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*Mar. 16, 17, 18
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*Jan. 24

JOHN JOSEPH CLEMENS (*Plaintiff*) ....APPELLANT;

AND

JOHN C. CLEMENS ESTATE, CROWN TRUST COMPANY, JAMES B. BROWN, EXECUTORS (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Parent and child—Advancement—Presumption of—Whether rebutted—Father and son with same name—Shares of stock registered—Whether resulting trust.

The appellant and his father had identical Christian names, J. J. C., but the father, throughout his life and in all his business dealings with a few exceptions, was known as and used the name J. C. C. In 1928, the father purchased shares and caused them to be registered in the name J. J. C. He used his own money for the purchase and retained physical possession of the certificates during his lifetime. At the same time he bought other shares which he registered in the names of his daughter, his other son and the name J. C. C.

The appellant sued his father's executors to recover the shares registered in the name J. J. C. The trial judge dismissed the action and the Court of Appeal for Ontario, by a majority, affirmed this judgment.

Held (Abbott J. dissenting): The appeal should be allowed.

Per Kerwin C.J., Rand and Cartwright JJ.: The inference from the evidence is irresistible that by causing the certificates to be issued in the name J. J. C., the father was designating the appellant and not himself.

The respondents have failed to adduce sufficient evidence of any contemporaneous act or declaration by the father to rebut the presumption of advancement. Furthermore, there was evidence of subsequent declarations of the father to support the view that the appellant was the beneficial as well as the legal owner of the shares. There was no evidence that the appellant gave up that ownership and became a trustee for his father.

Per Abbott J. (dissenting): The father was designating the appellant and not himself and, in consequence, a rebuttable presumption of advancement was created. The contemporaneous acts of the father in dealing with the certificates are not only inconsistent with any intention on his part to convey the beneficial interest in the shares to the appellant, but they indicate clearly that he intended to retain the right to deal with them as he might see fit. These acts are in themselves sufficient to rebut the presumption of advancement; the presumption is further rebutted by the acts and declarations of the appellant since he first learned of the shares registered in the name J. J. C., showing that he considered himself only a trustee.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming, Laidlaw J.A. dissenting, the dismissal by the trial judge of the action.

J. J. Clemens in person.

H. F. Parkinson, Q.C. and *M. J. Mowbray* for the respondents.

THE CHIEF JUSTICE:—After anxiously considering the evidence in the record, the judgments in the Courts below and the arguments addressed to us I have concluded: (1) That when the deceased caused the Certificates of Shares to be issued in the name of John Joseph Clemens he meant them to be in the name of, and for, the appellant; (2) the presumption is that he intended to advance the appellant and there is nothing in the record to rebut that presumption. I have had the opportunity of perusing the reasons for judgment of Mr. Justice Cartwright and I agree with them. On the second point, I merely add a reference to the decision of the House of Lords in *Shephard* v. *Cartwright* (2).

The judgment of Rand and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1), pronounced on January 12, 1953, dismissing an appeal from a judgment of

(1) [1953] O.R. 87; 2 D.L.R. 290. (2) [1955] A.C. 431.

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Judson J., delivered at the conclusion of the trial on May 1, 1952, dismissing the appellant's action. Laidlaw J.A., dissenting, would have allowed the appeal.

The respondents are the executors of the last will of the appellant's father, hereinafter usually referred to as Clemens Senior, who died on January 31, 1943.

In the pleadings the appellant asks (a) an order requiring the respondents to deliver to him 3,300 shares of the common stock of The International Nickel Company of Canada, Limited, represented by certificates numbers T.T.C. 9613 to 9645 inclusive, each for 100 shares and registered in the name of John Joseph Clemens; (b) payment of all dividends received by the respondents on such shares; (c) an order requiring the respondents to account for 200 shares of the common stock of International Nickel Company of Canada, Limited, represented by certificates numbers T.T.C. 9646 and 9647 registered in the name of John C. Clemens alleged to have formed part of the estate of Clemens Senior and to have been wrongfully given by the respondents to the appellant's sister Elizabeth Clemens Brown; (d) damages for wrongfully depriving the appellant of his property in the said shares; and (e) such further and other relief as might seem meet.

The respondents plead that 400 of the shares referred to in (a) above, represented by certificates numbers T.T.C. 9642 to 9645 inclusive, and the 200 shares referred to in (c) above never came into their hands; that the other shares referred to in the Statement of Claims were the property of Clemens Senior; and that the appellant is estopped by reason of the accounts of the estate having been passed in the Surrogate Court of the District of Sudbury on October 18, 1946. They also plead the Statute of Limitations and the Trustee Act.

