KATHLEEN M. NORDSTROM (*Defendant*) ..... APPELLANT;

1961

*Oct. 16, 17
Dec. 15

AND

JEAN BAUMANN (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Devolution of estates—Intestacy—Originating summons to determine right of wife to share in husband's estate—Husband killed in fire set by wife—Whether wife insane.

Courts—Procedure—Propriety of making findings of fact in civil proceedings which if proven in criminal proceedings would be held criminal.

N came to his death as a result of a fire caused by the act of his wife. The plaintiff, in her capacity as administratrix of the deceased's estate, issued an originating summons to determine the right of the widow to share in the estate of her late husband. The trial judge held that the defendant wife, when she set the fire, "did not appreciate the nature and quality of her act or know that it was wrong" and accordingly was entitled to inherit. In directing that the judgment of the trial judge and the proceedings before him, including the originating summons itself, should be "wholly set aside", the majority of the Court of Appeal did not find it necessary to review the finding as to the defendant's insanity, but disposed of the matter on the ground that the trial Court was without jurisdiction to determine by way of originating summons, or other civil proceeding, whether or not a person had committed a crime. The defendant appealed to this Court, asking that the trial judgment be restored, and the plaintiff cross-appealed, contending that the judgment of the Court of Appeal should be varied so as to direct that judgment be entered for her, and that the questions proposed by the originating summons should be answered so as to exclude the defendant from sharing in her husband's estate.

Held: The appeal should be allowed and the cross-appeal dismissed.

Per Taschereau, Locke, Martland and Judson JJ.: The judge before whom the application for directions came and the judge who heard the case were both apparently of the opinion that the questions to be determined could properly be disposed of by way of originating summons as prescribed by M.R. 765 (B.C.). This conclusion was correct. The Court had jurisdiction to determine the questions in a civil action commenced by an ordinary writ of summons, and there was no sound ground upon which to interfere with the discretion exercised by the two judges. *In Re Turcan* (1888), 58 L.J. Ch. 101; *Eggli v. Stewart* (1952), 5 W.W.R. (N.S.) 164, referred to. The question was one of procedure and not of jurisdiction and, if there were non-compliance with any of the rules or rules of practice, the matter could be dealt with under M.R. 1037.

If it were not permissible in civil actions to make findings of fact which if proven in criminal proceedings would be held criminal, the due administration of justice would be gravely impeded. Civil Courts constantly have to make such findings for the purpose of determining civil rights.

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

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Per Taschereau, Martland, Judson and Ritchie JJ.: An originating summons was a permissible, though not desirable, method of initiating these proceedings. The parties concerned consented to the case being tried in this way, and the trial judge who, in the exercise of his discretion, heard and determined the matter was clothed with jurisdiction so to do.

The rule of public policy precluding a person from benefiting from his or her own crime, which is an integral part of our law, applies also to cases where the distribution of the estate of an intestate is concerned. In re *Pitts, Cox v. Kilsby,* [1931] 1 Ch. 546; *Whitelaw v. Wilson* (1934), 62 C.C.C. 172; *Re Estate of Maud Mason,* [1917] 1 W.W.R. 329, referred to. The right to determine the question of whether or not the conduct of an individual amounts to a crime for the purpose of invoking this rule is a necessary concomitant of the jurisdiction which civil courts have long exercised in such cases.

Per Curiam: As to the cross-appeal, the plaintiff's arguments that the defendant failed to discharge the onus of proof necessary to rebut the presumption of sanity, and that the trial judge misdirected himself in the manner in which he applied the test of insanity contained in s. 16(2) of the *Criminal Code* were rejected. The trial judge's finding that the defendant was insane at the relevant time was a finding of fact based on a careful assessment of the relative value of the testimony of expert witnesses and should not be reversed on appeal. *Prudential Trust Co. Ltd. v. Forseth,* [1960] S.C.R. 210, referred to.

APPEAL and cross-appeal from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Wilson J. Appeal allowed and cross-appeal dismissed.

W. G. Burke-Robertson, Q.C., for the defendant, appellant.

David A. Freeman, for the plaintiff, respondent.

The judgment of Taschereau, Locke, Martland and Judson JJ. was delivered by

LOCKE J.:—The judgment of O'Halloran J.A. in this matter proceeds upon two grounds: the first being that a person's sanity or criminality should not be adjudicated upon in a hearing in a matter instituted by an originating summons; the second, that "a provincially constituted court is without jurisdiction to determine in civil proceedings whether or not a person has committed a crime."

