THE DOCTRINE OF PERSONA DESIGNATA AS APPLIED TO THE ONTARIO DEPENDANTS' RELIEF ACT

As the writer has recently been impelled to tackle The Dependants' Relief Act, R.S.O. 1937, c. 214, he hopes that he may not be accused of egotism if he ventures to share with others the impact of that comparatively new Act upon his legal sensibilities.

The purpose of the Act, originally 19 Geo. V, 1929, c. 47, which came into force on July 1, 1929, and was made applicable to the estate of any person dying on or after March 28, 1929, was, according to its full title, to make better provision for dependants of deceased persons. The reported cases show that provision for the maintenance of dependant relatives cannot, if the ends of justice are to be served, be invariably entrusted to the discretion of testators. The Act appears to be a drastic but salutary attempt by the Legislature to protect a testator's dependants from unfair or improvident testamentary treatment, and enables the special or statutory tribunal, to which the Act grants jurisdiction to apply the remedy for such treatment, in effect to revise to some extent the terms of a will. If it be contended that the will fails adequately to provide for the maintenance of the testator's wife, or husband, or child under 16 years, or child over that age who through illness or infirmity is unable to earn a livelihood, such dependant may make an application to a judge of the surrogate court of the county in which the testator was domiciled at the time of his death for an allowance out of the testator's estate sufficient to provide such maintenance. The Act prescribes the time when such application is to be made. Although original jurisdiction is given to a judge of the surrogate court, if the total value of the estate exceeds $10,000 and such judge has not yet heard the dependant's application for an allowance, a motion may be made to a judge of the Supreme Court for an order directing that the application pending before the surrogate court judge shall be heard by a judge of the Supreme Court. The judge who hears such motion may refuse it even though such value be proved.

When a dependant attempts to avail himself of the remedy prescribed by the Act, his solicitor is confronted with a problem of statutory interpretation, namely, deciding in what capacity the judge who hears the application for an allowance acts, and, in a case where the total value of the estate exceeds $10,000,

in what capacity the judge who hears a motion for an order directing that such application be heard by a judge of the Supreme Court in lieu of a judge of the surrogate court acts. Whether the judge acts as a Court or as a persona designata depends upon the intention of the Legislature as expressed in the Act. The following quotation from *In re Winnipeg Charter* (1927), 36 Man. R. 597 at 599 (C.A.), is relevant :

> The question of persona designata generally arises . . . when a statute provides for a new remedy and empowers a Judge or one of the Judges of such or such Court, thus designating him by his office, to deal with the same.
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> When the matter with respect to which the remedy is given, is already of the jurisdiction of the Court, the question of course does not arise, as the remedy is then manifestly in the Court. But when the matter is not already within the Court's jurisdiction, the question calls for various considerations based either on inferences to be drawn from the language used or from the nature of the matter with respect to which the remedy is provided.

Macdonnell J. A., in *Re Guardian Realty Co. of Canada, Limited and the City of Toronto*, [1934] O.R. 266 at 272 says: "Where a Judge is appointed by a Statute to perform certain functions, the question whether he is to be regarded as persona designata or not involves considerable difficulty. The decisions are not easy to reconcile. In particular the English and Canadian decisions seem to be in conflict. Did the Legislature, in making the appointment, intend the Judge to act qua Judge, with the rights and powers belonging to his office? Or did it merely appoint him as an individual to perform particular functions, selecting him because of his training as a most suitable or convenient person? In the latter case he is persona designata, in the former not." In construing a statute such as The Dependants' Relief Act, the Canadian presumption, being the reverse of the English presumption, is that the Legislature intended the judge to act as a persona designata. According to my reading of the few cases reported under the Act, it seems to have been assumed without argument that, under The Dependants' Relief Act, the judge acts as a Court. May I venture to express the view that that Act makes it abundantly clear that the Legislature's intention was that the judge should act as a persona designata? My view is based upon grounds which may be summarized as follows :

(1) The tribunal to which an application for an allowance must be made is persistently referred to in the Act as the judge (not the Court). See ss. 2 (1) (2); 4 (1) (2) (4); 5; 6; 7; 8; and 11.

