasions. At Examinations for Discovery he agreed that he had testified that he had no discussions with any of the Plaintiffs on this issue after June 1975 and that none of them ever told him whether or not they objected to his keeping the trophy.

[54] In the result, where there is a discrepancy between the evidence of Don Broder and that of any of the Plaintiff's witnesses and Don Broder's evidence is not otherwise supported by reliable independent evidence I accept the evidence of the Plaintiff's witnesses as true and find Don Broder's evidence to be unreliable.

[55] In any event Don Broder did not advance any right to own the trophy (outside of a claim based on the purported will) other than as a result of the Plaintiffs' claim being barred by laches or by the expiration of a statutory limitation period. He did not claim to have acquired ownership otherwise.

[56] That said, the evidence of George Broder, Earl Broder and Doris Bibaud which I have accepted as true was that the issue of ownership and possession of the trophy was never raised by any of the Plaintiffs with Don Broder at any time after he took the trophy from the family home in 1973, up until they read the article in the Edmonton Sun newspaper on March 4, 1997.

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[57] Having concluded that the Defendant has not proven that George Broder received Mr. Benjamin's 1975 letter, the only circumstance which could have triggered the commencement of the limitation period prior to March 4, 1997 is dependent on an inference that the Plaintiffs deduced or should have deduced from the long delay with no action that Don Broder was not in fact keeping the trophy to try to eventually sell it on their behalf but rather was keeping it as his own.

[58] While this issue is the most troubling in this litigation, I conclude that the Plaintiffs did not arrive at this conclusion notwithstanding the long period of inaction. First, that was the evidence of those Plaintiffs who testified, the others being deceased (in the case of Luella Adam) or too frail to endure the burden of participating in the trial. Secondly, they did take some steps in 1992 and 1994 to try to sell the trophy, which steps were inconsistent with any belief that it then belonged to Don. Thirdly, and most important, is the utter absence of communication on either part from which they could conclude that he was not simply, de facto, retaining an asset which had proved difficult to sell. None of the parties was particularly sophisticated and, prior to this litigation commencing all appeared to be confrontation-adverse. The Plaintiffs' inaction was equally consistent with their belief that a family treasure was simply being retained and preserved for the family as that it was being retained and preserved for and by Don Broder alone.

[59] Therefore I conclude that the first time the Plaintiffs knew that Don Broder was claiming the trophy as his own was when they read the March 4, 1997 article in the Edmonton Sun. The limitation period commenced running at that time.

c. is the action barred due to laches?

[60] The Defendant argues that the Plaintiffs should be barred from success because of delay. While I have found that they did not know Don Broder was claiming to be the sole owner of the trophy before March 1997, they knew as early as 1973 that he had removed and kept the trophy without their permission yet did nothing about it for almost 25 years. Further, the Plaintiffs George Broder and Doris Bibaud in their capacities as Personal Representatives of the estate of George Broder delayed in obtaining that appointment and from being added as parties to this action in that capacity for 4 years after they learned of Don Broder's claim of ownership of the trophy.

[61] While delay, or laches, is often discussed in the context of being an equitable defence to a claim for an injunction or the specific performance of contractual obligations, nothing has been provided which suggests that in a proper case it could not apply to an estate matter such as this.

[62] LaForest J. in ***M. (K.)*** **v.** ***M. (H.)***, [1992] 3 S.C.R. 6 (at pp.76, 77) adopted the explanation of the doctrine of laches as set out in ***Lindsay Petroleum Co.*** **v.** ***Hurd*** (1874), L.R. 5 P.C. 221:

> Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[63] La Forest J. concluded that mere delay is insufficient to trigger laches under either of its two branches (at p. 78):

> Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[64] Delay as a potential bar to relief is discussed by Mr. Justice Robert J. Sharpe in his text *Injunctions and Specific Performance*, 2d ed. at 1.830 as follows:

> Consideration of delay is an aspect of the more general principle which takes into account the injustice of awarding relief against a party who will be prejudiced on account of a change of position related to acts or omissions of the party seeking relief.

[65] In illustration Justice Sharpe goes on to cite the decision of Duff J. in ***Bark–Fong v. Cooper*** (1913), 49 S.C.R. 14 at 23:

> The doctrine of laches, it has been frequently said, is not a technical doctrine, and in order to constitute a defence there must be such a change of position as would make it inequitable to require the defendant to carry out the contract or the delay must be of such a character as to justify the inference that the plaintiffs intended to abandon their rights under the contract or otherwise make it unjust to grant specific performance.

and the decision of LaForest J. in ***M.(K.) v. M.(H.)***, *supra* at 77-8:

> A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, [*Equity Doctrines and Remedies* (Sydney: Butterworths,

1984)] at pp. 755-65 where the authors distill the doctrine in this manner, at p. 755:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.

[66] Therefore, more than delay - even delay in excess of 20 years - in asserting a right is needed to succeed on this defence. Either acquiescence or reliance must also be shown. Justice Sharpe defines acquiescence as being the equivalent of waiver in para. 1.870 of his text. No conduct on the part of any of the Plaintiffs which can be said to amount to a positive act of waiver has been established in this case. There was no evidence of an express or implied representation by any Plaintiff that they intended through the period of delay not to eventually demand the return and sale of the trophy, or that an application for the appointment of Personal Representatives would not eventually be made if necessary; see also Spry, I. C. F., *The Principles of Equitable Remedies*, 5th ed. (Agincourt: Carswell, 1998) at 239-240.

[67] The Defendant argued that George and Earl Broder should have interpreted his offer to let them "borrow" the trophy, made while they were hunting with Don Durand, as positive knowledge he was treating the trophy as his own, with the result that their subsequent inaction amounted to acquiescence. However, for the reasons stated earlier I do not conclude that even if the word "borrow" was used that term was inconsistent with Don Broder maintaining the trophy for safe-keeping rather than asserting ownership to it.

[68] The Defendant alternatively argued that his position was altered as a result of the delay. In ***Blundon v. Storm***, [1971] 20 D.L.R. (3d) 413, Judson J. on behalf of the Supreme Court of Canada concluded that in determining whether laches could be raised as a defence the court should examine the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[69] The Defendant argued that the expenditures he made in preserving the trophy and in acquiring objects which aided in its display constitute an altering of the status quo on his part so that ordering the delivery of the trophy up to the executors of the estate at this time would be unjust to him. He has shown that he relied upon the ongoing state of affairs at least to the extent that he expended considerable sums of money to facilitate showing the head, or the replica of the head at various sportsman's shows. However, I find that prejudice can best be addressed by way of the Counterclaim, as suggested in Spry, *supra* at 232:

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> ...if the material prejudice to the defendant arises through the expenditure of money by him, in appropriate circumstances an order for specific performance may be made that is conditional upon his being indemnified.

[70] Even if that were not the case, to the extent that laches must be resolved as a matter of justice between the parties, I note that on the facts nothing in the evidence at trial as to the siblings' dealings with the trophy supports the conclusion that they intended to alienate their interest in it to Don. He suffered no prejudice other than financial expenditure as a result of any delay in demanding the return of the trophy or in an application being made for Letters of Administration. On the other hand, I am forced to conclude that Don Broder's attempt to mislead the court through the production, in suspicious circumstances and timing, of the purported holograph will might in and of itself have led the court to exercise its discretion to refuse to apply the equitable doctrine of laches to deny the Plaintiffs their proper remedy; see Spry, *supra* at 246.

d. is the action out-of-time because the Personal Representatives of the Estate were added to the action more than 2 years after the cause of action arose?

[71] Notwithstanding statements in the pleading advancing a cause of action on behalf of the Plaintiffs personally, no evidence or argument at trial supported the proposition that any party other than the estate of Ed Broder, as represented by George Broder and Doris Bibaud as Personal Representatives had a claim for recovery of the trophy from George Broder.

[72] Those Personal Representatives were added to the action on September 18, 2001. Don Broder argues that the action is therefore out-of- time as the only parties who had a proper claim were added to it more than 2 years after the cause of action started to run; their subsequent addition cannot breathe life into an action that was, in effect, a nullity as it was brought by parties without standing, notwithstanding the orders of the Master, Justice of this Court and Court of Appeal each of which declined to strike it for this reason on a preliminary basis.

[73] The Personal Representatives can succeed only if allowed to take advantage of the earlier proceedings brought prior to the expiry of the limitation period notwithstanding the absence of any party properly entitled to sue at that time, i.e. absent Letters of Administration having even been granted, let alone the Personal Representatives being named as parties to the action.

[74] The Plaintiffs advance two reasons why the Personal Representatives should be entitled to rely on the timely commencement of this action by them in their personal capacities in conjunction with their other siblings.

[75] First, statute provides a potential remedy via s. 61(1) (b) of the *Limitation of Actions Act* which provides:

> s. 61(1) If an action to which this Part applies has been commenced within the time allowed by or under this Part, the court, on application, may authorize an

amendment to any pleading or proceeding therein that will result in a change of parties to the action...

> (b) when the action is one on behalf of... the estate of a deceased person and the action was brought by or in the name of a person not entitled under law to bring an action on behalf of...the estate of the deceased person, if the court is satisfied that no affected person has been misled as to the true nature of the action and if the change is only the substitution of the proper persons to bring the action;...

notwithstanding that the time limited by this Part for commencing that class of action had lapsed between the time the action was commenced and the time of the application for the amendment.

[76] This provision, although now repealed and replaced with the broader s. 6 in the *Limitations Act* , R.S.A. 2000, c. L-12 has been interpreted to avoid the conclusion that an action is a nullity; see ***Stout Estate v. Golinowski Estate*** (2002), 100 Alta. L.R. (3d) 5, 2002 ABCA 49at para. 93; ***Frank v. King Estate*** (1987), 56 Alta. L.R. (2d) 289 (C.A.). Section 61(1) (b) was passed to mitigate against the harsh consequences of cases such as ***Public Trustee (Alberta) v. Larsen*** (1964), 47 D.L.R. (2d) 184 (Alta.S.C.A.D.), as described by Justice Wittmann at para. 86 of ***Stout Estate***.

[77] Applying the evidence against the requirements of s. 61(1) I observe that addition of the Personal Representatives of the estate could not have resulted in the Defendant being misled as to the true nature of the action; there was no evidence that he had been misled in any manner. All the parties to the action remained the same; it is simply that an additional status, that of Personal Representative, was conferred upon two of the Plaintiffs. This "change" resulted only in the addition as parties of two of the Plaintiffs in their status as Personal Representatives of the estate; they were already parties in their personal capacity. The substance of the issue in dispute remained unchanged.

[78] Therefore by application of s. 61(1) (b) of the *Limitation of Actions Act* I find that this action is not statute-barred although the Personal Representatives of the estate were added as parties more than 2 years after the cause of action arose.

[79] Second, the same conclusion would result at common- law. There the doctrine of "relation back" if applicable would allow the Court to consider the action as if it had been commenced by the Personal Representatives, at one time known as Administrators, in 1997 although they were not appointed or added until 2001. That principle is described by the Alberta Court of Appeal in ***Stout Estate v. Golinowski Estate, supra*** where Wittmann J.A. stated at paragraphs 29-31:

Relating back...generally holds that an appointment of an executor may relate back to the testator's death, but a grant of administration would not similarly relate back to the instate's death. An executor's powers derive from the will, and so commence from the moment of death. Thus, acts done by an executor pursuant to that title after the testator's death are valid notwithstanding that probate may not have been issued; Williams and Mortimer [***Executors, Administrators and Probate***, 18th ed. Williams on Executors and 6th ed. Mortimer on Probate (Agincourt, Ont.: Carswell, 2000) p.87.

On the other hand, the powers of an administrator derive only from the grant of letters of administration. Prior to the grant, the administrator has no powers to exercise on behalf of the estate. It is in this context that the statements about nullity arise. An action brought by a person as an administrator of an estate has been said to be a nullity if the action is brought before the issue of letters of administration, because it is only upon the issue of letters that the administrator has any authority to represent the estate: ***Ingall v. Moran*** [1944] K.B. 160. Williams and Mortimer discuss this at pp. 93-94:

> At law, letters of administration must issue before the commencement of legal proceedings by a person entitled to administration for he has no right of action until he has obtained them and even if he obtains a grant afterwards, it does not for this purpose relate back. The proceedings are a nullity and cannot be validated by a later grant of administration.

There is, however, some precedent for relating back in the context of administrators, with the result that acts done before the grant of administration might be valid. This possibility was said to arise in cases where the acts were done for the benefit of the estate: Williams and Mortimer at pp. 94-97 and ***McEllistrum v. Etches***, [1954] 4 D.L.R. 350 (Ont. C.A.), reversed in part (1956), 6 D.L.R. (2d) 1 (SCC).

[80] In Williams and Mortimer at pp. 94 the authors observe :

> The general proposition that letters of administration do not relate back to the date of death is subject to a number of exceptions or apparent exceptions which apply by statute or at common law where this is for the benefit of the estate. The test is objective, that is to say, the grant will "relate back" only if it actually benefits the estate and not because the expected administrator thinks it will benefit the estate.

and at 95-96:

> An administrator can recover in trespass or trover against a wrongdoer who has seized or converted goods before the grant. The reason for this is that otherwise there would be no remedy for the wrongdoing.

[81] In ***McEllistrum v. Etches***, *supra* Laidlaw J.A. stated as well:

> The doctrine of 'relation back' does not apply, in my opinion, to every case and is not available 'for all purposes'. It is my considered opinion that it is applicable only in cases where it is necessary to protect the estate in the interval between the death of the intestate and the grant of letters of administration.

See also ***In the goods of Elizabeth Pryse***, [1904] P. 301 at 304 where the English Court of Appeal stated that a person who is eventually appointed administrator may bring an action for trespasses committed in the interval and, more recently, ***Bellegarde v. Murdock*** (1978), 25 N.S.R. (2d) 375 (C.A.) at para. 17.

[82] The Defendant led evidence from his then counsel, Joseph Kueber to the effect that Mr. Kueber wrote to Plaintiff's counsel in April, 1997 advising that he would advance a limitations defence but neither of his letters expressly raised the issue of the Plaintiffs' standing to sue at that time which, in any case, was before the original Statement of Claim was filed. Therefore, those letters create no estoppel which would prevent the application of the principle of relation back.

[83] That the action was brought for the benefit of the estate is not in question. The prayer for relief in both the original and amended Statement of Claim does not suggest any relief inconsistent with this result. Further, the evidence of the Plaintiffs, which I have accepted over that of the Defendant, was that their father repeatedly told a number of them during his lifetime that after his death he wanted the trophy sold and the sale proceeds divided among them, which is consistent with the conclusion the action was brought for the benefit of the estate.

[84] The effect of this action was in part to prevent Don Broder from disposing of the trophy during the course of litigation. I note that the Statement of Claim did request relief which included an interim injunction restraining the sale of the trophy and for an order directing its interim return. It is not clear whether an application for either type of interim relief was actually made but the trophy has clearly remained with Don Broder throughout. The risk of unauthorized disposal potentially increased after March, 1997 when the Plaintiffs demanded the return of the trophy with the result that Don Broder knew for the first time that his siblings challenged his right to call it his own.

[85] While clearly it took a significant period of time for the Plaintiffs to obtain Letters of Administration and they in fact made no efforts in that direction for several years after the action was commenced, I conclude that the Plaintiffs brought this action promptly for the purpose of ensuring the ownership of the trophy was litigated, once it came to their attention that ownership was in dispute. That litigation required that the trophy be preserved through all steps prerequisite to that issue being determined, including the proper appointment of administrators.

[86] Therefore I conclude that the action would not have been statute-barred on behalf of the Personal Representatives of the Estate of Ed Broder, George Broder and Doris Bibaud through the application of the principle of relation back even had s. 61(1) (b) of the *Limitation of Actions Act* not effected the same result. While they were added to the Statement of Claim more than 2 years after the cause of action arose, the action should be considered to have been commenced within that time period, when the pleadings were originally issued, through application of the principle of "relation back".

e. notwithstanding the provisions of the *Limitation of Actions Act,* did the limitation period start to run only upon the granting of the Letters of Administration?

[87] In light of the above conclusion this argument need not be considered. That said, I note the authorities which support the proposition that a cause of action can accrue to the estate of an intestate only upon the granting of letters of administration; see J.S. Williams, *Limitation of Actions in Canada*, 2d ed. (Toronto: Butterworths, 1980) at p. 191, *Canadian Encyclopedic Digest (Western)*, Executors and Administrators §388 citing ***Meyappa Chetty* v. *Supramanian Chetty***, [1916] 1 A.C. 603 (P.C. [Singapore]).

f. do the personal Plaintiffs have a cause of action independent of the Personal Representatives of the estate?

[88] Again, this issue need not be considered in light of the above conclusions. I note that the uncontroverted evidence shows that all parties entered into an agreement that George and Don Broder arrange for the sale of the trophy and then divide the sale proceeds equally among all the Broder children but whether an actionable breach of that agreement arose to give rise to a personal cause of action on behalf of the Plaintiffs was not argued at trial.

[89] This issue is noteworthy because the Court of Appeal earlier relied on the allegation of such an agreement as a reason for concluding the Statement of Claim disclosed a cause of action and was not, therefore, a nullity. However, in the end result the action is not a nullity for another reason, through the application of s. 61(1)(b) of the *Limitation of Actions Act* and the application of the doctrine of relation back, as described above.

g. should the Counterclaim succeed?

[90] Don Broder argued that if the trophy is to be returned to the Personal Representatives of the Estate and sold he should be entitled to recover the monies he expended as a result of maintaining it since 1973. He was unable to give exact figures for many of the expenses he claimed in this regard, nor to produce receipts for them given the passing of time and, I find, his belief that it would never be necessary to claim these sums in set-off or otherwise account for them.

[91] He testified that in 1983 he paid between $400 and $600 for a new cape for the trophy. A cape is a deer skin used in the mounting process. He also placed a rider on his house insurance policy for coverage for the trophy, which he valued at $10,000 for insurance purposes. This insurance cost an additional $45 in 1998 or 1999, the only year for which he had documentary proof of the cost.

[92] Craig Broder, Don Broder's son, testified that commencing in 1996 he and his father began to show the trophy more frequently and employed different mechanisms to help defray the travel and other costs associated with this activity. For example, they sold photos and t-shirts relating to the trophy at the various sportsman's shows where it was displayed.

[93] They decided to make a replica of the trophy and to show the replica rather than the original to ensure the original was not damaged in transit. The initial replicas were made in Wisconsin. Three replicas were made at a cost of $1,000 US each in addition to the $2,500 US in travel expenses Don and Craig Broder incurred in relation to obtaining them. These replicas did not prove durable with the result that two hardier replicas were made at a further cost of $1,000 US each.

[94] Eventually a life-sized mount was obtained, which could be used as a base for displaying either the original or a replica. It cost $5,000. Don Broder expended a further $3,500 US to have an artist travel here from Utah to visit the area in which the deer which yielded the trophy had originally been shot and to paint a backdrop in accordance with that scene against which the life-sized mount could be displayed.

[95] No receipts were produced to support any of these costs but the Plaintiffs did not lead any evidence to otherwise challenge these figures.

[96] Craig Broder testified that the genuine trophy has not been displayed since the first replica was obtained. He believed that the expenses of obtaining the replicas, life-sized mount and backdrop had increased the value of the trophy in some undefined way.

[97] The Plaintiffs argue that the only costs which were incurred to safeguard and protect the trophy were the original cape (needed because the one from 1926 had begun to deteriorate) at $600 and the yearly additional insurance premiums paid by Don Broder. at $45 each year from 1973 to the present which total $1,395. This would result in an admitted counterclaim of $1,995.

[98] However, I accept that had Don Broder not believed that his siblings might not claim the return of the trophy, based on their years of inaction, he would not likely have incurred the further substantial costs of the life-sized mount, the replicas and the backdrop. He obtained these for the purpose of showing the trophy as its owner and would not have done so if he was only a partial owner and expected only a limited time in which to claim even that status. I have not found these expenditures sufficient to support the defence of laches but they may properly be considered as part of the damages claimed in the counterclaim.

[99] No evidence was led to suggest that these items would have any more than a nominal value if they could not be displayed in conjunction with a claim that the original trophy belonged to Don Broder. No evidence was led on what amounts Don Broder earned by way of sale of souvenir items at sportsman's shows or that such sums in any way exceeded his costs of travel to those shows. In any event those travel expenses were not claims quantified or advanced by him in support of his counterclaim.

[100] No evidence was led by the Plaintiffs to suggest the figures advanced by Don and Craig Broder were inaccurate. Based on that evidence, admittedly based on cost estimates and unsupported by documentary proof, Don Broder expended $16,000 US or $20,000 Canadian in this regard in addition to the $1,995 for the original remount and insurance costs for a total of $21,995.

[101] The conclusion that the Plaintiffs lulled the Defendant into thinking they might not assert the estate's ownership right in the trophy through their long period of inaction is not inconsistent with the conclusion that they did not in fact abandon their interest as a result of this delay. I have found they believed that the estate continued to own the trophy but did nothing to realize on that asset. It is the lack of action which created the situation which led the Defendant into making these expenditures.

[102] Therefore, although the trophy is ordered to be delivered into the hands of George Broder and Doris Bibaud in their capacity as Personal Representatives of the estate of George Broder, the first $21,995 of the sale proceeds of the trophy, after deducting the costs of sale, shall be paid to Don Broder to compensate him for these expenses if he also delivers to them the replicas, life-sized mount and backdrop to be sold in conjunction with the trophy.

[103] Further, I order that the Personal Representatives of the estate of Ed Broder are to return for directions in relation to the mode of sale of the trophy within 30 days of receipt of the judgment to either myself or to Justice Marceau who as case manager is well familiar with this matter. Ample notice of the bringing of that application is to be given to the Defendant Don Broder who is at liberty to attend and make representations including a proposal or proposals as to means of sale.

[104] Steps are to be taken to sell the trophy forthwith which may include sale by local auction unless a better proposal is advanced by any party upon the bringing of the application for directions for sale. Those proposals may include arrangements which would allow any of the Broder siblings including Don Broder to purchase the trophy by matching the best offer received for it or, if it is sold by auction, to bid at that auction.

[105] If the trophy is ultimately sold to Don Broder, the amount he has been awarded pursuant to the counterclaim may be attributed toward his purchase price

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CONCLUSION

[106] The claim of Doris Bibaud and George Broder as Personal Representatives of the Estate of George Broder is allowed to the extent of entitling them to take possession of the trophy for the purposes of sale on behalf of the estate. The claims of all other Plaintiffs, including those of Doris Bibaud and George Broder in their personal capacities, is dismissed.

[107] The trophy in question is to forthwith be made available to George Broder and Doris Bibaud to be sold in accordance with the above directions. The Defendant is to receive the sum of $21,995 as a first charge on the sale proceeds net of the costs of sale in respect of his counterclaim in this matter if he also delivers the replicas, mount and backdrop so they might be sold in conjunction with the trophy. He is also to receive his equal share of all estate assets when distributed, including his share of the balance of the net sale proceeds of the trophy.

COSTS

[108] In light of the long period of inaction on the part of the Plaintiffs in which they did nothing to assert the estate's right to possession of the trophy and in light of the four-year delay between the cause of action arising and the application for the Letters of Administration being made, the Plaintiff Personal Representatives are not awarded costs of this litigation notwithstanding their ultimate success. Each party shall bear its own costs.

Heard on the 19th day of January 2004.
Dated at the City of Edmonton, Alberta this 9th day of March 2004.

M.B. Bielby
J.C.Q.B.A.

Appearances:

Elizabeth M. MacInnis
for the Plaintiffs

The Defendant Don Broder appeared on his own behalf

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Docket: 0403 - 0202-AC
0403 - 0267-AC

Queen's Bench No. 9703 - 12949

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(PLAINTIFFS)

I hereby certify this to be a true copy of the original.

For Deputy Registrar,
Court of Appeal of Alberta

- and -

DON BRODER AND CRAIG BRODER

APPELLANT
(DEFENDANTS)

- and -

BETWEEN:

DON BRODER

APPELLANT
(PLAINTIFF BY COUNTERCLAIM)

- and -

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(DEFENDANTS BY COUNTERCLAIM)

Docket: 0403-0356-AC

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(PLAINTIFFS)

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- and -

DON BRODER AND CRAIG BRODER

APPELLANT
(DEFENDANTS)

- and -

DON BRODER

APPELLANT
(PLAINTIFF BY COUNTERCLAIM)

- and -

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(DEFENDANTS BY COUNTERCLAIM)

BEFORE THE HONOURABLE:	)	ON FRIDAY, THE 23rd
MADAM JUSTICE CAROLE CONRAD	)	DAY OF DECEMBER, 2005
MR. JUSTICE RONALD BERGER	)	AT THE LAW COURTS,
MR. JUSTICE PETER COSTIGAN	)	EDMONTON, ALBERTA

JUDGMENT ROLL

UPON the within three appeals being heard on Thursday, December 1, 2005; AND UPON the Court reserving Judgment and rendering Judgment by way of Memorandum of Judgment dated December 23, 2005; AND UPON the Court hearing oral argument by Counsel for the parties; AND UPON the Court reviewing the Facta of the parties and the Appeal Books as previously filed;

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Appeal No. 0403 - 0267-AC, being the appeal relating to the estate's entitlement to the trophy is dismissed, and the trial judgment is therefore confirmed;

2. Appeal No. 0403 - 0202-AC, being the appeal relating to the finding of civil contempt, is

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allowed, and the citation for civil contempt is therefore vacated;

3. Appeal No. 0403 - 0356-AC, being the appeal relating to the penalty for civil contempt, is allowed, and the order for payment of a fine of $53,208.26 is therefore vacated; and

4. Costs in the sum of $28,500.00 are awarded against the appellant DON BRODER in favor of the respondents DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED.

M. CASSIDY

for REGISTRAR, COURT OF APPEAL OF ALBERTA

APPROVED AS TO FORM AND CONTENT BY:

LACOURCIERE ASSOCIATES

Per: Guy Lacourciere
Guy Lacourciere
Solicitors for the Appellant

WEIR BOWEN LLP

Per: _____
Elizabeth M. MacInnis
Solicitors for the Respondents

ENTERED this 30th day of January, 2006

_____
Registrar, Court of Appeal of Alberta

SEAL

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EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(PLAINTIFFS)

- and -

DON BRODER AND CRAIG BRODER

APPELLANT
(DEFENDANTS)

- and -

DON BRODER

APPELLANT
(PLAINTIFF BY COUNTERCLAIM)

- and -

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(DEFENDANTS BY COUNTERCLAIM)

JUDGMENT ROLL

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Docket: 0403 - 0202-AC
Docket: 0403 - 0267-AC
Queen's Bench No. 9703 - 12949

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(PLAINTIFFS)

- and -

DON BRODER AND CRAIG BRODER

APPELLANT
(DEFENDANTS)

- and -

BETWEEN:

DON BRODER

APPELLANT
(PLAINTIFF BY COUNTERCLAIM)

- and -

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

RESPONDENTS
(DEFENDANTS BY COUNTERCLAIM)

REGISTRAR FILED JAN 30 2006 Court of Appeal of Alberta

Docket: 0403-0356-AC

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM, AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF

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In the Court of Appeal of Alberta

Citation: Broder v. Broder, 2005 ABCA 442

Date: 20051223
Docket: 0403-0202-AC
0403-0267-AC
0403-0356-AC
Registry: Edmonton

Docket: 0403-0202-AC
0403-0267-AC

Between:

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Plaintiffs)

- and -

Don Broder and Craig Broder

Appellant
(Defendants)

- and -

Between:

Don Broder

Appellant
(Plaintiff by counterclaim)

- and -

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Defendants by counterclaim)

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Docket: 0403-0356-AC

Between:

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Plaintiffs)

- and -

Don Broder and Craig Broder

Appellant
(Defendants)

- and -

Don Broder

Appellant
(Plaintiff by counterclaim)

- and -

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Defendants by counterclaim)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment

Appeal from the Whole of the Judgment and Orders by
The Honourable Madam Justice M.B. Bielby
Date entered August 12, 2004
Date entered June 25, 2004
Date entered October 13, 2004
(2005 ABQB 175, Docket: 9703 12949)

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Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal demonstrates the importance of applying for probate, or letters of administration, in a timely fashion. Some 37 years after the death of Ed Broder, his seven children are involved in litigation over the title to the World's Record Non-Typical Mule Deer Trophy (the "trophy"). The appellant, Don Broder ("Don"), appeals a finding that his father's estate owns the trophy. In addition, he appeals a finding of civil contempt and the penalties imposed with respect to that finding.

II. Issues on Appeal

[2] The appellant filed three separate appeals. First, he appealed the substantive judgment awarding possession and sale of the trophy to the estate. Second, he appealed the contempt finding and, finally, he appealed from the punishment imposed and the fine of $53,208.26.

III. Background

[3] Mr. Ed Broder died in 1968. Rather than apply for letters of administration, his seven children appointed George Broder to informally co-ordinate the division of the estate, and nominated the appellant, Don, to assist him. No decision was made about title to the trophy, which remained on display in the family home.

[4] In 1973, Don approached his brother Richard, who was then living in the family home, to borrow the trophy in order to exhibit it at a sportsman's show. Richard refused. Don subsequently entered the house, took the trophy, exhibited it, and retained possession in his own home.

[5] In 1994, the siblings, less Don, made an unsuccessful attempt to find a buyer for the trophy. Three years later, in 1997, they saw an article in the *Edmonton Sun* in which Don and his son Craig claimed joint ownership of the trophy. The siblings made a demand for the return of the trophy. Don refused. The siblings then brought a civil action seeking return of the trophy and a declaration of joint ownership. In addition to filing a statement of defence, Don brought a counterclaim seeking damages for care and maintenance of the trophy.

[6] In 2001, Don brought a motion to strike the siblings' action for lack of standing. The motion was adjourned, *sine die*, to enable the siblings to seek letters of administration. Don appealed that decision to a Justice of the Court of Queen's Bench. In the interim, Don's siblings, George and Doris, were granted letters of administration and appointed as personal representatives of the estate. They immediately applied to be added as parties to the action, seeking the return of the trophy. The two applications were heard concurrently. Don's appeal was dismissed and the siblings' motion to

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have the personal representatives added to the statement of claim was granted. Any issues of limitations or standing were, however, reserved for the trial judge. That decision was upheld on appeal to this court, on the basis that the limitation would be a live issue at the trial.

IV. Trial Judgment

[7] The matter came to trial in early 2004. The trial judge found that although the siblings were aware Don had taken and retained the trophy in 1973, they assumed he was merely holding it for their joint possession. She found that the first time they knew otherwise was in 1997, when they read a newspaper article in which Don and his son Craig asserted ownership. It was at this point, according the trial judge, that the siblings demanded the return of the trophy and Don refused to honour that demand.

[8] As a result of this finding, the trial judge found Don liable in both conversion and detinue. She concluded that the limitation period for both was two years from the date of discovery in 1997. She concluded, nonetheless, that the action by the personal representatives in 2001 was validated by application of s. 61(1)(b) of the former Alberta limitation statute, the *Limitation of Actions Act*, R.S.A. 1980, c. L-15. In addition, she found that the 1997 civil action was legitimized as an action taken for the benefit of the estate under the common law doctrine of relationship back (see: ***Stout Estate v. Golinowski Estate*** (2002), 299 A.R. 13, 2002 ABCA 49 at para. 93; ***Frank v. Canada (Minister of Indian and Northern Affairs)*** (1987), 88 A.R. 241, 56 Alta. L.R. (2d) 289 (C.A.). She directed the return of the trophy to the personal representatives for sale and distribution of the proceeds. The trial judge allowed Don's counterclaim for expenses in the amount of $21,995, less the costs of the sale and subject to certain further conditions. With respect to costs, she found that, while the personal representatives had been successful, the excessive delay in this matter mitigated against any award of costs in their favor. She directed, therefore, that both parties bear their own costs.

[9] Following judgment, the appellant failed to deliver the trophy. On April 13, 2004, Veit J. ordered the appellant to deliver the trophy to the offices of a law firm and, if he failed to do so, he was to appear in chambers on Friday, April 23, 2004 to show cause why he should not be held in civil contempt. A fake trophy was delivered.

[10] On April 23rd, the appellant, aged 74, appeared before the trial judge. He was not represented by counsel, and did not disclose that the trophy had been sold and was no longer in his possession. Rather than show cause why he could not deliver the trophy, he took the position that there was a lien against the trophy and it would not be delivered until his charges were paid. The trial judge found him in contempt and ordered him taken into custody until he purged his contempt.

[11] At a subsequent chambers hearing, documentation was introduced demonstrating that an American businessman had bought the trophy some time in 2003. In the face of this new evidence, the appellant admitted that he had sold the trophy and that it was no longer in his possession. The trial judge directed that he was in continuing contempt, and he was to remain in custody until he

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paid the amount received for the trophy into trust for recovery of the trophy. The appellant produced the requisite funds and the trial judge released him, holding that he had purged his contempt. The trophy was recovered and then resold to the same individual at a higher cost by the estate.

[12] The estate subsequently applied to the trial judge for its costs from the date of trial. The trial judge did not adjust costs, but she imposed a fine of $53,208.26 instead on the appellant for contempt of court. The fine amounted to the siblings' solicitor-client costs from the date of sale of the trophy up until the conclusion of trial ($37,887.13) and the accrued fees ($15,321.13) due to the contempt proceedings. The award was then discounted by $1,995 – the amount of costs for maintaining the trophy.

A. Standard of Review

[13] The appeal raises both questions of fact and questions of law. The standard of review for errors of fact is palpable and overriding error. The standard of review for errors of law is correctness: ***Housen v. Nikolaisen,*** [2002] 2 S.C.R.235 at para.8.

