court. She has no excuse of having been misled, and none of any physical impossibility. In fact, she has nothing but inattention to plain and unmistakable statutory words."

The words used in the judgment lead to the conclusion that in order to prove "reasonable excuse" the plaintiff must prove either that he has been misled by the municipality into not giving notice or into giving improper notice or that it was physically impossible for him to give such notice. Mere inadvertence or inattention is not "reasonable excuse".

The statutes governing municipal corporations in Alberta have been radically altered since 1967. A review of these statutes is essential before dealing with such municipal corporations in order that reasonable claims and actions will not be defeated by technical errors.

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## SURROGATE COURT'S POWER TO GRANT PROBATE TO A FOREIGN EXECUTOR

Does The Alberta Surrogate Court have the power to grant probate to a foreign executor of an estate of property in Alberta? This question arises out of a decision of Tavender, D.C.J. in *Re Alder Estate,*[1] which dealt with an executor's application for probate of the will of a deceased who had resided and held assets in Calgary, Alberta. The deceased's will appointed his brother, who resided at Waterloo, Indiana, U.S.A., as his executor. The learned judge held that as Alberta only has reciprocal arrangements with the Proivnces and Territories of Canada, the United Kingdom and other British Dominions, States, Provinces, Colonies and Dependencies for application for grants of probate, he had no power to make a grant to an executor residing in the United States of America.[2] The learned judge suggested that the foreign executor, if temporarily out of jurisdiction, appoint an attorney within the province *durante absentia* or otherwise renounce probate and execution of the will. With respect, this decision seems to be contrary to previous law and practice both in Alberta and elsewhere.

This historical background of the law which applies to executors in Alberta is briefly discussed in the case of in *Re Rutherford Estate; Rutherford* v. *McCuaig and Royal Trust Company*[3] as stated by Lunney, J.A.:

> The Northwest Territories Act, R.S.A. 1886, c. 50, s. 11 provides that the Laws of England relating to civil and criminal matters as the same existed on July 15, 1870, shall be in force in the Territories, in so far as the same are applicable to the Territories.
> By the Alberta Act, 1905, c. 3, s. 16, all laws and all orders and regulations are in force until repealed by competent authority.

With respect to foreign executors, the Law of England as at July

1 (1963) 42 W.W.R. 697.
2 Under Rule 886 of *The Alberta Rules of Court*, for the purpose of an application for resealing Letters Probate or Letters of another Court, only grants from "a court of competent jurisdiction in the United Kingdom or in any other province or territory of the Dominion or in any other British Dominion, state, province, colony or dependency" can be accepted by the Clerk of the Surrogate Court of Alberta.
3 (1942) 1 W.W.R. 567.

In a recent Alberta decision *Kaughman* v. *City of Calgary*[5] Milvain J. (as he then was), in considering section 695 of The City Act;[6] which was subsequently replaced by section 385 of The Municipal Government Act[7]; applied strict rules of statutory interpretation and allowed a technical objection to defeat an otherwise meritorious action.

The matter came before Milvain J. pursuant to an order that an issue be tried; the operative portion of the order stated two issues for the consideration of the court:

> 1. 'Whether or not written notice of an accident and the cause thereof served upon the claims department of a city within six months of the happening of the accident, is sufficient compliance with Section 695(1) of The City Act, being Chapter 42 of the Revised Statutes of Alberta, 1955, and amendments thereto, so as to entitle the claimant to commence action for damages arising out of the said accident it being admitted that the solicitor of the city has been informed of he said accident and cause thereof within the said six-month period."
> 2. "If the said notice is not deemed sufficient compliance as above, whether or not the Plaintiff had reasonable excuse for not giving proper notice within the six month period required."

