SCHARA TZEDECK (PLAINTIFF) .....APPELLANT;

AND

THE ROYAL TRUST COMPANY, as Executor of the Will of Jennie Edith McIntyre, deceased (DEFENDANT) ... } RESPONDENT.

1952

*June 6
*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Will—Executor—Direction by Testatrix that body be buried in Jewish cemetery and cost be part of funeral and testamentary expenses—Amount of Executor's liability.

The appellant, a society incorporated under the *Benevolent Societies Act* (R.S.B.C. 1911, c. 19), maintains at Vancouver a synagogue and a cemetery and carries out the functions of a registered undertaker and provides for persons of the Jewish faith burial services in accordance with the ritual of that faith. Pursuant to a request, which was not made by the respondent executor, the appellant caused burial services to be conducted for and the body of the testatrix, a Jewess, to be buried in its cemetery. There was no communication between the appellant and the respondent until after this had been done. The appellant claimed to recover a fee for its services in an amount fixed by a committee of seven persons, members of its synagogue and in fixing such amount the committee took into account the financial circumstances of the testatrix, her mode of life and other considerations, a method it alleged to be authorized by usage and custom in respect to persons of the Jewish faith. The respondent brought an amount into Court with its defence and the trial judge gave judgment in an amount less than the sum so paid in. An appeal to the Court of Appeal was dismissed.

Held: (Rand J. dissenting) that upon the evidence the only liability of the respondent as executor was to pay a fair and reasonable amount for the services rendered, and as such amount had been awarded at the trial, the appeal failed. *The King* v. *Wade* 5 Price 622 at 627; *Tugwell* v. *Heyman* 3 Camp. 298; *Corner* v. *Shew* 3 M. & W. 350 at 354 applied.

Per: Kellock J. Assuming the usage and custom pleaded could be considered either reasonable or certain, there was nothing in the evidence which established the existence of either. Neither did the will contain anything upon which the appellant could claim against the estate other than the common law basis of liability of personal representatives with respect to funeral expenses.

Per: Rand J. (dissenting)—A contractual basis is inappropriate to the claim and the obligation to pay arises by way of bequest.

*PRESENT: Kerwin, Rand, Kellock, Estey and Locke JJ.

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APPEAL by plaintiff from a judgment of the British Columbia Court of Appeal (1), affirming the judgment of Clyne J. (2).

J. W. deB. Farris Q.C. for the appellant.

Alfred Bull Q.C. and *P. R. Brissenden* for the respondent.

The judgment of Kerwin, Estey and Locke JJ. was delivered by:

LOCKE, J.:—The appellant is a society incorporated under the provisions of the *Benevolent Societies Act,* R.S.B.C. 1911, c. 19, whose objects are described in its amended declaration as being religious, philanthropic, charitable, social, educational and fraternal, with power to hold lands for the purpose of erecting a house of worship for those of the Jewish religion and to acquire lands for the purpose of maintaining a "burial ground for burial privileges" for persons of that faith. The Society in due course erected a synagogue for the members of the Schara Tzedeck Congregation and established a cemetery known as the Schara Tzedeck Cemetery, on Marine Drive in the City of Vancouver.

By her last will and testament made on September 11, 1924, Jennie Edith McIntyre, therein described as having been born Waga, and sometimes using and known by the name of Jennie Green, of Sandon, B.C. appointed the respondent company as executor and trustee and, after making various minor bequests, directed that the moneys realized from the estate should be divided equally between her father, mother, brothers and sisters, described as resident in Russian Poland, and further directed that her body should be buried "in a Jewish cemetery in my own burial plot in a casket suitable to a person of my means and that a suitable head stone shall be placed on my grave and that the cost thereof shall be paid as part of my testamentary expenses."

Jennie Edith McIntyre died at Nelson, B.C. on December 9, 1946. She was of the Jewish faith and shortly thereafter Mr. David A. Chertkow, a member of the Bar of British

(1) 5 W.W.R. (N.S.) 279; [1952] 2 D.L.R. 298.

(2) 1 W.W.R. (N.S.) 760; [1951] 2 D.L.R. 288.