Clemens Senior was born on or about December 24, 1879. He was married to Catherine (or Katherine) Droste on September 27, 1911. Three children were born of this marriage, Elizabeth Louise Clemens on September 18, 1912, the appellant on December 20, 1914, and Richard A. Clemens on April 5, 1917.

Throughout his life and in all his business dealings, except in a few instances to be mentioned hereafter, Clemens Senior was known as John C. Clemens or John

Casper Clemens. It appears however from copies of a birth certificate and a baptismal certificate, which while not strictly proved were filed without objection, that Clemens Senior was baptized John Joseph so that his baptismal name was the same as that of the appellant.

On a date or dates not fixed by the evidence but prior to October 30, 1928, Clemens Senior purchased shares of common stock in the International Nickel Company of New Jersey and received certificates of deposit under an agreement dated October 30, 1928, in the following names and amounts:—

Elizabeth Louise Clemens	200 shares
Richard A. Clemens	600 shares
John Joseph Clemens	600 shares
John C. Clemens	140 shares

In exchange for these certificates of deposit certificates for shares of the common stock of The International Nickel Company of Canada Limited were issued, on a basis of six for one, on January 25, 1929, as follows:—

to Elizabeth Louise Clemens	1,200 shares
to Richard A. Clemens	3,600 shares
to John Joseph Clemens	3,600 shares
to John C. Clemens	840 shares

The certificates for the 3,600 shares in the name of John Joseph Clemens were each for 100 shares, were numbered T.T.C. 9610 to T.T.C. 9645 inclusive, and so include the certificates for 3,300 shares claimed by the appellant in this action.

The two main questions which arise in this appeal are (i) whether Clemens Senior in causing the original 600 shares and the 3,600 shares which were issued in exchange therefor to be registered in the name John Joseph Clemens intended to designate himself or to designate the appellant, and (ii) whether, if he intended to designate the appellant, the transaction was an advancement to the appellant or created a resulting trust for Clemens Senior.

As to the first of these questions, the learned trial judge was of opinion that Clemens Senior caused the 3,600 shares to be registered in his own name but that if his intention was to register them in the name of the appellant he did not intend the latter to become the owner thereof but was using his son's name "as a mere alias". In the Court of Appeal, Henderson J.A. agreed with the learned trial judge;

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Aylesworth J.A., with whom Hope J.A. concurred, also agreed with the learned trial judge and added reasons for holding that even if a presumption of advancement arose it was rebutted by the evidence; Laidlaw J.A. and Hogg J.A. were both of opinion that the shares in question were registered in the name of the appellant; Laidlaw J.A. held that the presumption of advancement had not been rebutted and would have allowed the appeal; Hogg J.A. held that such presumption had been rebutted and so concurred with the majority in dismissing the appeal.

I share the view of Laidlaw J.A. and am in substantial agreement with his reasons, but, as I am differing from the learned trial judge and the majority in the Court of Appeal, I will state my reasons in my own words.

With the greatest respect for those who entertain a contrary view, the reasons given by Laidlaw J.A. and by Hogg J.A. for holding that Clemens Senior was designating the appellant when he caused the certificates in question to be registered in the name John Joseph Clemens appear to me to be unanswerable.

The evidence that both in his domestic and business life Clemens Senior used the name, and was known as, John C. Clemens or John Casper Clemens is overwhelming. I propose to mention only some of the items. In the certificate of his marriage on September 27, 1911 he is described as "John C. Clemens". On October 8, 1924, he applied to the Sun Life Assurance Company for a policy on the life of the appellant whom he described in the application as John Joseph Clemens while describing himself and signing as "John C. Clemens". On December 6, 1934, he applied to the same company for another policy on the life of the appellant whom he described as John J. Clemens while describing himself and signing as John C. Clemens. He did all his banking in the name John C. Clemens and signed all cheques in that name. Mr. Van Norman, manager of one of the banks at Sudbury where Clemens Senior had his account and who knew and dealt with him from September 1929 until his death did not know that his baptismal name was John Joseph until he heard it at the trial. Clemens Senior invested in the stocks of numerous companies and at the time of his death held shares registered in the name John C. Clemens in the International Nickel Company of