(2) If the judge acts not as a persona designata but as a Court, the following expressions scattered throughout the Act are redundant: "according to the practice of the Court" in s. 4 (1); "he shall have the like powers", etc. in s. 4 (4); "as provided by the rules of Court" in s. 5; "The judge may direct that the costs of the application shall be payable out of the estate or otherwise as he may deem just and may fix the amount of the costs payable by any party . . . at a lump sum" in s. 11; "an appeal shall lie to the Court of Appeal from any order made under this Act" in s. 12.

(3) S. 13 of the Act states that "The Judges' Orders Enforcement Act shall apply to any order made under this Act."

I am aware that the Act would seem to provide some ammunition for one who disagrees with the above view. The first part of s. 4 (1) which reads as follows: "The application shall be made to the judge in chambers upon originating notice . . .", strongly savours of phrasing and procedure usually associated with a Court although, if the judge sits as a member of his Court, the remaining part of the subsection which reads as follows: "according to the practice of the Court", is quite redundant. The following portion of the headnote to *C.P.R.* v. *Ste. Therese*, (1889), 16 S.C.R. 606, is relevant: "Held, that the order in question having been made by a judge sitting in chambers, and, further, acting under the statute as a persona designata, the proceedings had not originated in a Superior Court within the meaning of s. 28 of the Supreme & Exchequer Courts Act, and the case was therefore not appealable." The principle decided in that case was followed in *St. Hilaire* v. *Lambert* (1909), 42 S.C.R. 264, the headnote to which reads as follows :

> On an application for the cancellation of a liquor license issued under the "Liquor License Act" of the Province of Alberta, the Judge of the Supreme Court of Alberta, in chambers, granted an originating summons ordering all parties concerned to attend before him, in chambers, and, after hearing the parties who appeared in answer to the summons, refused the application. The full

court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada,

Held, that the case came within the principle decided in the *Canadian Pacific Railway* v. *The Little Seminary of Ste. Therese* (16 Can. S.C.R. 606), and, consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal.

One may conclude therefore that, on the basis of the above high judicial authorities, the phrasing and procedure of s. 4 (1) are not incompatible with the judge mentioned therein acting as a persona designata. Consequently, s. 4 (1) is no impediment to my view.

S. 4 (2) provides that, where letters probate are applied for by the wife or husband of a testator or a guardian on behalf of minor dependants, the application for an allowance shall be made at the time of applying for letters probate, but there is nothing in that subsection which indicates that the application for the allowance is to be made to the same forum as the application for letters probate. It might be argued that an application under The Dependants' Relief Act is a testamentary matter or cause within s. 18 of the Surrogate Courts Act, R.S.O. 1937, c. 106, and that therefore jurisdiction in regard thereto is vested in the surrogate court. One answer to that argument is that, where the provisions of a special statute such as The Dependants' Relief Act conflict with those of a general statute such as the Surrogate Courts Act, the provisions of the special statute prevail. Another answer may be found by analogy in *Re Hunt & Lindensmith* (1921), 51 O.L.R. 320, App. Div., in which the Court expressed the view that "matter" and "cause" are not appropriate to a proceeding under The Children of Unmarried Parents Act, 1921, 11 Geo. V, c. 54, under which Act the judge acts as persona designata.

S. 4 (4) reads as follows: "At any time before the hearing of the application a judge of the Supreme Court upon motion on behalf of the trustees or executors, or the applicant, or any other person interested, and upon being satisfied that the total value of the estate of the testator exceeds $10,000, may by order direct that the application shall be heard by a judge of the Supreme Court and thereupon the matter shall be transferred into the Supreme Court and the application shall be heard by a judge of the Supreme Court and he shall have the like powers and shall proceed in the like manner as in the case

