THE MACDONALD WILL CASE

LEWIS ST. GEORGE STUBBS*

In his later years, Lewis St. George Stubbs, who died in 1958 a few days before his 80th birthday, used to refer to himself as Canada's only judicial heretic. He referred to his role in the *Macdonald Will* controversy as his major judicial crime.

As a devoted Liberal party member, Stubbs had stepped into the breach to contest the Marquette constituency against T. A. Crerar, leader of the Progressive Party, in the federal election of 1921. Three weeks prior to election day, Liberal candidate Edmund Henry, realizing the futility of opposing Crerar, stepped down. Mackenzie King did not want it thought that the Liberal party was afraid to oppose the Progressive Leader and asked Stubbs, as a personal favour to accept the nomination. Stubbs was soundly defeated at the polls but the Liberals swept back into power.

Judicial appointments are often a form of political patronage, and Stubbs became the first judge appointed by the newly formed King government when he was named to the County Court of Manitoba in April, 1922. The appointment was openly criticized for its politicalnature by some members of the Manitoba Bar Association, but Stubbs was popular among his brother judges.[1] In 1924, he was elevated to the position of Senior Judge of the County Court in the Eastern Judicial District of Manitoba. Stubbs was viewed as anything but a maverick in his first three years on the bench. While he had had a difference of opinion with R. W. Craig, Attorney General of Manitoba, over the inconsistency of the governments enforcement of the liquor laws, his first major controversy was the *Macdonald Will* case.

Alexander Macdonald was a wealthy Winnipeg merchant who died on August 23, 1928, at the age of eighty-four. Stubbs had visited the Stony Mountain penitentiary with Macdonald who had expressed a firm interest in aiding the less fortunate citizens of Manitoba. He had told Stubbs that his will provided for a large sum of money to be given to charity.[2] On February 26, 1929, a document purporting to be the last will and testament of Alexander Macdonald was filed in the Surrogate Court of the Eastern Judicial District of Manitoba. It did not contain the large charitable bequest of which Macdonald has spoken. Judge Stubbs granted probate of this document in common form. Two days later he learned from a reliable source that the will had not been executed in accordance with statutory requirements. Henrietta Isbister, Macdonald's nurse, who was purported to be a witness to the will, told Stubbs that she had not been present at its signing.[3] On March 1st, Judge Stubbs revoked probate and ordered that the document be propounded for proof in solemn form[4].

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1. Report of the Ford Commission (1933) (part of the papers of Lewis St. George Stubbs in the possession of Judge Roy St. George Stubbs).
2. Interview with Judge Roy St. George Stubbs, June 3, 1980.
3. *Ibid.*
4. The difference between the two procedures was, as the Judge later explained: "Proof in common form is the ordinary way, by affidavits verifying the application. Proof in solemn form is made in open court where all the parties are cited to appear before the court and testify in open court." Address by Judge Stubbs on the *Macdonald Will* case at the Walker Theatre, Feb. 13, 1980.

A. E. Hoskins, K.C. and A. C. Ferguson K.C., solicitors for the exing the execution, the will could not be proven in solemn form. After due consideration, they attempted to withdraw the document and to obtain instead a grant of administration in favour of Grace Anne Forlong, Macdonald's only surviving child. Since Mrs. Forlong was also the sole beneficiary of the invalid will, the practical consequences would be the same.

Stubbs refused to grant letters of administration. He was concerned with the fact that an attempt had been made to have him approve an invalid will. He insisted that a formal judicial enquiry into the matter of Alexander Macdonald's will be held.

The solicitors for Grace Forlong appealed Judge Stubbs to compel him to grant letters of administration, but, at a hearing on March 26th, the Manitoba Court of Appeal upheld Stubbs' action. The "solemn form" enquiry would proceed. Stubbs believed that it would reveal a good deal more about the matter than had so far been disclosed:

> On the hearing before the Court of Appeal, Mr. John Allen, who is King's Proctor, the proper official in such matters, intervened under instructions from the Chief Justice of the Court of Appeal. When the appeal was being heard, in response to questions from the Court, Mr. Allen admitted that he had found out that one of the witnesses had not been present at the execution of the will. Now, if Mr. Allen could find that out in two days, how much more did the others know who were trying to uphold probate of an invalid will?[6]

John Allen, who was also Deputy Attorney-General, wrote to Judge Stubbs on behalf of the Attorney-General's department on March 27th. He spoke of a meeting that he and Laidlaw, the lawyer for the Crown, had had with counsel for the estate.