V. Decision

A. Appeal relating to determination of ownership of the trophy

[14] The appellant argues that the cause of action was statute-barred. We disagree. The trial judge made very specific findings as to the date when the respondents first became aware of Don's claim to ownership. She accepted that, although they knew Don had taken the trophy from the home, they understood he was keeping the trophy safe, on behalf of all of the family, until the day when it was to be sold. Indeed, Don did not testify otherwise. Her finding that the limitation period began to run on the date the article appeared in the *Edmonton Sun* in 1997 is a reasonable one. Similarly, her decision that the claim was not barred due to *laches* is also reasonable.

[15] The major argument on appeal was whether the trial judge erred in finding that the action was not statute-barred because more than two years had elapsed between 1997 and the date the personal representatives were added to the action in 2001.The trial judge characterized the 1997 action as one brought for the benefit of the estate. She relied upon s. 61 of the *Limitation of Actions Act*, and the common law doctrine of relationship back, to find that the action was not statute-barred. In regard to the latter, she carefully reviewed the common law relating to that doctrine, including the limitations on the application of relationship back, but was satisfied that the doctrine applied to the facts before her.

[16] We cannot say the trial judge erred in characterizing the 1997 action as one brought on behalf of the estate. The statement of claim clearly referenced the father's death, and stated that the trophy was an asset of the estate. The statement of claim also set out that there had been no administration of the estate, and that the benefits were being sought, not just for the plaintiffs, but

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for those who would be entitled to distribution of the estate. The trial judge found at para. 83 (AB I, F26):

> That the action was brought for the benefit of the estate is not in question. The prayer for relief in both the original and amended Statement of Claim does not suggest any relief inconsistent with this result. Further, the evidence of the Plaintiffs, which I have accepted over that of the Defendant, was that their father repeatedly told a number of them during his lifetime that after his death he wanted the trophy sold and the sale proceeds divided among them, which is consistent with the conclusion the action was brought for the benefit of the estate.

[17] In our view, the trial judge's finding that the 1997 action had been brought on behalf of the estate was reasonable and did not amount to palpable and overriding error.

[18] Similarly, we find she did not err in law in finding the common law doctrine, surrounding relationship back, applied to save this action. Her factual findings support that conclusion. We do note that it is also arguable that the action in detinue may not have arisen until the personal representative was appointed, because this was when someone became legally entitled to possession. It is, however, unnecessary to deal with that issue in view of our decision that the trial judge did not err in applying the doctrine of relationship back. Neither is it necessary to resort to s. 61 of the *Limitation of Actions Act.*

[19] We dismiss the appeal relating to the estate's entitlement to the trophy.

B. Appeal relating to the finding of civil contempt

[20] The appellant raises many issues with respect to the procedure, evidence and rights of an accused in a civil contempt proceeding (which is quasi-criminal in nature). We need not deal with all these arguments. In our view, there is a problem maintaining the contempt at this time, because the citation for contempt related solely to an act that could not be performed at the time it was ordered. The appellant was cited in contempt for failing to deliver the trophy. In fact, he did not have the trophy in his possession at the time of the citation having sold it in 2003.

[21] Having said that, the trial judge did not err on the facts before her. The appellant chose to remain mute about the whereabouts of the trophy and he has only himself to blame for the fact he spent time incarcerated for contempt. Instead of explaining that he could not produce a trophy he did not have, the appellant's son suggested the only reason it was not produced was because there was a lien on the trophy for work done, and that it had to be retained until all charges were paid or the lien would be lost. The trial judge had no way of knowing Don had already sold the trophy.

[22] Nonetheless, on appeal we are faced with a citation for contempt related solely to the performance of a directive that could not have been performed. The only issue before the judge was

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whether Don was in contempt of Veit J.'s order to produce the trophy and the trial judge's order to deliver the trophy to the personal representatives. While there may have been other matters for which the appellant could have been cited in contempt, such as his fraud upon the court, the contempt citation related only to delivery of the trophy. The trophy was not in his possession and compliance with the order was impossible. It is clear that a mere request to the new owner would not have produced the trophy. Thus, the actual finding of contempt cannot be upheld, although we wish to make it clear that it is on that technical basis only that we vacate the finding of contempt.

C. Appeal relating to penalty for contempt

[23] Having concluded that the citation for contempt cannot be maintained, it follows that any punishment imposed must also be vacated. Here the trial judge ordered a fine of $53,208.26 payable to the respondents. The trial judge refers to the punishment as a fine, noting that the respondents had merely requested a fine large enough to compensate them for their out-of-pocket costs as a result of the appellant having put them through "this charade" (AB 1, F53). The trial judge went on to say at F54/14:

> Had there been no contempt on the Court, had Mr. Broder not sold the antlers before the trial had started, had he come to Court and told the Court that he had sold the antlers and where they were at the time the trial had commenced, we would not be here today and this would not be an issue for me to decide. This decision is simply as a result of those events which happened independent of the trial. The misrepresentation to the Court, the lies that he told in regard to the location of the antlers and the fact that they were no longer, in fact, still in his possession.

[24] Although the trial judge ordered payment by way of fine, when the appellant's lawyer questioned whether she could fine a private citizen, the trial judge said, "That is what is anticipated by the Rules of Court." (AB 1, F55)

[25] Rule 704(1) provides the jurisdictional authority to punish for civil contempt. Section 704 empowers a judge to order, *inter alia*, imprisonment for not more than two years, a fine, and to pay the other person such costs and expenses as may be considered proper. It also provides that a court may waive the imposition of any sanction, or suspend any punishment, if the person purges his contempt.

[26] Here, although the trial judge called the award a fine, she was obviously referring to the portion of s. 704 that allows a judge to order a payment to the other person of such costs and expenses as may be considered proper. She specifically noted that she was not revisiting costs. It is clear, therefore, the order was made to punish for contempt, and as such it must be vacated if the citation is vacated.

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[27] Thus, we vacate the citation and the fine imposed. That does not mean, however, that we cannot consider Don's conduct when we impose costs of the appeal. In addition, during argument, Don acknowledged that he should be responsible for the fees incurred in the contempt proceedings and offered to pay $15,000.00. We agree that he should do so. In addition, we are of the view that although he was successful with respect to the contempt appeal, he was unsuccessful on the appeal with respect to the merits of the conversion, detinue actions. The contempt appeal would never have been necessary but for Don Broder's deceptive conduct. As a result, in addition to the $15,000.00 the appellant has agreed to pay, we order one set of costs of the appeal in the sum of $13,500.00.

[28] In the result, we vacate the order for payment of a fine of $53,208.26 and direct that the appellant pay to the respondents (personal representatives of the estate), the sum of $28,500.00 in costs.

VI. Summary of Conclusions

[29] The appeal relating to the finding that the estate is entitled to the trophy is dismissed and the trial judgment confirmed. The citation for contempt, and the fine of $53,208.26, are vacated. Costs in the sum of $28,500.00 are awarded against the appellant in favour of the estate.

Appeal heard on December 1, 2005

Memorandum filed at Edmonton, Alberta
this 23rd day of December, 2005

as authorized by: Conrad J.A.

Berger J.A.

Costigan J.A.

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Appearances:

J.L.G. Lacourciere
For the Appellants

E.M. MacInnis and P.G. Kirman
For the Respondents

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MEMORANDUM OF ARGUMENT

PART 1
STATEMENT OF FACTS

1. This application for leave to appeal pertains to the definition and scope of the "relation back" doctrine in the context of the Law of Wills & Estates. In its decision below, the Alberta Court of Appeal held that this doctrine may be applied to "cure" an action which was a nullity as at the date it was originally commenced, and which remained a nullity until after the expiration of the applicable limitation period. This conclusion is directly at odds with the leading decision of the Ontario Court of Appeal on the same point.

2. The parties to this application for leave to appeal are the seven children and one grandson of the late Edmund Broder ("Edmund"). The Applicant, Don Broder ("Don") is the eldest of these seven children. The Applicant Craig Broder is Don's son. The Respondents are Edmund's other six children. The Respondents Doris Bibaud and George Broder have now been appointed as the personal representatives of Edmund's estate.

3. In 1926, Edmund shot a deer which yielded what is said to be the "World's Record Non-Typical Mule Deer Trophy" (the "trophy"). The current dispute relates to the ownership of this trophy, and entitlement to the proceeds of its sale.

   Reasons for Decision of the Hon. Madame Justice Bielby, at para. 4. [Tab 3B]

4. Edmund died intestate in 1968 with his wife having passed away the previous year. From the date of Edmund's death in 1968 to the year 2001, no formal application for Letters of Administration was brought by any of his heirs.

   Reasons for Decision of the Hon. Madame Justice Bielby, at para. 5. [Tab 3B]

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5. Following Edmund's death, the trophy remained on the wall of the family home until 1973. At this time, the Don removed the trophy for the purpose of exhibiting it at a sportsmen's show.

Reasons for Decision of the Hon. Madame Justice Bielby, at para. 10. [Tab 3B]

6. By 1997, the Respondents were all aware that Don had had held the trophy in his possession since 1973 and had shown it at various sportsman shows. Notwithstanding this knowledge, none of the Respondents asked for its return or questioned Don's right to retain the trophy. Also, none of the Respondents had applied for Letters of Administration.

Reasons for Decision of the Hon. Madame Justice Bielby, at para. 14. [Tab 3B]

7. On March 4, 1997, the Respondent Earl Broder read an article in the Edmonton Sun newspaper that read "[Craig] Broder and his father share ownership of the trophy". He then instructed a lawyer to write a letter to Don demanding the return of the trophy.

Reasons for Decision of the Hon. Madame Justice Bielby, at para. 15. [Tab 3B]

8. The letter was followed by the issuance of a Statement of Claim on July 8, 1997. This Statement of Claim named all the Respondents in their personal capacity. The relief sought in the Statement of Claim included an order directing a replevy of the trophy, as well as obtain a declaration that it was jointly owned by all the Broder siblings.

Reasons for Decision of the Hon. Madame Justice Bielby, at para. 16. [Tab 3B]

Statement of Claim dated July 8, 1997. [Tab 5A]

9. Notwithstanding the presence of claims in the Statement of Claim which purported to have been brought on behalf of "the estate", none of the Respondents had applied for or obtained letters of administration entitling them to commence legal proceedings on behalf of the estate.

10. The Applicant filed his Statement of Defence on July 28, 1997. Included in this Statement of Defence was a defence based upon the expiration of the applicable limitation period.

    Statement of Defence dated July 28, 1997. [Tab 5B]

11. In March of 2001, well after the expiration of the applicable limitation period, Don brought an application to strike out the Statement of Claim on the basis that the Respondents, not having been appointed as administrators, had no standing to bring the claim on behalf of the estate. Master Quinn of the Alberta Court of Queen's Bench adjourned the application *sine die* so as to allow the Respondents to apply for letters of administration. This Order was made without prejudice to Don's right to have his limitations defence fully heard and adjudicated upon at trial.

    Reasons for Decision of the Hon. Madame Justice Bielby, at para. 16. [Tab 3B]

    Broder v. Broder, [2002] A.J. No. 550 (Q.B.). [Tab 6A]

12. The Respondents Doris Bibaud and George Broder were appointed as personal representatives of the estate on May 24, 2001, some 4 years and 2 months after the date of the Edmonton Sun article. The Statement of Claim was subsequently amended to add claims by these parties in their capacities as personal representatives of the estate of Edmund Broder.

    Reasons for Decision of the Hon. Madame Justice Bielby, at para. 17.

    Amended Amended Statement of Claim, filed November 5, 2001. [Tab 5D]

13. On September 18, 2001, Mr. Justice C.P. Clarke of the Alberta Court of Queen's Bench dismissed an appeal from Master Quinn's Order, and added the personal representatives as Plaintiffs to the action. The Alberta Court of Appeal dismissed an appeal from this Order noting that the limitations defence was reserved for determination by the trial judge.

    Broder v. Broder, [2002] A.J. No. 1211 (C.A.). [Tab 6B]

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14. The matter came to trial on January 19, 2004 before Madame Justice M.B. Bielby on March 9, 2004. Justice Bielby held that the limitation period applicable to this claim began ticking on March 4, 1997 being the date of the Edmonton Sun article.

    Reasons for Decision of the Hon. Madame Justice Bielby, at para. 59. [Tab 3B]

15. Notwithstanding the fact that the administrators of the estate were not appointed until after the expiration of the applicable limitation period, Justice Bielby held that this defect was cured by application of the "relation back" doctrine and by operation of s. 61 of the *Limitation of Actions Act* of Alberta.

    Reasons for Decision of the Hon. Madame Justice Bielby, at paras. 71-86. [Tab 3B]

16. In the result, Justice Bielby found the Applicants liable to the Respondents in conversion and detinue, and ordered the return of the trophy for the purposes of sale and division of proceeds.

    Reasons for Decision of the Hon. Madame Justice Bielby, at paras. 106-07. [Tab 3B]

17. On appeal to the Alberta Court of Appeal, the appeal was dismissed and Justice Bielby's decision affirmed. It was held that Justice Bielby did not err in her application of the relation back doctrine, and that it was unnecessary to resort to s. 61 of the *Limitation of Actions Act*.

    Reasons for Decision of Conrad, Berger and Costigan JJ.A. by the Court, at paras 16-18. [Tab 3D]

18. The decision of the Alberta Court of Appeal also allowed appeals by the Applicant respecting orders and penalties applied to the Applicant for civil contempt. This application for leave to appeal does not relate to these aspects of the Court of Appeal's judgment.

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PART II

QUESTION IN ISSUE

19. The Applicant submits that this case raises the following issue of national importance:

> Did the Court of Appeal err in law in holding that the "relation back" doctrine may be applied beyond the expiration of the applicable limitation period whenever the action is one "brought for the benefit of the estate"?

PART III

ARGUMENT

Did the Court of Appeal err in law in holding that the "relation back" doctrine may be applied beyond the expiration of the applicable limitation period whenever the action is one "brought for the benefit of the estate"?

A. *The Traditional Approach to the "Relation Back" Doctrine as Adopted in Ontario*

20. It is well established that an administrator derives title solely from a grant of letters of administration. Consequently, in the case of an intestacy, an action purportedly commenced on behalf of the estate prior to the issuance of letters of administration is a nullity. This point was explained by Lord Parker of Waddington in the decision of the House of Lords in *Chetty v. Chetty*:

> It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: See Comyn's Digest, 'Administration,' B. 9 and 10; *Thompson v. Reynolds*, [3 C. & P. 123]; *Woolley v. Clark*, [5 B. & Ald. 744].
>
> *Chetty v. Chetty*, [1916] 1 A.C. 603 (H.L.) at 608-09. [Tab 6C] [Emphasis added]

21. The principle reflected in the above passage from *Chetty v. Chetty* has a venerable history. In his *Commentaries*, Blackstone states that administrators are only officers of the ordinary, and that their title and authority were derived exclusively from the ecclesiastical judge through grants of administration.

> William Blackstone, Knt. *Commentaries on the Law of England*, at Book II, c. XXXII, p. 496. [Tab 6D]
>
> *Fred Long & Son Ltd. v. Burgess*, [1950]1 K.B. 115 (C.A.) at 119. [Tab 6E]

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22. Prior to the decision of the Alberta Court of Appeal below, the leading Canadian case on the subject of the "relation back" doctrine in the context of letters of administration was the decision of Laidlaw J.A. writing for a unanimous Ontario Court of Appeal in *McEllistrum v. Etches*.

> After the most careful consideration I can give to the important question in controversy, I have decided that I cannot follow the earlier decisions in this Province. I think the statement of Boyd C. in *Trice v. Robinson, supra*, that "It was sufficient for all purposes that he [a plaintiff] should obtain letters before the case was heard, as they ... related back to the death", is too wide. The doctrine of "relation back" does not apply, in my opinion, to every case and is not available "for all purposes". It is my considered opinion that it is applicable only in cases where it is necessary to protect the estate in the interval between the death of the intestate and the grant of letters of administration.
>
> [...]
>
> I hold, following the high authority of Lord Parker of Waddington in *Chetty v. Chetty*, [1916] 1 A.C. 603, and the subsequent cases in England to which I have referred, that an action under s. 37 of the *Trustee Act* for torts or injuries to the person of the deceased cannot be instituted by a person in the capacity of administrator before the grant of letters of administration. In accordance with that view I must conclude that the writ of summons and subsequent proceedings in the action, so far as they relate to a claim under the *Trustee Act*, are a nullity. The judgment of the Court below should be varied and, as varied, should provide that the action under the *Trustee Act* be dismissed.
>
> *McEllistrum v. Etches*, [1954] 4 D.L.R. 350 (Ont. C.A.) at p. 357 [Tab 6F], rev'd in part on other grounds: [1956] S.C.R. 787 [Tab 6G]. [Emphasis added]

23. As the *McEllistrum* case indicates, the "relation back" doctrine has traditionally operated to allow prospective administrators to commence legal proceedings prior to the issuance of letters of administration for the purpose of preserving estate property during the brief interval between the death of the intestate and the grant of letters of administration. This point was further explained by Luxmoore J. of the English Court of Appeal in the case of *Ingall v. Moran*, followed by Laidlaw J.A. in *McEllistrum*:

> ...It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of an intestate's estate, and can obtain in a proper case interim relief by the appointment of a receiver pendente grant, but in all such

> cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognized practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required. A study of the cases referred to in the argument, and relied on in support of the supposed difference between the common law and chancery practice, makes this position clear. I need not refer to them in detail, because my brother Goddard has dealt with them in the judgment he is about to deliver, which I have had the opportunity of reading and with which I am in entire agreement. I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued. In my judgment, the learned judge was wrong in coming to the contrary conclusion. It follows that no proper action was commenced before the statutory period of limitation expired. That period expired before any grant of administration was obtained, and the right of action was lost to the intestate's estate. Although I cannot help feeling some regret I have no doubt but that the appeal must be allowed and the action dismissed.
>
> *Ingall v. Moran*, [1944] K.B. 160 (C.A.) at 169. [Tab 6H]

24. *Ingall v. Moran*, was followed in *Hilton v. Sutton Steam Laundry*, where the plaintiff had filed a Statement of Claim seeking damages under England's *Fatal Accidents Act* on behalf of her late husband's estate. In dismissing the plaintiff's request to amend her pleadings beyond the expiration of the applicable limitation period, the Court of Appeal held that the writ was a nullity and was not validated by a subsequent grant of administration.

> *Hilton v. Sutton Steam Laundry,* [1946] K.B. 65 (C.A.). [Tab 6I]

25. Similarly, in *Fred Long & Sons Ltd. v. Burgess,* the court accepted the view that the doctrine of relation back may only be applied to protect the estate from the wrongful injury occurring in the interval between death of the intestate and the grant of letters of administration.

> *Fred Long & Son Ltd. v. Burgess*, [1950]1 K.B. 115 (C.A.). [Tab 6E]

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26. As the above authority confirms, the relation back doctrine applies to validate proceedings commenced for the purpose of preserving assets of an estate during the brief interval between the death of the intestate and the issuing of a grant. For example, proceedings may be commenced by an administrator prior to a grant of administration for the purposes of obtaining an interim injunction to prevent the disposal of assets belonging to the estate.

B. *The Test Adopted by the Alberta Court of Appeal*

27. The approach to the "relation back" doctrine adopted by the Alberta Court of Appeal stands in stark contrast to that adopted by the Ontario Court of Appeal in *McEllistrum*. Rather than inquiring as to whether the action was commenced solely for the purpose of preserving estate property during the interval between the intestate's death and the grant of administration, the Alberta Court of Appeal instead applied the test of whether or not the action was "one brought on behalf of the estate". Having found at paragraph 18 that there was evidence before Bielby J. which was capable of supporting such a finding, the Court of Appeal dismissed the Applicant's appeal.

28. The test adopted by the Alberta Court of Appeal appears to have been derived from its previous decision in *Stout Estate v. Golinowski Estate* being a case relied upon by Bielby J. at trial. In *Stout Estate*, Wittman J.A. for the Court made the following *obiter* remarks respecting the relation back doctrine:

> There is, however, some precedent for relating back in the context of administrators, with the result that acts done before the grant of administration might be valid. This possibility was said to arise in cases where the acts were done for the benefit of the estate: Williams and Mortimer at pp. 94-97 and *McEllistrum v. Etches*, [1954] 4 D.L.R. 350 (Ont. C.A.), reversed in part (1956), 6 D.L.R. (2d) 1 (SCC).
>
> *Stout Estate v. Golinowski Estate*, [2002] A.J. No. 247 (C.A.) at para 29. [Tab 6J] [Emphasis added]

29. As a review of *Stout Estate* confirms, the "relation back" doctrine had no applicability to that case since, prior to the filing of the Statement of Claim, the plaintiff had been duly appointed

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as an administrator *ad litem* which order had not been appealed or set aside. This circumstance may explain the relative lack of analysis as to the nature of the test applicable to the relation back doctrine.

30. The remarkable breadth of the test adopted by the Alberta Court of Appeal will be noted. By operation of this authority, the "relation back" doctrine may now be applied to cure any and all actions deemed to have been commenced "for the benefit of the estate" – even beyond the expiration of the applicable limitation period. This approach fully emasculates the longstanding principle reflected in such early authorities as *Chetty v. Chetty* and *Blackstone's Commentaries*. Now, legal proceedings may be commenced on behalf of estates in the absence of a will, and in the absence of letters of administration. Even where no urgency exists, and where a grant of administration is not being sought, actions may be commenced "for the benefit of the estate" by persons with no right or title to the estate property. It is submitted that this alteration of the "relation back" doctrine by the Court of Appeal raises an issue of national importance.

C. *Conclusion*

31. In its decision below, the Alberta Court of Appeal has enunciated an approach to the "relation back" doctrine which is inconsistent with that adopted by the Ontario Court of Appeal in *McEllistrum v. Etches*, and which effectively reverses longstanding principles of law and practice pertaining to estate litigation. It is submitted that this decision raises issues of national and public importance which warrant review by this Honourable Court.

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PART IV

SUBMISSIONS IN SUPPORT OF THE ORDER SOUGHT CONCERNING COSTS

1. It is appropriate that costs be ordered to the Applicant.

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PART V

NATURE OF ORDER SOUGHT

2. It is requested that leave to appeal from the Judgment of the Court of Appeal dated December 23, 2006 pertaining to the ownership of the trophy be granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of February, 2006.

Marvin R. Bloos

Marvin R. Bloos Q.C.
Counsel for the Applicant
Don Broder
Beresh Depoe Cunningham

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PART VI

TABLE OF AUTHORITIES

TAB	AUTHORITY	PARAGRAPHS (in Memorandum of Argument)
A.	*Broder v. Broder*, [2002] A.J. No. 550 (Q.B.).	11
B.	*Broder v. Broder*, [2002] A.J. No. 1211 (C.A.).	13
C.	*Chetty v. Chetty*, [1916] 1 A.C. 603 (H.L.).	20, 21, 22, 30
D.	William Blackstone, Knt. *Commentaries on the Law of England*, at Book II, c. XXXII, p. 496.	21, 30
E.	*Fred Long & Son Ltd. v. Burgess*, [1950]1 K.B. 115 (C.A.).	21, 25
F.	*McEllistrum v. Etches*, [1954] 4 D.L.R. 350 (Ont. C.A.).	22, 23, 27, 28
G.	*McEllistrum v. Etches*, [1956] S.C.R. 787.	22
H.	*Ingall v. Moran*, [1944] K.B. 160 (C.A.).	23, 24
I.	*Hilton v. Sutton Steam Laundry*, [1946] K.B. 65 (C.A.).	24
J.	*Stout Estate v. Golinowski Estate*, [2002] A.J. No. 247 (C.A.).	28, 29

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PART VII

STATUTORY PROVISIONS

NONE.

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IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER
MARGARET MACPHEE, DORIS BILBOE, and LUELLA ADAM

Plaintiffs

- and -

DON BRODER and CRAIG BRODER

Defendants

STATEMENT OF CLAIM

1. The Plaintiffs and the Defendants are all resident in the Province of Alberta.

2. The Plaintiffs and the Defendant Don Broder are all siblings while the Defendant Craig Broder is the son of the Defendant Don Broder.

3. The Defendant Don Broder has for many years been in possession as custodian with the knowledge and consent of the Plaintiffs of their father's "world record mule deer trophy," (hereinafter "the Trophy"), following their father's death in 1968. The Plaintiffs say that the Defendant Don Broder's custody of the Trophy was for benefit of and on behalf of all siblings.

4. In or about the month of February 1997 the Defendant Don Broder with the assistance of the Defendant Craig Broder, and without the knowledge of the Plaintiffs exercised dominion over the Trophy asserting the Defendant Craig Broder was the sole owner thereof by displaying the Trophy in a trade show and receiving media coverage as owner, and against the rights and interests of the Plaintiffs.

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5. On or about March 6, 1997 the Plaintiffs made demand upon the Defendant Craig Broder for the return of the Trophy and have made continued demand for the return of the Trophy from the Defendants, but the Defendants have refused to return the Trophy and have made continued demand for the return of the Trophy from the Defendants, but the Defendants have refused to return the Trophy.

6. The Plaintiffs claim that the Defendants have received monies for the display of the Trophy in or about February 1997 and on prior occasions, particulars of which are unknown to the Plaintiffs but within the knowledge of the Defendants. The Defendants have refused to account to the Plaintiffs for any monies received.

7. The Plaintiffs propose the trial of this action at the Law Courts in the City of Edmonton in the Province of Alberta.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) Replevin of the Trophy;
(b) A declaration that the Trophy is jointly owned by the Plaintiffs and the Defendant Don Broder.
(c) An accounting from the Defendants for all monies had or received derived from their use or possession of the Trophy;
(d) An interim Injunction restraining the Defendants from displaying the Trophy or otherwise dealing with the Trophy (including selling/leasing, reproducing by cast or otherwise) without the Plaintiffs' written consent;
(e) An Interim Order for Replevin returning the Trophy to the Plaintiffs or to a storage facility;
(f) Damages as this Court deems meet;
(g) Such specials as shall be proven at the trial of this action;
(h) Prejudgment Interest on any monies had and received and due to the Plaintiffs and on any other damages;
(i) Costs on a solicitor and client basis;

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DATED at the City of Edmonton, in the Province of Alberta, this 8th day of July, 1997 and delivered by GRACE PARROTTA-KING of HUNT, YOUNG, PARROTTA-KING, Barristers & Solicitors, #440, 10055 - 106 Street, Edmonton, Alberta, T5J 2Y2, solicitor for the Plaintiffs whose address for service is in care of their said solicitor.

ISSUED out of the office of the Clerk of the Court of Queen's Bench, Judicial District of Edmonton, this 8th day of July, 1997.

CLERK OF THE COURT

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IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER MARGARET MACPHEE, DORIS BILBOE and LUELLA ADAM

Plaintiffs

- and -

DON BRODER AND CRAIG BRODER

Defendants.

STATEMENT OF DEFENCE

1. The Defendants admit paragraphs 1 and 2 of the Statement of Claim and agree with the proposal for trial contained in paragraph 7 of the Statement of Claim, however the Defendants deny each and every other allegation contained in the Statement of Claim as if *traversed seriatum* and puts the Plaintiffs to the strict proof thereof.

2. The Defendant Don Broder admits that he has had possession of the world record mule deer trophy (hereinafter "the Trophy") since 1968. The Trophy was given to the Defendant Don Broder by his father Mr. Ed Broder prior to his death in 1968 and the Defendant Don Broder has since that time possessed and held the Trophy as his own. At no time did the Defendant Don Broder ever agree that the Trophy would be held by him as a custodian for the benefit and on behalf of the Plaintiffs. At all material times the Defendant Don Broder maintained the Trophy was and continued to be his sole property and possession.

3. The Defendants deny paragraph 4 of the Statement of Claim. The Defendant Don Broder has always maintained that he was the sole owner of the Trophy and the

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Plaintiffs have had knowledge of this since 1968. The Defendants deny that the Plaintiffs have any interest in the Trophy as claimed or at all and put them to the strict proof thereof.

4. The Defendants further deny that the Defendant Craig Broder has asserted any rights of ownership of the Trophy and put the Plaintiffs to the strict proof thereof.

5. The Defendants further deny that the Defendants have received any funds from the display of the Trophy as alleged or at all.

6. In the alternative, the Plaintiffs and the Defendant Don Broder, subsequent to the passing of Mr. Ed Broder in 1968 agreed to distribute his personal effects and property among them in the settlement of his estate. It was agreed that the Defendant Don Broder would receive full right, title and interest in the Trophy without any further claim to such property by the Plaintiffs. The Plaintiffs, in turn, agreed to accept and divide among them a Model T automobile, saddle and various other personal possessions of Mr. Ed Broder, deceased. The Plaintiffs are estopped from making any further claim to the Trophy.

7. The Defendants plead the provisions of the Limitations of Actions Act being Chapter L-15, R.S.A. 1980, and amendments thereto. Any claim to the Trophy by the Plaintiffs is statute barred.

8. The Defendants claim that the claim against them by the Plaintiffs is frivolous, vexatious and otherwise an abuse of process and claim costs on a solicitor and his own client, full indemnity basis.

WHEREFORE THE DEFENDANTS PRAY that the claim against them be dismissed with costs on his own client, full indemnity basis.

DATED at the City of Edmonton, in the Province of Alberta, this ___ day of July, 1997 **AND FILED** by Bryan & Company, Barristers & Solicitors, 2600 Manulife Place,

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10180 - 101 Street, Edmonton, Alberta, T5J 3Y2, Solicitors for the Defendants, whose address for service is in care of the said solicitors.

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IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BILBOE, AND LUELLA ADAM

PLAINTIFFS

- and -

DON BRODER AND CRAIG BRODER

DEFENDANTS

AMENDED PURSUANT TO RULE UNDER ORDER/CONSENT DATED 18 DAY OF DEC A.D. 2020

SEAL
JOHN BACHINSKI
CLERK OF COURT

AMENDED STATEMENT OF CLAIM

1. The Plaintiffs and the Defendants are all resident in the Province of Alberta.

2. The Plaintiffs and the Defendant Don Broder are all siblings while the Defendant Craig Broder is the son of the Defendant Don Broder.

3. The Plaintiffs and the Defendant Don Broder's father, Ed Broder, died intestate in 1968. Among the assets of the Ed Broder Estate is a world record mule deer head trophy. There has never been any formal administration of the Estate of Ed Broder.

4. Ed Broder died leaving no surviving spouse. Pursuant to

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the provisions of the Intestate Succession Act, R.S.A. 1980, Chapter I-9, as amended, the said Estate shall be distributed per stripes among the issue, namely equally between the Plaintiffs and Defendant Don Broder.

5. From the time of Ed Broder's death until some time in 1973 the said trophy remained in the custody and safekeeping of the Plaintiff Richard Broder. In 1973 the Defendant Don Broder assumed custody of the trophy and has for many years been in possession as custodian with the knowledge and consent of the Plaintiffs of their father's "world record mule deer trophy", (hereinafter "the Trophy"), following their father's death in 1968. The Plaintiffs say that the Defendant Don Broder's custody of the Trophy was for benefit of and on behalf of all siblings.

6. In or about the month of February 1997 the Defendant Don Broder with the assistance of the Defendant Craig Broder, and without the knowledge of the Plaintiffs exercised dominion over the Trophy asserting the Defendant Craig Broder and/or the Defendant Don Broder were the sole owners thereof by displaying the Trophy in a trade show and receiving media coverage as owners, and against the rights and interests of the Plaintiffs.

7. On or about March 6, 1997 the Plaintiffs made demand upon the Defendant Craig Broder for the return of the Trophy and have made continued demand for the return of the Trophy from the

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Defendants, but the Defendants have refused to return the Trophy.

8. The Plaintiffs claim that the Defendants have received monies for the display of the Trophy in or about February 1997 and on prior occasions, particulars of which are unknown to the Plaintiffs but within the knowledge of the Defendants. The Defendants have refused to account to the Plaintiffs for any monies received.

9. The Plaintiffs propose the trial of this action be held at the Law Courts Building, in the City of Edmonton, in the Province of Alberta.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) Replevin of the Trophy;

(b) A declaration that the Trophy is jointly owned by the Plaintiffs and the Defendant Don Broder;

(c) An accounting from the Defendants for all monies had or received and derived from their use or possession of the trophy;

(d) An interim Injunction restraining the Defendants from displaying the Trophy or otherwise dealing with the Trophy (including selling/leasing, reproducing by cast or otherwise) without the Plaintiffs' written consent;

(e) An Interim Order for Replevin returning the Trophy to the Plaintiffs or to a storage facility;

(f) Damages as this Court deems meet;

(g) Such specials as shall be proven at the trial of this action;

(h) Prejudgment Interest on any monies had and received and due to the Plaintiffs and on any other damages;

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(i) Costs on a solicitor and their own client basis;

DATED at the City of Edmonton, in the Province of Alberta, this 8th day of July, A.D. 1997, and FILED and DELIVERED by MESSRS. WEIR BOWEN, Barristers and Solicitors, 1600 Canada Trust Tower, Edmonton, Alberta, T5J 0H8, Solicitors for the Plaintiff herein whose address for service is in care of the said Solicitors.

ISSUED out of the office of the Clerk of the Court of Queen's Bench of Alberta, Judicial District of Edmonton, in the City of Edmonton, in the Province of Alberta, this 8th day of July, A.D. 1997.