Bird J. A. in his oral judgment said nothing as to the first point but said that, if there was to be a finding that the appellant was guilty of a crime it should be made "in a properly constituted criminal proceeding and not in a civil proceeding such as this."

[1] (1961), 34 W.W.R. 556, 27 D.L.R. (2d) 634.

Davey J.A. who dissented, considered as to the first point that the manner in which the issues had been raised and tried was a matter of discretion and said that he would not interfere with the exercise of that discretion in the circumstances of this case.

The manner in which the issue came to be tried by Wilson J. is not referred to in the judgments of the Court of Appeal[1] and, since the objection is really that the procedure followed in raising and determining the issue as to whether the appellant was entitled to share in the estate of her deceased husband, it is of importance that this should be described.

The originating summons was issued on November 1, 1957, at the instance of the respondent, in her capacity as administratrix of the estate of John Alfred Nordstrom, for the determination of three questions and, by it, the appellant was directed to cause an appearance to be entered.

The proceedings thus initiated constituted an action as that term is defined in s. 2 of the *Supreme Court Act*, R.S.B.C. 1960, c. 374. The summons was issued by the plaintiff in the proceedings relying upon Marginal Rule 765 of the Supreme Court, which permits an executor or administrator to apply by originating notice returnable in chambers for the determination, *inter alia*, of:

> (*a*) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or heir-at-law or *cestui que* trust.

Mrs. Nordstrom, at the time of the issue of the summons, was an inmate of the Provincial Hospital for the insane and the Official Committee for British Columbia entered an unconditional appearance on her behalf.

The plaintiff then applied for directions under the provisions of Order 30 as to the manner in which the questions should be determined and such application came before Brown J. on August 17, 1958. By an order bearing that date that learned judge directed that the case be set down for hearing on the trial list without further pleadings, leave was given to the parties to call evidence at the hearing and to cross-examine on any affidavits which might be filed. It is clear that this order was made with the consent and approval of the committee acting on behalf of the defendant.

[1] (1961), 34 W.W.R. 556, 27 D.L.R. (2d) 634.

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In this manner the case came on for hearing before Wilson J. Counsel for the parties informed that learned judge that the date of the death and the manner in which it had been caused were admitted and that it had been agreed that the transcript of the evidence taken at the inquest, which had been held to enquire into the death of Nordstrom, should be admitted as part of the evidence at the trial and that the matter to be determined was whether at the time the defendant had set fire to the house she was insane, within the meaning of s. 16 of the *Criminal Code*. The defendant by her committee conceded that the onus was on her to establish such insanity, if it existed.

As stated in the reasons delivered, it was further admitted that if the defendant was guilty of either the crime of murder or arson she could not inherit and that the estate should be dealt with as if there had been an intestacy, but that if she was insane in the sense mentioned at the relevant time she was entitled to inherit.

Both parties called evidence and the trial was conducted in the same manner as if the action had been commenced by an ordinary summons, save that there were no pleadings. The question of the propriety of deciding the issues in this way was clearly not raised either on the application for directions or before the learned trial judge, the parties consenting to the matter being heard and disposed of by Wilson J. The propriety of proceeding in this manner was not questioned by either party in the Court of Appeal and was raised for the first time in the oral judgments given in that court. The practical aspect of the matter is that there was a trial at which both parties had full opportunity to be heard and the procedure adopted resulted in a considerable saving of expense to the litigants, since no pleadings were delivered or examinations for discovery held.

Marginal Rule 765 of the Supreme Court of British Columbia reproduces Order 55, Rule 3 of the Supreme Court of Judicature in England. The same rule is Rule 600 of the Supreme Court of Ontario. In its present form it appeared as Marginal Rule 765 of the Supreme Court Rules of 1906 and has been in force since that time.