Columbia practising in Vancouver and the General Secretary of the Cemetery Board of the Society, received a telephone call from Nelson informing him of the death, that the deceased had been a Jewess and asking whether the Society would accept her body for burial. The name of the person who spoke to Mr. Chertkow does not appear and apparently neither the latter nor any of the other active members of the Society knew Mrs. McIntyre. On the examination for discovery of Mr. Diamond, the President of the Cemetery Board of the appellant Society, Mr. Chertkow had appeared as counsel and, after consultation with him, Mr. Diamond said that they did not know who it was that had telephoned to Mr. Chertkow from Nelson. After receiving this message the Board had made inquiries sufficient to satisfy them that the deceased had been a Jewess: thereupon her body having been shipped from Nelson was buried in the casket in which it arrived without further inquiry, the services being conducted in accordance with the requirements of the Orthodox Jewish faith. No one on behalf of the appellant Society got in touch with the Royal Trust Company until after the funeral. Neither Mr. Chertkow nor any one connected with the appellant knew the contents of the will and were thus not informed that there was a direction that the body should be buried "in a Jewish cemetery in my own burial plot", and accordingly the burial was in what was described by him as a single grave. Burial was on December 15, 1946, and an account was rendered to the executors by the Cemetery Board on March 1, 1947.

The statement of claim, after describing the nature and objects of the Society and its ownership of the cemetery and that it carries out the functions of and is a registered undertaker, alleged that the Schara Tzedeck Cemetery Board, a committee appointed annually, has complete charge of burial arrangements and maintains and operates the cemetery, and that:—

> the said Board has the sole right and discretion to set and arrange a burial fee in accordance with the principles of the Jewish faith, taking into consideration, amongst other things, the character and nature of the deceased; the value of his or her estate; the persons dependent for support upon the said estate; and the manner in which the deceased in his or her lifetime discharged his or her obligations of giving and doing charity in accordance with the principles of the Jewish faith.

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After alleging that the deceased was a person of the Jewish faith, it alleged that:—

the said Board was called upon to perform the last rites.

and that this was done. By whom the Board was requested to do this was not stated. These allegations, however, were followed by a claim for moneys payable by the defendant to the plaintiff for goods, services, materials provided and moneys paid by the plaintiff for the defendant in and about the funeral of the said deceased, this being followed by a claim for $3,000 "total fees as set by the Board." These various allegations were put in issue by the statement of defence, the denials being followed by an allegation that it had been arranged between the parties that the plaintiff would provide a grave in its cemetery and attend to the burial of the said Jennie Edith McIntyre, but that the amount to be paid had not been agreed upon and that the claim was exorbitant. No reply was filed and these pleas were accordingly put in issue. Presumably the claim that there had been an arrangement made between the parties for the burial in advance of December 15 was not in accordance with the facts since no evidence was tendered to support it, the evidence tendered for the defendant on this aspect of the matter being therefore unchallenged. The statement of defence, in addition, alleged that the defendant had at all times been ready and willing to pay the plaintiff a reasonable amount for the grave and the burial and brought into court the sum of $1,000 as a sum ample to satisfy the claim.

At the trial before Clyne J. written admissions of the defendant were filed to the effect that the charges of commercial undertakers for undertaking, funerals, burial and cemetery services of the kind provided by the plaintiff to the deceased would amount from $200 to $600; that the defendant had no knowledge until some time after the funeral of the basis upon which the Society or any like Jewish organization fixed its charges for such services and that, under Jewish religious law and in accordance with Jewish custom, Jewish burial societies charged for the carrying out of burial rites on any one of three bases, namely, by a set fee which is the same for all members or by a fixed percentage of the estate of the deceased or by setting a fee in accordance with the principles of the

Jewish faith, taking into consideration amongst other things the value of the estate, the persons dependent upon the estate for support and the manner in which the deceased in her lifetime discharged her obligations of giving and doing charity in accordance with the principles of the Jewish faith, and that the plaintiff Society had since its origin adopted the last mentioned basis.

The evidence disclosed that the appellant Society appoints annually a committee of seven persons, members of its synagogue, who are designated as the Schara Tzedeck Cemetery Board, which is charged, inter alia, with the maintenance of the cemetery and the setting of the fees which are charged to estates of deceased persons for their burial. Mr. Chertkow, as secretary of this committee, wrote to the estates' officer of the respondent on July 22, 1947, explaining the manner in which the Board had fixed the fee of $3,000 shown in the account which had been rendered on March 1st of that year, pointing out that neither the persons who performed the last rites nor the members of the Board received any remuneration for their services which were performed as a religious duty to enable persons of the Jewish faith to receive a proper burial in accordance with the orthodox rites and customs of that faith and that in many cases they conducted burials without charge for the estates of persons unable to pay, that in fixing the charges made the Board took into consideration the character and nature of the deceased person, whether being financially able such person had discharged his or her religious duty of giving and doing charity in his or her lifetime for the assistance of those who were less fortunate, that the estates of people of means must pay for the burial of the poor of the Jewish faith, and that the Board considered the person's character, whether he or she had lived a good and proper life "judging from moral standards to which all people adhere to." The letter further stated that the Board endeavoured to be practical and applied these principles equitably and without hardship for the remaining dependents, that as regards the estate of Mrs. McIntyre the value of her estate far exceeded the value of most of the estates left by other Jews, that in her lifetime she had been removed from her people and did not discharge her charitable duties and "that her manner

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of living left much to be desired", that, as she left no immediate family or infants dependent upon her, sufficient would remain to take care of any remote relatives that would share under the terms of the will, and that, in addition to failing to give to Jewish charities in her lifetime, the deceased did not by her will make any bequest to such charities, while specifically providing for Jewish burial.

