

1917. must apply. If the construction of the will is not necessary
ROBERTSON for the purpose of true administration of the estate the estate
v. as a whole should not bear the costs.
GRAHAM.

Harvey, J. For these reasons I hold that in the present case the part of
 the trust fund as to which the questions in issue have arisen
 must pay the costs.

Solicitors : *Harold Cox* (Wollongong), by *McElhone & Barnes* ;
Russell & McClelland ; *F. W. Barker*.

[*Note.*—See also *In re Hall-Dare* ; *Le Marchant v. Lee Warner* ([1916] 1 Ch. 272).]

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*July 30 ;
Aug. 13.*

*The C.J.
Pring, J.
Sly, J.*

*Practice—Postponement of trial—Discretion of Court—Appeal
from refusal of adjournment.*

Where at the hearing of a suit an application is made for a postpone-
 ment of the trial, and the presiding Judge has, in the exercise of his
 discretion, refused such application, and an appeal is brought on the
 ground that an adjournment should have been granted, the Court will
 not interfere with the decision of the Judge presiding at the trial unless
 there has been a denial of justice or the Judge has exercised his discretion
 upon a wrong principle.

APPEAL from *Simpson*, C.J. in Eq.

This was a suit brought by the defendant's wife claiming a
 declaration that the defendant was a trustee for her of certain
 land standing in his name, and asking for an account of his
 dealings. The statement of claim was filed on the 6th
 September, 1916, and the statement of defence on the 5th
 October. It set up that the land was held by the defendant
 in his own right. The replication joining issue was filed on the
 11th October. In the month of November there were cross
 orders for interrogatories, and in February, 1917, negotiations
 for a settlement. Those negotiations having failed, the case on
 the 19th March was set down by the plaintiff for hearing for the
 13th April. At some time during the month of March, and about

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the end of the month probably, a nomination for the General Federal Elections took place, the elections being fixed for the 5th May, and the nominations being receivable six weeks before that. The defendant was nominated as a candidate for the Electorate of Parramatta. On the 18th April, the day fixed for hearing, the case was called on, and on an application by the defendant an adjournment was made. The application asked for an adjournment until after the Elections, 5th May. The Judge, having heard the parties, granted an adjournment until the 30th April, intimating that no further adjournment would be permitted. The case was again called on, on the 1st May. A further adjournment was applied for on behalf of the defendant on an affidavit sworn by him. That application was refused, and as the counsel present had only been instructed to apply for a postponement they on that refusal withdrew from the Court. The Judge proceeded to hear the case on evidence, and made a decree. It recited the adjournment from the 18th to the 30th April, and a refusal of the further adjournment; that the defendant then appeared in person, and applied that the suit should be heard before another Judge, and that the suit should be adjourned; and that the defendant, on this being refused, withdrew from the Court and attended no further during the proceedings. The decree then declared the defendant a trustee of the unsold land, ordered an account, and directed the costs of the suit to be paid by the defendant, reserving further consideration. The notice of appeal was directed against the refusal of the further adjournment asked for at the hearing, and against the decree itself. The grounds stated in the notice of appeal were: (1) that the defendant was not afforded a proper opportunity of defending the suit, and was not heard on the defence thereof. (2) that upon the facts admitted and proved His Honour should have granted an adjournment of the hearing of the said suit; (3) that the defendant had a *bona fide* defence to the said suit upon the merits.

So far as the decree itself was concerned, it was not set up that the Judge wrongly decided any fact on the material before him, or wrongly applied any principle of law. Nor was it set up that the defendant was in any way taken by surprise

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or that there was any witness other than himself whom he could have called.

Loxton, K.C., and C. G. W. Davidson, for the appellant.

J. A. Browne, and F. R. Jordan, for the respondent.

Cur. adv. vult.

On the 13th August, 1917, judgment was delivered.