Canada, Limited and in eleven other companies and shares represented by street certificates in four other companies. There was no suggestion in evidence or in argument that he had ever used the name John J. Clemens or John Joseph Clemens in purchasing any stock for himself in any company other than the International Nickel Company. In conveyances of land and in affidavits attached thereto he described himself as John C. Clemens. On June 16, 1938, he obtained a power of attorney from the appellant in which he was described as John C. Clemens. His sister, Mrs. Kaiser, who was 12 years his junior, always knew him as John C. Clemens. She said that the "C." stood for Casper which was a family name and she did not know that he had been baptized John Joseph until she was told so at the trial. Elizabeth Louise Brown stated that she knew her father as John C. Clemens and her brother, the appellant, as John Joseph Clemens.

In addition to the above there were other items of evidence given and it is not surprising to find the learned trial judge saying to the appellant's counsel who was tendering further evidence on this point:—

> There is a limit to this. It is abundantly established that Mr. John Clemens, Senior, was known everywhere as John C. Clemens, and it is merely proving the obvious. I know this now, and I do not need to be told this.

and a little later:—

> I am convinced that he was known as John C., everybody knew him as John C. or John.

The only instances disclosed in the record in which Clemens Senior referred to himself or caused himself to be referred to as John Joseph Clemens or John J. Clemens or J. J. Clemens are as follows:—

In a will dated February 9, 1939, and a codicil thereto dated December 2, 1941, he was described as "John Joseph Clemens (sometimes known as John C. Clemens)". He signed both will and codicil John C. Clemens. He was similarly described in a will dated September 22, 1942, which he signed John J. Clemens. In his last will dated December 12, 1942, he was similarly described and signed John C. Clemens. In certain correspondence carried on in 1939 and 1940 by the witness Stanley R. Brunton with Bankers Trust Company of New York on the instructions

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of Clemens Senior the latter is referred to as John Joseph Clemens Senior or as "John Joseph Clemens, father". In a trust agreement dated December 31, 1942, signed by the appellant and which was prepared on the instructions of Clemens Senior, the latter is referred to as "John Joseph Clemens Sr., father of the Settlor". It will be observed that the earliest of these instances is in 1939 ten years after the registration of the shares which are in question in this action.

It is against the background of this evidence as to how Clemens Senior described himself and was known in his business affairs that the dealings in International Nickel stock with which we are particularly concerned must be examined.

Particulars of the shares of International Nickel issued on January 25, 1929, have already been stated. Certain other transactions in the stock of this company must now be considered. On December 28, 1928, certificates T.T.C. 2709 to T.T.C. 2713, inclusive, each for 100 shares, were issued in the name of John Joseph Clemens. On January 4, 1929, these certificates, each of which was endorsed "John Joseph Clemens" in the handwriting of Clemens Senior, were cancelled and certificates replacing them were issued, for 475 shares to Stewart McNair and Company, and for 25 shares to William Thomas Brown. On January 26, 1929, certificates for a total of 1,000 shares, being numbers T.T.C. 9704 to T.T.C. 9713, inclusive, for 100 shares each, were issued in the name of "John Joseph Clemens" and on the same day there were issued certificates for a total of 1,000 shares in the name of Elizabeth Louise Clemens and certificates for a total of 1,000 shares in the name of Richard A. Clemens. All the shares above mentioned were purchased on the instructions of Clemens Senior and the certificates were received and kept by him. While it was questioned during the argument, I will assume for the purposes of this appeal that, as contended by the respondents, all of the purchase money of all of these shares was furnished by Clemens Senior and was his own money.

As a result of the transactions of Clemens Senior up to and including January 26, 1929, certificates had been issued

and were in his hands for shares of the common stock of the International Nickel Company of Canada, Limited, in the following names and amounts:—

Elizabeth Louise Clemens	4,180 shares
John Joseph Clemens	4,600 shares
Richard A. Clemens	4,600 shares
John C. Clemens	840 shares

Aylesworth J.A. attaches considerable significance to the purchase of 500 shares in the name of John Joseph Clemens on December 28, 1928 and the sale thereof a week later, but this circumstance does not appear to me to be of assistance in determining whether Clemens Senior was at that time designating himself or the appellant by that name. There is nothing to indicate that he did not intend these shares to be registered in the name of the appellant or that he did not use the proceeds of their sale in part payment for the 1,000 shares purchased in the name John Joseph Clemens on January 26, 1929. In dealing with the shares registered in the names of each of his children Clemens Senior appears to have proceeded on the view that he was entitled to endorse their names, a view which was clearly erroneous even on the theory that they held such shares on a resulting trust for him. The probative effect of the transaction in these 500 shares appears to me to be neutral.