Mr. Chertkow gave evidence at the trial and produced a list of the amounts which had been charged for the burial of various people of the Jewish faith in Vancouver during a period of five years prior to the time of the trial where, he said, the amounts charged had been fixed upon this basis. Of the three methods of fixing the charges referred to in the admissions, the one commonly known among Jews in Canada, in his opinion, was that of charging a fee in accordance with the ability of the estate to pay. Rabbi Kogen of the Congregation Beth Israel of Vancouver, gave evidence as to the great importance attached by people of the Jewish faith to having their bodies buried in Jewish cemeteries according to the Jewish ritual, and said that he believed that it had been the universal custom among Jews for many centuries and was now the custom that everybody was buried in the same manner and that the estates of the rich paid more than those of the poor. While in the case of members of his congregation there was an arrangement with the Schara Tzedeck Cemetery Board for the payment of a fixed fee which was the same for all, this was an exception to the common rule. This witness said further that giving to charity was considered to be an obligation upon every Jew. Rabbi Mozeson agreed with the evidence given by Rabbi Kogen.

Mr. Justice Clyne who considered that the evidence showed that the respondent had caused arrangements to be made for the burial decided that the plaintiff's claim could be only for services rendered, the remuneration to be such as in the circumstances would be just and reasonable, being of the opinion that the usage alleged was uncertain and had not been proved. Based upon the admission as to the charge on an ordinary commercial basis, he fixed the sum of $400 as being reasonable and allowed this amount, giving the plaintiff costs up to the time of the

payment into court and the defendant the subsequent costs of the action in accordance with the rules of the Supreme Court. The present appellant's appeal from this judgment was dismissed by a unanimous judgment of the Court of Appeal.

It is clear from the evidence that there was no express contract made between the respondent and the appellant for the burial of the body of the deceased and it was, no doubt, for this reason that the statement of claim merely asserted that the Board had been called upon to perform the last rites. The only evidence of any request to the appellant to bury the body of Jennie Edith McIntyre in its cemetery was of that made by some person in Nelson whose name was not disclosed and it was admitted by Mr. Diamond in his examination that no other instructions from any source were received. That this person was acting for or on behalf of the respondent was neither alleged nor proven. The services were not rendered in reliance upon the terms of the will since its existence was not known to the officers of the appellant Society until after the burial. If there is any liability in contract on the part of the respondent, therefore, it must be upon a contract to be implied by law in these circumstances.

The respondent in this matter properly admitted its liability to pay the reasonable cost of the burial of the testator and paid the sum of $1,000 into Court with the defence as sufficient to satisfy the claim. Apart from the fact that the *Administration Act* (R.S.B.C. 1948, c. 6, s. 153) provides that claims for funeral expenses not exceeding $100 shall be preferred as heretofore, neither the nature nor the extent of the liability of the executor is affected by any statute in force in British Columbia. At common law a duty is imposed upon an executor to see that the deceased is buried in a manner befitting his or her station in life and that no undue expense is incurred. In Williams on Executors, 12th Ed. p. 610, the learned author says that if the deceased has left directions as to the disposal of his body, though these are not legally binding on the personal representative, effect should be given to his wishes as far as is possible. The executor is liable to pay the reasonable funeral expenses, even without any order on

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his part, if he has assets available for the purpose (*The King* v. *Wade* (1); *Sharp* v. *Lush* (2), Jessel, M.R. at 472). In *Tugwell* v. *Heyman* (3), where the executors had neglected to give orders for the funeral of a testator and the claim was for expenses incurred for furnishing a funeral, Lord Ellenborough said that it had been shown that the funeral was conducted in a manner suitable to the testator's degree and circumstances and that the plaintiff's charge was fair and reasonable and, the executors, not denying that they had assets available, the law implied a promise on their part to satisfy the demand. This was followed in *Rogers* v. *Price* (4), by the Court of Exchequer. That the implied promise on the part of an executor who has assets to pay the reasonable expenses of such a funeral of his testator as is suitable to his degree and circumstances is a liability imposed upon the executor personally and not in his representative character was decided by Parke B. in delivering the judgment of the Court in *Corner* v. *Shew* (5). It is impossible, in my opinion, to import into a contract implied under these circumstances any term by reason of the usage which the appellant seeks to establish in this matter. In so far as support for the claim is based upon custom, it would have been necessary for the appellants to establish that a custom to charge the estate of deceased Jewish persons in the manner described in the letter from Mr. Chertkow had obtained the force of law in the locality and thus taken the place of the common law in respect of the matter (10 Hals. p. 2) and this was not done.