THE CHIEF JUSTICE (after setting forth the facts as above stated). The case raised by this appeal resolves itself into this question, whether this Court would be justified in the circumstances in over-ruling the exercise by the Judge of his discretion in the granting or refusing of adjournments. Outside the laws and rules directly governing the procedure of the Court there must often be questions upon which the Judge is entrusted with a discretionary power to be exercised according to the requirements of justice upon the particular circumstances existing and brought before him. It is necessary to see under what circumstances an appeal against such an exercise of discretion can be entertained by the Court. Among the authorities of recent years upon that point I shall refer to several, the first of which was in the year 1876. I refer to the case before the Court of Appeal of *Goulding v. Wharton Saltworks Company* (1 Q.B.D. 374). That was an appeal against an order of the Judge at the trial refusing to strike out a plea as embarrassing. The Court, consisting of Lords Justices *James, Mellish* and *Baggallay*, dismissed the appeal. Lord Justice *James* said : " The Court of Appeal in Chancery has laid down over and over again that on a question which depends on the discretion of the Judge the Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be over-ruled where serious injustice would result from that decision, but as a general rule the Court of Appeal declines to interfere." The material consideration there referred to is the question whether serious injustice would result from the decision. In the year 1888 the case of *Boucicault v. Boucicault* came before the Court of Appeal, when Lords Justices *Cotton* and *Bowen* were sitting. It is

reported in 4 T.L.R. 195. That was an appeal against the granting of an adjournment by the Judge in a case in the Divorce jurisdiction. The report is very short, and states the Lord Justices held that the order was one in the discretion of the Judge and that they ought not to interfere, and the appeal was dismissed with costs. In the year 1896, the appeal in *Hulbert v. Cathcart* ([1896] A.C. 470) came before the House of Lords in a case where there had been a refusal by the Judge of an order for sequestration to enforce payment of costs. Lord *MacNaghten* in that case said: "It seems to me that when the Court or Judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior Court unless it is shown that there has been an improper exercise of the discretion or some miscarriage of justice." Lord *Davey* said: "The rule which has been referred to seems to have invested in the Judge before whom the case may come a discretion as to whether a sequestration for costs should issue in that particular case. No doubt my Lords, it is what may be called a judicial discretion; but if the learned Judge below has exercised his discretion, it ought not to be interfered with by a Court of Appeal unless the Judge below has decided the case upon an erroneous principle or has omitted to take into consideration something which ought to have influenced his judgment." The last case to which I shall refer is the case of *Sackville West v. Attorney-General*, mentioned in Vol. 128 Law Times Journal at 266. In that case there had been a refusal by the President of the Probate Division to postpone the trial of the action. The appeal was based upon the ground that certain letters of request ordered by the President for the taking of evidence abroad could not possibly be returned, translated and read for the trial by the date fixed. On behalf of the petitioner it was contended that if the evidence was not available at the trial of the action and he were thus deprived of the advantages of the evidence, grave injustice would be done to him. *Held*, that although it could not be said that under no circumstances would the Court of Appeal be justified in interfering with the discretion of the learned Judge in a Court below as to the proper mode and time of trying an action, yet it would only be in the most extraordinary circum-

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stances that an application to review the decision of the learned Judge as to the conduct of the business in his own Court could succeed ; that the only case in which the Court of Appeal would so interfere would be if satisfied that the decision was such that notwithstanding any exercise by the learned Judge of the power of control which he would have over the action when it came on for trial justice did not result, and he had failed to see that such would be the effect of his decision ; that the Court of Appeal would assume that what was right would be done at the trial ; and that if when the petition in the present case came on for trial the learned President was satisfied that there was any ground for fearing an injustice would be done to the petitioner, he would in the exercise of his discretion adjourn the trial in order to give an opportunity for the evidence in question to be produced. There the appeal was refused. Other cases were referred to in the course of argument on this appeal on occasions when an amendment was refused at the trial for the purpose of raising an issue not raised by the pleadings. I do not think anything in those judgments in any way qualifies what was distinctly laid down by the authorities to which I have referred, and indeed the case of the refusal of an amendment at the trial is not strictly analogous to a case where a party applies for an adjournment of a hearing. In the former case the real issue may never have come before the tribunal. The Court may be seen to have failed to have discharged that function for which it exists, that is to decide actually existing disputes, unless to alter the pleadings at that stage of the trial would of itself create an injustice. Here the actual dispute existing between the parties had been defined by the pleadings and was heard, and even though it was heard in the absence of one of the parties, we must be careful to see whether he can complain that an injustice was done to him by the Judge in not acceding to his application to have the hearing postponed to a time more convenient to himself. It was contended that where a postponement is applied for, and any prejudice to the other side can be compensated for by costs, it is a denial of justice to refuse the postponement. That never has been, and could not justly be adopted as a rule of practice without some qualification. To adopt such a principle in that unqualified

form would involve this consequence—that a litigant who is a man of means could always purchase his own time for the hearing of a case brought against him, and a party without means must await his adversary's convenience for the decision of his rights. The mere power of paying the other litigant's legal advisers' and witnesses' expenses is not any advantage to the other litigant. The money does not go into his pocket. He may in the meantime be in the position of one who is kept out of his rights to suit the convenience of his debtor or someone who owes him an obligation.