The essential facts of the case were agreed upon by the parties and are stated concisely in the judgment:

> "All essential facts were agreed before me. The plaintiff's ownership of the property and its situation within the city are admitted. It is also admitted that on March 7, 1966, the property was flooded by water. At about 11:30 p.m. that night the plaintiff contacted agents of the city and workmen were sent to shut off the water supply. The next morning, city workmen excavated the service lines and the following day the main, where a break was found and repaired. A notice was given in writing to the clams department and on some occasions during the six months following the event, the plaintiff or her agents did have some conversation with the city solicitor's office. No notice was ever given to the city clerk."[8]

There has been a tendency to consider notice sufficient if it is sent to any municipal department. This decision should encourage members of the profession to become familiar with the provisions of The Municipal Government Act in order to submit such notices in a manner which fulfills the statutory requirements.

The want or insufficiency of notice is not a bar to an action if the court considers that there is "reasonable excuse" for such want or insufficiency of notice and that the municipality has not been materially prejudiced in its defence. In order to obtain relief under the provision both "reasonable excuse" and "no material prejudice" must be proven in order to obtain relief under the section.[9]

Milvain J. did not consider question of prejudice as the City of Calgary admitted that it had suffered no prejudice. In considering the question of "reasonable excuse" Milvain J. relied upon and followed *Varty* v. *Rimbey (Town)*[10] and concluded:

> "In my view the legislation is plain and unambiguous. It says clearly and precisely that notice shall be served upon the city clerk. It clearly contemplates no one else. When a statute speaks in clear terms it should be so interpreted."
> "In this case I cannot find any evidence of someone within the city fold having misled the plaintiff into giving notice to the claims department rather than to the city clerk as demanded, in plain terms, by the statute. Her real excuse in this connection, if any, is that she did not know notice must be given to the city clerk. The law is plain. Such ignorance is not an excuse acceptable to any

5 (1968) 63 W.W.R. 367.
6 R.S.A. 1955, c. 42.
7 S.A. 1968, c. 68.
8 (1968) 63 W.W.R. 367, at 368.
9 *Id.*, at 369.
10 (1952-53) 7 W.W.R. (NS) 681, affirmed (1954) 12 W.W.R. (NS) 256.

15, 1870 is found in the Court of Probate Act, 1857, c. 77, s. 73 which states:[4]

> . . . where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in such case by reason of the insolvency of the estate of the deceased or *other special circumstances* to appoint some person to be the administrator of the Personal Estate of the Deceased, . . . it shall be lawful for the Court *in its discretion* to appoint such persons as the Court shall think fit to be administrators. (own italics)

This section 73 was considered in the case of *In the Goods of Samson*[5] where at p. 49 Sir J. Hannen states:

> The necessity or convenience is further defined as that arising from the insolvency of the estate or other special circumstances. It is plain that I must not, merely because the executor is out of the country at the time of the testator's death, lightly set him aside . . . .

He went on to comment that in these circumstances only if the foreign executor was a person of questionable reputation would he be passed over in favour of another.

The effect of section 73 of the Court of Probate Act,[6] if modified at all by legislation in Alberta, would be by The Alberta Rules of Court, Rule 888 which states:

> If in any case it is in the interests of the estate of a deceased person that the same be forthwith administered or that someone other than the personal representative be appointed to administer the estate the Judge may on application wih such notice, if any, as he may direct, appoint as administrator the Public Trustee or such other person as he deems proper and may in making such appointment fix or dispense with the giving of security.

Thus it would seem that the Surrogate Court of Alberta does have the discretionary power to grant probate to a foreign executor. How is that discretion to be exercised?

In *Mortimer on Probate Law and Practice* 2nd Ed., after discussing the common law disabilities of executors such as an infant during his minority and a mental incompetent ,the learned author states at p. 209:

> If a probate is refused it must be on the ground of some legal disability recognized and allowed by the common law. For an executor is but a trustee for the deceased, and such a person as the testator thought proper to appoint for that office, without any previous qualifications . . .

This same problem was considered in *Smithson et al.* v. *Smithson*[7] where Gregory, J. said "The Court, unquestionably, has some discretion in the matter, but it is a discretion which should be exercised very sparingly".

In *Re Haggerty Estate*[8] Kirke Smith, L.J.S.C. quotes with approval a statement of Davey, J.A. in *Re Wolfe Estate,*[9] at page 88:

> The right of a testator to nominate the executor to administer his estate should not be lightly interfered with. In *Harris* v. *Gallimore*[10] and in *Re Agnew Estate; Brown* v. *Agnew,*[11] it was pointed out that, apart from statute, a court of probate had no right to refuse probate to the executor named in the will unless he was legally competent to act.