The appellant's claim is pleaded in contract but in the course of the argument addressed to us some support is sought for it under the terms of the will. Since I think all the available evidence was given at the trial, it is proper in a case such as this to consider this aspect of the matter, even though the claim is not so pleaded. I am unable, with respect for other opinions, to understand how there can be any claim upon this basis. It is contended in the factum of the appellant that the executor was bound by law pursuant to the directions of the will, to bury the body

(1) (1817) 5 Price, 621 at 627.
(2) (1879) L.R. 10 Ch. D. 468.
(3) (1812) 3 Camp. 298.
(4) (1829) 3 Y. & J. 28.
(5) (1838) 3 M. & W. 350 at 354.

in a Jewish cemetery in which the testatrix had her own burial plot, but this statement is not supported by authority (Williams, 12th Ed. p. 610: 3 Hals. p. 457). Since the appellant does not claim qua beneficiary but simply as a creditor of the Royal Trust Company for services performed after her death, at the request of some person whose identity is not disclosed and who was neither the agent or the representative of the Trust Company, the terms of the will relating to the manner of her burial cannot affect the matter. It is also to be noted that the manner of the burial of the body was not that directed by the will, not being in her "own burial plot" and being in the casket in which the body had been forwarded from Nelson. Had the terms of the will as to the manner in which the testatrix wished her body to be buried been communicated to the appellant by the respondent in advance of the burial and had the directions of the will been complied with, the nature of the liability of the respondent would require consideration, but nothing of the kind took place in the present matter. In my opinion, no support can be found for any claim based upon the provision in the will.

As to the claim on a quantum meruit, the admission filed was to the effect that the charges of commercial undertakers for undertaking, funerals, burial and cemetery services of the kind provided by the plaintiff in respect of the deceased would amount to from $200 to $600. While the evidence is silent on the matter, such a charge would no doubt include a casket but would not either provide a grave or perpetual care of the grave, which the appellant Society provides for graves in the Schara Tzedeck Cemetery. The appellant did not give any evidence as to what would be regarded as a proper charge for the use of its chapel or for the services of the watchmen at the cemetery and the learned trial judge was required to deal with the matter upon the evidence afforded by the admission. The appellants did not supply a casket in the present case and I respectfully agree with Bird J.A. that there is nothing in the evidence to lead to the conclusion that the amount awarded by Clyne J. was other than just and reasonable.

I would dismiss the appeal with costs.

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RAND J. (dissenting):—The question raised on this appeal is the right of the appellant, a Jewish church society in Vancouver, to receive a sum for the burial with its accessory services of a deceased unmarried Jewish woman. The action is framed in contract, but it is agreed that if recovery is warranted on any ground the form of the claim may be disregarded.

The deceased died in 1946 at Nelson, B.C., where for some years she had resided: and her will, made in 1924, at a place called Sandon in the same province, contains the following provision:—

> I DIRECT that I shall be buried in a Jewish cemetery in my own burial plot in a casket suitable to a person of my means and that a suitable headstone shall be placed on my grave and that the cost thereof shall be paid as part of my testamentary expenses.

The service of burial is one of the basic rites of the Jewish church law, and no member of that race can be buried in a Jewish cemetery without the prescribed ceremonial. By that law there is a duty on the Jewish community to accord the service in the same form to every member: all are treated on the same level: born equal, they are buried as equals. The ceremonies include preparation of the body, shrouds, coffin, use of the chapel and hearse, watchmen, interment, religious services and the grave with perpetual care. The Society here owns both the synagogue and the cemetery. In relation to burials, it has two governing bodies, a Board which administers the secular interests, and what is described as a Holy Society, members of which only can carry out the burial rites. The Board, among other duties, determines, according to church law, the assessment to be made on the burial ceremony. In this case, the rule of the Society was that generally adopted in Canada: it prescribed the determination of the contribution on a consideration of the entire circumstances of the life of the deceased: his conduct, his observance, generally, of Jewish law, his gifts to charity, the amount of his estate at death, the beneficiaries, the bequests, and, in short, all that the Board should deem relevant to the sum which, from his possessions, in the total circumstances the traditional judgment dictated. In many cases no charge is made, and the common saying is that the rich must pay for the poor, and that a grave

cannot be opened without a great deal of money. That this procedure was carried out in good faith is not questioned.