JOHN BACHINSKI

CLERK OF THE COURT

SEAL

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IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

EARL BRODER, GEORGE BRODER, RICHARD BRODER, MARGARET MACPHEE, DORIS BIBAUD, LUELLA ADAM AND DORIS BIBAUD AND GEORGE BRODER, PERSONAL REPRESENTATIVES OF THE ESTATE OF EDMUND BRODER, ALSO KNOWN AS ED BRODER, DECEASED

PLAINTIFFS

- and -

DON BRODER AND CRAIG BRODER

DEFENDANTS

AMENDED AMENDED STATEMENT OF CLAIM

1. The Plaintiffs, Doris Bibaud and George Broder were appointed Personal Representatives of the Estate of Edmund Broder, also known as Ed Broder, Deceased pursuant to an Order of this Honourable Court granted on May 24th, 2001 and bring this action on behalf of the Deceased's Estate and for the benefit of the beneficiaries of the Deceased's Estate being the Deceased's children, Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, deceased and the Defendant, Don Broder. The Plaintiffs and the Defendants are all resident in the Province of Alberta.

2. The Plaintiffs Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris

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Bibaud and Luella Adam, Deceased and the Defendant Don Broder are all siblings while the Defendant Craig Broder is the son of the Defendant Don Broder.

3. The Plaintiffs, Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud and Luella Adam, deceased and the Defendant Don Broder's father, Edmund Broder also known as Ed Broder, died intestate in 1968. Among the assets of the Edmund Broder Estate is a world record mule deer head trophy (hereinafter the "Trophy").

4. Ed Broder died leaving no surviving spouse. Pursuant to the provisions of the Intestate Succession Act, R.S.A. 1980, Chapter I-9, as amended, the said Estate shall be distributed per stripes among the issue, namely equally between the Plaintiffs, Earl Broder, George Broder, Richard Broder, Margaret, MacPhee, Doris Bibaud, Estate of Luella Adam, deceased and the Defendant Don Broder.

5. From the time of Ed Broder's death until some time in 1973 the said Trophy remained in the custody and safekeeping of the Plaintiff, Richard Broder. In 1973 the Defendant Don Broder assumed custody of the Trophy and has for many years been in possession as custodian, with the knowledge and consent of the Plaintiffs, of their father's "Trophy". The Plaintiffs say that the Defendant Don Broder's custody of the Trophy was for benefit of and on behalf of all siblings.

6. In or about the month of February 1997 the Defendant Don Broder with the assistance of the Defendant Craig Broder, and without the knowledge of the Plaintiffs exercised dominion over

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the Trophy asserting the Defendant Craig Broder and/or the Defendant Don Broder were the sole owners thereof by displaying the Trophy in a trade show and receiving media coverage as owners, and against the rights and interests of the Plaintiffs.

7. On or about March 6, 1997 the Plaintiffs Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud and Luella Adam made demand upon the Defendant Craig Broder for the return of the Trophy and have made continued demand for the return of the Trophy from the Defendants, but the Defendants have refused to return the Trophy.

8. The Plaintiffs claim that the Defendants have received monies for the display of the Trophy in or about February 1997 and on prior occasions, particulars of which are unknown to the Plaintiffs but within the knowledge of the Defendants. The Defendants have refused to account to the Plaintiffs for any monies received.

9. The Plaintiffs propose the trial of this action be held at the Law Courts Building, in the City of Edmonton, in the Province of Alberta.

WHEREFORE THE PLAINTIFFS CLAIM:

(a) Replevin of the Trophy;

(b) A declaration that the Trophy is jointly owned by the Plaintiffs and the Defendant Don Broder or alternatively by the Estate of Edmund Broder, also known as Ed Broder, Deceased;

(c) An accounting from the Defendants for all monies had or received and derived from their use or possession of the trophy;

(d) An interim Injunction restraining the Defendants from displaying the Trophy or otherwise dealing with the Trophy (including selling/leasing, reproducing by cast or otherwise) without the Plaintiffs' written consent;

(e) An Interim Order for Replevin returning the Trophy to the Plaintiffs or to a storage facility;

(f) Damages as this Court deems meet;

(g) Such specials as shall be proven at the trial of this action;

(h) Prejudgment Interest on any monies had and received and due to the Plaintiffs and on any other damages;

(i) Costs on a solicitor and their own client basis;

DATED at the City of Edmonton, in the Province of Alberta, this 8th day of July, A.D. 1997, and FILED and DELIVERED by MESSRS. WEIR BOWEN, Barristers and Solicitors, 1600 Canada Trust Tower, Edmonton, Alberta, T5J 0H8, Solicitors for the Plaintiff herein whose address for service is in care of the said Solicitors and Amended on the 12th day of March, 2001 and Amended Amended on the 21st day of September, 2001.

ISSUED out of the office of the Clerk of the Court of Queen's Bench of Alberta, Judicial District of Edmonton, in the City of Edmonton, in the Province of Alberta, this 8th day of July, A.D. 1997.

CLERK OF THE COURT

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Indexed as:

Broder v. Broder

Between
Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bilboe and Luella Adam, plaintiffs,
and
Don Broder and Craig Broder, defendants

[2001] A.J. No. 550
2001 ABQB 344
Action No. 9703 12949

Alberta Court of Queen's Bench
Judicial District of Edmonton
Master Quinn

Heard: March 22, 2001.
Judgment: April 27, 2001.
(22 paras.)

Counsel:

E. MacInnis, for the plaintiff.
Robert J. Sawers, for the defendant.

MEMORANDUM OF DECISION

¶ 1 **MASTER QUINN**:— This is an application by the defendants to strike out the statement of claim pursuant to Rule 129 of the Rules of Court on the grounds that the Plaintiffs have no standing to commence an action against the defendants, and that it discloses no cause of action. The defendants also say the statement of claim is frivolous and vexatious and is an abuse of process.

¶ 2 The plaintiffs and the defendant Don Broder are all children of the deceased Ed Broder, who died intestate in 1968.

¶ 3 The defendant Craig Broder is the son of the defendant Don Broder.

¶ 4 There has never been any formal administration of the Ed Broder estate.

¶ 5 The plaintiffs allege an asset of the Ed Broder estate is a world record mule deer head trophy. They allege the defendants are asserting ownership of the trophy and have refused to turn over the trophy to the plaintiffs and have refused to account for money they received for displaying the trophy at a trade show.

¶ 6 The plaintiffs ask for replevin of the trophy as well as a declaration the trophy is jointly owned by the plaintiffs and the defendant Don Broder, and for certain other relief.

¶ 7 Even if this statement of claim is struck out the question of who owns the trophy will remain unanswered.

¶ 8 If there was an administrator of the estate he or she should be the one taking proceedings to recover the trophy for the estate.

¶ 9 In an intestacy situation no one other than an appointed administrator has any status to sue and there is no persons recognized in law who can make a claim:

Stout Estate v. Golinowski Estate, (1999) 251 A.R. 20;

Fiebich v. Ortlieb, [2001] 2 W.W.R. 155

¶ 10 The plaintiffs submit they have status to bring this action to preserve the trophy for the estate. They rely on the decision of the Nova Scotia Supreme Court, Appeal Division in Bellegarde v. Murdock, (1978) 25 N.S.R. (2d) 375 (C.A.).

¶ 11 The headnotes of that case is as follows:

> An illiterate old woman went to live with her son and daughter-in-law just prior to her death. In the short period before her death, she transferred her home to the daughter-in-law and converted her bank accounts to joint accounts with the daughter-in-law. The son and daughter-in-law also alleged that certain shares were given to them although the certificates were not signed. The daughter-in-law refused to let plaintiffs, who were the other children of the woman, see her before her death. After the woman died, the other children brought an action to set aside the gifts. At trial, the action succeeded on the basis that defendants had failed to discharge the burden on them of proving that they did not exercise undue influence over the woman. On appeal, held, the appeal should be dismissed and the trial judgment affirmed.

¶ 12 The plaintiffs in the Bellegarde case were the children of the deceased, other than the defendant Howard Murdock. None of them were appointed as personal representative of their mother at the time the action was commenced. One of them Mrs. Bellegarde was subsequently appointed Administrator. The court held the appointment "dated back" and that the action was valid.

¶ 13 The present case is distinguishable on the ground that none of the plaintiffs in the present case have been appointed as administrator of the deceased Ed. Broder. No one has yet been appointed as administrator of the Ed Broder estate.

¶ 14 At page 4 of the Bellegarde v. Murdock case at paragraph 17 Macdonald J.A. said:

> 17 In the present case the doctrine of relation back is sufficient in my view to give the respondent Josephine M. Bellegarde standing to being this action. In addition and as pointed out in the Fairchild case by Currie, J., a person interested in an estate, not being the personal representative may sue "if but for such suit assets would be lost to the estate." This latter principle, if necessary, could be invoked by Mrs. Bellegarde to support her standing and, in my view, probably gives standing to the other respondents. I must confess however that I fail to see why it was necessary for them to be parties. The action could, and in my opinion should have been commenced by Mrs. Bellegrade alone. I leave the matter to the taxing master to take into account on the taxation of

costs.

(emphasis added)

¶ 15 No Alberta case has been shown to me that followed the Bellegrade case, but the approach taken in that case is very appealing. From a practical point of view to apply the "relation back" doctrine is preferable to striking out the existing action and requiring a new action to be commenced when an administrator is appointed. That is especially true in a case like the present where the court file is already quite thick.

¶ 16 Moreover it obviates the necessity of determining whether the decision of Currie J. in Fairchild v. Mitchell and Mattatal, (1959-60) 43 M.P.R. 9, referred to by MacDonald J.A., should be followed in Alberta.

¶ 17 The only sense in which the present action can be viewed as not disclosing a cause of action is that the plaintiffs have no status to sue.

¶ 18 In these circumstances I am adjourning this application sine die to give one of the present plaintiffs an opportunity of being appointed as administrator of the Ed Broder estate.

¶ 19 The plaintiffs are expected to make the required application without delay and the defendants are expected not to interfere with such an application.

¶ 20 If there is any unreasonable delay the party complaining of the delay may bring the matter back before me for further consideration.

¶ 21 If no one is appointed as administrator it is my intention to strike out the statement of claim.

¶ 22 I will make no order as to costs at this time.

MASTER QUINN

QL Update: 20010509
cp/i/nc/qljpn/qlhcs/qlltl

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Case Name:

Broder Estate v. Broder

Between
Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased, respondents (plaintiffs), and
Don Broder and Craig Broder, appellants (defendants)

[2002] A.J. No. 1211
2002 ABCA 232
Docket: 0103-0410-AC

Alberta Court of Appeal
Edmonton, Alberta
Côté, Conrad and Costigan JJ.A.

Heard: October 4, 2002.
Oral judgment: October 4, 2002.
Filed: October 11, 2002.
(6 paras.)

Practice -- Pleadings -- Striking out pleadings -- Bars.

Appeal by the defendant Broder from a decision refusing to strike out the statement of claim on the ground that it disclosed no reasonable cause of action.

HELD: Appeal dismissed. The statement of claim pleaded an agreement and a breach. It was not plain and obvious that the claim disclosed no cause of action.

Appeal From:

On appeal from the order of Clarke J. Dated September 18, 2001.

Counsel:

E.M. MacInnis, for the respondents.
J.L.G. Lacourciere, for the appellants.

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

The judgment of the Court was delivered by

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¶ 1 **CÔTÉ J.A.** (orally):— It is not necessary to call upon counsel for the respondents. I will give the unanimous judgment of the Court.

¶ 2 The Statement of Claim here may not be a model of clarity, but its paragraph 3 arguably pleads an agreement, and the following paragraphs arguably plead its breach. Therefore, it was not plain beyond argument that the Statement of Claim disclosed no cause of action. It could not have been struck out, and was not a nullity.

¶ 3 The only other objection now raised to the amendment of the Statement of Claim is limitations, but in paragraph 3 of his order the chambers judge preserved that issue for the trial judge. The appellants did not appeal that part of the formal order, and there is no cross appeal. Paragraph 3 of the order makes academic the limitations objection at this interlocutory stage.

¶ 4 The appeal is dismissed.

(Discussion with counsel re costs.)

¶ 5 This relates only to Court of Appeal costs, not to Queen's Bench costs. The two defendants, who are the appellants, will be jointly and severally liable to pay one set of costs to all the respondents in any event, but those costs will be payable only at the end of the lawsuit.

¶ 6 This is a very distressing lawsuit, and one has fears that the expense and the acrimony engendered are disproportionate to what is in issue. If this has not already been explored, we would suggest that the parties look seriously at some type of mediation. One possible type would be the judicial dispute resolution which the Court of Queen's Bench offers.

CÔTÉ J.A.

QL Update: 20021029
cp/i/qlmmm

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the provinces in the work, which is often difficult, of securing adequate assistance in the interpretation of the Constitution of Canada and the consequent framing of legislation. But, for reasons several times assigned in earlier judgments of the Judicial Committee, they feel the paramount importance of abstaining as far as possible from deciding questions such as those now stated until they come up in actual litigation about concrete disputes rather than on references of abstract propositions.

However, it so happens that on the present occasion most of the questions raised have been disposed of in the judgments in the three cases already referred to, and their Lordships will shortly indicate how far they consider this to have been done.

Questions 1 and 2 are answered as sufficiently as is expedient in the judgment given in *Bonanza Creek Gold Mining Co.* v. *The King.* (1)

Questions 3 and 4 are sufficiently disposed of by the judgments in the *Bonanza Case* (1) and *Attorney-General for Canada* v. *Attorney-General for Alberta.* (2)

As to question 5, their Lordships think it unnecessary to add to what they have said at length in the judgment in the *Bonanza Case.* (1)

As to questions 6 and 7, their Lordships have endeavoured in the case of the *John Deere Plow Co.* v. *Wharton* (3) to give as much assistance as is practicable in answering these questions. The questions are, however, in some of their developments of a highly abstract character, and the Board is of opinion that it is not prudent to go further than was done in the judgment in that case.

Their Lordships will humbly advise His Majesty that the answers to the questions brought before them on this appeal should be to the effect above indicated. There will be no order as to costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

Solicitors for Attorney-General for British Columbia, intervener: *Gard, Lyell, Betenson & Davidson.*

Solicitors for Canadian Manufacturers Association, interveners: *Lawrence Jones & Co.*

(1) Ante, p. 566. (2) Ante, p. 588.
(3) [1915] A. C. 330.

Applied in Re CROWHURST PARK [1974] 1 All ER 991

[PRIVY COUNCIL.]

S. M. K. R. MEYAPPA CHETTY . . . . . APPELLANT;

AND

S. N. SUPRAMANIAN CHETTY . . . . . RESPONDENT.

J. C.* 1916 — March 2.

ON APPEAL FROM THE SUPREME COURT AT SINGAPORE.

Limitation—Executor—Accrual of Right to sue—Testator domiciled Abroad—Probate—"Capable of instituting suit"—Devolution of Interest—Substitution of Plaintiff—Straits Settlements Ordinance No. 6 of 1896, ss. 17, 22—Straits Settlements Ordinance No. 31 of 1907, ss. 133, 196.

Straits Settlements Ordinance No. 6 of 1896, which deals with the limitation of suits, provides as follows:—Sect. 17, sub-s. 1: "When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application." Sect. 22: "When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party . . . . ":—

Held, (1.) that the executor of a will capable of probate in the Straits Settlements is a legal representative capable of instituting a suit, within the meaning of s. 17, sub-s. 1, from the date of the testator's death and not only from the date when he obtains probate: *quaere* as to an executor who renounces probate; (2.) that, according to the English practice (which is made applicable in the Straits Settlements in the absence of any other provision), the will of a testator domiciled in British India, or elsewhere outside the Straits Settlements, although not proved in the place of the testator's domicil, is capable of probate in the Straits Settlements if (*a*) it is valid according to the law of the testator's place of domicil, and (*b*) if there are assets of the testator in the Straits Settlements; (3.) that s. 22 contemplates cases in which a suit is defective by reason of the right persons not having been made parties, but not cases in which the suit was originally properly constituted but has become defective owing to a devolution of

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

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interest; in the latter circumstances a carrying-on order should be made under s. 169 of the Civil Procedure Ordinance No. 31 of 1907.

APPEAL from a judgment of the Supreme Court of the Straits Settlements (Settlement of Singapore), delivered June 26, 1914, reversing the judgment of the judge at the trial.

S. A. Supramanian Chetty, who was a native of and domiciled in British India, died on November 11, 1904, having by his will appointed as his executors S. R. M. Ramasamy Chetty (hereinafter called the executor) and another person who renounced probate at some date prior to August, 1907. For some years before his death the deceased had carried on a business at Singapore in partnership with the respondent. In December, 1904, the will was presented to the Court in British India for registration and probate. The respondent entered a caveat and contested its validity. After being set aside by the District Judge the will was affirmed by the High Court at Madras, probate being eventually granted to the executor in India on March 10, 1912.

Meanwhile, on March 10, 1910, the Supreme Court at Singapore granted to P. L. M. A. V. Meyappa Chetty, as representing the widow of the deceased, letters of administration pendente lite as to the assets within the jurisdiction of that Court. On October 23, 1911, he, as administrator pendente lite, commenced the present suit in the Supreme Court, claiming a declaration that the partnership in Singapore between the deceased and the respondent was dissolved by reason of the death of the deceased, and for the usual accounts and realization.

After the executor had obtained probate in India he appointed the appellant by power of attorney to obtain in the Straits Settlements a grant of letters of administration with the will annexed, and the grant was accordingly made. On April 11, 1913, it was ordered by consent that the name of P. L. M. A. V. Meyappa Chetty should be struck out as plaintiff in the suit and the name of the appellant substituted.

The respondent by his defence pleaded that the suit was barred by limitation, and the question of law so raised was subsequently argued upon an agreed statement of the facts.

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The Straits Settlements Limitation Ordinance No. 6 of 1896, by s. 4 and Sched. II., art. 86, provides that the period of limitation in the case of a suit for an account and a share of the profits of a dissolved partnership shall be three years from the date of the dissolution. Sect. 17, sub-s. 1, and s. 22, which were also material, are set out in the head-note.

Sproule J. held that the suit was not barred. Upon appeal this decision was reversed by Bucknill, acting C.J., and Sercombe Smith J., Ebden J. dissenting.

1916. Jan. 20, 21, 23. *Holman Gregory, K.C.*, and *Jowitt*, for the appellant. Sect. 17, sub-s. 1, of the Limitation Ordinance applies to the present suit; it applies to all suits in which the right of action has not accrued to the deceased before his death. There was no personal representative capable of instituting the suit until March 10, 1910, when the original plaintiff was granted letters of administration pendente lite. The suit was commenced on October 23, 1911, and was therefore in time within Sched. II., art. 86. The title of an administrator and his right to sue date from the grant and not from the death of the deceased: Tristram and Coote, Probate Practice, 14th ed., p. 58. The testator being domiciled outside the Straits Settlements could not institute a suit there until he had obtained administration or probate within that jurisdiction: *Vanquelin* v. *Bouard* (1); Williams on Executors, 10th ed., p. 271. Under the Straits Settlements Civil Procedure Ordinance No. 31 of 1907, s. 840, the executor could have obtained administration but not probate in the Straits Settlements. It is true that under Ordinance No. 12 of 1909, s. 44, probate in the Straits Settlements could be obtained upon an authenticated copy of the will, but under that section probate could not have been obtained before 1910. The respondent was himself disputing the will, and the executor cannot be regarded as capable of instituting a suit against him until the will was admitted to probate in India. The appellant was not a new plaintiff within the meaning of s. 22. The order of April 11, 1913, though in form made under s. 133 of the Civil Procedure Ordinance, was in effect a carrying-on order under s. 169 of that Ordinance. The order effected no real change of parties, but was consequent

(1) (1863) 15 C. B. (N.S.) 341.

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upon a transmission of interest within the terms of the latter section.

Upjohn, K.C., and *Latter*, for the respondent. Even assuming that s. 17, sub-s. 1, applies to the present suit, time began to run from the death of the testator, or at any rate from the date when the second executor renounced probate; in either case the suit is barred. The language of the sub-section is that used in *Murray* v. *East India Co.* (1), and the intention was to enact the law as established by judicial decisions in England. According to those decisions an executor can institute a suit on behalf of the estate at any time after the death of the testator, probate being merely necessary as evidence of title at the trial: Comyn's Digest, "Administration" B. 9 and B. 10; *Thompson* v. *Reynolds* (2); *Knox* v. *Gye* (3); *Woolley* v. *Clark*. (4) If a sole executor renounces probate time does not run because the renunciation relates back; here the executor, having intermeddled, could not renounce. There is no difference in principle in the case of the executor of a testator with a foreign domicil. A will valid according to the law of the place of domicil of the deceased is capable of probate in the Straits Settlements if there are assets there: *In the Goods of Deshais* (5); *Whyte* v. *Rose*. (6) Probate in the Straits Settlements could have been obtained before the grant in India under s. 840 of the Procedure Ordinance, 1907, as amended by Ordinance No. 12 of 1909, s. 44. But, the will being capable of probate in the Straits Settlements, it is not material to the present question at what date probate could have been obtained. The decision in *Vanquelin* v. *Bouard* (7) and the passage in Williams on Executors relied on by the appellant refer only to the necessity of a grant of administration or probate being obtained in the jurisdiction before the suit comes to trial. But even if there was no representative capable of suing before the grant pendente lite the suit is still barred. The present appellant, who was substituted as plaintiff by the order of April 11, 1913, was a new plaintiff within the meaning of s. 22 of the Limitation Ordinance. The proviso to that section would be unnecessary if this was

(1) (1821) 5 B. & Ald. 204.
(2) (1827) 3 C. & P. 123.
(3) (1872) L. R. 5 H. L. 656.
(4) (1822) 5 B. & Ald. 744.
(5) (1865) 34 L. J. (P.) 58.
(6) (1842) 3 Q. B. 493, 507.
(7) 15 C. B. (N.S.) 341.

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not so. The order was in fact made under s. 133 of the Procedure Ordinance.

Jowitt in reply. At the date when the suit was instituted the executor had done nothing in the Straits Settlements which amounted either to an acceptance or renunciation of probate. Intermeddling in the estate in India does not amount to intermeddling in the Straits Settlements: *Lowe* v. *Farlie* (1); *Logan* v. *Fairlie*. (2) The suit instituted by the administrator pendente lite was therefore not barred when it was commenced; it cannot have become barred by subsequent acts of the executor who is not a party.

March 2. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The facts of this case are not in dispute. S. A. Supramanian Chetty, a native of and domiciled in British India (hereinafter referred to as "the testator"), carried on for some years prior to his death a money-lending business in Singapore in the Straits Settlements in co-partnership with the respondent. He died on November 11, 1904, having by his will appointed S. R. M. Ramasamy Chetty and another to be his executors. Caveats were entered against the proof of this will, and in August, 1907, S. R. M. Ramasamy Chetty (his co-executor having renounced probate) presented a petition in the Court of the District Judge of Madura, in the Madras Presidency, propounding the will in solemn form. Ultimately, after protracted litigation, the High Court of Judicature at Madras ordered the District Judge at Madura to grant probate of the will to S. R. M. Ramasamy Chetty, and such probate was on March 10, 1912, granted accordingly. An appeal from the order of the High Court of Judicature in Madras has recently been dismissed by His Majesty in Council.

Meanwhile, on March 7, 1910, letters of administration pendente lite to the estate of the testator, situate within the jurisdiction of the Supreme Court of the Straits Settlements, were granted by that Court to P. L. M. A. V. Meyappa Chetty, the attorney of the testator's widow, and on October 23, 1911, the administrator pendente lite instituted the present suit, asking for a declaration that the partner-

(1) (1817) 2 Madd. 101.
(2) (1835) 1 My. & Cr. 59.

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ship existing between the testator and the defendant had been dissolved by the testator's death, and for the usual partnership accounts. The first question their Lordships have to decide is whether this suit was at the date of its institution barred by s. 4 of the Straits Settlements Ordinance No. 6 of 1896, being an Ordinance to amend the law relating to the limitation of suits.

Sect. 4 of this Ordinance provides that (subject to the provisions contained in ss. 5 to 25 thereof inclusive) every suit instituted after the period of limitation prescribed therefor by the Second Schedule thereto shall be dismissed, provided that limitation has been set up as a defence. The period prescribed by the Second Schedule in the case of a suit for an account and a share of the profits of a dissolved partnership is three years from the date of the dissolution. The date of dissolution was in the present case the testator's death; and unless there is something to the contrary contained in ss. 5 to 25 of the Ordinance, it is not disputed that time had run prior to the institution of the present suit.

Reliance is, however, placed on s. 17, sub-s. 1, of the Ordinance, which provides that when a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal personal representative of the deceased capable of instituting or making such suit or application. It is contended that there was no legal representative of the testator capable of instituting this suit until the appointment on March 7, 1910, of an administrator pendente lite, and that therefore the period of limitation must be computed from March 7, 1910.

Assuming, but without deciding, that this is to be deemed to be a suit which the testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld. It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in

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which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see Comyn's Digest, "Administration," B. 9 and 10; *Thompson* v. *Reynolds* (1); *Woolley* v. *Clark*. (2)

It would seem, therefore, that an executor is not only the legal representative of his testator, but capable of instituting a suit within the meaning of s. 17, sub-s. 1, of the Ordinance in question. There is nothing in the Ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. But, in their Lordships' opinion, the words "capable of instituting a suit" mean capable of instituting a suit in which a decree might be obtained. The will under which the executor claims must therefore be capable of probate; otherwise the action must fail. It has to be determined, therefore, whether the testator's will was in the present case capable of probate in the Straits Settlements. This question depends on the Civil Procedure Code, Ordinance No. 31 of 1907.

Sect. 3 of that Code provides that where no other provision is made by the Code or any law in force for the time being, the procedure and practice for the time being in force in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted. There is nothing in the Code or in any law in force in the Straits Settlements precluding the Supreme Court of the Straits Settlements from granting probate of the will of a person wherever domiciled. The English practice is therefore applicable. According to English practice, probate may be granted of the will of a person domiciled abroad upon proof that it is a valid will according to the law of the domicil, and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicil: see Jarman on Wills, 6th ed., vol. 1, p. 7, and *Robinson* v. *Palmer*. (3) It follows that the testator's will could have been proved in the Straits Settlements (1.) because it was valid according to the law of the testator's domicil, as shown by its admission to probate in the Court of the District Judge at Madura; and

(1) 3 C. & P. 123. (2) 5 B. & Ald. 744.
(3) [1901] 2 I. R. 489.

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(2.) because there were assets of the testator locally situate in the Straits Settlements.

There was a good deal of discussion before their Lordships' Board as to what would have been the result had the English Statutes of Limitation been applicable. This discussion, though perhaps not strictly relevant, was useful as illustrating the principles which ought to guide the Court and throwing light on the meaning of the Ordinances of the Straits Settlements. For the purpose of the English Statutes of Limitation time runs from the accruer of the cause of action, but a cause of action does not accrue unless there be some one who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death time will at once begin to run, if there be an executor, even though probate has not been obtained: *Knox* v. *Gye* (1); but if there be no executor, time will run only from the actual grant of letters of administration: *Murray* v. *East India Co.* (2) It is, in their Lordships' opinion, probable that s. 17, sub-s. 1, of the Ordinance in question was intended to apply this rule. A good deal was also said as to what would be the effect if the executor who might have instituted proceedings subsequently renounced probate. Their Lordships at first thought that this might be important for the purposes of the present case, because it is doubtful whether one of two joint executors can properly institute proceedings on behalf of their estate. On reference, however, to the record on the appeal from the order of the High Court of Judicature at Madras directing probate to be granted, it appears that S. R. M. Ramasamy Chetty's co-executor renounced probate at some time before August, 1907. Since August, 1907, S. R. M. Ramasamy Chetty was therefore sole executor and capable of instituting the action. The three years prescribed by the Ordinance must therefore in any case have elapsed before the suit was instituted.

The second question argued before their Lordships turns upon the effect of s. 22 of the Limitation Ordinance. That section provides that when after the institution of a suit a new plaintiff is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party; provided that when a plaintiff dies, and the suit is continued by his legal representative,

(1) L. R. 5 H. L. 656. (2) 5 B. & Ald. 204.

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it shall as regards him be deemed to have been instituted when it was instituted by the deceased plaintiff. It appears that after the grant of probate by the Court of the District Judge at Madura the letters of administration pendente lite granted to the original plaintiff in this suit were cancelled, and in lieu thereof letters of administration with the will annexed were granted by the Supreme Court of the Straits Settlements to the appellant as attorney for the proving executor. Subsequently, on April 14, 1913, an order was made in the suit striking out the original plaintiff and substituting the appellant as plaintiff. It is contended that, as regards the appellant, the suit therefore must, under s. 22 of the Ordinance, be deemed to have been instituted on April 14, 1913, at which date the action was barred, even if it was not barred when the action was instituted by the original plaintiff. Having regard to their Lordships' decision on the first question, it is not, strictly speaking, necessary to decide this point. In view, however, of its importance in practice it may be desirable to deal with it.

Their Lordships are of opinion that s. 22 contemplates cases in which a suit is defective by reason of the person or one of the persons in whom the right of suit is vested not being before the Court. Sect. 133 of the Civil Procedure Code provides against the defeat of a suit on this ground and enables the proper party to be added or substituted. If A. is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the Limitation Ordinance, to take advantage of a suit improperly instituted by B. Their Lordships do not think that s. 22 of the Ordinance has any application to cases in which the suit was originally properly constituted as to parties but has become defective because there has been a change or devolution of interest. Such cases do not fall within s. 133, but within s. 169, of the Civil Procedure Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to s. 22 of the Ordinance may have been inserted per cautelam, and cannot be relied on as controlling the operative words. The difficulty really arises out of the form of the order of April 14, 1913. What was required was an order under s. 169 of the Code, and if the order was competent it was competent under this section only. Their Lordships do not think that the respondent could have taken advantage of the form

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of order to escape a liability to which he would have been subject if the order had been made in proper form.

Under the circumstances their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Whites & Co.*

Solicitors for respondent: *Loughborough, Gedge, Nisbet & Drew.*

[HOUSE OF LORDS.]

H. L. (E.)* 1916 — Jan. 28.

CHURM . . . . . APPELLANT;

AND

DALTON MAIN COLLIERIES, LIMITED . RESPONDENTS.

Mines—Minimum Wage — Contract of Service — Construction — "Employer"—Collier and Filler—Filler receiving Wages directly from Collier—Liability of Colliery Owners—Coal Mines (Minimum Wage) Act, 1912 (2 Geo. 5, c. 2), s. 1, sub-s. 1.

A colliery company usually assigned two workmen, a collier and a filler, to each underground working place or stall, but occasionally a double or treble set of men, composed of an equal number of colliers and fillers, worked together in one stall. The men were paid upon a tonnage rate in accordance with the coal gotten. A weekly pay-note was made out to the number of the stall and the money was paid to the collier, or, in the case of double or treble sets, to one of the colliers. The division of the pay between the collier and the filler was a matter of private bargain between them. On entering the service of the colliery company all the workmen, whether colliers or fillers, were bound to sign three documents, one of which contained the by-laws of the company. By by-law 2, "All persons employed . . . . shall receive wages and payment according to the current rate of wages for the time being at the colliery." By by-law 13, "All persons working under or for or paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey these by-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work."

A filler worked with a collier in a stall under an arrangement whereby the collier first took for himself for each shift 1*s.*, and the balance was equally divided in accordance with the number of shifts worked by each of the two men. In a certain week the balance coming to the filler under this arrangement was less than the minimum wage to which he was entitled under the Coal Mines (Minimum Wage) Act, 1912. The filler claimed a minimum wage from the colliery company. The company, who for all purposes other than the payment of wages were the employers of the filler, pleaded that they were not his employers for the purposes of the Act:—

Held, assuming without deciding that the "contract of employment" mentioned in s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, meant a contract of employment at wages, that an obligation was imposed on the colliery company to pay wages to the filler by by-law 2 and was not taken away by by-law 13, and that the company were the employers of the filler within the meaning of the Act and were liable to pay him a minimum wage.

Per Lord Shaw of Dunfermline: For the purposes of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is not necessary that the employer should be also the paymaster of the workman.

Richards v. Wrexham and Acton Collieries [1914] 2 K. B. 497 distinguished.

Decision of the Court of Appeal reversed.

* *Present:* LORD BUCKMASTER L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

H. L. (E.) 1916 — CHURM v. DALTON MAIN COLLIERIES LIMITED.

APPEAL from an order of the Court of Appeal reversing a judgment of Bailhache J.

The respondents were the owners of the Silverwood Colliery, situate in the South Yorkshire coalfield. The appellant was employed as a filler at the colliery.

The action was brought by the appellant against the respondents for a declaration that he was entitled under the terms of his contract of employment with the respondents as filler to be paid wages at not less than the minimum rate provided by the Coal Mines (Minimum Wage) Act, 1912. The respondents by their defence denied that they were the employers of the appellant within the meaning of the Act.

On entering the respondents' employment on May 21, 1913, the appellant signed three documents, which were required to be signed by all persons employed in any capacity at the colliery, namely, the signing-on book, the contract signature book, and the contract of service. By the signing-on book the workman undertook to obey, fulfil, and agree to the rules and regulations of the colliery and the respondents undertook to fulfil and perform the same on

COMMENTARIES

ON THE

LAWS OF ENGLAND:

IN FOUR BOOKS;

WITH

AN ANALYSIS OF THE WORK.

BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE JUSTICES OF THE COURT OF COMMON PLEAS.

IN TWO VOLUMES,

FROM THE NINETEENTH LONDON EDITION.

WITH

A LIFE OF THE AUTHOR, AND NOTES,

BY

CHRISTIAN, CHITTY, LEE, HOVENDEN, AND RYLAND,

AND ALSO

REFERENCES TO AMERICAN CASES,

BY A MEMBER OF THE NEW YORK BAR.

VOL. I.—BOOK I. & II.