of a hearing and determination by the judge of the surrogate court." I recognize that the most formidable obstacle for me to surmount in justifying my view that the judge under The Dependants' Relief Act acts as a persona designata is the clause "thereupon the matter shall be transferred into the Supreme Court". My contention is that the subsection consistently refers to an application for an allowance under the Act as "the application" (which expression is used no less than three times in the subsection) and that the presumption therefore is that the expression "the matter" has a meaning other than the expression "the application". It is significant that the subsection provides that, after "the matter" has been transferred into the Supreme Court, "the application shall be heard by a judge of the Supreme Court" (note that the Act does *not* say: the application shall be heard by the Supreme Court or by the Supreme Court or a judge thereof) and that, when the application is heard by a judge of the Supreme Court, he shall have the like powers and shall proceed in the like manner as the judge of the surrogate court would have had and done if the application had been heard by the latter judge. If it be conceded that a judge of the surrogate court when hearing an application for an allowance under the statute acts as a persona designata, there would be a strong, if not irresistible, presumption that a judge of the Supreme Court when hearing the same type of application under the same statute also acts as a persona designata. When one places the ambiguous clause "thereupon the matter shall be transferred into the Supreme Court" against the background of the whole subsection and of the whole Act, my contention is that the word "matter" is not to be construed as equivalent to application or proceeding but should be construed as equivalent to material, documents, or papers. On the basis of the latter construction, the effect of the clause would be that, immediately after an order is made directing the application to be heard by a Supreme Court Judge vice a surrogate court judge, the originating notice (filed) by which the dependant commenced his application and the affidavits (filed) in support and rebuttal thereof should be transferred from the surrogate court into the Supreme Court. The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123, s. 1, seems to contemplate that documents used in a proceeding before a judge acting as persona designata are to be filed with the clerk of the court to which the judge belongs. As hereinbefore stated, in the case of *Re Hunt & Lindensmith*, the Court expressed the view that the words "cause" and "matter" were

not appropriate to a proceeding under The Children of Unmarried Parents Act, 1921, *supra*, under which Act the judge acts as persona designata. I submit that my construction of the word "matter" as used in the said subsection does not do too great violence to the language of the Act when that word is read in the light of the whole Act. Such a construction (even though it may be unusual) of the word "matter" is more consistent with the tenor of the Act than to construe "matter" as meaning application or proceeding.

The marginal note to s. 4 (4) reads thus: "Removal into Supreme Court." Such marginal note, which of course forms no part of the statute but is inserted for convenience of reference only (see The Interpretation Act, R.S.O. 1927, c. 1, s. 9), is ambiguous. If it means, as it is capable of meaning, that the documents, and not the application, are removed into the Supreme Court, it is consistent with my view. On the other hand, if it means, as it is capable of meaning, that the application is removed into the Supreme Court, it is inconsistent with my view. In any event, a marginal note is of little weight in interpreting a statute. Even if the marginal note were clearly in my favour, I should hesitate to cite it in support of my view in the light of the observations of certain English judges quoted in *Hirshman* v. *Beal* (1916), 38 O.L.R. 40 at 45.

S. 13 (the final section of the Act) reads thus: "The Judges' Orders Enforcement Act shall apply to any order made under this Act". Even if the Legislature had omitted that section from the Act, my opinion is that the Legislature would have made its intention more clear than is its custom, the obvious intention here being that any order made under the Act was to be made by a judge acting as a persona designata. I submit that s. 13 confirms my interpretation of the previous sections of the Act. The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123, was originally passed in 1893 under the title "An Act Respecting the Enforcement of Judges' Orders in Matters not in Court". Middleton J.A., in *Re Hynes and Swartz*, [1937] O.R. 924 at 928, in referring to The Judges' Orders Enforcement Act says: "The heading of this Act is unfortunate. It could be more aptly described as an Act Respecting the Decision of a Judge acting as persona designata." Part of the headnote in *Re Guardian Realty Co. of Canada, Limited, and the City of Toronto*, [1934] O.R. 266, reads thus: "The Judges' Orders Enforcement Act, R.S.O. 1927, c. 111, does not apply because