Read literally, the portion of the rule that I have quoted above appears to authorize an application by originating summons in a case of this kind, since the question affects the rights of a person claiming to be an heir-at-law of the

deceased person. There are, however, decisions in England such as *Re Powers*[1], where it was said that the English Rule in similar terms does not authorize a summons at the instance of alleged creditors of an estate for its administration when there was a dispute as to the debt. Where, however, a summons had been issued under Order 55, Rule 3, to decide questions between executors and adverse claimants and those named as defendants had entered appearances without objection and the matter being decided adversely to them appealed to the Court of Appeal objecting that the procedure was not authorized, Cotton L.J., delivering the judgment of the Court of Appeal, said that the objection could not be given effect to in these circumstances in the Court of Appeal (*In Re Turcan*[2]). That learned judge, whose opinion was concurred in by Bowen and Fry L. JJ., said in part:

> Order LV is not an order conferring jurisdiction, but merely regulating the mode in which questions are to be brought before the Court. If a person who is served with an originating summons in a matter not falling within a, b, c, d, e, f, and g in the 3rd rule of Order LV objected to the jurisdiction, and did not appear, the Court would not go on; but when the party has appeared and has taken the decision of the Court, it would be wrong to let him take the objection when the matter comes before the Court of Appeal.

In *Eggli v. Stewart*[3], where an originating summons had been issued to determine the validity of an alleged creditor's claim against the estate of a deceased person, Bird J.A., with whom O'Halloran J.A. agreed, said in part (p. 169):

> In my view the Rule is broad enough to permit determination thereunder of the validity of a debt, even where there is a dispute on fact; but it lies in the discretion of the presiding judge to decide whether the question can conveniently and economically be disposed of by the summary procedure prescribed by the Rule, or can be determined more satisfactorily in an action commenced by writ of summons.

In the present matter, Brown J. and Wilson J. were apparently of the opinion that the questions could properly be disposed of in this manner, a conclusion with which I respectfully agree. Considering as I do that the Court had jurisdiction to determine the questions in a civil action commenced by an ordinary writ of summons, I am unable to perceive any sound ground upon which to interfere with the discretion exercised by these two learned judges. The question is one of procedure and not of jurisdiction and, if

[1] (1885), 30 Ch. D. 291, 53 L.T. 647.
[2] (1888), 58 L.J. Ch. 101, 40 Ch. D. 5. [3] (1952), 5 W.W.R. (N.S.) 164.

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there were non-compliance with any of the rules or rules of practice, the matter might be dealt with under Marginal Rule 1037.

As to the second question, if it were not permissible in civil actions to make findings of fact which if proven in criminal proceedings would be held criminal, the due administration of justice would be gravely impeded. If this was the law, this Court would not have considered the issue as to whether the assured was a suicide in *London Life Insurance Co. v. Trustees of Lang Shirt Co. Ltd. et al.*[1], since, as found by Mignault J., where there is a successful attempt at suicide a crime is committed. Civil courts constantly have to make such findings, as in actions upon fire insurance policies where the defence may be that the assured has made false statements in a proof of loss, thus committing the offence of attempting to obtain money by false pretences. It is also unfortunately the fact that trial judges at times must find that witnesses have knowingly, with intent to mislead, sworn to what is false in the course of a trial, conduct punishable in criminal proceeding as perjury. The right to make findings such as these for the purpose of determining civil rights have, so far as I am aware, not been previously questioned.

If the court was without jurisdiction to determine the first question in a civil action, then since it is clear that both parties consented to submit their rights to be determined by Wilson J. it would be necessary to consider whether the proceedings were in the nature of an arbitration from which there would be no appeal (*Overn v. Strand*[2]; *Wong Soon v. Gareb*[3]). However, in the view I take of the matter this question does not arise.

I would allow the appeal and restore the judgment at the trial.

I have had the advantage of reading the reasons for judgment to be delivered by my brother Ritchie regarding the cross-appeal, with which I agree and with the proposed order as to costs.

[1] [1929] S.C.R. 117, 1 D.L.R. 328.
[2] (1930), 44 B.C.R. 47.
[3] (1935), 49 B.C.R. 456, 2 D.L.R. 415.

The judgment of Taschereau, Martland, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—These proceedings were initiated by way of an originating summons issued by the respondent in her capacity as administratrix of the estate of John Alfred Nordstrom pursuant to the provisions of Marginal Rule 765 of the 1943 Rules of the Supreme Court of British Columbia for the determination of the following questions:

1. Is the above-named Defendant, Kathleen M. Nordstrom, widow of the late John Alfred Nordstrom, entitled to the distributive share of the estate of the said John Alfred Nordstrom, deceased, as provided for in the Administration Act, R.S.B.C. 1948, Chapter 6, as amended by S.B.C. 1955, in view of the circumstances that the said John Alfred Nordstrom came to his death as a result of a fire caused by the act of the said Defendant?
2. If the answer to Question 1 is in the affirmative, to whom should the share of the said Defendant be paid in view of her confinement as a patient in the Provincial Mental Hospital, Essondale, B.C.?
3. If the answer to Question 1 is in the negative, to whom should the share which would otherwise have been payable to the Defendant be paid?