PHILADELPHIA:
J. B. LIPPINCOTT COMPANY.
1892.

of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

[*495] *The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were, therefore, not accountable to any, but to God and themselves, for their conduct (*k*). But even in Fleta's time it was complained (*l*) "*quod ordinarii, hujusmodi bona nomine ecclesiæ occupantes nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV. (*k*), written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiæ et pauperum dispensanda est.*" Thus, the popish clergy took to themselves (*l*) (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason, it was enacted by the statute of Westm. 2 (*m*), that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands; yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate

[*496] *dependents: and therefore the statute 31 Edw. III. c. 11, provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted (*n*) to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII. c. 5, enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both of them, at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept which ever he pleases.†

Upon this footing stands the general law of administrations at this day.

(*k*) Plowd. 277.
(*l*) 1. 2, c. 57, § 10.
(*k*) In Decretal. l. 5. t. 3, c. 42.
(*l*) The proportion given to the priest and to other pious uses, was different in different countries. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bulle, A. D. 1254 (*Regist. honoris de Richm.* 101), and was observed till abolished by the statute 26 Hen. VIII. c. 15.
(*m*) 13 Ed. I. c. 19.
(*n*) 9 Rep. 39.

† By 2 R. S. 74, § 27, 28, the order of granting administration is determined, and the widow is preferred to all others, next the children, then the father, &c.; males are preferred to females. The husband alone can take out administration on his wife's estate, (id. and § 29,) unless he neglects or is incompetent to act: he takes her personal estate to his own use, subject only to her debts. *Ib*

I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I proceed now, *secondly*, to inquire who may, or may not, make a testament; or what persons are absolutely obliged by law to die intestate (3). And this law (*o*) is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under some special prohibition by law or custom: which prohibitions are principally upon three *accounts: for want of sufficient discretion; for want [*497] of sufficient liberty and free will; and on account of their criminal conduct.

1. In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females† ; which is the rule of the civil law (*p*). For, though some of our common lawyers have held that an infant of any age (even four‡ years old) might make a testament (*q*), and others have denied that under eighteen he is capable (*r*), yet, as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament. Madmen, or otherwise *non compotes*§, idiots or natural fools (4), persons grown childish by reason of old age or distemper (5), such as have their senses besotted with drunkenness (6)—all these are incapable, by reason of mental dis

(*o*) Godolph. Orph. Leg. p. 1, c. 7.
(*p*) Godolph. p. 1, c. 8. Wentw. 212. 2 Vern. 94. 459. Gilb. Rep. 74.
(*q*) Perkins, § 503
(*r*) Co. Litt. 89.

(3) In pursuing this inquiry, our author appears to have taken Swinburne for his guide; the second part of whose Treatise on Wills and Testaments he has closely followed.

(4) See Swinburne, pt. 2, sect. 4, an idiot, according to juridical definition, is one who, from his nativity, by a perpetual infirmity, is *non compos mentis*. (Co. Litt. 246 a).

(5) See Swinburne, pt. 2, sect. 5. Old age alone does not justify a presumption of the party's incapacity; (*Lewis* v. *Pead*, 1 Ves. jun. 19); but, when accompanied by great infirmity, it will be a circumstance of weight in estimating the validity of any transaction; (*Griffiths* v. *Robins*, 3 Mad. 192); for, that hypothetical disability which is always supposed to exist during infancy, may really subsist when the party is of age, and even a much greater degree of incapacity, though the case be not one of insanity, or of lunacy, strictly speaking. (*Sherwood* v. *Saunderson*, 19 Ves. 283. *Ridgway* v. *Darwin*, 8 Ves. 67. *Ex parte Cranmer*, 12 Ves. 449).

(6) See Swinburne, pt. 2, sect. 6. A commission of lunacy has issued against a party who, when he could be kept sober, was a very sensible man; but whose constant habits were those of intoxication. (*Anonym.* cited in 8 Ves. 66). And in the case of *Rex* v. *Wright*, (2 Burr. 1099), a rule was made upon the de

† In New-York males must be 18, females 16 years of age. 2 R. S. 60, § 21.

‡ Mr. Christian observes, that "this has been thought an errour of the press in Perkins, and that four by mistake was printed for fourteen." The correction was first made by Swinburne, who, in a note to pt. 2, sect. 2, of his Treatise, speaks of the passage in Perkins as "*impressio vitiosa, literâ* (*x*) *omissâ, nam quod sic scribitur* iiij. *scribi debuit* xiiij."

§ See this subject learnedly investigated by Mr. Hargrave, who concludes with the learned Judge, that a will of personal estate may be made by a male at the age of fourteen, and by a female at the age of twelve, and not sooner. (Harg. Co. Litt. 90)."

§ See Swinburne, pt. 2, sect. 3. 1 Phillim. 100. 86. 9 Ves. 610. 3 Br. 444. 11 Ves. 1) 1 Adams, 284.

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the defendant's acts supported the view that the defendant was to pay alimony for the joint lives of himself and his wife. In my opinion the *Watcham* case (1) requires to be applied with care, and certainly, before it can be applied here, it must be shown (a) that there is a contract, and (b) that the acts which are relied on unequivocally support the construction which the court is invited by counsel, relying on them, to adopt. In the present case it is by no means clear that there is a contract. I need not go further into that point; suffice it to say that I agree with the observations on it made by my brother Bucknill. In the second place, even if there were a contract, the acts relied on are as consistent with the agreement coming to an end on the remarriage of the wife, as with its continuing during the joint lives of the husband and the wife. In those circumstances the *Watcham* case (1) does not appear to me to support the conclusion which the county court judge reached. I agree that the appeal should be allowed.

ASQUITH L.J.: The wife's counsel, in the course of an ingenious argument, has described the document as clear, simple, unambiguous and intelligible. With great respect, I cannot agree. The document specifies the date on which the payments are to begin, but not for how long they should continue or in what event, if any, they should cease. The husband agrees to pay the money, but it is doubtful whether he agrees to do so only so long as she remains his wife or longer; he agrees to pay, leaving it uncertain whether what he is to pay is something corresponding to alimony pendente lite or something corresponding to permanent maintenance, or, as seems probable, something corresponding to neither.

This is not clear or simple, but it is clear that nowhere on the face of this document is any consideration specified or even indicated by implication. The evidence, moreover, given by the wife, who was the only witness called, was to the effect that she undertook nothing and did nothing in return for this letter. Her solicitors, who obtained on her behalf a signature to the letter, were not called. The only consideration which could be deduced by inference from the circumstances would be an undertaking by the wife, in exchange for the husband's undertaking, not to apply to the court for alimony pendente lite or permanent maintenance; but any promise given by her to refrain from so applying would have

(1) [1919] A. C. 533.

been void and unenforceable on the principle laid down in *Hyman* v. *Hyman* (1). In those circumstances I think that there is no evidence at all of any consideration moving from the wife to the husband, and that the agreement in the document is not a binding contract. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the defendant (the husband): *Michael Abrahams, Sons & Co.*

Solicitors for the plaintiff (the wife): *Julius White and Bywaters, for Penman, Johnson & Ewins, Watford, Herts.*

(1) [1919] A. C. 601.

C. G. M.

FRED LONG & SON LD. *v.* BURGESS.

C. A. 1949 *July* 14, 25. Bucknill and Asquith L.JJ. and Hodson J.

Landlord and tenant—Death of contractual tenant intestate—Notice to quit served on President of P. D. and A. Division—Termination of contractual tenancy—Son of deceased tenant, living with her, continues in possession—Subsequently son obtains letters of administration—Doctrine of "relation back" invoked—Contention that administrator was contractual tenant when notice to quit served—Claim to hold over as statutory tenant.

The contractual tenant of a dwelling-house, subject to the Rent Restriction Acts, died intestate on November 7, 1948. On November 18, 1948, the landlords served a notice to quit the house, expiring on November 27, 1948, on the President of the Probate, Divorce and Admiralty Division of the High Court, in whom by virtue of s. 9 of the Administration of Estates Act, 1925, the deceased tenant's real and personal estate (including her tenancy of the dwelling-house) had vested, in the same manner, and to the same extent, as formerly, in the case of personal estate, it vested in the ordinary. The two sons of the late tenant had continued in occupation of the house and a week later the landlords brought an action in the county court claiming to recover possession of the house from the sons, who relied on the Rent Restriction Acts. When the case was part heard, the defendants applied for, and were granted, an adjournment in order that they might obtain a grant of letters of administration of the estate of their mother. At the resumed hearing one of the sons produced letters of administration granted to him on January 15, 1949, and the county court judge held that by the doctrine of "relation back,"

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as expounded by Luxmoore L.J. in *Ingall* v. *Moran* [1944] K. B. 160 at p. 168, the estate of the deceased tenant from the time of her death was vested in the administrator, who was, at the time the notice to quit expired, the contractual tenant thereof and, as such, was entitled to continue in possession of the house as a statutory tenant. On appeal by the landlords:—

Held, allowing the appeal, that (1.) the notice to quit the house served on the President terminated its tenancy on November 27, 1948; (2.) the grant of letters of administration to a son of the deceased tenant did not so relate back to the date of her death as to bring to life the terminated tenancy; and (3.) the doctrine of "relation back" did not place the administrator in the same position as the President when notice to quit was served on him.

Smith v. *Mather* [1948] 2 K. B. 212, and *Thynne* v. *Salmon* [1948] 1 K. B. 482, considered.

Held, accordingly, that it was unnecessary to decide whether the landlords succeeded on the point that when the defendants were first before the court they had no defence and that the case was adjourned to allow them, by obtaining letters of administration, to acquire one; and also on the point that the issue in the county court was whether at the time the plaint note was delivered to the landlord, or issue joined, the defendants had any defence to the claim.

Per Curiam: There was much force in the landlord's contentions: (1.) that the doctrine of the "relation back" of letters of administration must not be applied, save to protect the estate from wrongful injury occurring in the interval between the death and the grant of letters of administration; (2.) that a title cannot relate back, if it is a title to something which has perished or been extinguished without fault or wrong on the part of anyone, during the said interval; (3.) that the principle of "relation back" cannot be applied to invalidate interests lawfully acquired in the said interval; and that to apply that doctrine in circumstances, such as those of the case before the court, would leave a landlord, it might be for years, in a position of intolerable doubt as to his rights, e.g., whether he would be safe in re-entering the premises and dealing with them by sale or re-letting.

APPEAL from Great Yarmouth county court.

From 1943 Mrs. Burgess lived at 121, Lichfield Road, Yarmouth, with her two sons Alfred and Clifford Burgess, under a contractual tenancy at a rent, inclusive of rates, of 9s. 3*d*. a week. On November 7, 1948, Mrs. Burgess died intestate, and on November 18, her landlords, the plaintiffs, served a notice to quit No. 121, Lichfield Road, on the President of the Probate, Divorce and Admiralty Division, in whom by virtue of s. 9 of the Administration of Estates Act, 1925, her real and personal estate had vested in the same manner and to the same extent as formerly, in the

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case of personal estate, it vested in the ordinary. This admittedly operated to determine the contractual tenancy, on November 27, 1948. Alfred and Clifford Burgess continued to occupy the house: and a week later the landlords brought an action in the Great Yarmouth county court claiming the recovery of possession of the premises from them. By their defence, the defendants claimed the protection of the Rent Restriction Acts.

His Honour judge Carey Evans, at the first hearing on January 6, 1949, held that Mrs. Burgess at the time of her death was a contractual, and not a statutory, tenant. The solicitor for the tenants admitted that no grant of letters of administration had been applied for. The case of *Smith* v. *Mather* (1) was cited; and, the evidence for the tenants having been given, the solicitor for the tenants asked for an adjournment to enable the defendants or one of them to take out letters of administration. The note of the judge was: "Adjournment was not opposed by the solicitor "for the plaintiffs, though he will contend that the defendants "have no defence, even if letters of administration are granted." The case was then adjourned.

At the second hearing on February 10, 1949, letters of administration dated January 15, 1949, were produced in the name of Clifford Burgess. The judge held that by the doctrine of "relation back," as expounded by Luxmoore L.J., in *Ingall* v. *Moran* (2), the estate of Mrs. Burgess (including her contractual tenancy of 121, Lichfield Road), from the time of her death, was vested in the administrator. Clifford Burgess, therefore, was the contractual tenant at the moment of the determination of the tenancy (see s. 12, sub-s. 1 (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) and, as such, was entitled to hold over as statutory tenant. The judge said that his decision did not conflict with *Smith* v. *Mather* (1) because in that case there never was a grant of administration, and that the "fatal conflict" envisaged in *Thynne* v. *Salmon* (3) did not arise in this case, because the President was the only person in whom the tenancy vested, until the grant of administration and, as from the date of the grant, by virtue of the doctrine of "relation "back," the administrator alone was deemed in law to have been the person in whom the tenancy vested. In conclusion,

(1) [1948] 2 K. B. 212.
(2) [1944] K. B. 160, 168.
(3) [1948] 1 K. B. 482.

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he said: "It is very important to interpret *Smith* v. *Mather* "(1) in the light of the facts before the Court of Appeal, and "to remember that they were not considering at all the "effects of the doctrine of 'relation back.'" Accordingly, he gave judgment for the tenant, refusing the landlord's claim for possession. The landlords appealed.

Stephen Chapman and *Norman King* for the landlords. [Their argument is fully summarized in the judgment of ASQUITH L.J.]

The defendants did not appear and were not represented.

Cur. adv. vult.

July 25. BUCKNILL L.J.: This appeal raises an interesting question on the construction and application of s. 9 of the Administration of Estates Act, 1925. The section enacts: "Where a person dies intestate, his real and personal estate, "until administration is granted in respect thereof, shall "vest in the Probate judge in the same manner and to the "same extent as formerly in the case of personal estate it "vested in the ordinary." The section is included in Part II of the Act, which is headed "Executors and Administrators." Section 10 now replaced by s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, enacts that in granting letters of administration the court shall have regard to the rights of all persons interested in the estate of the deceased person; and s. 16, now replaced by s. 163 of the Supreme Court of Judicature (Consolidation) Act, 1925, deals with the power of the court to grant administration of the estate of a deceased person while legal proceedings are pending touching the validity of the will of the deceased person, or for obtaining, recalling, or revoking any grant of administration. By s. 55 (xv): "'Probate Judge' means the President of the "Probate, Divorce and Admiralty Division of the High Court." Schedule II to the Act repeals a large number of statutes, starting with 13 Edw. I, c. 19. Section 9 of the Administration of Estates Act, 1925, is in effect a re-enactment of s. 19 of the Court of Probate Act, 1858, which was repealed by the Administration of Estates Act, 1925, except that s. 19 applied only to personal estate and effects.

The learned editors of the second edition (1927) of Mortimer's

(1) [1948] 2 K. B. 212.

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Law and Practice of the Probate Division, at p. 280, state that the jurisdiction which the Ecclesiastical Courts exercised over the effects of persons dying without a will rested on a very ancient foundation. In the early periods of legal history the ordinary had by common law the absolute disposal of the personal property of all intestates, but these powers were gradually abridged by Acts of Parliament. Blackstone, in his Commentaries (1), states that the administrators are only the officers of the ordinary, appointed by him in pursuance of the statute 31, Edw. III, st. 1, c. 11, and that their title and authority were derived exclusively from the ecclesiastical judge by grants which are usually denominated letters of administration. Eventually, in 1857, the jurisdiction of the ecclesiastical and all other courts to grant letters of administration was abolished and the jurisdiction was transferred to the newly constituted Court of Probate.

The difficult problem before us, as I see it, raises the following questions: (*a*) did the notice to quit terminate the tenancy on November 27, 1948? if so, (*b*) does the grant of administration on January 15, 1949, coupled with the doctrine of "relation "back," bring to life the tenancy which had terminated on November 27, 1948? and (*c*) does the doctrine of "relation "back" put the administrator in the same position as the President when notice to quit was served on him and, if so, what effect would the notice to quit on the administrator have in terminating the tenancy agreement? There seems to be very little authority on the subject. In my opinion, the cases which deal with the doctrine of "relation back" do not have any such similarity to the facts of this case as to enable one to say that the principle contained in them should apply to this case.

I think that, on principle, and, historically, the vesting of the estate in the President is a positive act with some legal substance. Normally the court, formerly composed of the Probate Judge, appoints a person or persons to deal with the property of the intestate through a grant of administration, but I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can. That is why the property is vested in him. If the President's position is such as I have indicated, I think he must have the legal capacity to receive a valid notice to quit, and such notice, after the

(1) 2 Black. Comm. (1st ed.) 496.

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proper lapse of time, has full legal effect. If no grant of administration has been made, there is no other person but the President to whom the notice to quit can validly be given. At any date subsequent to the death of the intestate, a grant of administration may be made. There is no time limit in this matter. If a grant made years after the death is to make invalid the notice to quit validly given to the President, confusion and uncertainty will prevail and injustice may be done to those who have acted on the assumption that the notice to quit given to the President had full legal effect. In *Smith* v. *Mather* (1) the facts were similar to this case. The mother was the contractual tenant, and her son and daughter were living with her at the time of her death. The mother died intestate in October, 1946, and in December, 1946, the landlords served notice to quit on the President. No letters of administration were taken out at any time. The county court judge dismissed the landlords' action for possession, but, on appeal, the Court of Appeal held that the notice to the President was valid and that it was the proper procedure for giving effect to the landlords' right to determine the tenancy. The appeal was therefore allowed. It is quite true that the son or daughter did not think of applying for letters of administration during the hearing of the case before the county court judge, but, surely, if they had done so and succeeded in obtaining a grant, the grant must be taken of such property only as the intestate had at the time of the grant, and cannot be taken to include a right of property which had validly been extinguished or transferred.

In argument in *Mather's* case (1), counsel for the defendants submitted that the rule laid down in *Thynne* v. *Salmon* (2) did not apply, because in that case a grant of administration had been made, whereas in *Mather's* case the fatal conflict as to liability for rent between two different persons did not arise, in as much as the President would not become liable to pay rent when the contractual tenancy became vested in him under s. 9 of the Act of 1925. This argument in *Smith* v. *Mather* (1) was rejected by the Court of Appeal. Somervell L.J., at the beginning of his judgment said (3): "In circumstances "such as the present . . . . there must be a power in the "landlord to bring the tenancy to an end by whatever notice "is provided for in the agreement. As it seems to me, the

(1) [1948] 2 K. B. 212.
(2) [1948] 1 K. B. 482.
(3) [1948] 2 K. B. 212, 214–5.

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"proper procedure for doing that is the procedure adopted "in this case, namely, serving a notice on the President." If, then, the notice terminates the contract, it seems to me that it would be unjust to hold that a subsequent grant of administration brought the dead contract to life. The circumstances under which the grant was made in this case vividly illustrate the sort of injustice which the extension of the doctrine to this kind of case might do. I think the appeal should be allowed.

ASQUITH L.J. I agree. The main grounds on which the appellant landlords' counsel invited us to reverse the decision of the county court judge were the following: (1.) The principle of "relation back," it was argued, has no application where the asset, the administrator's title to which is sought to be antedated by its operation, has ceased to exist by the time when letters of administration are granted. For the title to relate back, it must be a title to something in esse at the date of the grant. A lease extinguished in the interval between the death and the grant (which I will call, for short, "the interval") is in this respect in just the same position as a chattel lost or destroyed in the interval. The title cannot effectively relate back, for it is a title to nothing. The doctrine of "relation "back" cannot breathe new life into a corpse. (2.) The principle of "relation back," it was further contended, only applies (to quote the language used in Williams on Executors and Administrators (12th edit), vol. 1, at pp. 409–411) "for "particular purposes," and these, when analysed, turn out all to be connected with the protection or preservation of the estate from wrongful injury in the interval. If, in the interval, the estate has been damnified by tortious acts on the part of anyone, or, in the case of leaseholds, by breaches of covenant, then the administrator, though appointed after the acts complained of, can sue in respect of them. The principle of "relation back," however, does not apply outside the limits of the purpose which called it into being. Here it is not necessary to the protection of the estate to invoke it; ergo it cannot be invoked. (3.) Even where the principle is otherwise applicable, it cannot be so applied as to disturb interests lawfully acquired during the interval: *Waring* v. *Dewberry* (1). In the interval, in the present case, the landlords (the plaintiffs)

(1) (1718) 1 Stra. 97 cited by Strange arguendo in *R.* v. *Mann* (1726) Gilb. Eq. Rep. 223.

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by a valid notice served on the President of the Probate, Divorce and Admiralty Division lawfully reabsorbed into their reversion the outstanding leasehold interest which had been vested in the deceased and, thereafter, in the President. They cannot now be divested of this. (4.) It was further argued that to hold that the title related back in such a case as the present might lead to inconvenient, if not intolerable, consequences. For instance, supposing, after validly terminating the President's interest in the tenancy, as they did, the landlords re-entered and occupied the premises themselves or re-let to a third person. Then, perhaps, years later, an administrator is appointed. If his title "relates back," the landlords or their new lessees have been trespassing for years and are liable for mesne profits accordingly, subject possibly to an offset of the rent for which the administrator would have been liable in respect of that period. Or supposing the landlord, after re-entering, had sold the freehold to X, who had mortgaged it to Y or let it to Z. The application of the doctrine of "relation back" would create chaos in such a case. (5.) Lastly, it was said that, assuming all the above contentions fail, the trial below was in any event vitiated by the improper action of the county court judge in proposing and ordering an adjournment, at a time when the defendants had no defence whatever, so as to allow them to try, by obtaining administration, to acquire one; and that, even if such action was not improper, its sequel, the grant of administration to one of the defendants, could not affect the issues which were raised on the pleadings, and which alone the judge had to determine, namely, whether at the time of the plaint or joinder of issue the defendants had any defence.

The argument on the defendants' side in the county court followed these lines: (1.) The principle of "relation back" vests any leasehold interest (such as the deceased woman's contractual tenancy) in the administrator as from the date of the death: *R.* v. *Horsley* (*Inhabitants of*) (1), so as to enable him to sue on the covenants, subject to his liability for the rents and profits, in respect of the interval. (2.) Therefore the administrator must be treated as having notionally acquired the title to this contractual tenancy on November 7, 1948—at the instant when Mrs. Burgess died. (3.) If he had, the contractual tenancy could never have vested in the President, nor could any notice served, or not served, on the

(1) (1807) 8 East 405.

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President have had any effect on the rights of the parties. The administrator became contractual tenant, in contemplation of law, on November 7, 1948, and nothing has happened since to bring his interest to an end. Subject to the next point, he has never had notice to quit and is still contractual tenant. (4) Alternatively, if the notice to quit served on the President has any relevance or efficacy, this can only be because in such circumstances the President was the administrator's agent or representative to receive it, and because notice served on the President equals a notice served on him, the administrator. But if notice had been served on the administrator, the latter would have been converted from a contractual to a statutory tenant, enjoying the protection of the Rent Restriction Acts, which he has done nothing to forfeit.

In my view, these arguments for the defendants, cannot prevail; the plaintiff landlords are right, and the appeal should be allowed. It seems to me that there is much force in the contentions advanced for the landlords that the doctrine "of relation back" must not be applied save to protect the estate from wrongful injury occurring in the interval (of which in this case there was none); that a title cannot relate back if it is a title to something which has perished or been extinguished without fault or wrong on the part of anyone in the interval; that the principle of "relation back" cannot be applied so as to invalidate interests lawfully acquired in the interval; and that to apply it in circumstances such as those of the present case leaves the landlord, it may be for years, in a position of intolerable doubt as to his rights; for instance, whether or not he can safely re-enter and deal with the property.

These reasons seem to me to require that the appeal should be allowed, and I need express no view as to the argument founded on the adjournment of the proceedings in the county court.

HODSON J. I agree.

Appeal allowed.

Solicitors for the landlords: *Gardiner & Co., for Humphrey Lynde & Elliott, Great Yarmouth.*

C. G. M.

McELLISTRUM v. ETCHES

Ontario Court of Appeal, Laidlaw, Aylesworth and F. G. MacKay JJ.A. September 21, 1954.

Executors & Administrators I, III — Death III B 2 — Child killed by negligence of defendant — Action by administrator under Trustee Act (Ont.) and Fatal Accidents Act (Ont.)— Administrator appointed in interval between commencement of suit and trial thereof — Whether administrator has status to sue—

An action brought under s. 37 of the *Trustee Act*, R.S.O. 1950, c. 400, for torts or injuries to the person of a deceased cannot be instituted by a person in his capacity as administrator before the grant of letters of administration. It is not enough that letters of administration were taken out prior to the trial of the action if they had not been so obtained at the time of the issue of the writ of summons. The doctrine of "relation back", which confirms the title of an administrator, on his obtaining a grant of letters of administration, as of the date of the intestate's death, is applicable only to cases where it is necessary to protect the estate in the interval between the death and the grant of administration and does not apply where, as here, the cause of action did not commence until the appointment of the administrator.

However, in the case of an action brought under the *Fatal Accidents Act*, R.S.O. 1950, c. 132, if it appears from the style of cause that the plaintiff was suing in his personal rather than his representative capacity, then he is entitled to recover despite the fact that he had not been appointed administrator at the time of the institution of the suit.

Cases Judicially Noted: *Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A.C. 603; *Ingall* v. *Moran*, [1944] K.B. 160; *Hilton* v. *Sutton Steam Laundry*, [1946] K.B. 65; *Stebbings* v. *Holst & Co.*, [1953] 1 All E.R. 925, folld; *Trice* v. *Robinson*, 16 O.R. 433; *Doyle* v. *Diamond Flint Glass Co.*, 8 O.L.R. 499; *Dini* v. *Fauquier*, 8 O.L.R. 712; *Johnson* v. *Gen'l Accident Ass'ce Co.*, [1929] 1 D.L.R. 597, 63 O.L.R. 296, disaprvd; *Ohard* v. *Rae*, 18 O.R. 371; *Burlington* v. *G.T.P.R.*, [1923], 4 D.L.R. 334, 2 W.W.R. 1161, consd; *Fred Long & Son Ltd.* v. *Burgess*, [1950] 1 K.B. 115; *Burns* v. *Campbell*, [1952] 1 K.B. 15; *Finnegan* v. *Cementation Co.*, [1953] 1 All E.R. 1130, refd to.

Statutes Considered: *Trustee Act*, R.S.O. 1950, c. 400, s. 37; *Fatal Accidents Act*, R.S.O. 1950, c. 132.

APPEAL by defendant from a judgment of McLennan J. awarding damages to plaintiff under the *Trustee Act* (Ont.), and a CROSS-APPEAL by plaintiff for a re-assessment of damages under the *Fatal Accidents Act* (Ont.)—Reversed in part; modified in part.

W. B. Williston, for appellant.

P. J. Bolsby, Q.C., for respondent.

The judgment of the Court was delivered by

LAIDLAW J.A.:—The defendant appeals to this Court from a judgment pronounced by McLennan J. after trial with a jury on the 26th and 27th October, 1953. In the notice of appeal the defendant asks that the judgment be varied by reassessing the quantum of damages allowed to the plaintiff under the provisions of the *Trustee Act*, R.S.O. 1950, c. 400, or that a new trial be ordered for the purpose of reassessing those damages, "and for such further and other order as to this Honourable Court may appear just." Notice of motion by way of cross-appeal was given on behalf of the plaintiff for an order that judgment should be entered for the plaintiff in the sum of $3,970.69, plus an allowance for damages under the *Fatal Accidents Act*, R.S.O. 1950, c. 132, or that a new trial be directed. Subsequently the plaintiff gave notice of motion to amend the notice of motion by way of cross-appeal by adding a clause thereto, which I need not now reproduce. Thereupon the defendant gave notice that "in the event that the Court grants leave to the Plaintiff (Respondent) to amend the Notice of Motion by way of cross-appeal the Court will be moved on behalf of the Defendant (Appellant) for leave to amend the Statement of Defence" by making an addition thereto as set forth in the notice.

On March 3, 1953, the defendant's motor truck struck Douglas Craig McEllistrum, an infant, on McNaughton Ave., in the City of Chatham, and his injuries resulted in death.

An action was started by Douglas McEllistrum, father of the infant, by issue of a writ of summons on September 8, 1953. The style of cause shows that the action was brought by the infant's father "both personally and as administrator of the estate of Douglas Craig McEllistrum, deceased". The statement of claim delivered under date September 15, 1953, alleges, *inter alia*, "that the plaintiff is . . . administrator of the estate and effects of the said Douglas Craig McEllistrum". Paragraph 3 of the pleading sets forth that: "The plaintiff brings this action personally and under the provisions of the Trustee Act, R.S.O. 1950, Chap. 400, and amendments thereto, and under the provisions of The Fatal Accidents Act, being R.S.O., 1950, c. 132, and amendments thereto, on behalf of himself and his wife, Lois Faith McEllistrum, the lawful parents of the said Douglas Craig McEllistrum, and their lawful surviving children, hereinafter described, as the only persons entitled or who claim to be entitled to the benefits under the provisions of the said Acts."

The jury found that the defendant had not satisfied them that the accident was not caused by any negligence or improper conduct on his part; that the deceased was negligent "in that he darted into the path of the oncoming vehicle"; that Douglas

Craig McEllistrum was 70% at fault and the defendant 30%; that the damages sustained by the plaintiff were as follows:

(a) Out-of-pocket expenses	$ 720.69
(b) Under the Trustee Act for pain and suffering	3,000.00
(c) Under The Fatal Accidents Act—	
(1) Funeral expenses	250.00
(2) General damages	Nil
	$3,970.69.

When the appeal came on for hearing counsel for the appellant argued that the quantum of damages allowed by the jury under the *Trustee Act* was excessive and unreasonable. He then raised the point that the writ of summons was a nullity because it was issued before letters of administration were granted to the plaintiff. That point was not raised in the statement of defence, or at trial, or in the notice of appeal to this Court, but it is set forth in the memorandum of fact and law as part of counsel's "Argument re Cross-appeal". The Court heard argument of counsel for both parties at length and permitted counsel for the respondent to file a "supplementary memorandum".

The objection taken by counsel for the appellant goes to the validity of the action, and I shall, therefore, discuss it at once. In support of his argument counsel relies upon a number of decisions in England. On the other hand, counsel for the respondent maintains that the action was properly constituted and commenced by the plaintiff notwithstanding that he had not been granted letters of administration at that time. He relies on decisions in this Province which are earlier than those in England and in direct conflict with them.

I have studied with care all the cases referred to by counsel and I propose to discuss first the cases in our Courts and then the later ones decided in the Courts in England.

In *Trice* v. *Robinson* (1888), 16 O.R. 433, an action was brought under the *Liquor License Act*, R.S.O. 1887, c. 194, s. 122, by Alice Trice, as administratrix of her husband, Henry Trice, deceased, against Robert Robinson for damages for the death of her husband. The accident from which the cause of action arose happened on June 1, 1887. The plaintiff issued her writ on August 31st, but letters of administration to her husband's estate were not granted until September 3rd. It was contended *inter alia*, "that the plaintiff was not the administratrix or 'legal representative' of the deceased Henry Trice at the time of the bringing of the action". On appeal argued before Boyd C. and Ferguson J., counsel for the appellant argued that an administrator had no right of action at law until appointed. He referred for authority for that proposition to Williams on Executors, 8th ed., p. 411. Boyd C. quoted the statute which gave the cause of action and then stated [p. 435]: "It does not say that the legal representative must obtain letters of administration or take out probate before suing out the writ. Nor is this essential according to the practice."

He proceeded to say that under the Rules of Practice the defendant admitted the representative capacity of the plaintiff because he had not specifically denied it and as a further answer to the objection "the title of the plaintiff as administratrix was perfected before the trial". He referred to the rule in Chancery proceedings as opposed to that at law, "that it was not needful for a plaintiff, if he were the person to take out letters of administration, to clothe himself with the character of administrator before he could file a bill", and said that "It was sufficient for all purposes that he should obtain the letters before the case was heard, as they, when obtained, related back to the death". He quoted as authority *Edinburgh Life Ass'ce Co.* v. *Allen* (1873), 19 Gr. 593. Finally, he gave effect to the equitable doctrine as opposed to that at law, as directed by s. 53(12) of the *Judicature Act*, R.S.O. 1887, c. 44. Ferguson J. agreed with the judgment of the Chancellor and expressed his opinion that: "It is not necessary that the administrator or administratrix should have letters of administration issued at the time the action was commenced."

In *Chard* v. *Rae* (1889), 18 O.R. 371, the plaintiff brought an action upon a judgment on a promissory note, but, at the time the action was commenced, the plaintiff was not the person primarily entitled to administer. It was held that the plaintiff had no status to bring the action. *Trice* v. *Robinson*, *supra*, was distinguished. Boyd C. referred to *Horner* v. *Horner* (1853), 23 L.J. Ch. 10, and the rule in equity that "It is enough for the plaintiff to obtain the letters before the case comes up for hearing to give her a right of suit", but he refused to extend the doctrine to a case where the person immediately entitled to obtain administration was not the one who brought the action.

In *Doyle* v. *Diamond Flint Glass Co.* (1904), 8 O.L.R. 499, the action was brought to recover damages for the death of a workman employed by the defendants owing to their alleged negligence. The plaintiff, his widow, obtained *pendente lite* letters of administration of the estate of the deceased. A Divisional Court (Boyd C. and Meredith and Anglin JJ.) followed *Trice*

v. *Robinson* and held that, if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action.

In *Dini* v. *Fauquier* (1904), 8 O.L.R. 712, a Divisional Court followed *Fell* v. *Lutwidge* (1740), Barn. Ch. 319, 27 E.R. 662, and considered *Trice* v. *Robinson* and *Doyle* v. *Diamond Flint Glass Co.* The judgment of Idington J. was reversed, and it was held (I quote the headnote) that: "Letters of Administration issued after action and before the trial, where the plaintiff brings his action as administrator, are sufficient to support the action, even where the plaintiff has no interest in the estate."

