1961
*Oct. 17, 18
Dec. 15

THE ROYAL TRUST COMPANY, surviving Executor and Trustee of the Will of Stephen Jones, deceased (*Plaintiff*) ..... APPELLANT;

AND

ELIZA MARGARET JONES, STEPHEN JONES (JR.), STEPHEN RANDAL JONES, FRANCES ELIZABETH BUCKLE, FRANCES GAIL BUCKLE (an infant), HARRY BUCKLE III (an infant), MILDRED VICTORIA GILLESPIE, MARGARET THOMPSON BRIGGS, MARLENE ANNE MILLER (an infant) (*Defendants*) ..... RESPONDENTS.

VIRGINIA JEAN WALLACE, VIRGINIA LORRAINE JONES, HOWARD STEPHEN JONES (an infant), ELSIE MARGARET LANGMAID and CAROL ANNE JONES (*Defendants*)

VIRGINIA LORRAINE JONES and HOWARD STEPHEN JONES (an infant) (*Defendants*) .. APPELLANTS;

AND

ELIZA MARGARET JONES, STEPHEN JONES (JR.), STEPHEN RANDAL JONES, FRANCES ELIZABETH BUCKLE, FRANCES GAIL BUCKLE (an infant), HARRY BUCKLE III (an infant), MILDRED THOMPSON BRIGGS, MARLENE ANNE MILLER (an infant) (*Defendants*) ..... RESPONDENTS.

AND

VIRGINIA JEAN WALLACE, ELSIE MARGARET LANGMAID and CAROL ANNE JONES (*Defendants*)

AND

THE ROYAL TRUST COMPANY, surviving Executor and Trustee of the Will of Stephen Jones, deceased (*Plaintiff*)

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts—Judgment affirmed by Court of Appeal—Action to set aside the judgment—Jurisdiction of trial judge.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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ROYAL TRUST CO. v. E. M. JONES et al.

V. L. JONES et al. v. E. M. JONES et al.

The Court of Appeal for British Columbia in 1933 dismissed an appeal from a judgment which had upheld the validity of a codicil of a testator's will. The codicil disinherited the testator's son H unless he complied with certain conditions, which he did not so do. In an action by H, his first wife and their two infant daughters, a judge of the Supreme Court of British Columbia, on June 26, 1945, held that the relevant portion of the codicil was invalid, void and of no effect, and that the judgment of the Court of Appeal in 1933 and the judgment which it affirmed should be set aside. Following the death of H in 1958, the plaintiff trust company, as sole surviving executor of the testator, commenced proceedings by originating summons for the determination of certain questions. The judge who gave judgment in those proceedings proceeded on the assumption that the judgment of June 26, 1945, was operative. The children of H by his first wife appealed to the Court of Appeal, asking that the judgment appealed from be varied. They sought a declaration that they alone (to the exclusion of H's second wife and his child by that wife) were entitled to share in that part of the testator's estate bequeathed to the widow and the children of H after his death. The Court of Appeal held that in pronouncing the judgment of June 26, 1945, the judge had acted without jurisdiction, that his judgment was a nullity and that the acts done by the trustees in pursuance thereof were without validity. The judgment appealed from and the originating summons upon which it was based were set aside, and a trial was directed to determine what ought to have been done by the trustees of the testator's will if the judgment of June 26, 1945, had never been pronounced. Pursuant to leave granted by this Court appeals were brought from this judgment (i) by the surviving executor and trustee of the testator and (ii) by H's second wife and his child by that wife.

Held: The appeal should be allowed.

The judgment below was founded upon the erroneous view that because the judgment which had upheld the validity of the codicil had been affirmed by the Court of Appeal, a judge of the Supreme Court of British Columbia was without jurisdiction to entertain an action to set it aside. That this is not the law was shewn by the authorities. *Falcke v. The Scottish Imperial Insurance Co.* (1887), 57 L.T. 39; *Flower v. Lloyd* (1887), 6 Ch. D. 297; *Jonesco v. Beard* [1930] A.C. 298; *Boswell v. Coaks* (1894), 6 R. 167, referred to.