I agree with Laidlaw J.A. and Hogg J.A. that the inference is irresistible that by the name John Joseph Clemens in which he caused the certificates for the 4,600 shares above mentioned to be issued Clemens Senior was designating the appellant and not himself. Whatever may have occurred some years later, the evidence establishes that at the time of the issue of such shares he was devoted to his three children, all of whom were then still infants. That he should purchase shares in the names of two of his infant children, Elizabeth and Richard, and none in the name of his elder son, John Joseph, seems unlikely. It is more unlikely that when he caused 3,600 shares to be registered in the name of John Joseph on the same day that he caused 3,600 to be registered in the name of Richard and 1,000 to be registered in the name of John Joseph on the same day that he caused 1,000 to be registered in the name of Richard

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he was not designating the appellant by the name John Joseph. The inference is clear that he was placing an equal number of shares in the name of each of his infant sons. The matter appears to me to be put beyond doubt when it is remembered that on the same day that he caused 3,600 shares to be registered in each of the names John Joseph and Richard he caused 840 shares to be registered in the name John C. Clemens which, so far as the record discloses, was the only name in which up to that time he had ever described himself in any transaction. I conclude that the 4,600 shares above referred to, registered in the name John Joseph Clemens, were registered in the name of the appellant and not of the father.

Turning now to the second point, as to whether, in causing the shares to be registered in the name of the appellant, Clemens Senior intended to advance his child or to create a resulting trust in his own favour, it must be borne in mind that the question is what was his intention at the time of the transaction. It is nothing to the point to shew that years later he endeavoured to appropriate some of the shares in question to his own use or purported to dispose of them as his own property.

There is, of course, a rebuttable presumption that a gift was intended. The principle is succinctly stated in Halsbury's Laws of England, 2nd Edition, Vol. 17, page 677, as follows:—

> Where a father purchases either real or personal estate in the name of a child alone . . . there is no resulting trust for the father; but the father is presumed to have intended to advance the child, especially where he is an infant. . . . The presumption may be rebutted by evidence of a contrary intention.

In speaking of the nature of the evidence required to rebut the presumption the Master of the Rolls in *Jeans* v. *Cooke* (1) said:

> Still, however, as it is a presumption, it may be repelled by evidence, and, in my opinion, the burden of proof lies on the plaintiff to rebut the presumption of advancement, by evidence sufficiently strong to lead to an opposite conclusion. The evidence ought to be distinct, because, as observed in several cases, this is a principle which is not to be frittered away by nice refinements. The evidence ought to be contemporaneous, or nearly so, because subsequent acts or subsequent declarations by a father will not enable him to convert an advancement for his son into a beneficial purchase for himself.

(1) (1857) 24 Beav. 513 at 521.

As to what evidence is admissible, the law appears to me to be correctly stated in *Lewin on Trusts,* 15th Edition at page 152, as follows:—

> So the father may prove a parol declaration of trust by himself, either before or at the time of the purchase, not that it operates by way of declaration of trust, for the Statute of Frauds would interfere to prevent it; but as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration of intention. The father cannot defeat the presumption of advancement by any subsequent declaration of intention, but his evidence is admissible for the purpose of proving what was the intention at the time.
>
> On the other hand, the son may produce parol evidence to prove the intention of advancement, and *a fortiori* such evidence is admissible on his side, as it tends to support both the legal operation and equitable presumption of the instrument. And it seems the subsequent acts and declarations of the father may be *used against* him by the son, though they cannot be used *in his favour,* and so the subsequent acts or declarations of the *son* may be used against *him* by the father, provided he was a party to the purchase, and his construction of the transaction may be taken as an index to the intention of the father; but not otherwise, for the question is, not what did the *son,* but what did the *father,* mean by the purchase.

In my opinion the effect of the evidence in the case at bar is accurately summarized by Laidlaw J.A. when he says:—

> There is no evidence of any act or expression of the father or of the appellant contemporaneous with the transfer and there is no evidence of any subsequent act or expression of the appellant touching the question of the father's intention when he transferred the shares and directed that they be registered in the name of the appellant.