Now I come to the actual material upon which the application for adjournment was made, because the facts set up in it have been made the foundation of a great deal of argument. It is very necessary to see what the material before the Judge was. After setting out the pendency of the election and that the defendant was a candidate he states that the contest was one of very considerable public and national importance. He says: "The Parramatta contest is specially noted throughout Australia and there have been leading and other articles by the newspapers and a large amount of time, labour and work has fallen to me in contributing to the press and otherwise framing and circulating literature for use throughout the electorate. The electorate of Parramatta is very large in area, involving an immense amount of time and preparation in order to address meetings in every portion of the constituency; I am as a consequence addressing meetings every evening and also during the day time, which takes up the whole of my time in preparation." Then he goes on in paragraph (7) to say: "By reason of this election I am mentally unfit to go into my case with my solicitor and counsel in order to prepare for the hearing in this suit." It is not suggested that the applicant was laboring under any infirmity of body or mind. That would be so inconsistent with the previous paragraphs I have read, that in the light of these his statement that he was mentally unfit, if that were his meaning, would hardly require any contradiction. But it was put to us as a statement of fact, which, being left uncontradicted, must be treated as proof that he was mentally unfit. I can only read it in the light of the whole affidavit as meaning that

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he was too preoccupied with his electoral contest to give his attention to the claim of the plaintiff, which had been matured on the pleadings six months before. His statement of defence had been prepared before that by an able counsel, who was one of those instructed by him on the very motion for postponement. He knew for some time before his nomination that the case was fixed for hearing on a certain date. The rest of the paragraph which concludes the affidavit sets out that "almost up to the date when the suit was set down for hearing," and that would be some time prior to the 19th March, "I was hopeful the suit would be settled, and since my nomination in connection with this election I have been quite unable to devote the necessary time to prepare for the hearing. I have not up to the present time been able to instruct my solicitor, and I am totally unprepared to go on with the hearing of this suit." Those then are the allegations of fact upon which it is argued before us that it was a denial of justice for the Judge to refuse a further postponement in addition to the 12 days he had already allowed. From the dates supplied to us he must have known some time before his nomination that the case was fixed for hearing on the date mentioned. He had been granted a previous postponement for the very purpose of further instructing his legal advisers before the actual hearing, and so far as appears on any information placed before us or suggested in argument, he had done nothing whatever in the interval towards preparing for trial. Under those circumstances I cannot see the smallest ground for complaining that an injustice was done to him, unless every candidate for Parliament is to be held *ex debito justitiæ* entitled to a postponement pending the elections. No such rigid rule could be adopted without risk of grave injustice to other litigants. What answer is it to a complainant who sets up that he has been kept out of his legal rights to be told that, knowing of that complaint and the invocation of the Court's jurisdiction, his particular adversary has thought fit to be nominated for Parliament and to give every other consideration the go-by until that business is disposed of? The circumstance of a pending election is simply one of the facts a Judge asked for a postponement would have to consider on such a motion. The political opinions held by the ap-

plicant, or the particular issues of the election, and the degree of importance which he or others may attach to them, are not matters for judicial investigation by a Court of justice. The Court must not look merely at the demands upon the time of the particular litigant as a candidate for Parliament. His conduct, the evidence he has furnished of *bona fides* in his application by making use of all the opportunities open to him of seeing that those advising him are put in possession of any information he can give them; this and every other consideration bearing on such a question are matters that a Judge asked for a postponement would take into account. Here I can see no ground whatever set out on which this Court would be warranted in saying that the Judge did any injustice in not allowing the pendency of the election to outweigh all other considerations, which is really what he was asked to do.

For these reasons I am of opinion that this appeal must be dismissed with costs.

PRING, J. I agree.

SLY, J. This is a suit by a wife against a husband claiming that he was a trustee for her of certain lands registered in his name, and asking for an account of dealings by the defendant of portion of the said lands. The defendant filed a defence setting out in paragraph 4 that he was really the owner of the lands, he would be clearly a necessary witness to prove such defence. The statement of defence was sworn to.