It has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. The law and practice on this point in British Columbia and in England are the same.

APPEALS from a judgment of the Court of Appeal for British Columbia[1], setting aside a judgment of Maclean J. and containing other provisions. Appeal allowed.

D. M. Gordon, Q.C., and *K. E. Eaton*, for the plaintiff, appellant.

[1] (1961), 34 W.W.R. 540, 28 D.L.R. (2d) 767.

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ROYAL TRUST CO. v. E. M. JONES et al.

V. L. JONES et al. v. E. M. JONES et al.

T. P. O'Grady, for the defendants, appellants.

W. H. M. Haldane, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—These appeals are from a judgment of the Court of Appeal for British Columbia[1] setting aside a judgment of Maclean J. and containing other provisions. In order to make clear the questions which arise it is necessary to set out the relevant facts in some detail.

The late Stephen Jones Sr., hereinafter referred to as "the testator", died on October 2, 1933. His domicile was in British Columbia. He left a will dated December 18, 1928, a first codicil dated December 18, 1928, and a second codicil dated June 5, 1933. He was survived by his widow, Eliza Margaret Jones, and by five children whose names and dates of birth are: Stephen Jones, Junior, December 11, 1910; Howard Jones, May 1, 1912; Frances Elizabeth Buckle, November 1, 1913; Mildred Victoria Gillespie, December 22, 1916; and Margaret Thompson Briggs (formerly Miller), April 23, 1918. The widow and all of the children except Howard Jones are still living. Howard Jones died on March 18, 1958.

The following grandchildren of the testator are now living: Stephen Randal Jones, son of Stephen Jones Junior; Elsie Margaret Langmaid and Carol Anne Jones, children of Howard Jones by his first marriage; Howard Stephen Jones, son of Howard Jones by his second marriage; Frances Gail Buckle and Harry Buckle III, children of Frances Elizabeth Buckle; and Marlene Anne Miller, daughter of Margaret Thompson Briggs.

The terms of the testator's will with which we are concerned gave an annuity to his widow for her life, made certain provisions for the maintenance and support of his children, directed $100,000 to be paid to each son on his attaining 35 years of age, directed that on each of his daughters attaining 35 years of age the sum of $100,000 should be set aside for her, the daughter to receive the income during her lifetime with a power of appointment as to the corpus.

Paragraph 12 of the will read:

(12) When my youngest child shall have attained the full age of thirty-five (35) years and each child or the issue of any child having died before that age has received in the case of sons the said capital sum of

[1] (1961), 34 W.W.R. 540, 28 D.L.R. (2d) 767.

One hundred thousand ($100,000) dollars and in the case of daughters the said capital sum of One hundred thousand ($100,000) dollars for each one having been ear-marked and set aside as by this my Will provided then and thereafter to pay the annual income of the balance of the said trust fund then left in the hands of my Trustee equally amongst my children and in the event of the death of any child of mine leaving issue then such issue shall take and share and share alike the portion of income which the parent of such issue would have taken if living and at the expiration of the period of twenty (20) years from the death of my last surviving child that now lives then as to as well the capital as the income of the said trust fund UPON TRUST for all of my grandchildren then living in equal shares that is to say share and share alike.

Paragraph 14 of the will provided, *inter alia,* that the payments of income to the widow should be free of income tax.

The first codicil read, in part, as follows:

In the event of any son of mine marrying and departing this life leaving him surviving a widow and child or children I WILL AND DIRECT that such widow take an equal share per capita with her child or children in all moneys coming to her child or children under and by virtue of the provisions of my said Last Will and Testament and in the event of there being left a widow and no issue then I WILL AND DIRECT that such widow be paid by my said Trustee an annuity of two thousand four hundred dollars payable and to be paid by my said Trustee in equal monthly payments computed from the first day of the calendar month next following my decease until and up to the day of her death or remarriage with full power to my said Trustee to take and apply so much of the incomes and profits of the said Trust Fund under my said last Will and Testament as may be necessary for the purposes of this annuity.