With the greatest respect, it appears to me that the learned trial judge and the majority in the Court of Appeal, when considering the evidence as to the conduct and statements of the appellant, have failed to take into consideration the fact that he took no part whatever in the transactions in which the shares in question were purchased in his name and indeed, as it is put in the respondent's factum, "he was not even aware of the existence of the shares until long after their acquisition." It is impossible that the appellant could have any knowledge of his father's intention at the time of the purchase of the shares except such as he might have acquired by hearsay long after the event.

I am unable to find evidence of any contemporary act or declaration by the father sufficient to defeat the presumption of advancement. It was suggested in argument that the father endorsed all the certificates in question in

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blank in the name of John Joseph Clemens at about the time of their issue. As has already been pointed out there is ample evidence that Clemens Senior endorsed the names of all of his children on share certificates that he had caused to be registered in their names. All the 36 certificates T.T.C. 9610 to T.T.C. 9645 issued in the name of John Joseph Clemens on January 25, 1929, are endorsed John Joseph Clemens in the handwriting of Clemens Senior but I can find no evidence that these endorsements were made at or near the date of the issue of the certificates. The endorsements bear the following dates; Numbers T.T.C. 9610 to T.T.C. 9612 inclusive, November 11, 1932; Numbers T.T.C. 9613 to T.T.C. 9641 inclusive, December 1, 1943; on Numbers T.T.C. 9642 to T.T.C. 9645 inclusive, the endorsements are undated. The 3 certificates in the first mentioned group were cancelled and new certificates were issued to Livingstone and Company on April 20, 1933. The endorsements on the 29 certificates in the second group bear a date subsequent to the death of Clemens Senior; they all came into the possession of the respondents. The 4 certificates in the third group are those alleged to have been given by Clemens Senior to his daughter shortly before his death; they never came into the hands of the respondents or either of them in their character of executors. It is said for the respondents that it may be inferred that when Clemens Senior endorsed the certificates he left the endorsements undated. This would seem to be probable as obviously he could not have filled in the date in the group of 29 certificates; but assuming this to be so it does not assist the respondents for it leaves the date on which the endorsements were signed uncertain. In the case of all 36 certificates the signature John Joseph Clemens is guaranteed by The Bank of Toronto and the guarantee stamp is signed by W. E. Van Norman, Manager, Sudbury, Ont. It is in evidence that Mr. Van Norman did not come to Sudbury until September 1929, that is nine months after the certificates in question were issued in the appellant's name. As there is no proof that Clemens Senior endorsed the certificates in question at or near the time of their issue it is unnecessary to consider whether it would have assisted the case of the respondents if there had been such proof.

The learned trial judge appears to have placed some reliance on the correspondence carried on between Mr. Brunton and Bankers Trust Company to which some reference has been made above but when Mr. Brunton's evidence is examined it becomes clear that this whole correspondence was carried on on the instructions of Clemens Senior and there is no evidence that the appellant had any knowledge of it or that he ever signed or even saw any of the letters of which it was said to consist.

The fact that the appellant signed the trust agreement of December 31, 1942, does not assist the respondent's case. The effect of the evidence on this point is that in 1942 the appellant at the request of his father signed the agreement which had been prepared on the father's instructions placing in a trust for the appellant's own benefit, but subject to a spendthrift clause, 900 of the 1,000 shares which his father had caused to be registered in his name on January 26, 1929. This is not evidence to rebut the presumption of gift which arose when the father purchased in the appellant's name, some time prior to October 30, 1928, the 600 shares in exchange for which 3,600 shares were issued to him on January 25, 1929. The fact that the father retained possession of the certificates and received the dividends and that the appellant, after he came of age and learned that his father had possession of certificates registered in his name, failed to demand delivery thereof and to ask for an accounting of the dividends does not rebut the presumption as to the father's intention at the time the shares were placed in the appellant's name some years before. On this point reference may usefully be made to *Sidmouth* v. *Sidmouth* (1), and to *Commissioner of Stamp Duties* v. *Byrnes* (2).

In my view the respondents have failed to adduce evidence sufficient to rebut the presumption that the shares in question were a gift to the appellant. But the decision of the appeal need not rest on a mere failure of the respondents to discharge the onus which rested upon them. The evidence of Mr. Cushing and the terms of the will of November 7, 1933 which he prepared on the instructions of Clemens Senior and which was duly signed and attested support the view that the children were the beneficial as

(1) (1840) 2 Beav. 447.
(2) [1911] A.C. 386.