The appellant, being a patient in the Provincial Mental Hospital, was represented by counsel acting on instructions from the Official Committee appointed under the *Lunacy Act*, R.S.B.C. 1948, c. 194, whose position before the Court was governed *inter alia* by the provisions of Marginal Rule 143 of the said Rules which contains the following provision:

> In all causes or matters to which any . . . person of unsound mind . . . is a party, any consent as to the mode of taking evidence or as to any other procedure shall, if given with the consent of the Court or a Judge by the . . . committee, or other person acting on behalf of the person under disability, have the same force and effect as if such party were under no disability and had given such consent: . . . .

At the opening of the proceedings and with the apparent consent of the trial judge, it was admitted by counsel for the Official Committee that Mr. Nordstrom died on May 30, 1956, by reason of asphyxiation suffered in a fire which had been set by the appellant, and it was further agreed by counsel for both parties that the transcript of the proceedings at the coroner's inquest on the body of John Alfred Nordstrom, except for the findings of the coroner's jury, should be treated as evidence in these proceedings.

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The only evidence as to the origin of the fire was contained in an account given by Dr. J. M. Coles of a statement made by the appellant on the morning after the event in which she said that she was feeling unwell on the evening in question and that she had got out of bed on two occasions to get herself some food and soft drink, and that when her husband told her that she had eaten enough and to come to bed she tried to call the doctor but her husband knocked the telephone out of her hand. Dr. Coles' report of her statement then continues:

> . . . she said, "I then lay down and waited until I heard him snoring good and loud," and when I asked her what she did next she stated that she got up and went out to the kitchen and set the curtains on fire. She was then asked "How did you set the curtains on fire", and she replied that she had taken some matches and lit the curtains.

On being further questioned at the trial, Dr. Coles stated:

> Then, as I recall it, she stated that she had taken the oil can and used it—the oil thereof—to soak the curtains, so that they would fire up.

Even if counsel had made no admission, it seems to me that this uncontradicted statement, taken together with the medical evidence that Mr. Nordstrom's death was caused by asphyxiation and the police evidence that his badly burned body was found in the bedroom after the fire would have afforded ample justification for the finding of the learned trial judge "that the widow set fire to the house and this act caused Nordstrom's death."

The real issue before the trial judge was whether or not, when she set this fire, the appellant was insane to such an extent as to relieve her of the taint of criminality which both counsel agreed would otherwise have precluded her from sharing in her husband's estate under the rule of public policy exemplified in such cases as *Lundy v. Lundy*[1], *The London Life Insurance Company v. Trustees of Lang Shirt Company Limited et al.*[2], *In the Estate of Crippen*[3] and *Cleaver v. Mutual Reserve Fund Life Association*[4].

The learned trial judge analyzed the evidence with great care, including the previous record of happy relations between the Nordstroms, the deranged and contradictory behaviour of the appellant after the fire and her long history of mental disease, epilepsy and diabetes, and having then weighed the opinions of four doctors, he concluded, based in large measure on the evidence of the Assistant Clinical

[1] (1895), 24 S.C.R. 650.
[2] [1929] S.C.R. 117, 1 D.L.R. 328.
[3] [1911] P. 108, 80 L.J.P. 47.
[4] [1892] 1 Q.B. 147, 61 L.J.Q.B. 128.

Director of the Provincial Mental Hospital, that the appellant, when she set fire to the house, "did not then appreciate the nature and quality of her act or know that it was wrong."

In conformity with this finding as to the appellant's mental condition, the trial judge ordered that the first question raised by the originating summons be answered in the affirmative and that the appellant's share of her husband's estate should be paid to the Official Committee.

In directing that the judgment of the trial judge and the proceedings before him, including the originating summons itself, should be "wholly set aside", the majority of the Court of Appeal did not find it necessary to review the finding as to the appellant's insanity, but rather disposed of the matter on a ground which had been raised by neither party, namely, that the trial court was without jurisdiction to determine by way of originating summons or other civil proceeding whether or not a person had committed a crime.