it only relates to orders made by persona designata and the County Court Judge in making the order appealed from did not act as persona designata". In a sense, The Judges' Orders Enforcement Act bears the same relation to a judge sitting as a persona designata as the Judicature Act and the Rules of Practice do to a judge sitting as a Court, as the former Act constitutes a code of rules for the enforcement of orders, filing of documents, payment of fees on such filing, disposal of costs, right to appeal, and forum of appeal, applicable in the case of a judge sitting as a persona designate. S. 13 of the Act—'*shall* apply to *any* order made under this Act'—is not merely imperative but also comprehensive. "Any order" is a very broad expression, and there seems no good reason for restricting its generality. There are three types of orders contemplated by the Act, namely: (1) an order made by a judge of the surrogate court upon a dependant's application for an allowance; (2) an order directing that the dependant's application for an allowance shall be heard by a judge of the Supreme Court instead of by a judge of the surrogate court which order is made pursuant to the motion provided for in s. 4 (4); and (3) if the order in (2) is granted, an order made by a judge of the Supreme Court upon a dependant's application for an allowance. S. 13 might be paraphrased as follows: An Act Respecting the Decision of a Judge acting as persona designata shall apply to every order made under The Dependants' Relief Act. Undoubtedly, the Legislature has the power to give special or peculiar jurisdiction to a Court and then to confer upon any judge of that Court exercising such jurisdiction the powers of a judge sitting as a persona designata, and it is within the realm of possibility that such was the Legislature's intention, but it is hardly reasonable or credible because the conferring of such powers would be wholly superfluous. S. 13 is undoubtedly most embarrassing to the view that the judge under The Dependants' Relief Act acts as a Court—much more embarrassing, I venture to suggest, than the clause "thereupon the matter shall be transferred into the Supreme Court" found in s. 4 (4) is to the view that such judge acts as a persona designata.

When a motion under s. 4 (4) to a judge of the Supreme Court for an order directing that the dependant's application for an allowance be heard by a judge of the Supreme Court vice a judge of the surrogate court is granted, such order would, if it were a Court order, be interlocutory and not appealable without leave: Rule 493. I regard the order as interlocutory because the motion upon which it is made does not

initiate, commence, or originate the dependant's application for an allowance but is merely for a direction that such application, which is already pending before a judge of the surrogate court, shall be transferred so that it will be pending before a judge of the Supreme Court. The order made on the said motion neither originates nor determines the claim for an allowance, but is, in the assertion of such claim, merely a procedural step intervening between the origination and determination of such claim. S. 12 of The Dependants' Relief Act provides that an appeal shall lie to the Court of Appeal from *any* order made under this Act (no leave being required) which provision is inconsistent with the said interlocutory order being a Court order and fortifies the view that the said interlocutory order is an order by a judge acting as persona designata. See The Judges' Orders Enforcement Act, R.S.O. 1937, c. 123, s. 3 (1) (a).

When a judge of the Supreme Court makes an order pursuant to the motion authorized by s. 4 (4) and directs that the dependant's application for an allowance be heard by a judge of the Supreme Court, I am inclined to the view that only the judge (being a persona designata) who makes that order may later hear the application. Middleton J.A., in *Re Hynes & Swartz, supra,* at 932 says :

> Where jurisdiction is conferred upon a group of persons answering to a specific description, and it is plain that any one of the named group may act, the first qualified person assuming to act under the Statute acquires sole and exclusive jurisdiction and no other qualified person may assume to act.
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> This is well illustrated by what was said by Lord Bramwell with reference to the twelve Taxing Officers at Westminster in a case already referred to. It was also made clear by *Doyle* v. *Dufferin* (1892), 8 Man. R. 294; *Chandler* v. *City of Vancouver* (1919), 26 B.C.R. 465, and Re Brokenhead, [1922] 1 W.W.R. 687.

In *Re Hunt,* [1940] O.W.N. 408, Urquhart J., stated that the object of The Dependants' Relief Act was to provide a speedy and inexpensive method of hearing claims of dependants who might be, and generally were, in need. He also pointed out that, even on proof that the total value of the estate exceeds $10,000, an order directing that the application shall be heard by a judge of the Supreme Court instead of by a judge of the surrogate court is within the discretion of the judge before