The question of granting probate to a foreign executor has been recently dealt with in *Re Knox Estate.*[12] After considering the authorities including *In Re Herron Estate,*[13] where Sullivan, J. approved a

4 20 and 21 Vict. c. 77, s. 73.
5 (1873) 3 P. & D. 48.
6 *Supra*, n. 4.
7 (1915) 9 W.W.R. 501.
8 (1967) 60 W.W.R. 574.
9 (1957) 21 W.W.R. 85.
10 57 O.L.R. 673 varying 55 O.L.R. 566.
11 (1941) 3 W.W.R. 723.
12 (1963) 44 W.W.R. 694.
13 File No. 71616 Vancouver Registry.

grant of probate on behalf of the sole executrix who resided in the State of California, Wootton, J. held that a foreign executor is entitled to a grant of probate, reserving to the Court a discretion to demand assurances from the executor that creditors not be overlooked. He states at page 697 "There is a considerable difference between the right to the grant of probate and the conditions upon which a grant may be made".

It would seem that this was essentially the position of Alberta law prior to the *Re Adler* decision.[14] In fact the possibility of a grant to a foreign executor and the safeguards to be applied by the Court in such a situation are dealt with by Rule 876 of The Alberta Rules of Court which states:

> Each person to whom a grant of administration is made and every *foreign executor* shall give a bond with at least two sureties in double the value of the property. (own italics).

With respect, the decision in *Re Adler Estate*[15] appears to be wrong. This question should, therefore, be clarified, and since Alberta now has a Surrogate Courts Act,[16] proper provisions for a foreign executor should be made.

The Province of Ontario's Surrogate Courts Act[17] provides:

> Letters Probate shall not be granted to a person resident in Ontario or elsewhere in the British Dominion, unless such person shall have given the like security, as is required from an administrator in case of intestacy, unless in the opinion of the Judges, such security should, under special circumstances, be dispensed with or reduced in amount.[18]

It seems manifestly unjust and unreasonable that a testator's personal choice of an executor should be refused merely because that person resides in the U.S.A.

—J. C. GORMAN, Q.C.*
—G. C. STEWART**

14 *Supra*, n. 1.
15 *Id.*
16 S.A. 1967, c. 79; see also the Administration of Estates Act, S.A. 1969, c. 2.
17 R.S.O. 1960, c. 388, s. 24.
18 See Macdonell and Sheard, *Probate Practice* (1953) at 106.
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## INTERNATIONAL LAW—ARCTIC SOVEREIGNTY—NORTHWEST TERRITORIES ACT, R.S.C., 1906, c.62—*R.* v. *TOOTALIK.*

The recent trans-Arctic voyage of the United States supertanker SS Manhattan and the oil discoveries in the Canadian Arctic have again brought to fore the long controversial question of Canada's sovereignty over the waters of the Arctic archipelago.[1] In a recent decision in *Regina* v. *Tootalik*,[2] Mr. Justice W. C. Morrow of the Territories Court of the Northwest Territories, declared in effect that Canada's sovereignty extends north to the Pole.

1 Canada's claims to territorial sovereignty over the Arctic islands have never been questioned by another state. However, regarding the position of Canadian sovereignty over the Arctic waters, the abundance of opinions expressed by politicians and publicists, both Canadian and foreign, are embarrassingly contradictory. See Head, *Canadian Claims to Territorial Sovereignty in the Acrtic Regions*, (1963) 9 McGill L.J. 200; G. W. Smith, "Sovereignty in the North: the Canadian Aspect of an International Problem," in *The Arctric Frontier*, 194 (R. St. J. Macdonald ed. 1966); Pharand, "Innocent Passage in the Arctic," 6 *Can. Y.B. Int'l L.* 3 (1968); and Pharand, (1969) 19 U.T.L.J. 201.
2 (1970) 71 W.W.R. 435. (Case decided November 17, 1969.)