From this judgment the appellant now appeals, asking that the decision of the trial judge be restored and the respondent, by way of cross-appeal, contends that the judgment of the Court of Appeal should be varied so as to direct that judgment be entered for her, and that the questions propounded by the originating summons should be answered so as to exclude the appellant from sharing in her husband's estate.

In the course of rendering his decision in the Court of Appeal, O'Halloran J.A. said in part:

> What I am saying from now on, I am speaking only for myself. In my judgment a person's sanity or insanity or criminality should not be adjudicated upon in a hearing by way of Originating Summons. It is my judgment also that in view of the divisional heads in Secs. 91 and 92 of the *British North America Act* that a provincially constituted Court is without jurisdiction to determine in civil proceedings whether or not a person has committed a crime.

Bird J.A. expressed his concurrence in this view in the following brief paragraph:

> I would allow the appeal substantially on the ground that the Order made below has for its foundation a finding that the appellant was guilty of a crime. It is my view that if there is to be any such finding it should be made in a properly constituted criminal proceeding and not in a civil proceeding such as this.

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Ritchie J.

I do not think that the procedure provided by Rule 765 of the said Rules of Court was primarily designed for the purpose of having seriously contested questions of fact determined by originating summons, but the terms of that Rule provide that the administrator of a deceased person may take out as of course an originating summons for the determination of "any question arising in the administration of the estate or trust" and of "any question affecting the rights of a person claiming to be . . . next of kin or heir-at-law . . . ." and it cannot be said that the trial judge was without jurisdiction to determine such a contested question of fact when so raised. In the present case it is plain that the parties concerned consented to the case being presented in this way, and as the trial judge, in the exercise of his discretion, heard and determined the matter, I agree with the dissenting opinion of Davey J.A. in the Court of Appeal and "would not be prepared to interfere with the use of an originating summons under the circumstances of this case."

The rule of public policy which precludes a person from benefiting from his or her own crime is an integral part of our system of law, and although some doubts have been raised as to whether this rule overrides the statute law as to the distribution of the estate of an intestate (see *In re Houghton, Houghton v. Houghton*[1]), the better view appears to me to be that it applies to such cases (see *In re Pitts, Cox v. Kilsby*[2], *Whitelaw v. Wilson*[3], and *Re Estate of Maud Mason*[4]). As Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Association, supra,* at p. 156 said:

> It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.

As has been indicated the civil courts of this country have repeatedly determined the question of whether or not the conduct of an individual amounts to a crime for the purpose of invoking this rule. Such a determination does not constitute a conviction or acquittal of the individual concerned nor is it in any way binding on a criminal court which may later be concerned with the same circumstances, but the

[1] [1915] 2 Ch. 173 at 176.
[2] [1931] 1 Ch. 546 at 550.
[3] (1934), 62 C.C.C. 172 at 177.
[4] [1917] 1 W.W.R. 329, 31 D.L.R. 305.

right to determine such an issue is a necessary concomitant of the jurisdiction which civil courts have long exercised in such cases.

It is true that if such an issue is raised in a civil court at a time when proceedings are pending for the determination of the same question in a criminal court, application may be made in the civil court for a stay of proceedings until the criminal prosecution has been concluded, but no such application was made in the present case, and in any event the view has been authoritatively expressed that such a discretion should only be exercised in exceptional circumstances (see *Canada Starch Company v. St. Lawrence Starch Company*[1], and *MacKenzie v. Palmer*[2]).

In view of the above, I am of opinion that an originating summons was a permissible, though not desirable, method of initiating these proceedings and that the learned trial judge was clothed with jurisdiction to determine the issue of whether or not the appellant was sane when she lit the fire that caused her husband's death, and I would, accordingly, allow this appeal.

The cross-appeal is directed to attacking the learned trial judge's finding as to the insanity of the appellant and is based on the contention that the appellant failed to discharge the onus of proof necessary to rebut the presumption of sanity, and that the learned trial judge misdirected himself in the manner in which he applied the following test of insanity contained in s. 16(2) of the Canadian *Criminal Code*:

> 16. (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

It is contended on behalf of the respondent (cross-appellant) based on what was said in the cases of *Rex v. Codere*[3], and *Rex v. Windle*[4], that the words "nature and quality" as employed in this section must be construed as referable to the physical character of the act and not as being intended to distinguish between its physical and moral

[1] [1936] 2 D.L.R. 142, per Riddel J.A. at 148-9.
[2] (1922), 62 S.C.R. 517 at 520, 63 D.L.R. 362.
[3] (1916), 12 Cr. App. Rep. 21.
[4] [1952] 2 All E.R. 1, 2 Q.B. 826.