> Early this morning Mr. Hoskins, acting on behalf of the Macdonald estate, conferred with me and asked me to hold up matters for a short while so that he could look into certain features which may make it necessary for Mr. Laidlaw and myself to appear further in the matter.[7]

Judge Stubbs did not approve of any such behind-the-scenes settlement. He replied to Allen's letter that day, stating, "All the facts and circumstances of this case call for and demand a judicial investigation and disposition and nothing less will suffice."[8] He informed the Deputy Attorney-General that due to the prominence of Macdonald and the size of the estate, the matter had gained considerable publicity. Stubbs felt that speculation was growing in the minds of the public. "Let it be plainly stated and distinctly understood that in so far as I am concerned, no question mark is going to be left in the mind of the public."[9]

The following day another attempt was made by counsel for the estate to get a special grant of administration in favour of Grace Forlong, this

5. Address by Judge Stubbs on the *Macdonald Will* case at the Walker Theatre, Feb. 13, 1930.
6. *Ibid.*
7. Letter from J. Allen to L. St. G. Stubbs, Mar. 27, 1929 (part of the Stubbs papers, *supra* n. 1).
8. Letter from L. St. G. Stubbs to J. Allen, Mar. 27, 1929 (part of the Stubbs papers, *supra* n.).
9. *Ibid.*

time directly from the Court of Appeal through Chief Justice Perdue. The Court of Appeal was unanimous in its decision not to grant administration.

On May 13th, the proceedings started before Judge Stubbs. Counsel for the executors named in the alleged will admitted that it was invalid and formally withdrew it. This did not deter the Judge, however. Having first ensured that unrepresented interests would be adequately protected, he proceeded: "On the morning of the 14th of May, I appointed Mr. Hugh Phillipps, K.C., to assist the Court and to represent the charitable institutions as a class. I cannot speak too highly of the able services rendered by Mr. Phillipps throughout the proceedings".[10] A. E. Hoskins then objected that the Court had no authority to pursue the enquiry and submitted that in doing so Judge Stubbs was acting *ultra vires* his judicial power. Stubbs overruled the objection and on June 12th delivered an interim, oral judgment.

> The late Mr. Macdonald was in his 84th year and in his recent years suffered from a progressive senility of the mind. As to just what time he can be said to have lost testamentary capacity it is difficult, if not impossible to determine. I am absolutely satisfied in my mind, however, that at no time during his last illness, which the doctor placed from the end of May to his death, did he have testamentary capacity. During that period I am satisfied he had no business capacity, no contractual capacity, no testamentary capacity, in the legal sense of those terms.[11]

The pivotal fact in the will controversy was that Macdonald, having amply provided for his family in his lifetime, had long intended to devote the bulk of his estate to charitable purposes in what he called "The Macdonald Trust". The alleged will that counsel for the estate finally withdrew left his entire estate to his surviving daughter, Grace Anne Forlong. Judge Stubbs felt that this radical departure from Macdonald's original charitable intentions was not the product of a sound mind: "His mind changed through the process of senile decay until it was so weakened and emfeebled that he had not, as I have already said, have testamentary capacity. He had not that sound mind, memory and understanding, the necessary qualifications of testamentary capacity."[12]

Judge Stubbs put no credence in this will. "The alleged will is not now considered because it never was in any manner or degree the act and will of the deceased. He died never knowing, never conscious of the fact that he had executed any such document as and for his last will and testament."[13]

Stubbs found that, before losing testimentary capacity, Macdonald had made two attempts to make wills providing for "The Macdonald Trust": "As far as it is known, or at least as far as the evidence disclosed, on only two occasions did the late Mr. Macdonald formally record his testamentary intentions in writing."[14] The first time was in December, 1923 and the second September, 1927. Macdonald had taken particular pains in stipulating the objects of his bounty and the general disposition of his estate in both

10. *Supra* n. 5.
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*

these earlier attempts. However, both wills were incomplete. The 1923 will was signed in the presence of only one witness, A. B. Flett, one of his employees. Stubbs reasoned that Macdonald had thought that he only required one witness and had signed the document believing it to be a valid will. After the death of his wife, on August 31, 1927, Macdonald, in collaboration with A. B. Flett, crew up a proposed new will and transmitted it with a copy of the 1923 will to his solicitors.[15] A copy of the 1927 document that was sent to Macdonald was never recovered. A. B. Flett testified that he had seen it unsigned on June 12th, 1928. Judge Stubbs was hesitant to believe Flett's evidence. The judge stated that normally a disappearing will would not be a contentious issue. However, in light of the fraudulent will that appeared directly after Macdonald's death, Stubbs suspected wrongdoing in connection with its disappearance. Judge Stubbs made the following statement regarding Flett and John Forlong:

> But Mr. Flett obtained in his favour from Mr. Macdonald on the 15th of June, 1928, when he was a sick man and not in proper condition to give it, a general power of attorney to himself, a copy of which I hold in my hand, under which he transferred to himself and to other managers and employees of the Macdonald Company stock in the Macdonald Company, and here are the cancelled certificates of the stock. Now, that transaction was one which, to my mind, was wholly reprehensible. The power of attorney was witnessed by a member of Mr. Macdonald's household and the affidavit sworn before John A. Forlong. You can bet he was not far away when there was anything of that sort being done.[16]

In his oral judgment, Stubbs cited the 1923 will to illustrate the type of man Macdonald was.