Johnson v. *Gen'l Accident Ass'ce Co.*, [1929] 1 D.L.R. 597, 63 O.L.R. 296, was decided by Wright J. The decision follows *Trice* v. *Robinson* and refers to *Dini* v. *Fauquier* and *Doyle* v. *Diamond Flint Glass Co., supra.* I observe, in passing, that it does not refer to *Chetty* v. *Chetty*, [1916] 1 A.C. 603. The action was brought upon an accident insurance policy before a grant of letters of administration to the plaintiff. The plaintiff did not specifically sue as administrator of the estate, but the learned trial Judge allowed an application to amend the proceedings so as to describe the plaintiff as administrator. The learned Judge quoted the words of the late Chancellor in *Doyle* v. *Callow* (1849), 12 Ir. Eq. R. 241 at p. 243, as follows: "There is abundant authority for this general proposition—that where a party files a bill with an equitable title at the time he does so, and afterwards clothes himself with a legal title not inconsistent with that, the latter has relation back, and the whole bill can be sustained."

It will be observed that in the foregoing cases the Court has not placed any limitation upon the scope of the doctrine of "relation back" of the title of the administrator from the time of the grant of letters of administration to the date of death Thus, Boyd C. stated in *Trice* v. *Robinson*, 16 O.R. at p. 436, that "It was sufficient *for all purposes* that he [a plaintiff] should obtain the letters before the case was heard". Likewise, full effect was given in those cases to the direction under the *Judicature Act* that in matters of conflict or variance between the rules of common law and the rules of equity, the rules of equity shall prevail. Those principles were accepted as applicable to all classes of cases, including actions by an administrator to recover damages under the *Trustee Act* and under the *Fatal Accidents Act.*

But in England the Courts have decided that the doctrine of "relation back" applies only to particular cases and that

the prevailing rule of equity cannot be invoked to give validity to an action of the kind now before this Court.

I refer first to *Meyappa Chetty* v. *Supramanian Chetty*, [1916] 1 A.C. 603. Lord Parker of Waddington points to the distinction between the title of an executor and that of an administrator, and says at pp. 608-9: "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: See Comyn's Digest, 'Administration,' B. 9 and 10; *Thompson* v. *Reynolds*, 3 C. & P. 123; *Woolley* v. *Clark*, 5 B. & Ald. 744."

In *Ingall* v. *Moran*, [1944] K.B. 160, the plaintiff issued a writ in an action brought by him under the *Law Reform (Miscellaneous Provisions) Act*, 1934, claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out letters of administration until nearly 2 months after the date of the writ. The plaintiff contended that, by the rules of equity, when letters of administration were granted the title of the administrator related back to the death of the intestate. The County Judge applied the doctrine of "relation back", but on appeal the Court held "that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of the 'relation back' of an administrator's title, on obtaining a grant of letters of administration to the date of the intestate's death could not be invoked so as to render the action competent".

Luxmoore L.J. discussed the doctrine of "relation back" and its origin. Goddard L.J. discussed *Fell* v. *Lutwidge, supra* which a Divisional court in this Province followed in *Dini* v. *Fauquier, supra.* He stated that in his opinion Lord Hardwicke did not mean in that case to lay down that in any Chancery suit it was open to a person to file a bill as administrator before he obtained a grant, and said: "If he did it is contrary to the latter authorities." He then referred to *Evans* v. *Bagshaw* (1870), L.R. 5 Ch. 340, and *Att'y-Gen'l* v. *Avon Corp.*

(1863), 3 De G. J. & S. 637, 46 E.R. 783, both suits in equity, directly in point, and he concluded that it was the plain duty of the Court to follow *Chetty* v. *Chetty, supra.*

He considered certain cases showing that when letters are granted, the title of the administrator relates back to the death, and said of them [p. 171]: "All these cases were administration suits or suits relating to the administration of estates. They show that actions brought by persons who would be beneficiaries in the administration are not defeated, either where the person entitled to obtain letters is plaintiff or where such a person is made a defendant, because a grant has not been made at the date of the writ. The action is brought to protect the estate."

In *Hilton* v. *Sutton Steam Laundry*, [1946] K.B. 65, the plaintiff, who was the sole dependent of her deceased husband, brought an action in an administrative capacity for damages under the *Fatal Accidents Act*, and also under the *Law Reform Miscellaneous (Provisions) Act*, 1934, in respect of his death. She had not, at the time when the writ was issued, taken out letters of administration. The Court applied *Ingall* v. *Moran, supra,* in respect of the claim under the *Law Reform Miscellaneous (Provisions) Act*, and also the claim under the *Fatal Accidents Act*. It was held that the writ was a nullity and was not validated by the subsequent grant of administration.

In *Fred Long & Son Ltd.* v. *Burgess*, [1950] 1 K.B. 115 at p. 121, Asquith L.J. accepted the view that the doctrine of "relation back" must not be applied save to protect the estate from wrongful injury occurring in the interval between death of the intestate and the grant of letters of administration.

Ingall v. *Moran* and *Hilton* v. *Sutton Steam Laundry, supra,* were applied in *Burns* v. *Campbell*, [1952] 1 K.B. 15. In *Stebbings* v. *Holst & Co.*, [1953] 1 All E.R. 925, counsel for the plaintiff agreed that, in respect of a claim for damages under the *Law Reform (Miscellaneous Provisions) Act*, 1934, the fact that at the time of issuing the writ letters of administration had not been taken out by the plaintiff made the writ a nullity. The claim in the action under the *Fatal Accidents Act* was maintained because the words "widow" and "administratrix" in the description of the plaintiff in the title simply described her personal status and did not declare the capacity in which she brought the action. *Ingall* v. *Moran* and *Hilton* v. *Sutton Steam Laundry, supra,* were followed in *Finnegan* v. *Cementation Co.*, [1953] 1 All E.R. 1130.

Counsel for the defendant referred the Court, lastly, to

Burlington v. *G.T.P.R. Co.*, [1923] 4 D.L.R. 334, a decision in the Court of Appeal for Saskatchewan in which it was held that an administrator has no right to issue a writ under the *Fatal Accidents Act* before the grant to him of letters of administration. *Doyle* v. *Diamond Flint Glass Co.* and *Dini* v. *Fauquier, supra,* were disapproved.

After the most careful consideration I can give to the important question in controversy, I have decided that I cannot follow the earlier decisions in this Province. I think the statement of Boyd C. in *Trice* v. *Robinson, supra,* that "It was sufficient for all purposes that he [a plaintiff] should obtain letters before the case was heard, as they . . . related back to the death", is too wide. The doctrine of "relation back" does not apply, in my opinion, to every case and is not available "for all purposes". It is my considered opinion that it is applicable only in cases where it is necessary to protect the estate in the interval between the death of the intestate and the grant of letters of administration.

When the deceased was injured by the defendant's motor vehicle a cause of action vested in him immediately. That cause of action did not pass on his death so as to become an asset of his estate. If it were not for s. 37 of the *Trustee Act* the maxim *actio personalis moritur cum persona* would have applied and the cause of action possessed by the deceased at the moment the accident happened, and thereafter, in his lifetime, would have ceased to exist at the time of his death. That section of the statute created a right of action in the administrator, but there is nothing in the section which made the right enforceable before the administrator obtained his letters of administration. The life of the right of action commenced when the administrator was appointed, and not before that time.

I hold, following the high authority of Lord Parker of Waddington in *Chetty* v. *Chetty*, [1916] 1 A.C. 603, and the subsequent cases in England to which I have referred, that an action under s. 37 of the *Trustee Act* for torts or injuries to the person of the deceased cannot be instituted by a person in the capacity of administrator before the grant of letters of administration. In accordance with that view I must conclude that the writ of summons and subsequent proceedings in the action, so far as they relate to a claim under the *Trustee Act*, are a nullity. The judgment of the Court below should be varied and, as varied, should provide that the action under the *Trustee Act* be dismissed. Counsel for the defendant did not raise the present point in defence of the claim at any stage of the proceed-

ings before the hearing in this Court, and while that fact is, of course, no answer to the objection now made, the defendant should not be allowed costs in the Court below.

While the action under the *Trustee Act* fails, in my opinion, for the reasons I have given, nevertheless, it is proper to state my views in respect of the argument that the quantum of damages assessed by the jury is excessive and unreasonable. The deceased suffered a dislocated nose and complained of pains in his abdomen and his back. An operation was performed on the day after the accident and he did not regain consciousness from that time until his death 4 days later. In my opinion the sum of $3,000 allowed by the jury for pain and suffering is so excessive as to require a new assessment. Counsel for both parties consented that, in such event, the Court should assess a proper sum. Acting on that consent, I would assess the damages for pain and suffering of the deceased at the sum of $500.

I turn now to the claim under the *Fatal Accidents Act*. If the plaintiff brought the action in the capacity of administrator, then it must fail for the same reasons I have given in respect of the branch of the action under the *Trustee Act*. If, however, on a fair construction of the style of cause and statement of claim, the action was brought by the plaintiff in his personal capacity to recover damages under the *Fatal Accidents Act*, for the death of his son, then no objection can succeed in respect of that branch of the case. The style of cause and the statement of claim leave much to be desired in clarity and do not, in my opinion, disclose clearly the capacity in which the plaintiff brings the action under the *Fatal Accidents Act*. Nevertheless, counsel for the defendant stated, generously I think, that the writ of summons and statement of claim could be read in such a way as to show that the plaintiff instituted the action in his personal capacity to recover damages under the *Fatal Accidents Act*. Therefore, I am willing to hold that the action is properly constituted in respect of that cause of action.

The jury omitted to allow any "general damages" for the death of the infant, and that omission is an error in law, and assessment of the loss of pecuniary expectation of the persons entitled under the *Fatal Accidents Act* should have been made by the jury. Counsel for both parties consented that this Court should now assess those damages. I would allow the sum of $500, together with the sum of $250 for funeral expenses. I point out that the persons entitled under the statute do not include the brothers and sisters of the deceased, and the claim for those persons, as made in the statement of claim, fails.

The judgment in appeal should be varied and, as varied, should provide for recovery by the plaintiff on behalf of the persons entitled under the *Fatal Accidents Act*, who are the plaintiff and his wife, the sum of $225, being 30% of the total damages suffered by reason of the death of the deceased. I would allow the plaintiff the costs of the action in respect of the claim under the *Fatal Accidents Act* on the County Court scale, without set-off.

I would allow the parties to make the amendments set forth in their respective notice of motion before this Court.

The success in this Court is divided and, in the circumstances, I would allow no costs to either party.

Appeal allowed respecting claim under Trustee Act; cross-appeal allowed respecting assessment of damages under Fatal Accidents Act.

THE QUEEN EX REL. F. W. WOOLWORTH CO. LTD. AND SLABICK et al. v. LABOUR RELATIONS BOARD OF SASKATCHEWAN

Saskatchewan Court of Appeal, Martin C.J.S., Gordon, Procter, McNiven and Culliton JJ.A. May 31, 1954.

Administrative Law — Labour Organizations III E, VIII B — Mandamus I A — Decertification application of employees dismissed by Labour Board — Finding application by employees in form only — Finding that majority support of Union not gone — Mandamus by employees and employer — Whether Board acted on extraneous considerations — Whether mandamus appropriate — Standing of employer to bring mandamus — Trade Union Act (Sask.)—

A Trade Union was certified as bargaining agent of employees of a retail store under the *Trade Union Act*, now R.S.S. 1953, c. 259, but the parties were unable to conclude an agreement, a strike occurred and on a number of occasions complaints against the employer and its agents of unfair labour practices were established before the Labour Relations Board (Sask.). Subsequently twelve of the store's eighteen employees applied to the Board for decertification of the Trade Union, pursuant to the power of the Board under s. 5(*i*) to make orders rescinding or amending any previous order. Notice was given to the employer, and, after a hearing at which the applicant employees, the certified Union and the employer were represented, the Board (by a majority) dismissed the application on the ground that it was made in form only by the employees (being really inspired by the employer) and that, moreover, it was not established that the certified Union had lost its majority support in that the applicants were not in fact a majority of the employees. Thereupon the unsuccessful applicants and the employer moved for *mandamus* directing the Labour Board to act under s. 5(*i*) to rescind the certification order and alleging that its refusal to do so was based on extraneous matters and on bias. *Held*, by a majority,

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TREASURER OF ONTARIO v. OYLE et al.

Cartwright J.

deceased; and it is contended by the appellant that while Carr Hatch had "a" beneficial interest in the shares from which the income was derived he did not have "the" beneficial interest. It is argued that there are outstanding beneficial interests in the shares in the person or persons, as yet unascertainable, who will become entitled to the shares on the death of Carr Hatch. If this argument is accepted it would seem to follow that the exclusion in cl. (iv) of s. 1 (*f*) could operate only where the recipient of income under a trust was exclusively entitled to the whole of the corpus from which the income was derived, in which case he could demand the immediate transfer of the corpus, although he might as a matter of convenience leave it in the hands of the trustee. It is difficult to suppose that the Legislature intended to provide for so unusual a situation. In ordinary speech I think that where realty or personalty is settled on A for life with remainders over on his death it may be said that during his life A has the beneficial interest in the settled property. In the case at bar, so long as Carr Hatch lives no one else has any beneficial interest in possession in the shares nor has anyone else any vested beneficial interest in them. The exclusion is, in my opinion, intended to operate where the recipient of income derived from trust property has such beneficial interest in the property as to give him the absolute right to be paid the income. So long as he lives Carr Hatch has such absolute right.

It appears to me that to construe the exclusion as inapplicable to the facts of the case at bar would be virtually to deprive it of all meaning; and that to construe it as applicable will give effect to the apparent intention of the Legislature to avoid double taxation.

For these reasons I am in agreement with the conclusion reached by the Courts below on the second question also.

It follows that I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: W. D. Blair, Toronto.

Solicitors for the respondents other than the Official Guardian: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

DOUGLAS McELLISTRUM, both personally and as administrator of the estate of Douglas Craig McEllistrum, deceased (*Plaintiff*) ..... APPELLANT;

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*June 19, 20
*Oct. 2

AND

ARCHIE JAMES ETCHES (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Contributory negligence—Child of tender years—Rule to be applied.

It cannot be laid down as a general rule that a child of 6 years is never to be charged with contributory negligence. Dictum of Trueman J.A. in *Byers v. Gillis & Warren Limited* (1940), 48 Man. R. 164, disapproved. The proper rule is that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. *Mercer et al. v. Gray*, [1941] O.R. 127, approved.

Executors and administrators—Right to bring action in representative capacity—Action instituted before grant of administration—Other circumstances—The Trustee Act, R.S.O. 1950, c. 400, s. 37.

The plaintiff sued for damages arising out of the death of his infant son, claiming both personally, under *The Fatal Accidents Act*, and as administrator of his son's estate, under s. 37 of *The Trustee Act*. The action was commenced some two weeks before the grant of letters of administration to the plaintiff, and the Court of Appeal held that this fact was fatal to the claim under *The Trustee Act*, since an administrator had no status to sue until after his appointment.

Held: The judgment should be reversed in this respect. Assuming, but not deciding, that in Ontario an action under s. 37 of *The Trustee Act* could not be instituted by a person in the capacity of administrator before the grant of letters of administration to him, the writ in this action was nevertheless not void *in toto*, since the plaintiff admittedly asserted in it a valid claim under *The Fatal Accidents Act*. No period of limitation had expired when it came to the attention of the trial judge that letters of administration had not been granted until after the issue of the writ, and it would therefore have been open to him at that stage to order that the plaintiff, in his capacity of administrator, be added as a party plaintiff. The reason that no steps were taken at that time to regularize the matter was that counsel for the defendant made it plain that he was not raising the point that the action was improperly constituted. In these circumstances he should not now be heard to object on that ground, and the plaintiff should have judgment on this branch of the case.

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*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

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McELLISTRUM v. ETCHES

APPEAL from the judgment of the Court of Appeal for Ontario (1), varying the judgment at trial. Appeal allowed in part.

P. J. Bolsby, Q.C., for the plaintiff, appellant.

W. B. Williston, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Ontario the plaintiff in this action appeals from a judgment of that Court (1) which had varied the judgment at the trial held before a judge and jury. The plaintiff is Douglas McEllistrum in his personal capacity and as administrator of the estate of his infant son. It would appear that leave was given in order that this Court might pass upon the question as to whether an action for damages under s. 37 of *The Trustee Act*, R.S.O. 1950, c. 400, was properly brought by the father who, at the date of the issue of the writ, had not been appointed administrator. However, in order to appreciate various other questions raised by the appellant, it is necessary to set out in some detail the occurrence which gave rise to the action and some of the proceedings therein.

On March 3, 1953, the infant, who had just reached the age of 6 years, accompanied by a younger boy was walking westerly on the north side of McNaughton Avenue in the township of Chatham. Undoubtedly he moved from that position, which was a safe one, to the travelled portion of the highway and was struck by the defendant's motor vehicle which was also travelling westerly. His injuries consisted of a fractured or displaced nose, severe welts on his back, general bruises and internal injuries including a rupture of the spleen which was described as being an extremely painful injury. After removal to the hospital, he was kept under observation and about 10.30 on the next morning his condition began to worsen. About 1.30 p.m. the ruptured spleen was removed and from that time he remained unconscious except for response to deep or painful stimulus. He died on March 8, 1953.

(1) [1954] O.R. 814, [1954] 4 D.L.R. 350.

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The writ was issued September 8, 1953; the statement of claim was delivered September 15, 1953, and in para. 1 thereof it was alleged that the plaintiff was the administrator of the estate and effects of the infant. In fact the plaintiff was not appointed administrator until September 25, 1953, but in its defence delivered September 26, 1953, the defendant admitted the allegation contained in the statement of claim. At the trial when the letters of administration were filed as an exhibit the following occurred:—

HIS LORDSHIP: What is the date of the letters of administration?

Mr. BOLSBY [counsel for the plaintiff]: The date of the granting of the letters of administration is the 28th [*sic*] of September, 1953.

Mr. THOMPSON [counsel for the defendant]: On that particular point, I do not know what significance it has but this action was started by the plaintiff who is the administrator some considerable time before and before letters of administration were obtained.

HIS LORDSHIP: The writ was issued the 8th of September?

Mr. BOLSBY: The date of death was the 8th of March, 1953, the granting of the letters of administration was the 25th of September, 1953.

HIS LORDSHIP: And the writ was issued on the 8th of September?

Mr. BOLSBY: That is correct, my Lord, the application was then before the Court. I will deal with any legal arguments in due course.

HIS LORDSHIP: There is nothing in the defence about it?

Mr. THOMPSON: No, I do not think it is significant anyway.

Mr. BOLSBY: Then why fight about it?

At the conclusion of the plaintiff's case which included the reading of extracts from the examination for discovery of the defendant, the latter called no evidence. Although the statement of defence contained no allegation of contributory negligence on the part of the infant, presumably counsel on each side dealt with the matter and undoubtedly the trial judge did so. The questions submitted to the jury and the answers are as follows:—

1. Has the defendant Etches satisfied you that the accident was not caused by any negligence or improper conduct on his part? Answer "Yes" or "No". Answer: No.

2. Was there any negligence on the part of the deceased Douglas Craig McEllistrum which caused or contributed to the accident? Answer "Yes" or "No". Answer: Yes.

3. If your answer to Question No. 2 is "Yes", then state fully of what the negligence of the deceased Douglas Craig McEllistrum consisted? Answer fully: The deceased Douglas Craig McEllistrum was negligent in that he darted into the path of the oncoming vehicle.

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4. If your answer to Question No. 1 is "No", and your answer to Question No. 2 is "Yes", state in percentages the degree of fault or negligence attributable to each.

Deceased Douglas Craig McEllistrum 70%
Defendant Etches 30%
Total 100%

5. Irrespective of how you answer the other questions, at what amount do you assess the total damages sustained by the plaintiff, Douglas McEllistrum?

(a) Out of pocket expenses ..... $ 720.69
(b) Under Trustee's Act for Pain and Suffering 3,000.00
(c) Under the Fatal Accident's Act
(1) Funeral expenses 250.00
(2) General damages ..... Nil

Upon these answers, judgment was entered against the defendant for $1,191.21 made up as follows: For the plaintiff in his personal capacity, $216.21 (being 30 per cent. of the amount fixed by the jury for out-of-pocket expenses); for the plaintiff as administrator, $975. In view of the jury having assessed the total damages under *The Fatal Accidents Act*, R.S.O. 1950, c. 132, at $250 (the limit fixed by statute for funeral expenses) and in view of the finding of negligence on the part of the infant to the extent of 70 per cent., the trial judge directed that $75 be paid to the plaintiff in his personal capacity under that heading. The plaintiff was given his costs.

The defendant appealed to the Court of Appeal asking that the judgment be varied by re-assessing the quantum of the damages allowed the plaintiff under *The Trustee Act*, or that a new trial be ordered for the purpose of re-assessing such damages on the ground that the amount awarded was excessive and unreasonable and against the evidence and the weight of evidence. The plaintiff cross-appealed. By its first reasons the Court of Appeal directed that the judgment at the trial be varied and that the plaintiff personally recover from the defendant the sum of $216.21; that the claim of the plaintiff as administrator under *The Trustee Act* be dismissed without costs; that the plaintiff recover from the defendant $225 apportioned equally between him and his wife; and that the costs of the action in respect of the claim under *The Fatal Accidents Act* be paid by the defendant to the plaintiff on the scale of the County Court without a set-off. In his notice of cross-appeal the plaintiff

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did not clearly say anything about the absence of any plea of contributory negligence but later he served a notice of motion for leave to amend his original notice by raising the point, whereupon the defendant moved that in the event of the Court granting that permission to the plaintiff, he, the defendant, should be given leave to amend his statement of defence by adding a paragraph alleging such contributory negligence. Both of these motions were granted by the Court of Appeal and objection is taken to the action of the Court in permitting the defendant to raise such a plea at that late date. In view of the course of the trial this Court will not interfere with the discretion of the Court of Appeal.

After the reasons for judgment of the Court of Appeal had been delivered the defendant moved to alter the minutes as settled by the Registrar on the ground that he had paid $1,000 into court in satisfaction of the plaintiff's claim at the time of the delivery of its defence, September 26, 1953. Upon that being brought to the attention of the Court of Appeal the direction as to costs was varied and the formal order provides that the costs of the action until payment into court should be paid on the scale of the County Court by the defendant to the plaintiff and that the costs after payment into court should be paid by the plaintiff to the defendant on the same scale. It was argued that the notice of payment into court did not comply with Rule 310 of the Ontario Rules of Practice and Procedure because, without any order of the Court, it did not specify the claim or cause or causes of action in respect of which payment was made and the sum paid in respect of each claim or cause of action. This question should have been raised at the time and it cannot now be said that the money was not properly paid into court.

There is no basis for the plaintiff's complaint of that part of the trial judge's charge to the jury where he instructed them that, if they considered the boy had "darted" into the path of the defendant's automobile, they might find that he had been guilty of contributory negligence, because whatever expressions were used in evidence, that was not an inappropriate manner of describing the infant's action. Extracts from the examination for discovery of the defendant having been put in as part of the plaintiff's case, there was no obligation on the trial judge to refer in detail to

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what there appeared. In his address to the jury counsel for the plaintiff had referred a number of times to the fact that the defendant had not gone into the witness-box or called any evidence. As to this, the trial judge directed the jury:—

> Do not infer anything from that one way or the other; do not infer any liability against him or give him the benefit of anything by reason of his failure to go into the witness-box. It is quite proper in the course of a trial and it is not unusual for a defendant not to put in evidence. There is nothing unusual about that. Very often they do but you should not let that influence you in any way any more than you will allow the fact that the plaintiff called a great number of witnesses to weigh in his favour or against him. If you just consider the evidence that was given by the witnesses as they gave their testimony and the exhibits then you will not go far wrong.

Bearing in mind that throughout his charge he made it abundantly clear that the onus throughout was on the defendant no fault may be found with the extract quoted.

It is agreed that the trial judge had before him the decision of the Ontario Court of Appeal in *Mercer et al. v. Gray* (1) that it is a question for the jury whether an infant such as the one here in question was guilty of contributory negligence. There is nothing inconsistent with that rule and the judgment of this Court in *T. Eaton Co. v. Sangster* (2) where the Court, without calling upon counsel for the other side, dismissed an appeal from the judgment of the Court of Appeal for Ontario (3) affirming a judgment at trial, from the report of which it appears that the child there in question was 2½ years of age. Nor is it inconsistent with the decision in *Hudson's Bay Company v. Wyrzykowski* (4). According to the report in this Court the child was 4 years of age while in the Manitoba Reports the age is stated to be 3½ years. In *Eyers v. Gillis & Warren Limited* (5), the Court of Appeal for Manitoba held that a girl of 6 years could not be guilty of contributory negligence. Whether the result arrived at in that case can be justified is not before us, but the statement of Trueman J.A., speaking on behalf of the Court, at p. 168, that it was well established "that a person of her tender age and inexperience cannot be charged with contributory negligence" must be taken to be inaccurate. The judgment of Duff J. in *The Winnipeg Electric Railway Company v. Wald* (1), relied on by Trueman J.A., does not decide the question as to whether a child of 6 years of age is accountable for contributory negligence; in fact he left it open and Girouard and Davies JJ. agreed with him. Idington J. did so hold, but it should be noted that the judgment of Ferguson J. in *Ricketts et al. v. The Village of Markdale* (2), referred to by him, did not settle the point because, as appears at p. 623, Ferguson J. was of opinion that contributory negligence on the part of a boy under 7 years of age had not been made to appear. The matter is mentioned but not decided in *Joseph v. Swallow and Ariell Proprietary Limited* (3), where there is a reference to Beven on Negligence. The present view of the law is summarized by Glanville L. Williams in his work on Joint Torts and Contributory Negligence, 1951, s. 89, p. 355. It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience. In the present case the trial judge so charged the jury.

The Court of Appeal considered that under the circumstances the amount allowed under *The Trustee Act* was so grossly excessive that it should be set aside. Counsel for both parties had agreed that in that event that Court should fix the damages rather than have a new trial, although Mr. Bolsby stated that his consent had been given on the condition that the infant would not be charged with contributory negligence. The Court of Appeal would have awarded $500 under that heading if it had not concluded that the plaintiff was not entitled to anything because he was not administrator of the infant's estate at the date of the issue of the writ. We agree with the Court of Appeal that the jury's estimate was grossly excessive and counsel

(1) [1941] O.R. 127, [1941] 3 D.L.R. 564.

(2) (1895), 24 S.C.R. 708.

(3) (1894), 21 O.A.R. 624, affirming 25 O.R. 78.

(4) [1938] S.C.R. 278, [1938] 3 D.L.R. 1, affirming 44 Man. R. 266, [1936] 2 W.W.R. 650, [1936] 4 D.L.R. 208.

(5) 48 Man. R. 164, [1940] 3 W.W.R. 390, [1940] 4 D.L.R. 747.

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(1) (1909), 41 S.C.R. 431 at 443. (2) (1900), 31 O.R. 610.

(3) (1933), 49 C.L.R. 578 at 585-6.

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for both parties agreed that we should fix the damages and we see no reason to disagree with the amount mentioned by the Court of Appeal.

In view of the course of the trial, it is not necessary to decide whether the writ of summons so far as it related to the cause of action under *The Trustee Act* asserted by the plaintiff in the character of administrator was a nullity. Assuming without deciding that, in Ontario, an action under s. 37 of *The Trustee Act* for damages for a tort for personal injury caused to a deceased cannot be instituted by a person in the capacity of administrator before the grant of letters of administration and that in an action so commenced where no other claim is asserted the writ would be a nullity, it will be observed that in the case at bar the writ admittedly asserted a valid claim by the plaintiff in his personal capacity for damages under *The Fatal Accidents Act*. The writ therefore was not null *in toto*. It follows that when it was brought to the attention of the learned trial judge, on October 26, 1953, that letters of administration had not been granted to the plaintiff until after the issue of the writ it would have been open to him, on the view that so far as the writ related to the claim made *qua* administrator it was void, to order that the appellant in his capacity of administrator be then added as a party plaintiff. At that time no period of limitation had intervened, and the reason that the necessary steps to regularize the matter were not taken was that counsel for the respondent made it plain that he was not raising the point that the action was improperly constituted. Under these circumstances the respondent ought not to be heard to object in an appellate Court, and judgment on the cause of action under *The Trustee Act* should be entered for $150, that is, 30 per cent. of $500. In fact counsel for the respondent did not seek to insist on the point and by letters written after the judgment in the Court of Appeal and again on the argument in this Court offered to submit to judgment for $150 on this cause of action.

The appeal should be allowed in part and para. 1 of the formal order of the Court of Appeal, dated November 26, 1954, which embodies the terms of the judgment at the

trial as varied by the Court of Appeal, should be amended by striking out cl. (2) and inserting in lieu thereof the following:—

(2) This Court doth further order and adjudge that the plaintiff recover from the defendant as damages under The Trustee Act the sum of $150.00.

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The costs before the Court of Appeal will be as directed by that Court. Under all the circumstances there should be no costs in this Court.

Appeal allowed in part.

Solicitor for the plaintiff, appellant: P. J. Bolsby, Toronto.

Solicitor for the defendant, respondent: Donald G. E. Thompson, London.

DAME WINIFRED BEAUVAIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1956

*June 21

*Oct. 2

ON APPEAL FROM THE COURT OF QUEEN'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC

Criminal Law—Trials by magistrates for indictable offences—Sufficiency of information and complaint without formal indictment—The Criminal Code, 1953-54 (Can.), c. 51, ss. 467, 478.

Where an accused is brought before a magistrate charged with an indictable offence that is within the magistrate's absolute jurisdiction to try, there is no necessity for the preparation of an indictment. The magistrate's jurisdiction is absolute and does not depend upon the consent of the accused, under s. 467 of the *Criminal Code*, where the accused is "charged in an information", and s. 478, requiring the preparation of an indictment in Form 4, applies only where the accused has elected under s. 450, 468 or 475 to be tried by a judge without a jury. *Ship v. The King* (1949), 95 C.C.C. 143 at 150, approved.

While it is true that criminal prosecutions must be conducted in the name of the Crown, and not in that of the informant, this requirement is sufficiently satisfied if the information is headed "Au Nom de Sa Majesté la Reine".

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Nolan JJ.

C. A.

1943

Oct. 26, 27, 28; Dec. 10.

INGALL *v.* MORAN.

Administration—Action by administrator—Writ issued by administrator before grant of letters of administration—Title of plaintiff to sue—Doctrine of relation back.

The plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administrator of his son's estate, but he did not take out letters of administration until nearly two months after the date of the writ:—

Held, that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death could not be invoked so as to render the action competent.

APPEAL from Croydon county court.

On September 19, 1941, the son of the plaintiff was riding a motor cycle combination along the highway, when he was killed in an accident caused by the negligence of the defendant, a Canadian soldier, who was driving a lorry owned by the Canadian government. On September 17, 1942, the plaintiff issued the writ in the present action, as administrator of his son's estate, against the defendant, under the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff did not take out letters of administration until November 13, 1942. The defendant contended that, as the plaintiff at the time when the writ was issued was not the administrator of his son's estate, he had no title to sue, and the action would not lie. He further contended that, even if the action was properly constituted by the grant of letters of administration in November, 1942, it was barred by s. 21, sub-s. 1, of the Limitation Act, 1939 (1). It was admitted before the county court judge that the defendant was entitled to the protection of the Public Authorities Protection Act, but the plaintiff contended that by the rules of equity when letters of administration were granted, the title of the administrator related back to the death of the intestate. The county court judge applied the doctrine of "relation back," found for the plaintiff,

(1) Limitation Act, 1939, s. 21, sub-s. 1: "No action shall be "brought against any person for "any act done in pursuance, or "execution, or intended execu- "tion . . . . of any public duty "or authority, or in respect of "any neglect or default in the "execution of any such . . . . "duty or authority unless it is "commenced before the expiration "of one year from the date on which "the cause of action accrued."

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and awarded him 494*l*. 8*s*. 6*d*. damages. The defendant appealed.

Havers K.C. and *B. Reece* for the defendant. The decision of the county court judge was wrong. There is a wide distinction between the position of an executor and that of an administrator. An executor derives his title from the will of the deceased, and he is allowed to bring his action for the benefit of the estate of the deceased before the will is proved, but he must be able to produce probate of the will before judgment is given. An administrator derives his title from the grant of the letters of administration, and cannot take proceedings in the administration until he has obtained a grant. Holt C.J. said in *Martin* v. *Fuller* (1): In case of an executor, if he hath the probate at the time when he declares, it is well; but it is otherwise in the case of an administration. See also *Wankford* v. *Wankford* (2), where Powys J. said, "but an "administrator cannot act before letters of administration "granted to him." Lord Parker in delivering the advice of the Judicial Committee of the Privy Council in *Meyappa Chetty* v. *Supramanian Chetty* (3) said: "It is quite clear that "an executor derives his title and authority from the will of "his testator and not from any grant of probate. The personal "property of the testator, including all rights of action, vests "in him upon the testator's death, and the consequence is "that he can institute an action in the character of executor "before he proves the will. He cannot, it is true, obtain a "decree before probate, but this is not because his title depends "on probate, but because the production of probate is the "only way in which, by the rules of the court, he is allowed to "prove his title. An administrator, on the other hand, derives "his title solely under his grant, and cannot, therefore, institute "an action as administrator before he gets his grant. The "law on the point is well settled." Phillimore J., on this ground, set aside a judgment in *Tattersall* v. *Ashworth* (4), which had been obtained under Or. XIV on a writ issued by a person suing as administrator before grant of letters of administration, and gave unconditional leave to defend, although between the issue of the writ and the order for judgment the plaintiff had obtained the grant of administration.