The deceased left an estate of approximately $105,000. The only relatives suggested are parents, brothers and sisters who remained in Russia from where she came, but who are believed now to be dead. So far as inquiries disclosed, she had made no contributions to charity during her lifetime. The Board fixed the amount that should be paid at $3,000, and upon the refusal of the trustee to pay that sum, brought the action.

In the trial court, Clyne J., proceeding on the basis of an undertaker's charges for burial, allowed $450 as on a quantum meruit, and his judgment was affirmed on appeal.

In my opinion, that contractual basis is inappropriate to the claim made. The subject matter is a religious service with mystical implications, conceived as an entirety, which in most of its elements cannot be valued in terms of money. In the background of the Jewish religion and its law, looking to the future life as well as the past, that service carries to every Jew the deepest significance of all the rites of his people. It is somewhat analogous to extreme unction and other fundamental rites in other religions.

What, then, did the testatrix have in mind when she directed her body to be given such a funeral and that "the cost thereof shall be paid as part of my testamentary expenses."? She had previously in the will referred to the payment of "my funeral and testamentary expenses". The will had been drawn either by a lawyer or one who was familiar with the language of lawyers, but who probably had little or no knowledge or acquaintance with these rites or their associated tolls; and the words "cost" and "expenses" must be interpreted with that in mind. There is also the fact that, colloquially, "cost" would ordinarily be used to describe all payments directly related to such a service performed by third persons.

In the early '40's, the deceased had visited Vancouver and had, in some way, satisfied herself about burial. She spoke of this to a merchant acquaintance in Nelson and seemed to be at ease about it. In discussions between them at this period she made it quite evident that she was

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familiar with the burial charges under the church law which she summed up by repeating what has already been mentioned: the rich pay more and the poor less.

Having, undoubtedly, in mind that in relation to the burial service the church law would prescribe an assessment, by the provision of the will she expressed her intention that the last act relating to her existence on earth, believed by her to be significant to her future life, was to be fulfilled in all respects according to a rule of great antiquity which to her bore a sacred obligation. Included in that act was the payment of a sum of money designed, among other things, to accomplish finally the moral and secular duty owed by her during her lifetime as prescribed by her church law.

There is no question of public policy, of enforcing church laws, of uncertainty as to object or person entitled, or of anything of a similar nature. Assuming that her direction could have been disregarded by the trustee and an ordinary non-Jewish burial given, it is settled that under the law the trustee was at liberty to carry it out as was done. What is involved is merely the interpretation of the language of the instrument; and once the burial society became identified, and it is agreed that it was the proper and in fact the only society in Vancouver by which the desire of the deceased could be fulfilled, the direction became complete. Upon the performance of the services, therefore, the obligation to pay the money as by way of bequest arose and the right to demand it likewise.

I would allow the appeal and direct judgment accordingly. All costs in all courts will be paid out of the estate, those of the Trust Company as between solicitor and client.

KELLOCK, J.:—The facts are set out in the judgment of my brother Locke and it is not necessary to repeat them. Appellant contends on the basis alternatively of custom or usage, that it has established a liability extending to the executor or administrator of a person of the Jewish faith to pay to those undertaking the burial such charges as they themselves determine, having regard to (*a*) the character and nature of the deceased person, judged from moral standards, (*b*) whether that person, being financially

able, had discharged his or her religious duty in the doing and giving of charity in his or her lifetime for the care and assistance of his or her less fortunate brothers, (*c*) the size of the deceased person's estate, and (*d*) the existence or otherwise of dependents of the deceased.

Assuming that, on either basis, such a custom or usage could be considered either reasonable or certain, I find nothing in the evidence which establishes the existence of any such custom or usage. Evidence such as that given by the witness Brook as to his own knowledge or that of the deceased that "the rich pay more than the poor" for funeral services, falls far short of the custom or usage alleged.

Nor do I think that the language of the will is to be interpreted as the appellant seeks to interpret it. In my view, with respect, the will contains nothing more than a direction to the executor which furnishes no ground upon which the appellant may claim against the estate other than the ordinary common law basis of liability upon which all personal representatives stand with respect to funeral expenses.

On the argument I had thought that perhaps the amount allowed by the learned trial judge did not take into consideration the fact that the appellant had undertaken to furnish perpetual care of the burial plot, but I think the written admission of the appellant does cover this item. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *D. A. Chertkow.*

Solicitor for the respondent: *P. R. Brissenden.*