The income from the residue of the estate after providing the $100,000 for each of the testator's children has proved sufficient to pay the income directed to be paid to the widow (plus an additional allowance awarded to her by order of D. A. McDonald J. made on September 28, 1934, under the *Testator's Family Maintenance Act*) and to leave a surplus of income each year to be divided among the testator's children.

The second codicil appointed additional executors and continued:

As regards and with reference to my second son Howard Jones who has contracted an ill-advised marriage and has become entangled in disputes and troubles with his wife I revoke all gifts and provisions made to or for him in my said last Will and Testament and in lieu thereof I give devise and bequeath as follows that is to say: All moneys in and by my said Last Will and Testament bequeathed to or provided for or directed to be paid to or for the benefit of my said son Howard Jones shall fall back into and be accumulated with and form part of "the said Trust

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Fund" directed by my said last Will and Testament to be created and accumulated and I will and direct that except as hereinafter in this Codicil provided the Executors and Trustees of my said last Will and Testament shall deal with and distribute all my estate and also the said Trust Fund as though my said son Howard Jones had never been born subject however to the two following provisions namely first that my said trustees and Executors shall pay to the said Howard Jones the sum of seventy dollars per month so long as he shall live computed from the first day of the month next following my decease and second that if in the event of the said Howard Jones on the day of his attaining the full age of thirty-five years being free of disputes and troubles with his present wife and being under no liability to contribute and pay either directly or contingently to her any money received by him from my estate then the said Howard Jones shall be reinstated so as to receive as on and from that day as a new gift and without any right to claim back for intervening time all and singular such money, share of my said estate and provisions for his benefit as on attaining the said age he would have been entitled to under my said last Will and Testament if this Codicil had not been made.

Howard Jones married Virginia Jean Jones (now Virginia Jean Wallace) on March 6, 1933.

Shortly after the testator's death (the exact date does not appear in the material before us) proceedings were commenced by originating summons in the Supreme Court of British Columbia to determine whether Howard Jones was entitled to receive the gifts and bequests provided for him under the testator's will unaffected by the provisions of the second codicil quoted above. The question raised was whether the codicil was void as being against public policy. The matter came before Murphy J. and on May 28, 1934, that learned judge gave judgment upholding the validity of the codicil. Howard Jones appealed to the Court of Appeal for British Columbia and his appeal was dismissed, McPhillips and McQuarrie JJ.A. dissenting. The reasons of the Court of Appeal are reported *sub nom. In Re Estate of Stephen Jones, Deceased. The Royal Trust Company et al. v. Jones et al. (No. 2)*[1].

At a date not stated in the material an action was commenced in the Supreme Court of British Columbia in which Howard Jones, his wife Virginia Jean Jones and his two infant daughters were plaintiffs and the executors of the testator and all the other persons then living entitled to share in the estate were defendants. The pleadings in that action are not before us but it appears from the judgment of Manson J., before whom it was tried, and from his reasons that the plaintiffs asked that the judgment of

[1] (1934), 49 B.C.R. 204.

Murphy J., affirmed by the Court of Appeal as set out above, be set aside upon the grounds: (i) that all the interested parties were not before the Court; (ii) that the plaintiff Howard Jones had, under duress, failed to produce certain material evidence before Murphy J.; and (iii) that other material evidence had just recently come to the knowledge of Howard Jones which had not been produced before Murphy J.

On June 26, 1945, Manson J. gave judgment.

In paragraph 1 of his formal judgment, that portion of the second codicil to the testator's will quoted above is declared to be invalid, void and of no effect.