(1) (1695) Comberbach's Rep. 371.
(2) (1698) 1 Salkeld 299, 301.
(3) [1916] 1 A. C. 603, 608.
(4) (1903) unreported; see Annual Practice for 1943, p. 182.

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In *Creed* v. *Creed* (1) where a plaintiff had obtained a grant of administration and commenced an action as administrator, when in point of fact there was a will, it was held that the plaintiff's letters of administration were void ab initio, and that the plaintiff had no title to sue when the action was brought: see also Williams on Executors (12th ed.), vol. 1, p. 272. The estate of the deceased in the present case, including the right of action in respect of his death, was, until the grant of letters of administration, vested in the President of the Probate, Divorce and Admiralty Division of the High Court and not in the plaintiff. The writ, therefore, was issued when the plaintiff had no title and no right to sue. There is a difference in practice between the chancery and common law courts on this point. In the King's Bench Division the court will not allow an administration action to be brought until there has been a grant of letters of administration. The practice of the chancery courts cannot extend so as to deprive a defendant of a right which he possesses under a statute of limitations. [*Fell* v. *Lutwidge* (2); *Humphreys* v. *Humphreys* (3); *Horner* v. *Horner* (4); *Mabro* v. *Eagle, Star & British Dominions Insurance Co.* (5); *Evans* v. *Bagshaw* (6); *Attorney-General* v. *Corporation of Avon* (7); *Weldon* v. *Neal* (8); and *Hudson* v. *Fernyhough* (9) were also cited.]

Samuels K.C. and *Bassett* for the plaintiff. When letters of administration are granted, they relate back to the time of the death of the intestate: *Long* v. *Hebb* (10); *Anon.* (11); and, therefore, the action brought by the plaintiff as administrator was properly brought: *Fell* v. *Lutwidge* (2). In equity it is sufficient if letters of administration are obtained after the issue of the writ, but before the trial of the action, although such an action would not be good at common law. [GODDARD L.J. The writ was endorsed as being issued by the plaintiff in a representative capacity at a time when he had no representative capacity, and therefore the writ could have been struck out.] Lord Parker of Waddington said in *Meyappa Chetty* v. *Supramanian Chetty* (12): "But a cause of

(1) [1913] 1 I. R. 48.
(2) (1740) 2 Atk. 120.
(3) (1734) 3 P. Wms. 349, 351.
(4) (1853) 23 L. J. (Ch.) 10.
(5) [1932] 1 K. B. 485.
(6) (1870) L. R. 5 Ch. 340.
(7) (1863) 3 De G. J. & S. 637.
(8) (1887) 19 Q. B. D. 394.
(9) (1889) 61 L. T. 722.
(10) (1652) Styles, 341.
(11) (1697) Comberbach 451.
(12) [1916] 1 A. C. at p. 610.

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"action does not accrue unless there be someone who can "institute the action. In the case of a cause of action arising "in favour of the estate of a deceased person at or after his "death, time will at once begin to run, if there be an executor, "even though probate has not been obtained . . . .; but if "there be no executor time will run only from the actual grant "of letters of administration." Therefore in the present case time would not run until after the grant of the letters of administration to the plaintiff. In the Chancery Division an administrator's title is treated as relating back to the intestate's death in order to safeguard the estate against injury before the administrator's title is perfected. It is submitted that the same principle should be applied in the King's Bench Division. [*Foster* v. *Bates* (1) was also referred to.]

Cur. adv. vult.

Dec. 10. The following judgments were read.

SCOTT L.J. This remitted action was brought by a father, suing in the representative capacity of administrator to his son's estate, for damages recoverable under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of his son, age twenty, in a motor accident on September 19, 1941, by reason of the defendant's negligence. His Honour Judge Hurst gave judgment for the plaintiff for 494*l.* 8*s.* 6*d.*—as to 450*l.* for general damages for loss of expectation of life, and for the balance as special damages. Before us there was no appeal on the issue of death through the defendant's negligence, but the defence raised two pleas which were fully argued—(1.) that the action was never properly constituted in that while it purported to be a representative action by the plaintiff as administrator, by writ issued on September 17, 1942, in fact the grant of letters of administration was only on November 13 following; and (2.), alternatively, that even if the action ever became well constituted by the grant in November, that was too late, as it was not "commenced" within the statutory period of twelve months from the accrual of the cause of action, as required by the Limitation Act, 1939, s. 21. The plaintiff sought to answer both pleas by the contention that the plaintiff's title "related back" to the death of the intestate.

Many cases were cited to us in argument, and I have read

(1) (1843) 12 M. & W. 226.

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and agree with my brother Goddard's review of them, but I think a preliminary analysis of the legal questions arising for our determination may help in defining the precise relevance of those cases. The cause of action arose, and was vested in the deceased lad, at the moment when he was injured, and the measure of his damages included fair compensation for such loss of expectation of life as was caused to him by the defendant's tort. That chose in action was his. To it the common law maxim "Actio personalis moritur cum persona" would have applied on his death but for the Act of 1934 which caused it to survive. If he had left a will, it would at the moment of his death automatically have vested in his executor. As he died intestate, it vested in the President of the Probate, Divorce and Admiralty Division, and remained in him until letters of administration were issued. Then—and not before—it would automatically pass from the President to the administrator. As the writ was issued on September 17, 1942, and there was no grant till November, it follows, necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator. It purported to launch a representative action under Or. III, r. 4—an action in which he confessed, first, that he was not suing in his own right, and, secondly, that he had no right in that action to prosecute any claim except in his representative capacity. The defendant could have demanded production of the non-existent letters of administration, and on the plaintiff's failure to produce them the action would, on the defendant's application, automatically have been struck out. Such an action was, in my opinion, incapable of conversion by amendment into a valid action—just as much so as if he had issued a personal writ claiming to be lawfully possessed of the estate of the deceased and had subsequently asked leave to amend by substituting a representative claim. It is true that when he got his title by the grant of administration he prima facie became entitled to sue, and could then have issued a new writ, but that was all. An application by him to treat the original writ of September 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ

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was, in truth, incurably a nullity. It was born dead, and could not be revived. If that conclusion is right it follows equally that the statement of claim was not delivered in any action recognized by the Rules of the Supreme Court, and all subsequent proceedings in the supposed action, including the judgment of the learned county court judge, were likewise nugatory, for, if the action and the pleadings were bad, there was no valid action before the learned judge to try and it is our duty to say so.

The plea of a statutory limitation of twelve months is really an alternative plea. If the action was never a valid action there was and could be no valid judgment in favour of the plaintiff, and the plea of the statute was superfluous. It is only if possession by the plaintiff of representative capacity at the time of delivery of the statement of claim is sufficient to satisfy the statute, that the second plea of the defendant calls for decision. On both pleas the plaintiff had to rely, by way of replication, on the doctrine of "relation back," which, it was contended, cured the invalidity which affected the plaintiff's right of action when he issued his writ, as from the moment when he became administrator, and then gave validity even to the writ, or, alternatively, if it did not cure the defect in the writ, gave validity to the action as from the date of the grant and entitled the plaintiff to say that his action was "commenced," at latest, when he delivered the statement of claim on November 18, five days after the grant of administration. I assume for this purpose that the act of negligence which caused the death was one within the category defined in s. 1 of the Public Authorities Protection Act, 1893, and s. 21, sub-s. 1, of the Limitation Act, 1939, so that, by the combined effect of the two, the action would be barred if not "commenced before the expiration of one year from the date "when the cause of action accrued"; i.e., before September 20, 1942. Whether it is open to the plaintiff, as respondent in this court, to contend that the Public Authorities Protection Act has on the facts in evidence no application, I will consider presently.

There is one small difference of language in the above mentioned two statutes which should perhaps be mentioned. While the Act of 1893 speaks of "any action, prosecution or "other proceedings," the Act of 1939 speaks only of an "action." I do not think the words "any other proceeding" can have any relevance to this appeal. We are only concerned

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with the barring of a right of action. The point to which I refer depends on the meaning of the word "action." The plaintiff contends that the invalidity of the writ is not fatal, as the grant of letters on November 13 saved the statement of claim from being defective as a statement of claim, but that hypothesis does not make the action valid, for, so far as the present appeal is concerned, by the definition of s. 225 of the Judicature Act, 1925, the word "action" means a civil proceeding commenced by writ. It is, therefore, just as impossible for the plaintiff to contend that he "commenced" his action when he delivered his statement of claim, as it is for him to contend that he commenced his action by a valid and effective writ. It follows that on the issue raised by each plea he is driven to the same replication, viz., the doctrine of "relation "back," but, in my opinion, that doctrine does not help him on either plea. If the writ was bad when issued, the action was never commenced. The learned judge was in error in speaking of the issue of the writ as being a question of fact and not law, and no doctrine of relation back could give reality to a statement of claim not preceded by a duly issued writ. Finally, once September 19, 1942, had passed without a writ duly issued by a duly qualified administrator, the cause of action was barred, and could not be resurrected. The words of Scrutton L.J., in *Mabro* v. *Eagle, &c., Co.* (1), are directly in point: "In my experience the court has always refused to "allow a party or a cause of action to be added where, if it "were allowed, the defence of the Statute of Limitations would "be defeated. The court has never treated it as just to deprive "a defendant of a legal defence. If the facts show either "that the particular plaintiff or the new cause of action "sought to be added are barred, I am unable to understand "how it is possible for the court to disregard the statute." The plaintiff there, in answer to a plea of the Statute of Limitation, sought to add an administrator as plaintiff after the statutory time had run out.

On the doctrine of "relation back" and its origin in equity, I have nothing to add to the judgment of Luxmoore L.J., which explains the true position with such admirable clearness. It follows that the doctrine has no application in the present appeal. A faint attempt was made before us, on behalf of the plaintiff, to raise a contention which had been expressly disclaimed in the court below. It was that the Act had no

(1) [1932] 1. K. B. at p. 487.

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application because the driver of the lorry which caused the death was in the employ of the Canadian government, and that government was not a "public authority" within the British Act. It would be wrong to allow such a point to be taken for the first time in the Court of Appeal, especially after it had been expressly conceded below that the Act did apply. I express no opinion on the point. The appeal must be allowed, the judgment below set aside with costs here and below, the latter on scale "C."

LUXMOORE L.J. [after stating the facts]. Apart from the denial of negligence the defendant alleged that the plaintiff's claim was barred by s. 21, sub-s. 1, of the Limitation Act, 1939. At the trial it was conceded on behalf of the plaintiff that the section referred to applied because the defendant was driving his lorry in pursuance of a public duty. There was no argument on this point, either in the court below or in this court, and I therefore proceed on the footing that the concession was rightly made. The effect of the statutory provisions referred to, so far as they affect the present case, is that no action can lie "unless it is commenced" within twelve months next after September 19, 1941, i.e., before September 20, 1942. On behalf of the plaintiff it was urged that, although he was not, in fact, the administrator of the deceased's estate when the writ was issued, the subsequent grant perfected the plaintiff's title and related back to the death of the deceased. The judge below accepted this argument, and upheld the plaintiff's claim, and, consequently, rejected the defendant's contention that the action was incompetent and the claim statute barred.

The defendant has appealed to this court, and the only question arising in the appeal is whether the doctrine of relation back, which is well established in respect of an administrator's title to a deceased's estate, has any application to the status of a plaintiff who can only sue in a representative capacity in an action started before the grant of letters of administration. It is, I think, well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate

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before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor. If any authority for this is required it is to be found in the judgment of Lord Parker in *Chetty* v. *Chetty* (1). An administrator is, of course, in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate, including all choses in action, vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ. Lord Parker, in the case to which I have already referred, states this to be the law in the plainest terms. The defendant in the court below referred to an unreported case (*Tattersall* v. *Ashworth*) (2) heard by Phillimore J. in King's Bench chambers, which is cited in the Annual Practice for 1943, at page 182, and also in the Yearly Practice for 1940, at page 14. The relevant passage in the Annual Practice is as follows: "An executor is entitled to sue in the High "Court before obtaining probate, he being named in the "will as executor, and the grant of probate being only a com- "pletion of his title. But an administrator is not entitled "to sue in King's Bench Division until administration is "granted, for until such grant there is no certainty that there "is an intestacy, nor that if there is an intestacy any "particular person will be administrator. On this ground "judgment under Or. 14 on a writ issued by a person suing "as administrator before grant of letters of administration, "was set aside with costs, and unconditional leave to defend "given; although between the issue of the writ and the order "for judgment the Plaintiff had obtained the grant of "administration (*Tattersall* v. *Ashworth* (unreported), "Phillimore J., in chambers, July 2, 1903). In Chancery "Division an administrator may sue before grant of adminis- "tration, provided that letters of administration are produced "at the hearing." A statement to the same effect appears in the Yearly Practice, but there a doubt is raised whether an administrator is not now entitled to sue before grant, even in the King's Bench Division, since the abolition of profert and oyer.

(1) [1916] 1 A. C. 603. (2) (1903) unreported.

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In my judgment, these statements are incorrect. It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of an intestate's estate, and can obtain in a proper case interim relief by the appointment of a receiver pendente grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognized practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required. A study of the cases referred to in the argument, and relied on in support of the supposed difference between the common law and chancery practice, makes this position clear. I need not refer to them in detail, because my brother Goddard has dealt with them in the judgment he is about to deliver, which I have had the opportunity of reading and with which I am in entire agreement. I have no doubt that the plaintiff's action was incompetent at the date when the writ was issued, and that the doctrine of the relation back of an administrator's title to his intestate's property to the date of the intestate's death when the grant has been obtained cannot be invoked so as to render an action competent which was incompetent when the writ was issued. In my judgment, the learned judge was wrong in coming to the contrary conclusion. It follows that no proper action was commenced before the statutory period of limitation expired. That period expired before any grant of administration was obtained, and the right of action was lost to the intestate's estate. Although I cannot help feeling some regret I have no doubt but that the appeal must be allowed and the action dismissed.

GODDARD L.J. This action was brought under the Law Reform Act, 1934, to recover damages for the loss of expectation of life of one Alfred Kenneth Ingall deceased, and for his funeral expenses and damage to his motor cycle. The plaintiff in the writ described himself as the administrator of the estate of the deceased, though, in fact, he had not at the time

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the writ was issued obtained letters of administration, though he had done so by the time the statement of claim was delivered. The question is whether he was entitled to sue when he did. If he was not, it follows that the action is bad as being brought by a person who had no title to sue, and no other question will arise.

There is no doubt that where a deceased person leaves a will and therein names an executor the latter can institute actions before obtaining probate, though the actions may be stayed until the probate is granted: *Tarn* v. *Commercial Bank of Sydney* (1). The reason for this is, no doubt, that the executor's title is derived from the will which operates from the death of the testator, and all he has to do is to prove the will, that is, to prove that the will which names him as executor is the last will of the deceased. He has a title to sue, but the court requires him to perfect his title and will not allow the action to proceed till this has been done. The action will be stayed, but not dismissed. An administrator is in a different position. An intestate's property, including choses in action, formerly vested on death in the ordinary, and now, by virtue of the Administration of Estates Act, which in this respect re-enacts earlier statutes, vests in the President of the Probate Division till he grants letters of administration to someone. The difference in the position of an executor and administrator in this respect was authoritatively stated by Lord Parker in delivering the advice of the Judicial Committee in *Chetty* v. *Chetty* (2). He said: "It is quite clear that an executor "derives his title and authority from the will of his "testator and not from any grant of probate. The personal "property of the testator, including all rights of actions, "vests in him upon the testator's death, and the conse- "quence is that he can institute an action in the character "of executor before he proves the will. He cannot, it is true, "obtain a decree before probate, but this is not because his "title depends on probate, but because the production of "probate is the only way in which, by the Rules of the Court, "he is allowed to prove his title. An administrator, on the "other hand, derives title solely under his grant, and cannot, "therefore, institute an action as administrator before he gets "his grant. The law on the point is well settled: see Comyn's "Digest, Administration, B. 9 and 10; *Thompson* v.

(1) (1884) 12 Q. B. D. 294. (2) [1916] 1 A. C. 603, 608.

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"*Reynolds* (1); *Woolley* v. *Clark* (2)." The other members of the board were Lord Loreburn, Lord Atkinson and Lord Sumner, and, though not technically binding on this court, it is impossible to treat a pronouncement of such high authority as otherwise than conclusive of the point. This case was not cited to the learned county court judge, who, in a careful and well reasoned judgment, came to the conclusion that, though an administrator could not sue at law before a grant of letters he could do so in equity, and that, if there were a conflict between law and equity, the latter must prevail. The only authority cited to him was the unreported case of *Tattersall* v. *Ashworth* (3), cited both in the Annual and the Yearly Practice. In the former book the citation is on p. 182 of the 1943 edition, where it is stated that Phillimore J. in chambers set aside a judgment obtained at the suit of a person suing as administrator to whom letters had not been granted at the date of the writ, but who had obtained a grant before judgment. There it is stated that in the Chancery Division an administrator may sue before grant of administration, provided that the letters are produced at the hearing, and reference is made to Daniell's Chancery Practice, 8th ed., p. 352. To the same effect is the note in the Yearly Practice which considers *Tattersall* v. *Ashworth* (3) to be of doubtful authority. In my opinion, the decision of Phillimore J. was right, and the statement as to what may be done in the Chancery Division is too wide. It is enough to refer to the cases which are cited in Daniell's Chancery Practice as authority for the proposition stated—*Fell* v. *Lutwidge* (4); *Humphreys* v. *Humphreys* (5), and *Horne* v. *Horne* (6). All these cases were administration suits or suits relating to the administration of estates. They show that actions brought by persons who would be beneficiaries in the administration are not defeated, either where the person entitled to obtain letters is plaintiff or where such a person is made a defendant, because a grant has not been made at the date of the writ. The action is brought to protect the estate. The modern practice would be to issue a writ asking for the appointment of a receiver pending a grant of letters, and, if brought by a person who would be a beneficiary in the administration, there would be no objection to the action because the person entitled to take out letters is and must be

(1) (1827) 3 C. & P. 123.
(2) (1822) 5 B. & Ald. 744.
(3) Unreported.
(4) 2 Atk. 120; Barn. C. 320.
(5) 3 P. Wms. 351.
(6) 23 L. J. (Ch.) 10.

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made a defendant though the grant has not yet been made. It is true that in *Fell* v. *Lutwidge* (1), Lord Hardwicke, then Lord Chancellor, but who had also been Lord Chief Justice of the King's Bench, gave as a reason for an action at law not being maintainable by a person who was merely entitled to administration, that he would have to make profert of the letters and that was not required in a court of equity, but I do not think he meant to lay down that in any chancery suit it was open to a person to file a bill as administrator before he obtained a grant, and if he did it is contrary to the later authorities. *Evans* v. *Bagshawe* (2); *Attorney-General* v. *Corporation of Avon* (3), both suits in equity, are directly in point, but it is unnecessary to go through the many cases cited in argument because, in my opinion, it is the plain duty of this court to follow *Chetty* v. *Chetty* (4), and that is conclusive on this point.

The cases mentioned in Daniell are not an exception to this rule of law. They are cases in which letters were not necessary for a plaintiff to establish his title to sue or in which the absence of letters did not afford a defence to a defendant. Nor is it necessary to consider the many cases which show that once letters are granted the title of the administrator relates back to the death. They have no application to this question. All they show is that, once letters have been obtained, the title relates back so that the administrator may sue in respect of matters which have arisen between the date of the death and the date of the grant, just as he may sue in respect of a cause of action that had accrued to the intestate before his death, provided the cause of action survives. The result is that this action was, and always remained, incompetent, and judgment ought to have been entered for the defendant. I desire to say that it was, in my opinion, entirely wrong to have described the plaintiff in the writ as the administrator. Whether it misled the defendants I do not know, though I gather from the fact that in the defence all that is said is that the grant of the administration is not admitted that it may well be that it was not till a later stage that it came to their knowledge that the plaintiff was not an administrator. Such a description cannot be justified on the ground that the plaintiff hoped and expected and had every reason to believe that he would become the administrator. Had the writ described him as the person

(1) 2 Atk. 120; Barn. C. 320.
(2) L. R. 5 Ch. 340.
(3) 3 De G. J. & S. 637
(4) [1916] 1 A. C. 603.

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entitled to letters of administration the question might have been raised at a very early stage, by an application to dismiss the action, and a good deal of expense might have been saved. On the other hand, if the proper description had been given and the defendants had taken no action in respect of it till the trial, their failure to do so might well have influenced the question of costs as they lost on the issue of negligence. The appeal should, in my opinion, be allowed with costs, and judgment entered for the defendant in the court below, with costs.

Appeal allowed.

Solicitors for defendant: *L. Bingham & Co.*
Solicitors for plaintiff: *W. C. Crocker.*

A. W. G.

In re DECISION OF WALKER.

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APPEAL OF W. S. LEWIS AND OTHERS.

Local Government—Remuneration of officers—"Reasonable remuneration"—Allowances for children—Legality—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 106, *sub-s.* 2.

Following meetings between the representatives of the non-manual staff of the Birmingham City Council and representatives of the council, at which were discussed proposals for increasing the salaries and remuneration of the staff to meet the increased cost of living due to the war, the council adopted a recommendation by its salaries, wages and labour committee to increase generally the existing war bonus and also, in the case of married men, widowers and widows, to pay an allowance of 2*s.* 6*d.* per week for each child under fourteen years of age, or under eighteen if undergoing full-time education. The district auditor of the Ministry of Health disallowed the payments for children's allowances and surcharged certain members of the council, on the ground that the allowances had no relation to the services rendered to the council by the recipients, and were therefore contrary to law. On a motion to quash the decision of the district auditor:—

Held, that the allowances were paid as part of the consideration for services rendered; that the allowances having been given by the council as part of a settlement of a request by the staff for a

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existing at the time when he hears the case, while for the purpose of answering questions (iii.) and (iv.) he must look back into the past. The judge answered question (i.) "Yes," and I cordially agree with him. I find it difficult to imagine a case in which it would be more reasonable to make an order for possession. As to question (ii.) it is well settled that the words "is reasonably required" in para. (*g*) of sch. I. to the Act refer to the date of the hearing, see *Nevile* v. *Hardy* (1), a decision on the same phrase as it appears in the Act of 1920. I see no reason why the words which follow "engaged in his whole-time "employment" should refer to any other date. That being so the judge was right in answering question (ii.) in the affirmative, as there is no doubt that Schuler was engaged in the whole-time employment of the plaintiffs from April 16, 1945, onwards. It is unnecessary therefore, to decide whether he answered this description at an earlier date, but I think that he did not, for the reasons stated by MacKinnon L.J. It seems to me that from February to April, 1945, Schuler had been engaged *for* whole-time employment in the future by the plaintiffs, but was engaged *in* the whole-time employment of other persons. I disregard the words in sch. I. (*g*) "or with whom, conditional "on housing accommodation being provided, a contract for "such employment has been entered into," because it has not been proved in the present case that a contract for employment was entered into with Schuler conditional on housing accommodation being provided. As to question (iii.) there can be no doubt that the defendant was in the employment of the plaintiff company for some years, up to December 13, 1944. Therefore the answer to this question must be "yes."

As to question (iv.), it was stated by this court in *Read* v. *Gordon* (2) that the crucial time at which this question must be decided is the date of the notice to quit. In my view the question which has to be decided, as at that time, may be accurately stated as follows: Was the tenancy, which was determined by the notice to quit, a tenancy which had been granted to the tenant in consequence of his employment by the landlord? In *Read* v. *Gordon* (2) this court took the view that the tenancy which was determined by the notice to quit was a new tenancy, which had not been granted in consequence of the tenant's employment by the landlord. Counsel for the defendant argued that the evidence in the present case led to the same conclusion, but I do not accept that argument. It is

(1) [1921] 1 Ch. 404, 407. (2) [1941] 1 K. B. 495, 505.

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true that the plaintiff company continued to accept the rent of 10s. a week from the defendant after his employment had ceased, but I can see no good ground for holding that a new tenancy was thereby created. In my view the rent continued to be paid under the tenancy created in 1941, and there can be no doubt that that tenancy was granted to the defendant in consequence of his employment by the plaintiff company. Thus the tenancy which was determined by the notice to quit was a tenancy granted to the defendant in consequence of his employment by the plaintiff company and question (iv.) must be answered in the affirmative.

As to question (v.) there can be no doubt the defendant had ceased to be in the employment of the plaintiff company before the county court judge heard the case. I incline to the view that this is the relevant date, but it is unnecessary to decide the point, as that employment had ceased before the date of the notice to quit, and, of course, before the present proceedings were commenced.

The result is that all the conditions laid down by the Act of 1933 were fulfilled in the present case, and the county court judge rightly made an order for possession. I agree that the appeal must be dismissed with costs.

Solicitors for defendant: *Churchill, Clapham & Co.*
Solicitors for plaintiffs: *Bulcraig & Davis.*

W. L. L. B

HILTON v. SUTTON STEAM LAUNDRY.

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1945
July 20, 23
Lord Greene M.R., du Parcq and Morton L.JJ.

Administration—Action by administrator—Writ issued by administrator before grant of letters of administration—Claim under Fatal Accidents Acts—Title of plaintiff to sue—No relation back—Application to amend writ by suing in individual capacity as dependant—Limitation of time for bringing proceedings—Amendment not allowed—R. S. C. Or. 3, r. 4—Fatal Accidents Act, 1846 (9 & 10 *Vict., c.* 93), *s.* 3—*Fatal Accidents Act*, 1864 (27 & 28 *Vict., c.* 95), *s.* 1.

The plaintiff, who was the sole dependant of her deceased husband, brought an action in an administrative capacity for damages under the Fatal Accidents Acts in respect of his death by accident. She had not at the time when the writ was issued taken out letters of administration:—

Held:—(1.) applying *Ingall* v. *Moran* [1944] K. B. 160, that the writ was a nullity and was not validated by the subsequent

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grant of administration ; and (2.) that, although the action could have been brought by the plaintiff as sole dependant in a personal capacity with the same result, the court could not allow an amendment of the writ and statement of claim, more than a year after the husband's death, so as to convert the action into one brought by the plaintiff in her personal capacity. To allow such an amendment would deprive the defendants of the benefit of the time limit fixed for bringing an action under the Fatal Accidents Acts by s. 3 of the Act of 1846, which prevented the plaintiff from commencing a new action in a personal capacity.

APPEAL from Birkett J.

On October 29, 1942, the plaintiff's husband died as the result of an accident to him while employed on the defendants' premises, and on February 19, 1943, the plaintiff, Emily Rose Hilton, issued a writ as administatrix of the deceased's estate, claiming " damages against the defendants for negligence and " breach of statutory duty pursuant to the provisions of the " Fatal Accidents Acts and the Law Reform (Miscellaneous " Provisions) Act, 1934." She delivered a statement of claim on March 15, 1943, and para. 1 was as follows : " The plaintiff " who is the widow of Frank John Hilton deceased, brings this " action as administratrix of the deceased's estate for the " benefit of such estate under the Law Reform (Miscellaneous " Provisions) Act, 1934, and for the benefit of herself the sole " dependant of the deceased who has suffered damage by reason " of the death of the deceased under the Fatal Accidents Acts, " 1846-1908."

At the time of the issue of the writ and the delivery of the statement of claim the plaintiff had not obtained a grant of letters of administration, which were only granted on October 22, 1943.

On December 10, 1943, it was decided in *Ingall* v. *Moran* (1) that an action brought by a plaintiff under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administratrix of her son's estate before letters of administration had been taken out, was incompetent and that the doctrine of the relation back of an administrator's title to the intestate's death could not be relied on. If this applied, a new action could not be brought under the Fatal Accidents Acts because the period of twelve months from the date of the death, limited by s. 3 of the Act of 1846 for the bringing of a claim under those Acts, had

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expired. The plaintiff therefore applied for leave to amend the writ and statement of claim by striking out the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and varying the claim under the Fatal Accidents Acts, so as to make it a claim by the plaintiff in a personal capacity. The master refused leave and Birkett J. affirmed his decision. The plaintiff appealed.

C. L. Henderson K.C. and *B. M. Goodman* for the plaintiff. A joinder of claims by or against an executor or administrator with claims by or against him personally is permitted by Or. 18, r. 5, and Or. 3, r. 4, makes it necessary to say if a claim is made in an administrative capacity. Further by Or. 16, r. 11, no cause or matter is to be defeated by reason of the misjoinder or non-joinder of parties. While the writ only made a claim in an administrative capacity the statement of claim only made a claim in an administrative capacity so far as the Law Reform (Miscellaneous Provisions) Act, 1934, was concerned and in view of the decision in *Ingall* v. *Moran* (1) that claim is void because the plaintiff had not taken out letters of administration. But the claim under the Fatal Accidents Acts could be brought by an executor or administrator or by the dependants in a personal capacity in cases within the Fatal Accidents Act, 1864, s. 1. That enabled the plaintiff to sue in a personal capacity as sole dependant and that was done by the statement of claim on its true construction. [They referred to *In re Richardson* (2).] Order 70, rr. 1 and 2, make it clear that non-compliance with rules does not render a proceeding void unless the court so directs. Under r. 2, any application to set aside a writ must be made within a reasonable time. Here the defendants became aware of the irregularity when they were told that the plaintiff had no grant of administration. They could have applied to strike out the claim in the statement of claim but waited a year and took part in interlocutory proceedings.

If this view of the construction of the statement of claim is wrong and the proceedings under the Fatal Accidents Acts are brought in a representative capacity, the court ought to allow the amendment asked for. There is special ground for allowing the amendment seeing that an action under these Acts has the same result whether the plaintiff sues in an administrative or a personal capacity. It is only the limitation of the time for

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bringing actions under these Acts to one year from the death that prevents the plaintiff from beginning a new action in a personal capacity. As to the propriety of the amendments see Or. 16, r. 11 and *Mabro* v. *Eagle, Star & British Dominions Insurance Co.* (1).

The case is distinguishable from *Ingall* v. *Moran* (2) which related only to an action under the Law Reform (Miscellaneous Provisions) Act, 1934.

Beney K.C. and *T. F. Davis* for the defendants. Admittedly the writ was issued by the plaintiff in a representative capacity and Or. 3, r. 4, makes it necessary for the capacity to be stated. The statement of claim is on its true construction an action in the same capacity; see para. 1 and the form of claim. There is nothing to indicate a personal claim. The action therefore is a nullity on the authority of *Ingall* v. *Moran* (2) which must be applied to an action under the Fatal Accidents Acts equally with one under the Law Reform (Miscellaneous Provisions) Act, 1934. The action was born dead and cannot be revived. The amendments sought would deprive the defendants of the benefit of the limitation in time for the bringing of actions imposed by the Fatal Accidents Act, 1846, s. 3. It is well settled that nothing will be done by the court to deprive a defendant of the benefit of any statute of limitations.

LORD GREENE M.R. This is an unfortunate case. The plaintiff is the widow and, as she alleges, no doubt correctly, the sole dependant of her deceased husband, who died as the result of an accident on October 29, 1942. The result therefore is that the period of twelve months allowed for the bringing of a claim under the Fatal Accidents Act began to run on that day. On February 19, 1943, that is, about five months after the death she issued a writ. On the face of the writ she is described merely as a widow, but the endorsement is in the following terms: "The plaintiff claims as administratrix of Frank John "Hilton deceased, for damages for negligence and breach of "statutory duty pursuant to the provisions of the Fatal "Accidents Acts and the Law Reform (Miscellaneous Provi-"sions) Act, 1934." That, of course, on its face, raises two quite separate causes of action, which have a fundamental difference. A claim under the Law Reform (Miscellaneous Provisions) Act, 1934, is a claim for the benefit of the estate; the money recovered falls into the estate and is subject to the will,

(1) [1932] 1 K. B. 485. (2) [1944] K. B. 160.

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if any, of the deceased person and to the claims of his creditors. A claim under the Fatal Accidents Acts, on the other hand, has this difference, that the money recovered, in a case like the present, where there is only one dependant, will go to the dependant whether the action is brought by the personal representative of the deceased or by the dependant in her personal capacity. Under the Act of 1846 the person to bring the action was the legal personal representative, not for the benefit of the estate but for the benefit of the dependants, and, by the amending Act of 1864, a dependant was entitled to bring an action in cases where there was no personal representative, or, if there was one, the personal representative failed to begin proceedings within six months. Whichever is the form of action the result is precisely the same, because the money recovered does not form part of the estate of the deceased person, but goes, as through a conduit pipe, to the dependants who are entitled.

If the plaintiff had in fact held letters of administration at the date of this writ, no difficulty would have arisen. She delivered a statement of claim on March 15, 1943, and it is argued on her behalf that, on the true construction of that statement of claim, she has shifted her ground, as regards the claim under the Fatal Accidents Act, by claiming under that Act in her personal capacity and not in a representative capacity. So far as the claim under the Law Reform Act is concerned, it is not suggested, and of course it could not be suggested, that her claim was otherwise than in her alleged capacity as administratrix. In my opinion the statement of claim as regards the claim under the Fatal Accidents Act does not bear the interpretation suggested. The statement of claim follows the writ, and in respect of both Acts the claim under para. 1 purports to be made in a representative capacity. I should have thought, reading that paragraph as a piece of English, that the words "as administratrix of the deceased's estate" cover both limbs of the claim, each limb introduced by the words "for the benefit "of": in the one case, "for the benefit of the estate," and, in the other case, for the benefit of herself as sole dependant. That seems to me to be the natural construction of the words. It is argued that the words "as administratrix of the deceased's "estate" must be confined to the claim under the Law Reform Act. I do not so read the paragraph. When the rest of the statement of claim, so far as is relevant, is looked at she gives, the particulars pursuant to the Fatal Accidents Act, which she is bound to do under the statute: name of the person on whose

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behalf the action is brought, Emily Rose Hilton, widow of the deceased, and then in her own prayer she claims damages. (1.) under the Fatal Accidents Act, and (2.) under the Law Reform Act, not distinguishing in any way the alleged two different capacities. I think, therefore, that the statement of claim must be read in the way I have indicated.