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well as the legal owners of the shares which Clemens Senior had purchased in their names. Clause (*c*) of paragraph 7 of the will reads as follows:—

(*c*) Upon the death of my said wife the corpus of my estate shall be divided into three parts, and in such division I direct my trustee to take into consideration the following facts and govern such division, having such facts in mind, namely:—I have in the past invested and speculated with private funds of my children and have accumulated for each of them as their own respective separate property certain stocks, bonds, cash and securities in varying amounts for each of them. I direct my trustee to investigate and ascertain as of the date of my wife's death what the value then may be of the said stocks, bonds, cash and securities of my said children and, then, when that has been so ascertained to divide the said corpus of my estate in such a manner that the three shares thereof, when respectively added to the ascertained value of each of my said children's securities, shares, bonds and cash, shall respectively make three equal amounts, such shares to be then held for the benefit of my children, Elizabeth Louise, John Joseph and Richard Aloysius, in manner hereinafter set forth.

It is difficult to see how the executors could carry out the direction in this clause to ascertain the value of the stocks of each child otherwise than on the assumption that shares in the possession of Clemens Senior registered in the name of a child of his belonged to that child.

In the course of Mr. Cushing's evidence there is the following passage the effect of which was in no way weakened in cross-examination and which is not contradicted by any other evidence:—

Q. Did Mr. Clemens indicate to you whether or not he considered that the children owned the shares that were registered in their names?

A. I would have to answer your question in this way—he stated to me that he had from time to time purchased shares in the names of his children, and that in so doing he was building up separate estates for them, putting stock in their names, mentioning to me in particular this point—that if he lost his own fortune, there would always be something in the name of his children.

It is, of course, true that although Clemens Senior had made a gift of the shares in question to the appellant the latter, after coming of age, could have given them back to his father or constituted himself a trustee for his father. I am in complete agreement with the reasons given by Laidlaw J.A. for holding that there is no evidence of any such action on the part of the appellant.

In my opinion it is established that from the time Clemens Senior purchased the 600 shares of The International Nickel Company of New Jersey in the name of the

appellant the latter was both beneficial and legal owner thereof and that he was equally the beneficial and legal owner of the 3,600 shares of The International Nickel Company of Canada, represented by certificates T.T.C. 9610 to T.T.C. 9645 inclusive, which were issued in exchange.

We are not concerned with the 300 shares, represented by certificates T.T.C. 9610 to T.T.C. 9612 inclusive, transferred to Livingstone and Company on April 20, 1933, as no claim in regard to them is asserted in this action.

Of the remaining 3,300 shares 2,000, represented by certificates T.T.C. 9622 to T.T.C. 9641 inclusive are still in the hands of the respondents, and the appellant is entitled to an order that they be forthwith delivered to him. The respondents in the course of administration sold 900 of the shares represented by certificates T.T.C. 9613 and T.T.C. 9621 inclusive. In regard to these shares the appellant is entitled to an accounting. The certificates T.T.C. 9642 to T.T.C. 9645 inclusive representing 400 shares were given by Clemens Senior to Elizabeth Louise Brown shortly before his death. On June 7, 1944 Mrs. Brown surrendered these certificates and received new certificates in her own name. Mrs. Brown is not a party to these proceedings. It follows from the holding that these shares were the property of the appellant, that Clemens Senior could not pass title to them and that the certificates were invalidly endorsed. It has already been mentioned that these shares did not at any time come into the hands of the respondents in their character of executors. It does not appear to me that the claim in regard to these 400 shares can be satisfactorily dealt with in an action to which neither Mrs. Brown nor The International Nickel Company of Canada Limited is a party.

The claim asserted in the pleadings in regard to the 200 shares represented by certificates T.T.C. 9646 and T.T.C. 9647 registered in the name of John C. Clemens fails on the evidence.

The appeal should be allowed and the judgment of the learned trial judge should be varied to provide:—

(a) that the respondents do forthwith deliver to the appellant certificates T.T.C. 9622 to T.T.C. 9641 inclusive representing 2,000 shares of the common stock of The International Nickel Company of Canada Limited;

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(b) that it be referred to the proper officer of the Supreme Court of Ontario to ascertain and report what amounts are due from the respondents to the appellant in respect of dividends received by them on the 2,000 shares referred to in (a) and in respect of their dealings with the 900 shares represented by certificates T.T.C. 9613 to T.T.C. 9621 inclusive;

(c) that further directions including the costs of the reference hereby directed be reserved until after such officer shall have made his report;

(d) that this judgment be without prejudice to the right of the appellant to assert such claim in respect of the 400 shares represented by certificates T.T.C. 9642 to T.T.C. 9645 inclusive as he may be advised.