Paragraph 2 reads as follows:

2. That the Judgments of the Honourable Mr. Justice Murphy and of the Court of Appeal in the pleadings herein mentioned and dated the 28th day of May, 1933, and the 9th day of October, 1933, respectively, be and the same are hereby set aside.

Paragraph 3 commences with the words:

3. That the Defendants The Royal Trust Company and Samuel McClure, as the Executors and Trustees of the will of the said Stephen Jones, deceased, shall and may from and after the date hereof administer and distribute the estate of the said Stephen Jones, deceased, as if the said codicil bearing date the 5th day of June, 1933, being the second codicil to his will bearing the date the 18th day of December, 1928, had never included the words and terms quoted in paragraph No. 1 hereof, but subject to the following conditions, namely:

There follow a number of provisions, consented to by Howard Jones, dealing with the manner in which the accounts between him and the executors were to be adjusted.

No appeal was taken from the judgment of Manson J. and the executors have ever since administered the estate and made payments of capital and income in reliance on that judgment.

On September 25, 1945, Howard Jones left his wife, Virginia Jean Jones in British Columbia and went to California, U.S.A. Later Virginia Jean Jones went to Reno, Nevada, and commenced an action for divorce on October 15, 1945. Howard Jones entered a general appearance in that action and both parties were present in Nevada at the time of the hearing. A decree of divorce was granted by the Nevada court on December 7, 1945. Thereafter Virginia Jean Jones returned to British Columbia, and on February 23, 1946, was married there to Hugh Holdsworth Wallace.

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Howard Jones married Virginia Lorraine Hurst in Nevada on December 7, 1945, and then returned with her to California. As already stated, there was born of this marriage one child, Howard Stephen Jones.

Following the death of Howard Jones, on March 18, 1958, the executors were in doubt as to the validity of the divorce granted in Nevada and as to what persons were entitled to the share of the testator's estate to which Howard Jones had been entitled in his lifetime.

On May 29, 1958, the Royal Trust Company, which was then the sole surviving executor of the testator, commenced proceedings by originating summons for the determination of the following questions:

1. From what source shall the Trustee make the monthly payments of $500 to the widow of the said Testator required by Clause 4 of the Will and the monthly payments of $200 to said widow required by the order of the Honourable Mr. Justice McDonald dated the 28th day of September, 1934?

2. From what source should the Trustee pay the income tax of said widow as directed by said Will and said order?

3. If any part of said monthly payments or income tax should be paid out of capital, in what order should capital and income be resorted to?

4. Is the widow of said Testator entitled to have all her income taxes paid out of the estate of said Testator regardless of the source of income, or only so far as her income comes from the estate of said Testator?

5. To what extent can and should the Trustee exercise the power given by the following language in Clause 3 of the Will of said Testator, viz:

UPON TRUST out of the incomes and profits of the said trust fund, with right and full power to my Trustee to have resort to principal in the event of any deficiency in incomes and profits?

6. Was the Nevada divorce dated 7th December 1945 between the Defendant Virginia Jean Wallace and said Howard Jones a valid divorce?

7. Did said Howard Jones die "leaving him surviving a widow" within the meaning of the said Testator's second codicil?

8. If so, who was such widow?

9. Is the defendant Virginia Jean Wallace estopped from claiming to be such widow by having obtained the said Nevada divorce or by having later purported to re-marry?

10. Was said Howard Jones' purported marriage to the defendant Virginia Lorraine Jones a valid marriage?

11. What children did said Howard Jones leave "him surviving" within the meaning of said first codicil and what issue within the meaning of Clause 12 in said testator's will?

12. How should the Trustee divide the income of the Testator's estate that Howard Jones would have taken if living between the lawful widow and the children of Howard Jones?

13. If neither the defendant Virginia Jean Wallace nor the defendant Virginia Lorraine Jones can claim as the lawful widow of said Howard Jones, who is entitled to the portion of the income of the estate of said Testator that Howard Jones would take if living?