> The late Mr. Macdonald was a very successful business man. He was a man of large wealth and also of large heart. Throughout his life he was known for his generous assistance to various charitable institutions, particulary to the 'Home of the Friendless' and the 'Children's Home of Winnipeg', in which he took special interest. During his lifetime he made generous provision and endowment for his family, so that the members were independently wealthy in their own right.[17]

The 1923 will left a legacy of $100,000 to both his daughter Grace and son Duncan. In the solicitor's copy of the 1927 will, the amount was increased to $150,000 for both children. Duncan Macdonald died fifteen days earlier than his father. Grace Forlong inherited the bulk of her brother's estate, probated at $353,902.97, as well as a considerable sum from her mother's estate.[18]

Judge Stubbs' oral judgment stressed that the significant and most characteristic feature of the 1923 and 1927 documents was "The Macdonald Trust" which was constituted in both of them in the following words:

> I direct my trustees to stand possessed of the balance or residue of my estate to be called "The Macdonald Trust" to invest and reinvest same with power to vary such investments and to pay my daughter Grace during her natural life one-fourth of such income without in either case power of anticipation and during the lifetime of both Grace and Duncan to pay the remaining two-fourths of such income and on the death of either of them, three-fourths of such income and on the death of both of the, the whole of such income to such charitable institution or institutions (including

15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*

> hospitals) in or about the City of Winnipeg as my acting trustees for the time being may in their absolute discretion from time to time select, said income to be paid in such institutions if more than one, in such proportions as my said trustees may think proper.[19]

Judge Stubbs thought that the deceased should be allowed his wish.

> The conclusion is irresistable that Mr. Macdonald wanted his good works to live after him in the "Macdonald Trust". That was the project nearest and dearest to his heart and most thoroughly characteristic of him. On the only two occasions that we know he formally recorded his testamentary intentions in writing he provided for it in the same specific and definite language.[20]

In his oral judgment, Judge Stubbs stated that, had he the power, he would admit to probate the 1923 will signed by Macdonald in the presence of one witness. However, the *Wills Act* provided that to be valid a will must be signed in the presence of two witnesses. Stubbs found that other than that one irregularity, the document was authentic.

> Counsel Phillips had suggested that the special and very exceptional circumstances of this case warrant and would justify resort being had to the only authority in this Province that could validate the 1923 will, namely, the Legislature. That, of course, is a very unusual step to take at any time. Our legislature has on a number of occasions dealth with wills, construed wills, conferred special powers upon executors and administrators and so on, and on one occasion regularized and validated a will irregular and invalid for the same reason as the 1923 will of Mr. Macdonald.[21]

Stubbs agreed with Phillips, feeling that justice to both the late Alexander Macdonald and to the intended objects of his bounty required the Legislature to participate.

Judge Stubbs emphasized that his oral judgment was interim only and that a written judgment to be given later would be his final disposition on the matter. On June 28th, he advised lawyer A. C. Ferguson that letters of administration would not be granted to Grace Anne Forlong and offered to appoint any reputable trust company to administer the estate temporarily and under certain conditions. The conditions would stipulate that although the assets of the estate could be managed, they could not be distributed until after the Legislature had had an opportunity to consider the validity of the 1923 will at its next session. The offer of temporary administration was refused and Ferguson reiterated his desire for unrestricted letters of administration.

There the matter rested until September 30th, when Ferguson filed with the Surrogate Court a bond in support of Mrs. Forlong's appointment as administratrix. Stubbs again refused to grant letters of administration. He renewed his offer to appoint a trust company to control the estate temporarily and conditionally. Ferguson threatened to start *mandamus* proceedings against Judge Stubbs if the grant for administration were not issued. On October 15th, Judge Stubbs was informed that if administration were not granted to Grace Anne Forlong by October 21st, *mandamus* proceedings would be taken immediately thereafter to compel the issue of a grant to her. On December 9th, an order of *mandamus* was made by Mr. Justice Donovan, ordering the Judge and Clerk of the Surrogate Court to grant letters of administration to Grace Anne Forlong within eight days

19. *Ibid.*
20. *Ibid.*
21. *Ibid.*

after the service of the order upon them.[22] At this juncture Judge Stubbs appealed, and instructed H. A. Bergman K.C. to represent him on the appeal.