The statement of claim having been delivered on March 15, 1943, on May 17, 1943, the defendants' solicitors wrote a letter to the plaintiff's solicitors acknowledging a letter from the latter, in which they said that no letters of administration had been taken out as the value of the estate was under 100*l*. The defendants' solicitors then asked whether the plaintiff in those circumstances was entitled to sue as administratrix. Her solicitors considered the point, and on July 27, having taken the advice of counsel, they wrote saying that it would be necessary for the plaintiff to take out letters of administration and suggesting that the action should be stayed pending the obtaining of the grant. It would appear from that letter that the solicitors were under the impression that, notwithstanding the lack of letters of administration when the writ was issued, a subsequent grant for which they were proposing to apply, would in some way operate retrospectively so as to validate the writ. Indeed there was, I think, current in some quarters a belief that that was the law, that a subsequent grant would validate a writ which had been issued in the alleged capacity of administratrix so that the writ became a good writ ab initio. The solicitors in fact obtained for the plaintiff a grant of administration on October 22, that is to say, a week before the expiration of the statutory period of twelve months within which an action under the Fatal Accidents Act had to be brought. On October 26, 27 and 28, a case was argued in this court and judgment was delivered on December 10, that is to say, after the expiration of the twelve months. That was a case of *Ingall* v. *Moran* (1), where the plaintiff was claiming under the Law Reform (Miscellaneous Provisions) Act, 1934, and based his claim upon his alleged representative capacity as administrator. At the date when the writ was issued no letters of administration had been taken out and they were not taken out until two months later. The question before this court was whether, in those circumstances, the action was competent, and it was held that it was not: that the subsequent grant of letters of administration did not operate retroactively to validate the original writ, which, from the beginning, was a

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nullity. If the principles there laid down are applicable to this case it would mean that the original writ here was a nullity and could not be validated by anything that happened afterwards, either by the alleged new basis on which the statement of claim is said to have been framed, or by the grant of letters of administration, or by any order of the court under any of the rules of court, on the ground that it was a mere irregularity. It is said that the principles of *Ingall* v. *Moran* (1) do not apply, but before considering briefly the arguments, I must say a word about the actual nature of this appeal. It is an appeal from an order of Birkett J. confirming an order of the master, who refused the plaintiff's application for leave to amend her writ and statement of claim. The nature of the amendments asked for was this. In the writ the plaintiff sought to strike out the words "as administratrix of the estate "of Frank John Hilton deceased" and the reference to the Law Reform Act. I can get rid of the Law Reform point at once by saying that, so far as the claim under the Law Reform Act is concerned, it seems to me, and, indeed, the contrary is not suggested, that *Ingall* v. *Moran* (1) completely covers the case for the very simple reason that the decision related to a claim under the Law Reform Act, which is a claim for the benefit of the estate. Looked at, therefore, as a claim under the Law Reform Act, this action was bound to fail for the reason that no letters of administration had been granted when the writ was issued. It was therefore desired to lighten the ship by striking out the claim under the Law Reform Act. But the intention of the rest of the amendment of the writ which was sought for clearly was to get rid of the allegation of the representative capacity of the plaintiff, and leave the writ as a writ issued by her, not as administratrix but in her personal capacity, pursuant to the power of a dependant under the Fatal Accidents Act, 1864, to bring an action in his or her name. In the statement of claim consequential amendments are sought by getting rid of the claim under the Law Reform Act, and by getting rid of the reference in para. 1 of the statement of claim to the allegation that she was bringing the action as administratrix, leaving the statement of claim quite clearly on its face a claim in an action by her in her individual capacity.

The substantial question we have to decide is whether or not those amendments will have the effect of altering the position of the defendants in the action for the worse with regard to the

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statutory period of limitation laid down in the Fatal Accidents Acts. It was suggested that if the action went to trial on the writ and pleadings unamended it would still be open to the plaintiff to argue before the trial judge that the misdescription was a mere technicality which could be remedied by a special order of the court under the rules. It was not desired to leave matters in that shape, and it was thought convenient to test the position by applying now for leave to amend. If the leave to amend was refused, the position of the plaintiff would be that she could either go on in the hope of getting the irregularity, if that is all it is, forgiven by the court at the hearing, or she could save herself the expense of continuing with an action which must necessarily fail. Supposing that this amendment is not allowed, and the action proceeds to trial as it now stands, will it necessarily fail? If the principles laid down in *Ingall* v. *Moran* (1) apply to the claim under the Fatal Accidents Act, as they unquestionably apply to the claim under the Law Reform Act, the answer to that question must be that the action will fail. If the amendment is allowed, the action will not fail on that ground, although, of course, it may fail on the merits. The result, therefore, will be that if we allow the amendment we shall be prejudicing the position of the defendants, who are, as things stand, in the position to argue that the plaintiff's case is irreparably lost because the action she had brought is incompetent, and will enable the plaintiff to set the action on its feet. Further, if the action is incompetent the plaintiff can do nothing, because the time for launching a new competent action has elapsed. If then we allow this amendment, the defendants will, in that respect, be prejudiced because they will obtain no benefit from the limitation period laid down by the statute. It is, however, very well settled that the court does not allow amendments having the effect of depriving a defendant of a defence under any statute of limitations, and that will be the very effect of allowing this amendment if the principles to which I have referred, laid down by this court in *Ingall* v. *Moran* (1) are applicable to the case. There is only one ground of distinction which has been suggested to us as differentiating this case from that. It is pointed out, correctly, that in that case the only claim involved, and the only claim that could be brought, was a claim by the personal representative of the deceased, because the benefit of the claim, if it was made good, would enure to the benefit of the estate. It is then

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pointed out that here the position is different: that there is no difference of substance between a claim under the Fatal Accidents Act by a personal representative and a claim by a dependant in his or her personal capacity. In either case, it is said that the cause of action is precisely the same although the statute enables two different classes of persons to sue: the beneficiaries of the judgment if obtained would be the same; the estate of the deceased is not concerned in the matter, and the personal representative was only brought in as the person to sue under the original Act as a matter of convenience and not as a matter of substance.

I should not be averse to discovering any proper distinction which would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the defendants in fairness pointed out the difficulty, there appear to me to be no merits on their side. But the statute of limitations is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations is entitled, of course, to insist on his strict rights. He is similarly entitled to insist on the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings. In this case it seems to me that, to allow this amendment would be to deprive the defendants of the benefit of the statute by setting the action on its feet again, and, in effect, validating ab initio the original representative writ. The distinction suggested between this case and the earlier one is one which, in my opinion, does not produce the result suggested. It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does not alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under Or. 3, r. 4, be stated in the endorsement on the writ. That was done in this case and the plaintiff bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences. In the result, sorry though I am, and sorry as Birkett J. was, to be compelled to come to this conclusion, the appeal in my opinion must be dismissed with costs.

DU PARCQ L.J. I agree. I think there is no mistake in the conclusion to which the learned judge came. I agree with the reasons given by my Lord, and I have nothing to add.

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MORTON L.J. I also agree, and I share the regret which is felt by the other members of the court.

Appeal dismissed.

Solicitors: *Eland, Nettleship & Butt; Simmons & Simmons.*

H. C. G.

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1945
Oct. 16, 29.
Cottesley, Goddard and Finnemore JJ.

REX v. JARMAIN.

Criminal law—Murder—Robbery—Pointing loaded and cocked pistol to intimidate—Inadvertent pressure of trigger.

The accused, engaged in robbery in the office of a garage, after endeavouring to frighten the cashier, who was counting the day's takings, pointed a loaded and cocked Browning automatic pistol at her. In giving evidence he said that since the cashier had treated him with scorn he did not know what to do, and that "he was thinking what to do when the gun went off." He had not, he asserted, intended to press the trigger. The cashier fell wounded and the accused grabbing some of the cash, escaped. The cashier died of her wounds. At the trial the judge directed the jury that since the accused, by his own evidence, was engaged in an unlawful and dangerous act which amounted to a felony, even if he had pressed the trigger inadvertently, that was murder. The accused was convicted of that crime. On appeal it was contended for the appellant that inadvertence in the doing of the act which causes death is always a defence to a charge of murder and, accordingly, that the trial judge had misdirected the jury:—

Held, that there was no misdirection; that a person who uses violent measures in the commission of a felony, involving personal violence, does so at his own risk and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim.

Director of Public Prosecutions v. *Beard* [1920] A. C. 479 applied.

APPEAL against conviction for murder.

Peter Joseph Jarmain purchased a Browning automatic pistol of Belgian manufacture for the purpose of committing armed robbery. When the magazine of this pistol is filled, to fire it, the safety catch is released, the magazine engaged (an action which places a round in the chamber and is known as "cocking") and the trigger pressed. Between 5.30 and 6 p.m. on June 28, 1945, Jarmain entered the office of the Red Arrow Garage at Thornton Heath, holding the pistol with its loaded magazine in his right hand as he passed

C. C. A.
1945
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through the doorway. He found Mrs. Ivy May Phillips, a cashier, counting the day's takings, two piles of silver on the top of some notes being in front of her. Jarmain, according to his statement to the police and his evidence, pointed the pistol in his right hand at her saying: "I'll have that, sister." Mrs. Phillips continued to write for some moments, then put down the pen, looked at him and said: "Don't be silly." Jarmain, the safety catch being released, cocked the pistol but then ejected the round from the chamber. This he did, he said, to frighten her. Jarmain then re-cocked the gun and took it in his left hand saying: "This ain't no toy." Mrs. Phillips said: "Don't be absurd." Jarmain, in evidence said that though he kept the loaded pistol in his left hand, pointed at Mrs. Phillips to frighten her, she had treated him with scorn and he did not know what to do, "that he was "thinking what to do, when the gun went off"; and that he had not intended to press the trigger. Mrs. Phillips fell to the ground mortally wounded and died on June 30. Jarmain, having grabbed some of the notes, made his escape.

At the trial at the Central Criminal Court Charles J. in the course of his summing-up, said: "It has been laid down many "times by myself and other judges, and as recently as three "years ago, that where an act which a person is engaged in "performing is unlawful, then if, at the same time, it is a "dangerous act, that is, an act which is likely to injure another "person, and quite inadvertently the doer of that act causes "the death of another person, then he is guilty of manslaughter. "Now, that is if the act is unlawful, but if, in doing that same "dangerous and unlawful act, he is doing an act which amounts "to a felony, he is guilty of murder and not manslaughter. "Such are the general terms of the law. Let me apply them, "if I may, to the circumstances of this case. This man was "by all admissions, by his own sworn testimony, engaged upon "an armed robbery, and that is a felony . . . . and in the "course of that armed felony this unfortunate young woman "met her death at his hands. You have been invited to say "that there was a sort of break, that is to say that when this "woman refused to be cowed by the exhibition of this loaded "and cocked revolver, this man was so bewildered with her "bravery that he forgot and set aside the execution of the "felony for which he had entered the garage, and that while "momentarily, almost, he was in that condition of mind he "inadvertently, he knows not how, squeezed the trigger and

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Case Name:

Stout Estate v. Golinowski Estate

Between
Sheila Stout, Administrator ad litem of the Estate of Kelsey Anne Stout, deceased, Sheila Stout and Timothy Stout, appellants (plaintiffs), and
The Public Trustee for the Province of Alberta, Administrator ad litem of the Estate of Allan M. Golinowski, deceased, respondent (defendant)

[2002] A.J. No. 247
2002 ABCA 49
Docket: 0003-0014-AC

Alberta Court of Appeal
Edmonton, Alberta
Picard, Fruman and Wittmann JJ.A.

Heard: May 9, 2001.
Judgment: filed February 28, 2002.
(109 paras.)

On appeal from the order of Clarke J. Dated November 9, 1999. Filed December 30, 1999.

Counsel:

K.G. Nielsen, Q.C. and D.F. Reay, for the appellants.
R.J.G. Baril, Q.C., for the respondent.

REASONS FOR JUDGMENT

WITTMANN J.A.:—

INTRODUCTION

¶ 1 This appeal raises issues about whether an action brought by an administrator ad litem, appointed by court order on behalf of the estate of an intestate, should be considered a nullity or a curable irregularity, and whether a statement of claim can be amended after the applicable limitation period to substitute the administrator of the estate in place of the administrator ad litem. This Court is asked to consider and define the tests applicable and the result.

BACKGROUND

¶ 2 Kelsey Anne Stout ("Kelsey") was killed in an accident on May 4, 1997, while riding as a passenger in a motor vehicle driven by Allan Golinowski ("Golinowski"), who was also killed. On April 28, 1999 applications made to the Court of Queen's Bench resulted in two orders. One was an ex parte

order made pursuant to Rule 50 of the Alberta Rules of Court, appointing Kelsey's mother, Sheila Stout, administrator ad litem of Kelsey's estate for the purpose of the intended action against Golinowski. The other was a consent order appointing the Public Trustee administrator ad litem of the estate of Golinowski for the purpose of defending the intended action.

¶ 3 The order appointing the administrator ad litem of Kelsey's estate provided that:

> Sheila Stout be and is appointed Administrator Ad Litem of the Estate of Kelsey Anne Stout, deceased, and is authorized and required to act in said capacity pursuant to Rule 50 of the Alberta Rules of Court for all purposes of the intended action.

¶ 4 This appointment was acknowledged in the consent order appointing the Public Trustee administrator ad litem of the Golinowski estate:

> The Public Trustee for the Province of Alberta be and is hereby appointed Administrator Ad Litem of the Estate of Allan M. Golinowski, deceased, and is authorized to act in the capacity of Administrator Ad Litem for all purposes of the action in which the Plaintiffs will be named as Sheila Stout, Administrator Ad Litem of the Estate of Kelsey Anne Stout, deceased, Sheila Stout and Timothy Stout, and the Defendants will, pursuant to this Order, be named as The Public Trustee for the Province of Alberta, Administrator Ad Litem of the Estate of Allan M. Golinowski, deceased, and Justin E. Laun, such action arising out of a motor vehicle accident which occurred near Westlock, Alberta, on the 4th day of May, 1997.

¶ 5 A statement of claim, which was the intended action referred to in the ex parte orders, was filed the same day. It named as plaintiffs Sheila Stout as administrator ad litem, Sheila Stout in her personal capacity, and Timothy Stout, Kelsey's father, in his personal capacity. Named as one of the defendants was the Public Trustee as administrator ad litem of the estate of Golinowski. Claims were advanced on behalf of Kelsey's estate and on behalf of her parents personally. A draft of this statement of claim was appended to an affidavit filed in support of both applications for the administrator ad litem appointment orders.

¶ 6 On August 24, 1999, the defendant filed notice of a motion to strike the claim of Sheila Stout as administrator ad litem as disclosing no cause of action, returnable October 28, 1999. The grounds for the application included that only an administrator (or executor) could sue on behalf of an estate; that an administrator ad litem could defend, but not sue on behalf of an estate. The notice of motion characterized the claim of the administrator ad litem as "scandalous, frivolous, and vexatious, and otherwise an abuse of process of the Court."

¶ 7 Sheila Stout was appointed administrator of Kelsey's estate on October 1, 1999 and on October 5, 1999, the plaintiffs gave notice of a cross-motion, also returnable October 28, 1999, requesting that the statement of claim be amended nunc pro tunc to substitute as plaintiff Sheila Stout, administrator, for Sheila Stout, administrator ad litem.

¶ 8 On November 9, 1999 the learned chambers judge granted the application to strike and dismissed the application to amend. He held in reasons reported at (1999), 251 A.R. 20, that he was bound by the decision of this Court in Public Trustee of the Province of Alberta v. Larsen (1964), 49 W.W.R. 416 (Alta. C.A.) to hold the claim a nullity, incapable of amendment. He reasoned that this claim had been made by an administrator ad litem, and this office conferred status only to defend, not to institute an action. He concluded that although the action had been brought within the limitation period, the disputed

part had been brought by a person who had no status to sue and therefore was void ab initio. The result was that there was nothing to amend and no valid legal proceeding to which a new claim could be added under limitations legislation. Further, because the grant of administration of the estate was issued after the limitation period had expired, he held that a newly constituted action would be statute barred.

GROUNDS OF APPEAL AND STATEMENT OF ISSUES

¶ 9 The appellants seek a reversal of this decision. They also applied to this Court for reconsideration of the Larsen decision. At the hearing there was consensus that the issues underlying the reconsideration application were subsumed within those underlying the appeal. Whether the reconsideration application would be entertained depended on the determination of the issues on the appeal. In the result, for reasons below, Larsen will not be reconsidered.

¶ 10 The central question on this appeal is this: Is the action on behalf of the estate, because it was instituted by an administrator ad litem appointed by court order for that purpose, a nullity incapable of amendment outside the limitation period; and if not, is amendment appropriate?

¶ 11 This question comprises two issues:

1. Must an action purporting to be brought by an administrator ad litem on behalf of an estate be characterized as a nullity incapable of amendment, rather than simply an irregularity which can be cured?
2. If the part of this action that is purportedly brought by an administrator ad litem on behalf of an estate can be considered a curable irregularity, should this Court allow amendment of the pleadings outside the limitation period?

¶ 12 The first issue requires a consideration of the principles flowing from Larsen and other cases dealing with actions on behalf of estates. The second issue requires a consideration of the law relating to limitation of actions, as it applies to this case.

STANDARD OF REVIEW

¶ 13 The questions raised on this appeal are questions of law, and the standard of review for this Court is correctness.

ANALYSIS

¶ 14 The task of answering whether the learned chambers judge was correct must be informed by the test that governed the applications before him: an application to strike a pleading as disclosing no cause of action, along with a competing application to amend the pleading. The learned chambers judge correctly noted that extreme caution must be exercised in striking a pleading for want of a cause of action. A court must not strike a pleading unless it is plain and obvious that it cannot succeed and that its flaws cannot be amended. Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 971-80, 990. See also the discussion and cases cited in Fullowka v. Whitford (1996), 147 D.L.R. (4th) 531 at 537-538 (NWTCA).

¶ 15 The learned chambers judge noted that it is usual to consider first the application to amend and then, having regard to the outcome of that application, to decide the application to strike. However, he viewed this case as being different because the application to strike was based not on a defect in the way the claims were pleaded, but rather on a question of capacity to sue at all. He reasoned that if it were concluded that the plaintiff had been without capacity to sue, the claim would not be a valid legal

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proceeding and there would be nothing to amend.

¶ 16 With respect, that distinction does not determine the issues. The issues are intertwined. The question whether the pleading is capable of amendment is part of the analysis of the legal effect of instituting a claim in the name of an administrator ad litem pursuant to a court order. If the named plaintiff had no capacity to sue, it must be determined whether the pleading was a nullity, or was an irregularity curable by amendment. If the latter, the question is whether the case for amendment has been made out so that the cause of action can be properly pleaded.

1. Must an action purporting to be brought by an administrator ad litem on behalf of an estate be characterized as a nullity incapable of amendment, rather than simply an irregularity which can be cured?

Actions on behalf of an estate: Larsen and other cases

Larsen

¶ 17 The learned chambers judge viewed this case as "on all fours with" Larsen (para. 8). He considered himself bound by Larsen and compelled by its authority to conclude that the claim of Sheila Stout as administrator ad litem was a nullity not capable of amendment. He held that Larsen established that an administrator ad litem cannot institute an action in Alberta and that an action started by an administrator ad litem, before the appointment of an administrator of the estate, is a nullity. The learned chambers judge further held that subsequent to the Larsen decision, neither changes to legislation and rules of court nor intervening case authority detracted from this principle.

¶ 18 The circumstances of Larsen were these: The deceased had died of injuries sustained in a motor vehicle collision. There was no executor or administrator of his estate. An order was sought and granted naming the Public Trustee administrator ad litem of his estate for the purpose of bringing an action for damages, and a statement of claim was issued. The defendant disputed the capacity of an administrator ad litem to bring the action and obtained an order setting aside the appointment. The appeal was from the latter order. In the interim, the Public Trustee obtained letters of administration of the estate. This Court dismissed the appeal.

¶ 19 This Court rejected all three of the appellant's submissions: first, that the letters of administration eventually granted could relate back to the death so as to validate actions taken prior to the grant of letters; second, that the applicable legislation might be interpreted in a way that permitted an administrator ad litem to commence an action; and third, that the pleading could be amended after expiry of the limitation period to substitute the administrator as plaintiff.

¶ 20 Analysis of the legal basis for the Court's decision shows that the learned chambers judge erred in interpreting Larsen as requiring him to hold Kelsey's action a nullity incapable of amendment. There are some key points to note at the outset. First, the nature of the proceeding in Larsen was different. In Larsen, the order appointing the administrator ad litem granted in the court below was set aside on the basis that an administrator ad litem was not a party that could bring the action. The question for the court in Larsen was whether the action that had been instituted by the administrator ad litem could nevertheless somehow continue. But here, the administrator ad litem was in existence pursuant to an unappealed court order, and was acting in that capacity throughout the relevant time. No attempt has been made here to set aside or appeal the order appointing Sheila Stout administrator ad litem.

¶ 21 Secondly, there is a distinction between Larsen and this case because of the presence of

additional claims. In Larsen, the claim of the Public Trustee as administrator ad litem was the entire action. Here, there are individual actions as well. The importance of this distinction is in the possibilities it creates in respect of the application to amend, as will be discussed more fully below.

¶ 22 Thirdly, at no point does the Court in Larsen state that the action was a nullity. Nullity was not the basis for its decision. Rather, the Court reviewed the applicable legislation and concluded it could not be interpreted as permitting an administrator ad litem to maintain an action, other than as a defendant. That is, an administrator ad litem was empowered to bring a claim only in the context of a counterclaim or third party proceeding, in an action already instituted. The Court dismissed the possibility that the problem could be resolved by the doctrine of relating back.

¶ 23 Finally, in Larsen the Court held that the pleading could not be amended after the limitation period to substitute the administrator of the estate as plaintiff. The basis for this decision was the legislation then in force barred such an amendment outside the limitation period. The Court did not base its refusal to amend on a characterization of the original pleading as a nullity.

Relating back: the "nullity" cases

¶ 24 The chambers judge in this case rested his conclusions on the premise that the part of the action purportedly brought by an administrator ad litem is a nullity. A determination of whether this premise is sound will benefit from an examination of when the courts have characterized actions as nullities. The "relating back" argument which was advanced in the Larsen appeal referred to whether the eventual grant of the letters of administration might "relate back" to the date of death and allow the Public Trustee as administrator to continue the action. The concept is important in understanding the legal framework of the authorities. A review of the doctrine suggests that there are specific circumstances in which actions have been characterized as nullities.

¶ 25 The doctrine of relating back arises where an action is brought by and in the name of the executor or administrator of an estate before the issue of the grant - that is, by a person who eventually becomes executor or administrator but before he or she has received the appointment. This situation can be distinguished from this case, where the action is brought by and in the name of an administrator ad litem who in fact has received that appointment at the time the action is brought, and who later receives letters of administration. The same can be said of Larsen, except in Larsen the order appointing the administrator ad litem was set aside after the action was commenced and before the letters of administration were granted.

¶ 26 The distinction is important because each situation gives rise to different legal issues. Where a person has brought an action as an executor or administrator of an estate before having received the grant, the issue is whether the eventual grant can relate back to the date of death so that the person can be deemed to have had the proper status when the action was instituted. If so, then the action may continue; if not, the action may not continue. The legal problem in these cases is that the action was brought in the name of a personal representative that did not exist in that capacity. There is no question of amending pleadings; the appropriate party for instituting the action was named but did not exist in that capacity at the relevant time. The cases historically have said that an action brought by such a non-existent party is a nullity. More will be said about the nullity characterization later; for the moment, it should be understood that this is the context in which it has been applied.

¶ 27 Where, on the other hand, an administrator ad litem is appointed and institutes the action and letters of administration are later issued, the problem is that the action was not brought by the proper plaintiff. When the newly appointed administrator seeks to continue the action after an intervening

limitation date, the issue that arises is whether the pleading can be amended to substitute the proper plaintiff even though the limitation period has expired.

¶ 28 In Western Canadian Greyhound Lines Ltd. v. Pomerleau, [1955] 4 D.L.R. 133 (Alta. S.C.A.D.) this Court similarly distinguished these types of cases and categorized the first type, the relating back cases, as those where nullity characterizations arise. Johnson J.A. stated as follows at p.135:

> The cases cited for the respondents fall into three general classifications. The first is cases where the plaintiff is suing as executor or administrator under the Fatal Accidents Act, or what would be under our law the Trustees Act provisions, and was not, in fact, either an executor or an administrator at the time the writ was issued: Hilton v. Sutton Steam Laundry, [1946] K.B. 65; Bodnaruk v. C.P.R. [1947] 1 D.L.R. 694 (a decision of this Division); Finnegan v. Cementation Co. [1953] 1 All E.R. 1130; Last (Executor of Henderson Estate) v. Ashworth (1955), 62 Man. R. 503. In these cases the action as framed was, to use the language of Freedman J. in the Last case, "a nullity ab initio".
> The second class of cases is where it is sought to add or substitute plaintiffs or defendants after the limitation period has expired...
> The third is cases such as Weldon v. Neal (1887), 19 Q.B.D. 394, where attempts were made to add new causes of action to those which the statement of claim contained at the date the limitation period expired.
>
> [Emphasis added]

¶ 29 Relating back is discussed in J.H.G. Sunnucks, et al., Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, (18th ed. Williams on Executors and 6th ed. Mortimer on Probate) (London: Sweet & Maxwell, 2000) [hereinafter Williams and Mortimer]. The nullity cases speak to relating back in the context of acts done by an administrator of an estate. The doctrine generally holds that an appointment of an executor may relate back to the testator's death, but a grant of administration would not similarly relate back to the intestate's death. An executor's powers derive from the will, and so commence from the moment of death. Thus, acts done by an executor pursuant to that title after the testator's death are valid notwithstanding that probate may not have been issued: Williams and Mortimer, p. 87.

¶ 30 On the other hand, the powers of an administrator derive only from the grant of letters of administration. Prior to the grant, the administrator has no powers to exercise on behalf of the estate. It is in this context that the statements about nullity arise. An action brought by a person as an administrator of an estate has been said to be a nullity if the action is brought before the issue of letters of administration, because it is only upon the issue of letters that the administrator has any authority to represent the estate: Ingall v. Moran [1944] K.B. 160. Williams and Mortimer discuss this at pp. 93-94:

> At law, letters of administration must issue before the commencement of legal proceedings by a person entitled to administration for he has no right of action until he has obtained them, and even if he obtains a grant afterwards, it does not for this purpose relate back... The proceedings are a nullity and cannot be validated by a later grant of administration.
>
> [Emphasis added]

¶ 31 There is, however, some precedent for relating back in the context of administrators, with the result that acts done before the grant of administration might be valid. This possibility was said to arise in cases where the acts were done for the benefit of the estate: Williams and Mortimer at pp. 94-97 and

McEllistrum v. Etches, [1954] 4 D.L.R. 350 (Ont. C.A.), reversed in part (1956), 6 D.L.R. (2d) 1 (SCC).

¶ 32 Like Larsen, this appeal is not a case in which an administrator commenced an action before actually receiving the appointment or a case in which the plaintiff was non-existent. Thus, the relating back doctrine cannot be the basis of a nullity characterization here.

¶ 33 There is also a distinction between a suit brought by an administrator ad litem and a suit brought in the name of the deceased. In the latter case there would be no existing person as plaintiff, and suits in this situation have also been characterized as nullities. The distinction is made in Clay v. Oxford (1866), L.R. 2 Ex. 54 at 55:

> This is not a case where it can be said that persons, not formally entitled to be parties, have brought an action to try certain matters perfectly well known to both sides . . . But here the plaintiff is altogether wrong, or there is no plaintiff; the man in whose name the action was brought was dead. It cannot be said that this is an amendment "necessary for the purpose of determining in the existing suit the real question in controversy between the parties," nor is this an application made between the parties to the suit; for there is no plaintiff, and, therefore, no existing suit, and no question in controversy between the parties. If we could see some person suing who had a beneficial interest in the claim made, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted.
>
> [Emphasis added]

The words the court used in the first sentence to describe a situation distinguishable from the matter before it can be used to describe the situation in this appeal.

Claims by an administrator ad litem

¶ 34 The learned chambers judge was of the view that an administrator ad litem has no capacity to bring an action; hence, the nullity characterization. He held that neither statute nor Rule 50 conferred capacity. The nullity characterization was central to the chambers judge's decision that no amendment could be entertained.

¶ 35 Although not expressly argued before us, a review of the capacity issue may assist in the analysis of the nullity characterization.

Legislation

¶ 36 In Larsen, it was argued that provisions of The Fatal Accidents Act, R.S.A., 1955, c. 111 as amended, 1960, ch. 31 and The Trustee Act, R.S.A., 1955, c. 34, as they then stood, could be interpreted so as to give an administrator ad litem the authority to sue. The argument was rejected. A similar argument, based on the current versions of those provisions, was unsuccessfully raised before the learned chambers judge.

¶ 37 A review of the current legislation and Rules of Court discloses no express statement that an administrator ad litem can never commence action. The Survival of Actions Act, R.S.A. 2000, c. S-27 vests a deceased's cause of action in the estate, but it does not specify who must bring or continue the

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action on behalf of the estate. Specifically, it does not say that an administrator ad litem may not do that. The Survival of Actions Act sets out things an administrator ad litem may do, but does not specifically define the jurisdiction of an administrator ad litem. For example, subsection 8(2) says that an administrator ad litem "may take any steps that a defendant may take in an action", in respect of a cause of action against a deceased person for whom there is no personal representative, but it does not say an administrator ad litem can act only as defendant.

¶ 38 The Fatal Accidents Act, R.S.A. 2000, c. F-8 states in s. 3(1)(b) that an action shall be brought by and in the name of the executor or administrator of the deceased. However, the action referred to in this provision is one "for the benefit of the wife, husband, co-habitant, parent, child, brother or sister" of the deceased. The Fatal Accidents Act does not deal with actions on behalf of the estate. Section 5(2) sets out what an administrator ad litem's powers are in the case of a deceased person as a defendant. It does not deal with a deceased person as a plaintiff.

¶ 39 Section 5(2) of the Fatal Accidents Act and s. 8 of the Survival of Actions Act do not create and define the limits of the jurisdiction of a superior court to appoint an administrator ad litem. They specify the powers or functions of an administrator ad litem in the situations described in the sections. Thus, it is necessary to look elsewhere to determine the scope of the powers associated with the office of administrator ad litem.

Jurisdiction to appoint administrator ad litem: historical basis and Rule 50

¶ 40 Rule 50 reads as follows:

> 50(1) In any action or intended action, where it appears that a deceased person, who was interested in the matters in question in an action or proceeding, has no personal representative, the Court may
> (a) proceed in the absence of any person representing his estate, or
> (b) appoint some person to represent the estate for all purposes of the action or proceeding notwithstanding that
>
> (i) the estate may have a substantial interest in the matters, or
> (ii) there may be active duties to be performed by the person so appointed, or
> (iii) a claim is made for administration of the estate, or
> (iv) the person appointed may represent interests adverse to any other party.
>
> (2) An order so made and any orders consequent thereon bind the estate of the deceased person in the same manner as if his personal representative had been a party to the action or proceeding.
> (3) Moneys payable to an estate by a judgment in an action in which the estate is represented by an administrator ad litem, shall be paid into Court to be paid out to the executor or administrator of the estate when letters probate or administration have issued or as the Court may direct.

¶ 41 Rule 50 does not say that an administrator ad litem can be appointed only in a defensive capacity. At best, the wording appears neutral. However, predecessors of Rule 50 clearly have received a restrictive interpretation. They have been interpreted to enable the appointment of persons in a defensive capacity only. It is not clear from the current wording of Rule 50 why this is so. A review of the earlier cases, the origins of Rule 50, and the history of the office of administrator ad litem may be

useful in locating the basis for the restrictive interpretation of earlier versions of the Rule. This review also shows that predecessors to Rule 50 have not been consistently interpreted as governing administrators ad litem as distinguished from some other office.

¶ 42 Larsen cited Bodnaruk v. C.P.R., [1947] 1 D.L.R. 694 (Alta. S.C., A.D.) and Abbott v. Browns (1921), 58 D.L.R. 288, 16 Alta. L.R. 232 (Alta. S.C., A.D.) for the point that administrators ad litem cannot sue. Bodnaruk considered Rule 63, the immediate antecedent of Rule 50. The wording, which is different from the current Rule 50, is set out at p. 695 of the decision. The plaintiffs obtained appointments under Rule 63 and sought to continue proceedings they already brought purportedly as administrators of the estates of the deceased persons. O'Connor, J.A. said of the then-Rule 63 at p.695:

> In Abbott v. Browns (1921), 58 D.L.R. 288, 16 Alta. L.R. 232, a defendant appointed to represent the estate of a deceased person under the then R. 30 which was somewhat narrower than the present R. 63 is referred to as an administrator ad litem but R. 63 does not authorize such an appointment. (Article by Bora Laskin, 17 Can. Bar Rev., p. 677.)

The Court appears to have been questioning the characterization of a person appointed under the then Rule 63 as an administrator ad litem. However, the Court did not say that the appointment under Rule 63 was limited to defending and not commencing the proceeding. It did conclude that the plaintiffs were not administrators of the estates in issue and it struck the portions of the statement of claim wherein they purported to bring claims in that capacity.