14. If the said Howard Jones left a lawful widow, will she take any interest, and if so what interest, in the capital of the estate of said Testator?

15. If such widow takes an interest in such capital will this be contingent on (a) her surviving the last surviving child of said Testator by twenty years, (b) her having children who survive the last surviving child of said Testator by twenty years?

A preliminary inquiry as to the domicile of Howard Jones, directed by order of McInnis J., came on for hearing before Macfarlane J. and on October 26, 1959, that learned judge made an order declaring that Howard Jones was domiciled in the State of California both:

(1) at the date when the defendant Virginia Jean Wallace obtained against said Howard Jones a divorce decree or alleged divorce decree dated the 7th day of December, 1945 in the Second Judicial District Court of the State of Nevada in and for the County of Washoe; and

(2) at the date when the defendant Virginia Jean Wallace presented her petition on which said decree was granted.

This order further provided that the matter should be brought on again before the presiding judge in Chambers and that evidence of the relevant law of California might be given by affidavit subject to any order in that regard which the presiding judge might make.

The matter later came on for hearing before Maclean J. and on June 17, 1960, that learned judge gave judgment making the following answers to the questions quoted above:

Question 1.

Answer: All the monthly payments should be made in priority to payments of any other income under said will out of the income from the estate of the said Testator coming to the hands of the plaintiff, so far as the same suffices, other than income of the special trust funds set aside for the three daughters of Testator, with resort to residuary capital in any case of insufficiency of said general income.

Question 2.

Answer: From the same sources as the widow's monthly payments of income, as directed in the last Answer.

Question 3.

Answer: Payments should be made to the widow of said Testator out of income so far as this extends, with resort to capital from time to time so far as income proves deficient.

Question 4.

Answer: In paying the income taxes of said widow the plaintiff shall follow the provisions of para. 6(*c*) and (*d*) of the agreement dated the 15th day of December, 1945, forming Exhibit "A" to said affidavit of William Booth McFadden, which provisions the Court finds to be in accordance with the will of the said Testator.

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Question 5.

Answer: At the present state of administration the power extends only to the monthly payments referred to in the Answer to Question 1.

Question 6.

Answer: No answer needed.

Question 7.

Answer: Yes.

Question 8.

Answer: The defendant Virginia Lorraine Jones.

Question 9.

Answer: Yes, she is estopped.

Question 10.

Answer: The validity of this marriage depends on the validity of the said divorce of Howard Jones; the validity of the said divorce and marriage for the purposes of this summons is governed by the law of California, and the marriage must be considered valid because by that law no party interested in contesting the said divorce has any locus standi to contest it.

Question 11.

Answer: The children and issue in each case are the defendants Elsie Margaret Langmaid, Carol Anne Jones and Howard Stephen Jones.

Question 12.

Answer: The trustee should pay the said income (one-fifth of all income of the residuary estate after monthly payments of income to the widow of the said Testator) as follows:

One-third of said one-fifth to the defendant Elsie Margaret Langmaid;

One-third of said one-fifth to the defendant Carol Anne Jones;

One-sixth of said one-fifth to the defendant Howard Stephen Jones (through his guardian during his infancy);

One-sixth of said one-fifth to the defendant Virginia Lorraine Jones.

Question 13.

Answer: No answer needed.

Question 14.

Answer: If the defendant Virginia Lorraine Jones survives the expiration of the period of 20 years from the death of said Testator's last surviving child, and the defendant Howard Stephen Jones survives the same period, then said Virginia Lorraine Jones will share equally with said Howard Stephen Jones the portion of said Testator's capital that said Howard Stephen Jones would have taken in his sole right if she had not survived said period.

Question 15.

Answer: Virginia Lorraine Jones' taking capital will depend on both her and Howard Stephen Jones surviving the last surviving child of said Testator by 20 years.