> I didn't have sufficient confidence in the Attorney-General's Department in this matter to ask them to act for me, as would ordinarily be the case, and so I sent for my friend, Mr. H. A. Bergman, K.C., to ask him to represent me and the Surrogate Court. He asked me what line I wanted to give him. I said: "Simply this, Bergman. Go over there and in the proper court language tell it is none of their business. Don't tell Mr. Justice Donovan why I have done anything, because I don't have to, and I am not going to submit what I have done for his review and consideration.[23]

On the appeal, Mr. Bergman argued, on behalf of Judge Stubbs, that the Surrogate Court was not subject to *mandamus* and that, even if it were, an order for *mandamus* could only command the court to hear a matter. It could not dictate the manner in which the matter was to be decided. Judge Stubbs took Donovan J.'s order of *mandamus* as a personal affront to the dignity of the Surrogate Court and his own judicial independence:

> It was a violation of the fundamental principle of the independence of judgment of a judge. Take away the right of absolute independence of judgment from a judge, deny to him its exercise, subject him to outside dictation in forming his judgment, and he is no longer a judge, but a tool, a mere rubber stamp.[24]

Donovan J. had issued a mandamus compelling Judge stubbs to grant administration to a named person and had relied on, as authority for this, an edition of *Williams on Executors* that had been long out of date. As the Court of Appeal pointed out, in deciding to set aside the order of *mandamus:* "No case can be found in England after 1857 in which a *mandamus* has issued to compel the granting of administration to a named person."[25] However, the Court disagree with Bergman's contention that the Surrogate Court was not subject to *mandamus* and ordered that Stubbs proceeded to hear and determine the application of Grace Anne Forlong.

Four days later Stubbs met with Ferguson, Mrs. Forlong's solicitor, and told him that, as the mandamus order had been set aside, his written judgment would follow within a week. He informed Ferguson that the bond for four million dollars that had been tendered in support of the Forlong application could not be accepted, as it was given by a company with assets over liabilities of less than half a million dollars. On January 18th, 1930, Judge Stubbs formally recorded his refusal to grant letters of administration and promised to substantiate his reasons with a written judgment shortly thereafter.

On January 22nd, the Court of Appeal ordered that letters of administration be issued to Grace Anne Forlong.[26] Judge Stubbs was not served with notice and saw this as a deliberate attempt by the Court of Appeal to dispose of the case prior to his written judgment. He was furious.

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22. *In Re Macdonald Estate; In Re Surrogate Courts Act*, [1929] 3 WWR 693 (Man. K.B.).
23. *Supra* n. 5.
24. *Ibid.*
25. *In re Macdonald Estate; Rex v. Surrogate Court Judge (no. 1)*, [1930] 1 WWR 242 (Man. C.A.), at 250.
26. *In re Macdonald Estate; Rex. v. Surrogate Court Judge (no. 2)*, [1930] 1 WWR 261 (Man. C.A.).

> The Court of Appeal on an Ex Parte Motion heard by special leave of the Court, without any notice to the Judge of the Surrogate Court and without any request to him for the grounds of his refusal to grant administration; without notice to the parties appearing on the proceedings before the judge; without ever considering the application for administration and accompanying proof, without the bond before it, and with no consideration as to its sufficiency; in a session lasting only a fewminutes with the order previously prepared by the solicitors and ready for execution, ordered and adjudged that letters of administration be granted to Grace Anne Forlong and ordered and directed the Clerk of the Surrogate Court to forthwith issue, sign, seal and deliver them to her.[27]

On January 24th 1930, Stubbs read his written judgement in court. The Judge supplied copies of the judgment to both newspapers. Although nothing appeared in print, he claimed: "The papers had special men working on it at night, setting it up, and it was ready to publish on Saturday".[28] Only the *Union Bulletin* would publish the judgment. Isaac Pitblado, K.C., senior partner of the law firm acting for the estate, had advised the *Tribune* that what Stubbs had given them was not a judgment because the oral judgment on January 18th, and its reversal by the Court of Appeal on January 22nd, had divested him of any authority to render further judgments in the matter. Since it was not a judgment, Pitblado had argued, Stubbs' comments would not be protected by privilege from the laws of libel. This would mean that publication of the judge's critical comments about the persons involved in the case could leave the newspapers open to libel actions. To Stubbs there was no question of libel:

> If my judgment is not a judgment, I would like to know what it is. Am I not a judge? He said that because the Court of Appeal had granted administration in the matter, therefore, I had no right to deliver a judgment — no right to deliver a judgment in a matter in which I had been working for months and which I have not yet disposed of.[29]

But the threat of libel suit was enough to keep Stubbs' judgment out of the two daily papers. On January 29th, Stubbs wrote to the editors of both papers.