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aspects, and that the words "knowing that an act or omission was wrong" must be treated as meaning "wrong in law" as opposed to meaning "morally wrong".

It does not seem to me to be necessary in the present case to express any opinion concerning the adequacy of the tests of insanity adopted in the *Codere* and *Windle* cases, *supra.* Although the trial judge considered these cases in the course of his decision, it is to be remembered that he had medical evidence before him to the effect that the appellant, when she lit the fire, was in such a state of unawareness as to be unable to appreciate that what she was doing was wrong *in any sense,* and, as the learned trial judge found this evidence to be consistent with all the circumstances, he had no occasion to concern himself with distinctions between the moral, physical or legal aspects of the appellant's understanding.

In my view, the success of this cross-appeal must depend on it being shown that the learned trial judge was clearly wrong in his assessment and interpretation of the evidence and that the appellant failed to discharge the burden of proving insanity.

The onus of proof lying upon the appellant was that of showing that

> . . . balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant . . . reasonable men in concluding that it had been established that the accused when "she" committed the act was mentally incapable of knowing its nature and quality, or if "she" did know it, did not know that "she" was doing what was wrong. . . . .

(See *Clark v. The King*[1], per Anglin J. (as he then was)).

Counsel for the respondent (cross-appellant) stressed the evidence of the medical experts who expressed a different view of the appellant's condition from that expressed by Dr. Halliday, the Assistant Clinical Director of the Provincial Mental Hospital, and on this ground it is contended that the appellant has not and cannot meet this onus.

In this regard the learned trial judge said:

> I think I must conclude that Dr. Gould and Dr. Coles, with the proper caution one expects of experts, probably think that Mrs. Nordstrom was not insane within the meaning of the M'Naghten rules, that Dr. Fister thinks she may or may not have been insane within the meaning of those rules, and that Dr. Halliday has a clear opinion that she

[1] (1921), 61 S.C.R. 608 at 626, 59 D.L.R. 121.

was insane. Consideration of the circumstances of the case as revealed by the witnesses impels me to the conclusion that Dr. Halliday's opinion is most consistent with those circumstances and ought to be accepted.

The language of Lord Alness, speaking for the Privy Council in *Caldeira v. Gray*[1], appears to me to be pertinent in the circumstances. He there said at p. 542:

> The learned trial judge accepted the view of the medical men adduced as witnesses for the respondent, and rejected the view of the medical men adduced as witnesses for the appellant. Their Lordships see no reason to doubt that, in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial judge—e.g., whether, . . . they confined themselves to giving evidence, or acted as advocates—may powerfully and properly influence the mind of the judge who sees and hears them in deciding between them. These advantages, which were available to the trial judge, are manifestly denied to their Lordships sitting as a Court of Appeal.

As the trial judge's finding that the appellant was insane at the relevant time is a finding of fact based on a careful assessment of the relative value of the testimony of expert witnesses, I do not think it should be reversed on appeal (see *Prudential Trust Company Limited v. Forseth*[2]).

In the result, I would allow this appeal, dismiss the cross-appeal and restore the judgment of the learned trial judge.

At the outset of the proceedings, counsel for the respondent made the following statement:

> The administratrix, although nominally acting as administratrix,—she is, of course, opposing any interest of her stepmother—was the daughter of the deceased, but not the daughter of the Defendant, Mrs. Nordstrom, ...

In view of this situation, I would direct that the costs of the appeal and cross-appeal to this Court and of the appeal to the Court of Appeal should be paid by the respondent personally, although I would not disturb the disposition of costs of the trial made by the trial judge.

Appeal allowed, cross-appeal dismissed and judgment at trial restored.

Solicitors for the defendant, appellant: Douglas, Symes & Brissenden, Vancouver.

Solicitors for the plaintiff, respondent: Freeman, Freeman, Silvers & Koffman, Vancouver.

[1] [1936] 1 All E.R. 540, 80 Sol. Jo. 243.
[2] [1960] S.C.R. 210, 21 D.L.R. (2d) 587.