From this judgment Elsie Margaret Langmaid and Carol Anne Jones appealed to the Court of Appeal asking that the judgment be varied. While their notice of appeal did not specify the terms of the judgment for which they asked, it

is clear from the grounds set forth in the notice that the answers to the first five questions were not attacked and that what the appellants sought was a declaration that they alone (to the exclusion of Virginia Lorraine Jones and Howard Stephen Jones) were entitled to share in that part of the testator's estate bequeathed to the widow and children of Howard Jones after his death. This was the only question raised for the decision of the Court of Appeal. No appeal was taken by any other party.

The material filed before Maclean J. included an affidavit exhibiting a copy of the judgment of the Court of Appeal dated October 9, 1934, and a copy of the judgment of Manson J. dated June 26, 1945. It was, of course, necessary that the last mentioned judgment should be before Maclean J. and presumably it was thought desirable to include the judgment of the Court of Appeal in the material so as to complete the history of the matter.

The argument of the appeal commenced on February 22, 1961, continued on February 23 and concluded on February 24. The appeal case filed in this Court includes a transcript of what was said in argument on the final day of the hearing in the Court of Appeal. From this it appears that it was only at the conclusion of the argument on February 23 that counsel for the Royal Trust Company called the attention of the Court to a passage in his factum which, as quoted in the reasons of the Court of Appeal, read as follows:

> The plaintiff (that is the Trustee) has the embarrassing role of bringing before the court what *prima facie* appears to be a conflict between a judgment of this court dated the 9th of October, 1933 (A.B. pp. 66-68) and a judgment of Manson J. dated the 26th June, 1945. The judgment of this Court upheld the validity of the testator's second codicil, which disinherited Howard Jones unless he complied with certain conditions, which he did not. This Court's reasons are reported at (1934) 49 B.C.R. 207. The judgment of Manson J. held the codicil void and of no effect, as being contrary to public policy.
>
> Bringing this conflict forward is not at all in the plaintiff's interest, since the plaintiff has acted upon the judgment of Manson J. But the plaintiff feels that it cannot avoid doing so, since it is asking for the advice and direction of the courts, and must disclose the material facts. As has already been said, without Manson J.'s judgment none of the persons claiming as wife or children of Howard Jones can have any claim at all under the Will, since the second codicil said that unless its conditions were complied with, the estate should be distributed as though Howard Jones had never been born:
>
> Maclean J., without discussing the point at all, proceeded on the assumption that Manson J.'s judgment was operative. The judgments of this Court and of Manson J. alone are before the Court; the record of the

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case before Manson J. is of some size and the plaintiff did not feel justified in going to the expense of having copies made unless and until the Court required them.

As has been said, the plaintiff has no interest in disturbing or any wish to disturb the judgment of Manson J. Its interest is all the other way.

With respect, this passage appears to me to have been unfortunately worded; the suggestion that there was a conflict between the judgments mentioned presupposed that both were in force whereas the earlier one had been set aside by the later.

In giving the reasons of the Court of Appeal O'Halloran J.A. made it clear that, on the assumption that the part of the second codicil quoted above purporting to disinherit Howard Jones was invalid, the Court would have dismissed the appeal. The learned Justice of Appeal then referred to the passage in the factum of counsel for the Royal Trust Company quoted above and went on to hold that in pronouncing the judgment of June 26, 1945, Manson J. had acted without jurisdiction, that his judgment was a nullity and that the acts done by the trustees in pursuance thereof were without validity.

By the formal judgment of the Court of Appeal it was declared ordered and adjudged:

> (a) That the judgment of Mr. Justice Maclean now under appeal, and the originating summons upon which it was based, be and the same are hereby set aside.
>
> (b) That the said judgment of Mr. Justice Manson in so far as it purports to set aside and overrule the judgment of the Court of Appeal as reported in 1934—49 B.C.R. 207, is on its face without jurisdiction and should be quashed as a nullity and is hereby set aside and quashed accordingly.
>
> (c) That a trial be directed to determine upon all admissible evidence . . . .