whom the motion for such order comes and that such an order should not be readily granted. It would seem that orders have in some cases been made under s. 4 (4) not merely directing that the application be heard by a judge of the Supreme Court but also directing an issue, delivery of pleadings, examinations for discovery, production of documents, etc. The result is that a dependant for the maintenance of whom a testator has not made adequate provision is compelled to submit, in order to assert his or her claim, to delay and expense similar to those involved in a Supreme Court action. Thus, one of the purposes of the Act, namely an expeditious and comparatively inexpensive method of determining the dependant's claim, is defeated. On the other hand, the clear defining of the issues between the parties on an originating motion, there being no pleadings, presents difficulties, and thus the direction of an issue, pleadings, etc., is not without some advantages to both parties. Urquhart J. in *Re Hunt, supra*, seemed to doubt that he had the power to direct an issue on the ground that the privileges of the parties are no higher when the application is heard by a judge of the Supreme Court than they are when it is heard by a judge of the surrogate court and that an issue cannot be directed in the surrogate court. But, with deference, one may ask if Surrogate Court Rule 27 does not authorize the direction of an issue? Moreover, if the judge acts as persona designata, would not the power to direct an issue be the cumulative effect of The Judges' Orders Enforcement Act, s. 2, The Dependants Relief Act, s. 4 (1) (4), and Surrogate Court Rule 27?

S. 1 (1) of The Judges' Orders Enforcement Act states that, subject to the provisions of the statute under which he acts, the orders of a judge as persona designata shall be entered in the same way as orders made by him in matters pending in the Court of which he is a judge. It seems to be the common practice in Ontario that the documents used in connection with a proceeding before a judge as persona designata are entitled in the Court to which such judge is attached although such a practice does not seem to be consistent with the doctrine of persona designata. I have been unable to find any Ontario case definitely deciding the meaning of the said s. 1 (1), which states that the orders of a judge as persona designata "shall be entered in the same way as orders made by him in matters pending in the court of which he is a judge." It may be that the words "in the same way" have been interpreted in practice as meaning in the same form, although "way" is not a synonym

for "form" and although persona designata orders in practice, in spite of being very numerous and frequently, if not always, entitled in the Court, are not signed invariably by the Registrar of the Court but sometimes by the judge himself as persona designata. In *Re Young*, 14 P.R. 303 at 306, Street J. commented upon certain proceedings as having been styled in the County Court although they were really proceedings before a judge of the County Court as persona designata, but the inference to be drawn from the report of the case is that that learned judge did not consider that such styling destroyed the validity of the proceedings as persona designata proceedings. Doubtless, a Court might hold that such styling is mere surplusage. On the other hand, the reaction of the Supreme Court of British Columbia on the relevant point may be of interest even though of no binding authority in Ontario. It was held in *Spencer* v. *City of Vancouver* (1921), 30 B.C.R. 382, that the entitling of persona designata proceedings "In the Supreme Court of British Columbia" nullified the proceedinsg as such proceedings could be entertained not by such Court but only by a judge of such Court as persona designata. It seems to me that, under The Dependants' Relief Act, if the originating notice be entitled in the surrogate court (I do not think it should be so entitled), there may be a possibility of the proceedings being later declared a nullity unless it is made plain at least in the body of the notice that the application is being made to the judge of the surrogate court as a persona designata and not as a Court. On this point, the following extract from the headnote in *Canadian Northern Ontario Railway Co.* v. *Smith* (1904), 50 S.C.R. 476, is relevant, and shows that the entitling of the documents in persona designata proceedings as being in the Court may be misleading and dangerous to the validity of the proceedings :

> Per Duff J.—"The Judge under Section 196 of The Railway Act acts as persona designata and no appeal lies from his orders under that Section;—in this case the application having been made to and the parties having treated the contestation as a proceeding in the Superior Court which had no jurisdiction the Court of King's Bench rightly dismissed the appeal from the order refusing to appoint arbitrators; and the appeal to the Supreme Court of Canada being obviously baseless should for that reason be quashed."

See also *Chandler* v. *City of Vancouver*, [1918] 3 W.W.R. 53 at 55.

I hope that I have succeeded in arousing in the reader a curiosity concerning the doctrine of persona designata which, at least in Ontario practice, requires clarification. Should he wish further to track down this doctrine, I strongly recommend for his consideration a very instructive article written by Mr. D. M. Gordon of the British Columbia bar and published in 1927 in 5 *Can. Bar Review* at p. 174, and the very illuminating written judgments in 1937 by members of the Ontario Court of Appeal in *Re Hynes & Swartz, supra.* The Dependants' Relief Act is only one of many modern and important statutes, Ontario and Dominion, to which the doctrine of persona designata is pertinent.

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