The suit was instituted on 6th September, 1916, the defence was filed on 5th October, and the replication on the 11th October of the same year.

There were certain negotiations for settlement in January of 1917, and on the 19th March the suit was set down for hearing for 13th April, and came on for hearing on 18th April.

The defendant was a candidate for the Federal Elections which were to take place on Saturday, 5th May, and on the 18th April he asked for a postponement till after the Federal Elections, on the ground that he was a candidate and that he did not have time to instruct counsel. His Honour granted an adjournment, but only until the 30th April, and the suit came on for hearing on 1st May. On that day Mr. Loxton as counsel

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for defendant applied for a further adjournment till after the Federal Elections ; an affidavit was filed by defendant in support thereof dated 1st May. No affidavit was filed in opposition, nor was application made to cross-examine defendant on his affidavit. That affidavit stated (*inter alia*) :

Par. 3. I was duly nominated for such constituency by the requisite number of electors and the election takes place on Saturday next, May the fifth. After having been duly nominated it is impossible for me to withdraw from the contest.

Par. 6. The Electorate of Parramatta is very large in area, involving an immense amount of time and preparation in order to address meetings in every portion of the constituency ; I am as a consequence addressing meetings every evening and also during the day time, which takes up the whole of my time in preparation.

Par. 7. By reason of this election I am mentally unfit to go into my case with my solicitor and counsel in order to prepare for the hearing of this suit. Almost up to the date when the suit was set down for hearing I was hopeful that the suit would be settled as detailed by me in my affidavit of the eighteenth of April last and filed herein and since my nomination in connection with this election I have been quite unable to devote the necessary time to prepare for the hearing. I have not up to the present time been able to instruct my solicitor and I am totally unprepared to go on with the hearing of the suit.

Mr. Loxton stated to His Honour that unless a postponement was granted he would have to withdraw from the case, as he was not instructed. His Honour refused an adjournment and, the shorthand note says : " His Honour said he had already granted an adjournment, from the 18th April, and refused the present application. Mr. Loxton, together with Mr. Davidson and Mr. Yabsley, with His Honour's permission, then retired."

The case proceeded in the absence of defendant and His Honour made a decree in favour of plaintiff.

This is an appeal now from His Honour's order in refusing to postpone the case.

It was not suggested by counsel for plaintiff, nor is there any note, that His Honour said he did not believe the affidavit

of defendant, and it is difficult to see how His Honour could say so as the affidavit was uncontradicted.

If the affidavit is true, an injustice would be done to defendant, I think, in proceeding with the case, as he would be unable to present his defence properly.

No doubt this postponement of the case is a matter for His Honour's discretion, and the question is whether this Court should interfere with His Honour's discretion.

In the case of *Hulbert & Crowe v. Cathcart* (1896 A.C. at 470), the principles are laid down under what circumstances an appellate Court should interfere with the discretion of a Judge. At p. 475, Lord *MacNaghten* says: "It seems to me that when the Court or the Judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior Court, unless it is shown that there has been an improper exercise of the discretion or some miscarriage of justice."

And Lord *Davey*, at p. 476, says: "If the learned judge below has exercised his discretion it ought not to be interfered with by a Court of appeal unless the judge below has decided the case upon an erroneous principle, or has omitted to take into consideration something which ought to have influenced his judgment."

I am clearly of opinion if we take this statement of Lord *MacNaghten*, that there has been a miscarriage of justice in not granting a postponement under the circumstances of the case, and if we take the words of Lord *Davey*, I am also clearly of opinion that His Honour did not take into consideration the facts stated in the affidavit of the defendant which should have influenced his judgment. Mr. Conroy could not, by law, once he was nominated withdraw from the contest, and he had his duty to his supporters to fight the election thoroughly. And as far as the notes appear His Honour did not grant the postponement asked for because he had already granted a postponement before. But if the facts stated in the affidavit are true, and we must assume under the circumstances that they are true, the defendant was not in a position to go on with the case at that time so as properly to present his case before the Court.

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I think, therefore, that this is a case in which the Court should interfere with the discretion of His Honour the Chief Judge in Equity, and that this appeal should be allowed, and that the proper order to be made is : that the order of His Honour be set aside, the defendant to pay the costs of the day of 1st May, and the costs of this appeal and of the previous hearing be costs in the cause.

Appeal dismissed with costs.

Solicitors : *A. J. R. Yabsley ; Norton Smith & Co.*

END OF VOL. 17.