There follow a number of paragraphs providing in effect that at the trial so directed it shall be determined what ought to have been done by the trustees of the testator's will if the judgment of Manson J. had never been pronounced.

Pursuant to leave granted by this Court, appeals were brought from this judgment (i) by the Royal Trust Company as surviving executor and trustee of the testator and (ii) by Virginia Lorraine Jones and Howard Stephen Jones. In both of these appeals it was asked that the judgment of the Court of Appeal be set aside *in toto*, that the judgment of Maclean J. be restored and that the costs of all parties in this Court and in the Court of Appeal should be paid out of the Estate.

On the argument before us, counsel for the respondents other than Stephen Jones Jr. (who was not represented by counsel) supported the submission of counsel for the appellants except on the question of the order which should be made as to costs.

I have reached the conclusion that the judgment of the Court of Appeal must be set aside. It is founded upon the view, which, in my respectful opinion, is erroneous, that because the judgment of Murphy J. had been affirmed by the Court of Appeal, a judge of the Supreme Court of British Columbia was without jurisdiction to entertain an action to set it aside. Counsel for the appellants referred us to a wealth of authority to shew that this is not the law. It will be sufficient to refer to a few of the cases which were cited.

In *Falcke v. The Scottish Imperial Insurance Company*[1], a judgment of Bacon V.C. had been reversed by the Court of Appeal in 1886 (vide 34 Ch. D. 234) and judgment had been entered rejecting the claim of one Emanuel and directing the whole of the proceeds of an insurance policy to be paid to Mrs. Falcke. On December 22, 1886, Emanuel appealed to the House of Lords. On February 14, 1887, the parties came to a compromise and the appeal was withdrawn. In April 1887 Emanuel obtained a letter dated the — day of May, 1878, which he contended was newly discovered evidence which would have been decisive in his favour if it had been available in the earlier proceedings. Emanuel applied for leave to commence an action in the nature of a bill of review grounded upon new matter discovered after the making of the said orders. The application came before Kay J., as he then was, on August 3, 1887, and that learned Judge raised the question whether an action could be brought to review a judgment of the Court of Appeal; he thereupon directed that the matter should stand over until the following Monday so that he might be furnished with authority. After the matter had been fully argued Kay J. gave judgment holding that the old jurisdiction to entertain an action in the nature of a bill of review was unaffected by the Judicature Acts; he said in part at page 40:

> In this case leave to bring an action in the nature of a bill of review is sought because since the decision of the Court of Appeal material evidence is alleged to have been found; but such leave is not given unless,

[1] (1887), 57 L.T. 39.

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first, the evidence is material; secondly, that it has been discovered since the decision; and, thirdly, could not with reasonable diligence have been discovered before. I am stating from memory what I believe to be the settled practice of the Court of Chancery in such a matter. I had doubts whether, as the decision was made since the Judicature Acts, the application should not have been made to the Court of Appeal. No authority could be found, and on consideration I came to the conclusion that it was not the practice to make the application to the Court of Appeal. The decision of the Court of Appeal is enrolled as a decision of the High Court, and the application to institute an action in the nature of a bill of review is part of the original jurisdiction of the High Court. The Court of Appeal has no original jurisdiction of that kind. The proper court to apply to is the High Court; the right application is to the High Court to exercise its original jurisdiction; there is no reason why the application should be to the Appeal Court.

Kay J. then dealt with the merits of the application and dismissed it.

Flower v. Lloyd[1], was a decision of the Court of Appeal the effect of which is accurately summarized in the headnote which reads as follows:

> The Plaintiffs commenced an action to restrain the Defendants from infringing their patent, and obtained a judgment which was reversed by the Court of Appeal, who dismissed the action on the ground that the Defendants' process was no infringement of the Plaintiffs' patent. After the order on appeal was passed and entered, the Plaintiffs applied to have the appeal reheard with fresh evidence, on the ground that when an expert sent down by the Court, and whose evidence was in fact the only material evidence before the Court as to the nature of the Defendants' process, examined the Defendants' works, the Defendants had fraudulently concealed from him parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the Plaintiffs:
>
> *Held,* that the Court of Appeal had no jurisdiction to rehear the appeal, and that the remedy of the Plaintiffs was by original action analogous to a suit under the old practice to set aside a decree as obtained by fraud.