The appellant moved under the provisions of Section 68 of The Supreme Court Act for special leave to have further evidence received. This motion was adjourned to be heard, and was heard, at the time of the hearing of the appeal. As in my view the appellant is entitled to succeed on the record as it stands I do not find it necessary to consider this motion further and I would make no order as to the motion or as to the costs thereof.

The appellant is entitled to his costs of the trial, of the appeal to the Court of Appeal and of the appeal to this Court.

ABBOTT J. (dissenting):—I have had the advantage of reading the reasons for judgment to be delivered by my brother Cartwright and which I understand are concurred in by a majority of the Court. For the reasons which he has given, I agree that by the name John Joseph Clemens, in which the deceased caused shares of the International Nickel Company stock to be issued, he was designating the appellant and not himself, and that in consequence a rebuttable presumption of advancement was created. Since I am of the opinion, however, that such presumption has been rebutted, I should perhaps state briefly the reasons which have led me to this conclusion.

The contemporaneous acts of the father relied upon to rebut the presumption of advancement are (a) the purchase of 500 shares of International Nickel stock in the

name of John Joseph Clemens on December 28, 1928, and the subsequent sale of the same shares a few days later, on January 5, 1929, and (b) the endorsement in blank by the father of certificates for 4,600 shares of International Nickel stock, registered in the name of John Joseph Clemens.

So far as the purchase and sale of the 500 shares are concerned, which took place shortly before the issue of the 4,600 shares in the name of John Joseph Clemens, there is no evidence in the record as to the reason for such purchase and sale or whether it resulted in a profit or a loss.

As to 1,000 shares of the said stock purchased on January 26, 1929, and evidenced by Certificates Nos. TTC9704/13 there can be no question but that these certificates were endorsed in blank by the deceased on or about the date he received them. This is admitted by the appellant in his factum when he states:—"The endorsements on Certificates TTC9704/13 were forged on January 29, 1929." The endorsements on these certificates were guaranteed by Stewart McNair and Co., the brokers through whom the shares had been purchased, thus putting these certificates in what is commonly known as "street form".

As to the certificates representing the 3,600 shares registered in the name of John Joseph Clemens on January 25, 1929, here again appellant has admitted in his factum that his father had converted the shares "into negotiable securities by endorsing in his own handwriting 'John Joseph Clemens' on each and every certificate." The exact time when such endorsement was made is not established but it most certainly was prior to April 20, 1933, when the father sold 300 of the said shares. In my opinion, an examination of the certificates themselves and of the surrounding circumstances, indicates clearly that the father endorsed all these certificates in blank at or about the time he received delivery of them, namely, on January 25, 1929.

These acts of the father in purchasing and selling securities in the name of John Joseph Clemens, endorsing the certificates in blank, and having some of them, at any rate,

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converted into street form, in my opinion, are quite inconsistent with any intention on his part to convey the beneficial interest in such shares to the appellant. On the contrary, I think they indicate clearly that the deceased intended to retain the right to deal with the shares as he might see fit, and as in fact he did deal with them, as well as with other shares issued in the names of other members of his family which were similarly endorsed.

These contemporaneous acts of the father are, in my opinion, in themselves sufficient to rebut the presumption of advancement arising out of the registration of the shares in the name of the appellant but I am further of opinion that this presumption is also rebutted by acts and declarations of the appellant between 1936, when he testified he first learned that there were several thousand shares of International Nickel stock registered in his name, and June 21, 1950, when the present action was taken.

These acts and declarations have been fully reviewed by Mr. Justice Hogg in his reasons delivered in the Court below and I need not repeat them here. To borrow the words of Sir John Romilly, Master of the Rolls, in *Jeans* v. *Cooke* (1), evidence of such acts and declarations of the appellant "may be used for the purpose of showing that he considered himself only a trustee."

For the reasons I have given and since I find myself in entire agreement with the findings of the learned trial judge, concurred in by the majority of the Court of Appeal, that any presumption of advancement was rebutted by evidence of contemporaneous acts of the father and of subsequent acts and declarations of the son, I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the respondents: *Facer & Shea.*

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(1) (1857) 24 Beav. 513 at 521.