¶ 43 In Abbott v. Browns an earlier predecessor, Rule 30, had been used to appoint a person to represent an estate as defendant. The court revoked the order because it had been made without the person's consent and because the order had been granted after the trial was over. The court stated that it would be illogical to appoint an administrator ad litem after the litigation was concluded. Further, the plaintiff's pleadings had sued the defendant as the administrator of the estate. Again, it is not apparent from the decision that an administrator ad litem cannot sue on behalf of an estate or that the Rule cannot be used to appoint a representative as plaintiff.

¶ 44 In Joncas v. Pennock (1959), 17 D.L.R. (2d) 60, 27 W.W.R. 174 (Alta. S.C., A.D.) at 65-66 (D.L.R.), also cited in Larsen, there was a specific conclusion that the appointment that can be made under Rule 63 would not extend to authority to commence or carry on an action. The plaintiff sought to be appointed administrator ad litem at the appeal, after having proceeded through trial without any appointment. The Court held that Rule 63 could not authorize this. Obiter the Court doubted that it had the power under Rule 63 or any other legislation to appoint an administrator ad litem to commence an action except, perhaps, where equitable relief was sought.

¶ 45 Discussion in Williams and Mortimer seems not to foreclose the possibility that an administrator ad litem historically could commence a suit, so long as it is the specific action in respect of which the appointment was made. The grant of administration ad litem is discussed in Williams and Mortimer as follows at pp. 354-355:

> It is often necessary, mainly in the Queen's Bench Division, but also in the Chancery Division, to constitute a party, particularly a defendant, to the action.
>
> [Emphasis added]

¶ 46 Black's Law Dictionary defines an administrator ad litem as follows: "A special administrator

appointed by court to supply a necessary party to an action in which deceased or his estate is interested." This seems indistinguishable from a Rule 50 appointment. However, when the origin of Rule 50 and the office of administrator ad litem are traced back and compared, it is clear they have different histories. What also appears clear is that these histories have merged in more recent years to the point that the two offices are now generally discussed interchangeably and probably equivalently.

¶ 47 That the administrator ad litem and the appointment under the original predecessor of Rule 50 created two different offices is indicated in early editions of texts on executors and administrators and Chancery procedure. Sir E.V. Williams, A Treatise on the Law of Executors and Administrators (Williams on Executors), 9th ed., v. 1 (London: Stevens and Sons, Sweet and Maxwell; Toronto: Carswell, 1893) at p.446 describes the early role of administrator ad litem as "limited to commencing or substantiating proceedings in Chancery". They add that "the appointment of an administrator ad litem is now in many cases unnecessary" because of the existence of the predecessor of Rule 50.

¶ 48 The most recent revision of this treatise reiterates this for present practice. In Williams and Mortimer at pp.879-880, it is stated:

> The appointment of an administrator ad litem is in many cases unnecessary, since the court has power where any deceased person interested in the matter in question has no representative, to proceed in the absence of such representative, or to appoint some person to represent the estate for the purposes of the proceedings. [CPR 19.7, 19.8]

¶ 49 The two roles are probably indistinguishable today. The term "administrator ad litem" has been used to describe the person appointed under Rule 50 (and is used in Rule 50 itself, in paragraph (3)). In Narkaus v. Narkaus, [1947] 1 W.W.R. 86 at 86, 89 (Alta. S.C., A.D.) Frank Ford, J.A. said at p.90: "The use of the term 'administrator ad litem' to designate the person appointed as representative of an estate under [the predecessors of Rule 50] is of long standing in this province".

¶ 50 The history of administrators ad litem reaches back much farther than does that of Rule 50. It appears the administrator ad litem office was a creature of the ecclesiastical courts for the purpose of Chancery proceedings. Rule 50, on the other hand, has its origins in mid-nineteenth English procedural legislation.

History of administrators ad litem

¶ 51 Williams on Executors, 9th ed., summarizes the scope of an administrator ad litem's power and interest by saying at p. 448, note (h) that "as a general proposition, an administrator ad litem represents the estate to the extent of the authority which the letters of administration purport to confer" (citing Daniell's Chancery Practice, 6th ed., 207). The usual form of the letters was said to be as had been granted in Brant v. King, ex rel. Mr. Wilson (1829), 2 Phill. Ch. C. 549-551 (which predates Rule 50 and its predecessors): "limited for the purpose only to attend, supply, substantiate, and confirm the proceedings already had or that may be had in the cause, in the High Court of Chancery, or any other cause which may be commenced, touching the matters at issue in the cause, and until a final decree shall be made therein, and the decree carried into execution, and the execution thereof fully completed". The wording of this form of grant contemplates proceedings already existing or related to causes already existing.

¶ 52 J. Mitford (Lord Redesdale), Pleadings in Suits in The Court of Chancery, 5th ed. (London: Stevens, 1847), a treatise that also predates the origin of Rule 50, offers an early description

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of the early purpose of administrators ad litem at 203-204:

> When there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required. In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the court... [T]he limited administrator can collect no such assets by the authority under which he must act...

¶ 53 It is clear that the powers of an administrator ad litem were intended to be circumscribed in comparison to the powers of a general administrator, even in Chancery. It appears, though, that there were limited circumstances in which an administrator ad litem was able to bring proceedings in Chancery if necessary for the benefit of the estate (at 205):

> Where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the court to proceed to a decision on the claim...

See also Williams and Mortimer at p. 879.

¶ 54 These proceedings would not have included actions specifically in respect of administration of the assets of the estate: Mitford, supra, at p. 404.

¶ 55 In Saskatchewan Farm Loan Board v. Tomlin et al., [1940] 3 D.L.R. 527, the Saskatchewan Court of Appeal traced the practice of appointing administrators ad litem to the Judicature Ordinance of 1893 (which, by virtue of ss. 2 and 5 of the Judicature Act, R.S.A. 2000, c. J-2, reflects the current jurisdiction of this Court). Gordon J.A. said at pp.528-529:

> So far as I can find the practice of appointing administrators ad litem in the North-West Territories was governed by r. 469, of the Judicature Ordinance of 1893. This rule was as follows:
>
> > Where no probate of the will of a deceased person or letters of administration to his estate have been granted, and representation of such estate is required in any action or proceeding in Court, the judge may appoint some person administrator ad litem, according as the case may require, to the estate, and the person so appointed shall give security if not dispensed with as the judge may require, and have, pendente lite as the case may be, the rights, authorities and responsibility of an administrator as in other cases.
>
> In the Judicature Ordinance of 1898 this rule was carried forward as follows:
>
> > 592: Where no probate of the will of a deceased person or letters of administration to his estate have been granted, and representation of such estate is required in any action or proceeding in Court, the judge may appoint the Public Administrator administrator ad litem according as the case may require.

. . .

[Underlining added.]

¶ 56 It can be inferred from the underlined portions that these rules contemplated an action or proceeding already existing at the time of the appointment of administrator ad litem. The administrator ad litem was appointed not to institute a new proceeding on behalf of an estate, but only where representation of the estate was required in a proceeding.

¶ 57 As discussed below, the same language is found in the rules from which Rule 50 is derived. Hence, the same inferences have been drawn about the original scope and intent of the rule.

History of Rule 50

¶ 58 Rule 50 had its origins in the procedure of the Chancery courts, in s. 44 of An Act to amend the Practice and Course of Proceeding in the High Court of Chancery (also referred to as The Improvement of Jurisdiction of Equity Act, or the Chancery Procedure Act) (1852), 15 & 16 Vict. c. 86:

> If in any suit or other proceedings before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally by public advertisements; and the order so made by the said Court, and any orders consequent thereon shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court.

¶ 59 Prior to this provision, the practice was for the ecclesiastical court to grant administration ad litem, limited to proceedings taken in Chancery, in cases of pressing necessity: G.O. Morgan, Statutes, General Orders, and Regulations Relating to the Practice and Jurisdiction of the Court of Chancery, 2d ed. (London: Wildy and Sons, 1860) at p.225, note (i). The rule seems to have been created to obviate the requirement in many circumstances for a grant of administration ad litem. A.L. Goodhart and H.G. Hanbury, eds., Sir William Holdsworth, A History of English Law vol. xv (Methuen & Co.; Sweet & Maxwell, 1965) at 118:

> ...it was the Chancery Procedure Acts of 1852 which inaugurated the modern procedure in equity.
> ... a series of new procedural powers given to the court enabled it to simplify procedure and to do substantial justice with a considerably less expenditure in time and money....If there was no legal personal representative the court could appoint one for the purposes of the suit.

¶ 60 S.E. Williams and F. Guthrie-Smith, Daniell's Chancery Practice, vol. 1, 8th ed. (London: Stevens and Sons, 1914) also discuss the new s. 44 power at 155-156. It is clear from their description that a s. 44 appointee was meant to have the same function as an administrator ad litem.

> Where a claim on property in dispute would vest in the personal representative of a deceased person, and there was no general personal representative of that person, an

> administration, limited to the object of the suit, was formerly necessary to enable the Court to proceed to a decision on the claim; but now the Court may, if it thinks fit, in any cause, matter or other proceeding, appoint a person to represent the estate, or proceed in the absence of any such representative.

¶ 61 Section 44 was interpreted to have two key restrictions which would militate against a conclusion that the person appointed thereunder could sue on behalf of the estate. Both arise from the introductory words of the provision: "If in any suit or other proceedings before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative..." The first restriction is that the representative would be appointed only where there was a suit or proceeding already before the court of Chancery. This is the same limitation that existed in respect of the powers of an administrator ad litem. The second restriction is that a person who was interested in the matters could be appointed, but a person was not to be appointed to represent the whole of the adverse interest.

¶ 62 This interpretation is apparent in Daniell's Chancery Practice at 157-9, in a discussion of the provision and its relation to administration ad litem:

> The power of the Court to appoint a person to represent the estate, or to proceed without a representative, will not be acted upon...where the whole adverse interest is unrepresented; nor where there is personal responsibility attached to the position. . .
>
> . . .
>
> The proper person to be appointed is the person who would be appointed administrator ad litem; but the Court will not appoint a person against his will.

¶ 63 As noted, the wording of the rule has changed since the original s. 44. The current wording of Rule 50 arguably may remove the restrictions that governed s. 44 because it does not clearly exclude the institution of proceedings and contains several other key additions. For example, in Plett v. Blackrabbit, [2001] A.J. No. 1296, 2001 ABQB 843, a case that was decided after Stout Estate, Park J. held at para. 15 that the wording of Rule 50 "demonstrates that procedurally, an administrator ad litem can act as a plaintiff."

¶ 64 That argument was not made before this court. It is not necessary to interpret Rule 50 in this case because, whether or not the rule conferred authority on Sheila Stout to commence an action, the statement of claim is not a nullity and Larsen can be distinguished on its facts.

¶ 65 I therefore leave for another day a determination of the interesting issue whether an administrator ad litem has authority under Rule 50 to initiate a claim on behalf of an estate. I note in passing that if the rule does not provide this authority, it should be amended to clarify its scope and intent, as the current wording suggests a broad authority that could be a trap for the unwary.

¶ 66 It is appropriate in these circumstances to assume, without deciding, that an administrator ad litem or Rule 50 appointee is unable to initiate a claim on behalf of an estate. There remains the question whether the claim brought here is a nullity incapable of amendment.

Rejection of the "nullity" characterization

Acts done under the authority of a court order

¶ 67 At no time prior to the application for the order under appeal, that is, the application to dismiss

the suit, was there an appeal of, or a motion to set aside, the order appointing Sheila Stout administrator ad litem for the purpose of bringing the action. In fact, as stated earlier, the appointment was acknowledged in a consent order appointing the public trustee administrator ad litem of the Golinowski estate.

¶ 68 Thus, there was an administrator ad litem in place, and she had been given that appointment for the purpose of bringing the action. This is a key distinction from Larsen. As stated earlier, in Larsen, the order under appeal had set aside the appointment of an administrator ad litem.

¶ 69 The factual distinctions between this appeal and Larsen and differences with the learned chambers judge's interpretation of Larsen have been noted. Perhaps more important than these, though, are other decisions and legislative changes that came about in the intervening period.

¶ 70 In many cases in which courts have refused to substitute an executor or an administrator for an administrator ad litem, the administrator ad litem had been appointed where there was already an executor or administrator in existence. Amendment would be refused on the premise that nonexistence of an executor or administrator was a precondition to appointment of an administrator ad litem (e.g. Mantle v. McIntyre, [1965] 2 O.R. 130 (C.A.).) Thus, the reasoning went, the appointment of the administrator ad litem was void ab initio and the action could not have been brought. The executor or administrator could not be substituted because to do so would be to add something to nothing.

¶ 71 This approach was explicitly rejected in this jurisdiction in McLay v. Alberta (Public Trustee) (1980), 36 A.R. 200 at paras. 3-7 (Q.B.). The court refused to accept the premise that an administrator ad litem could not exist where there is a validly appointed administrator or executor. Purvis, J. stated this at para. 7:

> A grant of administration ad litem is a court order and is valid and binding until revoked by another court order, or until the reason for the existence of the grant disappears. Consequently, the appointment of the Public Trustee in this case is still valid and existing for the purpose of carrying on the litigation which was commenced within the limitation period.
>
> [Emphasis added]

¶ 72 A five-member panel of this Court confirmed this view in Frank v. King Estate (1987), 56 Alta. L.R. (2d) 289 (C.A.). There were two cases under consideration in Frank. In the first, Laurien's cause, the plaintiff had obtained an order appointing the Public Trustee administrator ad litem of the deceased's estate and named the Public Trustee as defendant. Unbeknownst to the plaintiff, an administratrix had been appointed, and she subsequently was named a defendant in her personal capacity, as owner of the vehicle the deceased had been driving. The administratrix obtained an order setting aside the order appointing the administrator ad litem on the basis that there is no authority to appoint an administrator ad litem when there exists an administrator or executor. She also succeeded in having the statement of claim struck.

¶ 73 This Court explicitly disagreed that the order appointing the administrator ad litem should be characterized as void ab initio, even though it should not have been made. Stevenson J.A. for the Court agreed with McLay, stating at 295 that:

> . . . an order of a court of competent jurisdiction is not void, but valid until set aside . . . The validity of such an order so long as it is unimpeached has long been recognized . . .

In my opinion the order was irregular, at most voidable.

¶ 74 Because the appointment of the administrator ad litem was valid, the action against the administrator ad litem was validly constituted and the court refused to strike it solely on the basis there was another person that should have been the named defendant. Stevenson J.A. said at 297:

> In my view the action was properly constituted as against the administrator ad litem, representing the estate of the deceased for that purpose. I would not follow the authorities characterizing the action a nullity . . .
> Since the order appointing the administrator ad litem was effective until set aside, the administratrix can be substituted under R. 38. It is not a case of adding something to nothing: it is a case of substituting the proper party for one irregularly appointed, but appointed nonetheless . . .
> When the action was commenced the administrator ad litem was clothed with authority to defend the action on behalf of the estate.

¶ 75 Although it is a case where the administrator ad litem was improperly named as defendant rather than plaintiff, the Laurien matter in Frank Estate is more closely applicable to this appeal than is Larsen. There was a validly, but irregularly appointed, administrator ad litem and a properly constituted action brought on the authority of that appointment. Even if the appointment may be validly set aside, neither it, nor the action brought on the basis of it, is a nullity.

Broader rejection of "nullity" characterization

¶ 76 In Frank's cause, the second of the two matters under consideration in Frank Estate, the Court went even further than its holding in Laurien (that an action naming a validly but irregularly appointed party is not void ab initio). In Frank, the Court rejected the nullity characterization altogether, even though one of the named parties was not a suable entity, and none existed at the time.

¶ 77 In the Frank case the pleading named "the estate", not a personal representative, as defendant. The pleading therefore named as defendant an entity that could not be sued. The Court said that the authorities would have held the action a nullity in these circumstances. The Court noted that because the deceased was an Indian under the Indian Act, the superintendent under that legislative scheme was the personal representative of the deceased's estate. There was, therefore, a proper representative in existence that could have been substituted. The Court chose not to decide the case by distinguishing it from the nullity ones on this basis. Instead, the Court decided that an action against an "estate", an entity not suable, should no longer be considered a nullity. Current legislative policy could not support the nullity characterization. The pleading was instead a curable irregularity. Stevenson, J.A. said at pp.300-301:

> I agree with the argument of Frank's counsel that there was a personal representative who could be substituted but would prefer to say that an action against the estate of a deceased person should no longer be characterized as a nullity. It is, in my view, in keeping with current legislation and the principle that ought to be applied, that the court, in deciding whether to add or substitute a party to an action, ought not concern itself with whether the action is a "nullity", but whether the amendment results in prejudice, bearing in mind express limitation periods and the principles behind them . . .
> This is not to deny the existence of error nor to say that error is always curable. Moreover, error is often attributable to lack of care and we do not encourage carelessness. I will return to that point in disposing of the costs of these appeals. Error,

> however, must [not] be compounded into injustice and the almost invariable result of characterizing proceedings as a nullity with automatic consequences tends to that end . .
>
> .

¶ 78 This approach was followed by Kent J. who extended it to a plaintiff in Wells Estate v. Purdy (April 17, 2001), Action No. 9701-14530 (decided with Action Nos. 9701-14788, 9701-14763, 9701-05316, and 9801-01644).

¶ 79 Rejection of the nullity approach in these kinds of cases is consistent with legislative development in other jurisdictions. In England, even the doctrine of relating back no longer causes an action commenced by an administrator before appointment to be considered a nullity. England has altered that situation by changes in procedural law. Sir J. I. H. Jacob & I.S. Goldrein, eds., Bullen & Leake & Jacob's Precedents of Pleadings, 13th ed. (London: Sweet & Maxwell, 1990) at 373:

> The court has the power under R.S.C., Ord. 20, 5(4) [now Rule 17.4(4) of the Civil Procedure Rules] to alter the capacity in which a party sues as the administrator of the deceased, even if he has acquired that capacity after the commencement of the action, and further, even if the relevant period of limitation has expired. The effect of this rule is that cases such as Ingall v. Moran [1944] K.B. 160, which provided that an administrator could not commence an ordinary action for debt or damages until the letters of administration were issued, are now negatived. Thus it is only actions begun in the name of the deceased as plaintiff which are nullities, incapable of being cured by any of the court's present powers.

¶ 80 In Ontario similar changes to the Rules of Civil Procedure are found in Rule 9.03. G.D. Watson, ed., Holmested and Watson, Ontario Civil Procedure, v. 2, looseleaf (Toronto: Carswell, 1993) at 9-4 to 9-4.1 explain that Rule 9.03 "contains a series of new remedial provisions to overcome a body of pre-existing case law holding that, in a variety of situations, the improper constituting of proceedings against an estate made the proceedings a nullity."

¶ 81 By Rule 9.03(1), a proceeding brought by or against a person as administrator before a later grant of administration is deemed to have been properly constituted from the start. By Rule 9.03(2) a proceeding commenced by or against an estate naming the estate is not a nullity but may be continued by or against the executor or administrator or against a litigation administrator. Rule 9.03(3) permits a proceeding commenced in the name of or against a person who has died to be continued by or against the executor or administrator or a litigation administrator, with amendment to the style of cause. Finally, Rule 9.03(5) provides that a proceeding by or against a deceased or an estate is not a nullity because it was not properly constituted. The court may analogize from other provisions of Rule 9.03 to order the proceeding to be reconstituted.

¶ 82 These procedural amendments are not present in this jurisdiction, but the judicial pronouncement in Frank Estate is to the same effect. In circumstances closer to the old nullity cases than this appeal, the Court directed that the nullity characterization is no longer supportable. Frank is binding. There is no reason not to extend the reasoning in Frank to a plaintiff in these circumstances. The order granting the administrator ad litem appointment is not a nullity; neither is the claim brought under its authority. Rather, the pleading is an irregularity at most. The question is whether the irregularity can and should now be cured by amendment.

2. If the part of this action that is purportedly brought by an administrator ad litem on behalf of an estate can be considered a curable irregularity, should this Court allow

amendment of the pleadings outside the limitation period?

Changes in limitations legislation since Larsen

¶ 83 In Larsen the Court held that the statement of claim could not be amended to substitute the administrator as plaintiff because the action was out of time: "As the limitation periods for commencing action under these Acts have now expired, there can be no question of amending the statement of claim by substituting the proper party as plaintiff." The Court relied on then settled law and the limitations legislation in place and concluded that amendment would not be allowed as the effect would be to deprive the defendant of a limitations defence.

¶ 84 Although the learned chambers judge held that Larsen governed this case and that the impugned pleadings were a nullity incapable of amendment, he considered whether the effect of Frank was to overrule Larsen to the extent of permitting an amendment to substitute the administrator of the estate for the administrator ad litem. The learned chambers judge concluded that Frank does not go so far as to allow the court to add a party to a proceeding brought by a plaintiff who had no status to sue.

¶ 85 When Frank was decided, different limitations legislation was in place than when Larsen was decided. The parties agree that this case is governed by different legislation again: the Limitations Act, R.S.A. 2000, c. L-12, rather than the Limitation of Actions Act, R.S.A. 1980, c. L-15, applies.

¶ 86 The Limitation of Actions Act was amended after Larsen was decided. The amended s. 61(1)(c) specifically allowed an amendment to add or substitute a party outside the limitation period. The learned chambers judge did not discuss the effect of this change in legislation on post-Larsen cases, including Frank. He did refer to s. 61(1) and noted that it has been repealed with the repeal of the Limitation of Actions Act. The chambers judge properly held that this is a case for application of the new statute. The current provision dealing with amendment outside the limitation period is s. 6 of the Limitations Act. The chambers judge was of the view that s. 6 would not permit amendment outside the limitation period in this case because it allows a party to be added only to a valid legal proceeding, and that the action brought by the administrator ad litem was a nullity, so was not a valid legal proceeding.

¶ 87 I respectfully conclude the learned chambers judge was in error in adopting the nullity characterization. Thus, this premise for disallowing the amendment fails. Because the limitation period here has expired, the question of amendment rests on the application of the new provision and case law interpreting the court's power to amend pleadings after the limitation period.

¶ 88 The applicability of s. 6 of the Limitations Act was not argued as an issue before us, except to the extent that a pre-condition to applicability was the existence of a valid legal proceeding. In the Limitations Act, s. 1 states as follows:

> 1. In this Act,
>
> (a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;
> (b) "claimant" means the person who seeks a remedial order;

It is to be observed that s. 6(1) of the Limitations Act references "a claim . . ." added to a proceeding previously commenced. The phrase "the added claim" appears in subsections 6(2), 6(3) and 6(4). Section 6 reads as follows:

6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied. . . .

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

(a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,

(b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

...

(5) Under this section,

(a) the claimant has the burden of proving

(i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and

(ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,

and

(b) the defendant has the burden of proving that the requirement of subsection (3)(b) or (4)(b), if in issue, was not satisfied.

¶ 89 In these proceedings there is no "added claim" in the sense that the body of the pleading originally brought is the subject of the amendment applied for. What is sought to be amended is the style of cause by substituting a claimant. The person who seeks a remedial order in the context of s. 1 of the Limitations Act is Sheila Stout in her capacity as administrator of the estate of Kelsey Stout.

¶ 90 The definition of "claim" as defined in s. 1(a) of the Limitations Act has two components. Not only must it be a matter giving rise to a civil proceeding but it must be one in which a claimant seeks a remedial order. "Claimant" is separately defined as the person who seeks a remedial order.

¶ 91 The structure of s. 6(1) - s.(4) refers to added claims. Added claims mean not only matters giving rise to civil proceedings. There must also be a "claimant" - a person who seeks a remedial order - to constitute a claim. It follows that the scope of s. 6 includes applications to add or substitute a claimant or change the capacity in which a claimant sues without in any way altering the body of the pleading, which is the case here. The scope also includes an amendment to the body of the pleading without any change in the status of a claimant. In the latter case, for example, s. 6(2) is applicable. It is evident that many combinations may be asserted by an applicant under s. 6 which need not be illustrated here. Suffice it to say that, in terms of the applicability of s. 6, what is sought in these proceedings is an added

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claim that changes the capacity in which a claimant sues. It falls squarely within the wording of s. 6(3) of the Limitations Act.

¶ 92 The purpose of s. 6 of the Limitations Act is informed by its history including its relationship with s. 61(1) of the Limitation of Actions Act. The applicable portion of s. 61(1) is as follows:

> 61(1) If an action to which this Part applies has been commenced within the time allowed by or under this Part, the court, on application, may authorize an amendment to any pleading or proceeding therein that will result in a change of parties to the action . . .
>
> (c) when the action is one brought against a person who was in fact deceased at the time the action was commenced against him, if the court is satisfied that the action is one which under the Administration of Estates Act or the Survival of Actions Act could, at the time, have been maintained against the estate of a deceased person and if the change is only the substitution of the estate of the deceased person; notwithstanding that the time limited by this Part for commencing that class of action had lapsed between the time the action was commenced and the time of the application for the amendment.

¶ 93 This Court in Frank at p.299 described this provision as "a legislative determination, that, for the purposes of the Act, an action against a non-existent party is not a nullity but will sustain an application to substitute."

¶ 94 In the mid 1970s The Institute of Law Research and Reform began a study that led to the publications, Limitations, Report for Discussion No. 4, September 1986, and Limitations, Report No. 55, December 1989. Prior to this, in June, 1977, it issued its Working Paper, Limitation of Actions. The Institute's comments at pp. 63-64 of the Working Paper shed some light on the purpose of s. 61(1) of the old Act and what has become s. 6 of the new one. The Institute mentions Larsen as an example of the harsh operation of the rule as it existed prior to the 1966 amendments (which gave rise to s. 61(1)) and goes on to explain that even s. 61(1) could benefit from expansion:

> Our courts have accepted the judge-made rule that parties should not be added or substituted after the expiration of time, and that this prohibition includes an attempt to change the capacity of a party. . . .
> The rule often operates harshly, as appears from: Public Trustee v. Larson [sic] (1964), 49 W.W.R. 416 (App. Div.) . . .
> An attempt to change the party after the expiration of time was unsuccessful.
> . . . s. 61(1) permits change of parties in three specific cases. . . .
>
> (b) Where the plaintiff suing on behalf of a person who is under disability or is deceased is not entitled to bring the action, as long as the court is satisfied that no one has been misled and the change is only the substitution of the proper plaintiff.
>
> . . .
> . . . Section 61(1)(b) deals with a case in which action is brought by the wrong person on behalf of an estate but we think there should be a more comprehensive provision. The present one does not cover all cases of the wrong plaintiff and one must fall back on the distinction between a misnomer of the plaintiff and the wrong plaintiff . . .

> A general provision could take one of several forms. It could simply allow addition or substitution of a plaintiff; it could allow addition or substitution on the basis of a connection with the original cause of action, as British Columbia does; it could use the criterion of prejudice to the defendant, or it could follow the proposal of Professor Watson. He would permit the addition or a change of a plaintiff only where the defendant knows of the claim within the limitation period plus the time provided for the service of process, which is one year. We are not sure whether there is much difference between these proposals. We are inclined to agree with Professor Watson.

¶ 95 Thus, the Institute approved of the reform that had been brought by s. 61(1) of the old Act but found that it did not go far enough. Section 61 of the Limitation of Actions Act was considerably more specific than s. 6. The learned chambers judge took the effect of the absence of this specific provision in the new Act to mean the remedy provided by s. 61(1)(b) is no longer there. With respect, this conclusion does not follow. The Institute's comments, and a plain reading of s. 6, suggest that the new s. 6 was intended not only to retain the exception, but also to broaden it to encompass other situations. The discussion suggests also that a purpose of both provisions was to relieve against the harsh results in cases such as Larsen.

¶ 96 The new statute has only 13 sections, as compared with 61 in the previous statute. One of the strategies of the new statute was to reduce complexity by setting limitation periods that can be mechanically applied, and creating exception provisions for situations where it would not be unjust to a defendant to remove the limitations defence: Report for Discussion, pp. 1-2.

¶ 97 Two approaches have developed in assessing whether pleadings can be amended outside the limitation period: the functional approach, which presumes that amendments will be allowed unless the party resisting amendment can show it will suffer actual prejudice; and the analytical approach, which presumes that amendments will not be allowed, even in the absence of prejudice, unless the party seeking amendment can show special circumstances. The two approaches proceed from opposite assumptions, and cannot be merged: Madill v. Alexander Consulting Group, [1999] A.J. No. 865, 1999 ABCA 231, 237 A.R. 307 at para. 59.

¶ 98 The analytical approach was prescribed in Weldon v. Neal (1887), 19 Q.B.D. 394 at 395 (C.A.), and modified by the Supreme Court of Canada in Basarsky v. Quinlan, [1972] S.C.R. 380, [1972] 1 W.W.R. 303. The functional approach was first advocated by Professor Watson in "The Amendment of Proceedings after the Expiry of Limitation Periods" (1975), 53 Can. Bar Rev. 237. He suggested that the effect of a limitation statute must be reconciled with the competing principle found in the broad power of amendment, and that a restrictive approach might impair the just determination of the real matters in dispute.

¶ 99 This Court, in cases governed by the former Limitations of Actions Act, concluded that the analytical approach is the proper one: Madill; Neis v. Yancey (1999), 250 A.R. 19, 180 D.L.R. (4th) 463 (C.A.); Cunningham v. Irving-Adams, [2001] A.J. No. 157, 2001 ABCA 38, 277 A.R. 115. However, in Neis the Court foreshadowed the possible adoption of a different approach, noting that the new Limitations Act would "permit a claim to be added after the limitation period [...] unless the defendant can prove that he or she did not receive, within the limitation period, sufficient knowledge of the claim to avoid being prejudiced in maintaining a defence": at para. 22. Other provinces have also enacted legislation adopting the functional approach. See The Queen's Bench Act, 1998, S.S. c. Q-1.01, s. 30; Limitation Act, R.S.B.C. 1996, c. 266, s. 4(4).

¶ 100 The approach advocated by Watson more than 25 years ago has now made its way into s. 6 of the Limitations Act. As the analytical approach has been replaced by a legislated functional approach,

special circumstances are no longer required to amend pleadings. Instead, a court must evaluate whether each of the requirements of s. 6 are made out in the circumstances of the particular case.

¶ 101 The learned chambers judge based his decision that s. 6 could not save the impugned pleading on the reasoning that a valid legal proceeding was required before a claim could be added, and the nullity determination meant this threshold was not met. As indicated earlier, the pleading here is not a nullity. There is a "proceeding previously commenced" to which claims can be sought to be added.

¶ 102 Further, even if the impugned claims were somehow found to be a nullity, there were other, regular claims, including one by Sheila Stout in her own capacity, that would constitute a valid proceeding. The chambers judge did not consider whether the existence of the other, valid claims would satisfy the threshold requirement of a proceeding previously commenced. The decision of the Supreme Court of Canada in McEllistrum v. Etches suggests this approach is available. There the court assumed, without deciding, that an action cannot be instituted by a person in the capacity of administrator before letters are issued and held that, where an action containing a claim by an administrator not yet appointed (which traditionally would have been held a nullity) also contains another claim that is brought by a valid plaintiff, a late-appointed administrator might still be added to the action. The writ was held not to be a nullity because it contained such an additional valid claim, and the trial court could consider an application to add the administrator as a plaintiff. The limitation period had not then expired.

¶ 103 The approach the Supreme Court took in McEllistrum turns the question not to nullity, but to amendment of valid pleadings. Here, unlike McEllistrum, there was an intervening limitation period, but there is now legislation that supplies the court with jurisdiction to add a claim if the criteria for amendment are met.

¶ 104 The requirements of s. 6(3) for this case come down to these:

> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and
> (c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

¶ 105 Subsection 6(5) provides that the plaintiff bears the onus of proving the first and third requirements and the defendant bears the onus of disputing the second.

¶ 106 I conclude that all three requirements are made out. The pleading sought to be brought by the administrator of the estate as the added claim is the same pleading that may have been erroneously brought by the administrator ad litem and arises from the conduct, transaction or events described in the original pleading, which is the same conduct or events from which the other, regular claims arise.

¶ 107 The respondent had sufficient knowledge of the added claim within the limitation period and has not shown otherwise. This is obvious from the order, consented to by the respondent, appointing the Public Trustee administrator ad litem for the Golinowski estate. As noted, that order was granted on the support of an affidavit appending the statement of claim ultimately filed (which contains the all claims which, if the amendment is allowed, will have been brought by the administrator). The respondent does

not take the position that prejudice will be suffered if the amendment is granted.

¶ 108 The third criterion requires that the claims sought to be added are necessary or desirable to ensure the effective enforcement of the claims originally intended to be asserted. The appellant clearly intended bringing a claim on behalf of the estate, and the order appointing Sheila Stout administrator ad litem clearly was sought - and intended by the court granting it - to make that possible. In this case that claim should not be pursued by an administrator ad litem as the capacity of a person to do so in that office may be in doubt. In any event, Sheila Stout has now obtained a grant of administration and in that capacity is the person with undisputed authority to pursue the claim. She has applied to amend. The amendment is necessary and desirable to ensure that the claim which all parties, and the court, clearly intended to be asserted can proceed without dispute as to her status.

CONCLUSION

¶ 109 The view expressed in Frank that the nullity characterization should be avoided is extended to a plaintiff in these circumstances. The portion of the pleading containing claims by Sheila Stout as administrator ad litem should not have been struck. Instead, the pleading is capable of amendment and should be amended to substitute Sheila Stout in her capacity as administrator of the estate of Kelsey Stout for Sheila Stout in her capacity as administrator ad litem. In so concluding, I do not reject or reconsider Larsen; it does not govern this case because the facts are distinguishable. Rule 50 of the Alberta Rules of Court should be amended to clarify its scope and intent. Accordingly, the appeal is allowed.

WITTMANN J.A.
PICARD J.A.
FRUMAN J.A.

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