The decision of the Court of Appeal in *Flower v. Lloyd* was approved in the unanimous judgment of the House of Lords, delivered by Lord Buckmaster, in *Jonesco v. Beard*[2] particularly at pages 300 and 301.

In Mitford's Chancery Pleading, 5th ed., 1847, among the bills in the nature of original bills are listed "Bills impeaching decrees upon the ground of fraud" and "Bills to avoid decrees on the ground of matter subsequent" (page 97), and at page 105 the learned author says:

> A bill of review upon new matter discovered has been permitted even after an affirmance of the decree in Parliament.

[1] (1877), 6 Ch. D. 297.

[2] [1930] A.C. 298, 99 L.J. Ch. 228.

Boswell v. Coaks[1] is a decision of the House of Lords. In 1883, Fry J. gave judgment dismissing with costs an action in which it was sought to set aside a sale. In the following year the Court of Appeal reversed this decision. In 1886 the House of Lords allowed an appeal from the judgment of the Court of Appeal and restored that of Fry J. These judgments are reported at 23 Ch. D. 302; 27 Ch. D. 424; and 11 App. Cas. 232. Some years later an action was brought to have it declared that the judgment given by the House of Lords, restoring that of Fry J., was obtained by the fraudulent suppression of evidence. A motion to dismiss this action on the ground that it was frivolous and vexatious and an abuse of the process of the Court was granted by North J. whose decision was affirmed by the Court of Appeal and by the House of Lords. The unanimous judgment of the House of Lords was delivered by the Earl of Selborne. There is nothing in his speech to suggest that the bringing of an action in the High Court to impeach the earlier judgments was not the proper practice, indeed he assumes that it was the right way in which to proceed. He points out that the old practice of the Court of Chancery which required a preliminary application to the Court for leave to take proceedings in the nature of a bill of review is no longer in use and that the safeguard against an action to set aside a judgment being proceeded with on insufficient grounds is now found in the power of the Court to stay such an action. Earl Selborne then went fully into the merits and held that the action was properly dismissed on the ground that the matter which was alleged to have been newly discovered was not material.

An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. Section 9 of the *Supreme Court*

[1] (1894), 6 R. 167.

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ROYAL TRUST CO. v. E. M. JONES et al.

V. L. JONES et al. v. E. M. JONES et al.

Cartwright J.

Act, R.S.B.C. 1936, c. 56, which was in force at the time when Manson J. dealt with the matter (and which is now section 9 of the R.S.B.C. 1960, c. 374) reads as follows:

> 9. The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.

There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and practice on this point in British Columbia and in England; in my opinion they are the same.

It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, is a valid judgment of the Court binding upon all those who were parties to it.

The conclusion that Manson J. had jurisdiction to pronounce the judgment of June 26, 1945, renders it unnecessary to examine the other grounds upon which counsel argued that the judgment of the Court of Appeal should be set aside.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of Maclean J. In the somewhat unusual circumstances of this case I would direct that the costs of all parties in this Court and in the Court of Appeal should be paid out of the capital of the Estate, those of the surviving trustee as between solicitor and client.

Appeal allowed, judgment at trial restored.

Solicitors for the plaintiff, appellant: Crease and Co., Victoria.

Solicitor for the defendants, respondents: W. H. M. Haldane, Victoria.

Solicitor for the defendants, appellants: T. P. O'Grady, Victoria.

Solicitor for Elsie Margaret Langmaid and Carol Anne Jones: John McConnell, Victoria.

Solicitor for Virginia Jean Wallace: P. J. Sinnott, Victoria.