> Elbert Hubbard used to say "Never explain, your friends don't need it; and your enemies won't believe it, anyway." That is sound enough philosophy, perhaps, in private affair. But there are certain things which demand public explanation. One of them is how the grant of administration in this estate was got out of the Surrogate Court. The question now is: has your paper the "intestinal fortitude" using the classical expression for a cruder colloqualism, to publish the facts.[30]

This produced no results. Stubbs' friend, labour M.L.A. S. J. Farmer, interested himself in the matter and attempted to read as much of the judgment as he could from the floor of the Legislature. "Yet the press only reported the fact that the judgment was read, without reporting the nature and substance of the judgment itself as to which the public is still in ignorance."[31]

On January 27th, an irate Judge Stubbs met with Chief Justice Prendergast of the Court of Appeal. He vigorously protested the actions of

27. *Supra* n. 5.
28. *Ibid.*
29. *Ibid.*
30. Letter from L. St. G. Stubbs to Dafle, Jan, 29, 1930 (part of the Stubbs papers, *supra* n. 1).
31. *Supra* n. 5.

the Court of Appeal. He informed the Chief Justice that if the administration were not revoked in three days time "I would carry my appeal to the Final Court of Public Opinion, regardless of consequences, and at the cost of the sacrifice of my office, if need be."[32] That was no idle threat! On February 8th, 1930, Stubbs published at his own expense a pamphlet called *The Macdonald Will Case.* He cited the evidence he had gathered from his nine month enquiry and addressed himself to the salient issue of the case, the fact that Winnipeg's charitable institutions were being deprived of roughly 2 million dollars. Stubbs then called together a group of his friends to ascertain how more light could be shed on the subject. Only Marshall J. Gauvin, leader of the Winnipeg Rationalist society, and Bob Russell, secretary of the O.B.U., encouraged him to pursue the matter further. William Ivens, Labour M.L.A., warned Stubbs that it might cost him his position on the bench. Stubbs replied: "Ivens, this is a crisis in my life. I have got to do it."[33]

It was resolved that a general meeting would be held in the Walker Theatre. On February 6th, Marshall J. Gauvin addressed his weekly lecture at the Garrick Theatre[34] on the *Macdonald Will* case and announced that Judge Stubbs would address a meeting on Saturday, February 15th at the Walker Theatre. (H.R. Drummond-Hay of the legal firm of the Pitblado, Hoskins, and Co., and the estates law firm was present at the Gauvin lecture.)

The committee responsible for the Walker Theatre lecture encountered some difficulty in obtaining the theatre. It was discovered that the theatre was already engaged for Friday and Saturday of that week. Thursday was the only available day that week that would allow time for advertisement. R. B. Russell and his assistant, William Sykes, were given the task of securing the theatre and had all but agreed with Walker on the rental fee of $150.00 for the Thursday. While the three men discussed finalizing the matter, Drummond-Hay phoned and offered $250.00 to rent the theatre for that Thursday. Russell phoned Judge Stubbs, who recommended that Walker accept the $250.00 and that he and his supporters rent the theatre on Sunday. But when Sunday proved to be unavailable Walker honoured his arrangement with Sykes and Russell. In his speech on Thursday, February 13th, 1930 Stubbs told his audience:

> Mr. Walker, apparently is one of the few men of this city who had anything to do with this case, who has not had his wits scared out of him by the 2 million dollars in issue, backed up by a battery of big gun lawyers. That is how Mr. Walker lost $250.00 dollars easy money.[35]

In his closing remarks to the crowd Judge Stubbs gave his reasons for holding the meeting.

> In speaking to you in this way I have done something very unusual, but I have no apology to make to anybody. I have come before you, whose servant I am, to tell you how I have been during your business and how certain other people have been doing your business, and surely to Heaven there can be no crime in that. If there is, I

32. *Ibid.*

33. *Ibid.*

34. Gauvin was a carpenter from New Brunsick who was dubbed at that time "Winnipeg's Anti-Christ". At a time when church attendance was on the wane, his rationalist lectures invariably drew a large crowd. Gauvin came to Winnipeg in the spring of 1926 to give three lectures at the invitation of Bob Russell. He never left. It is interesting to note that it was Clarence Darrow who had recommended Gauvin to Russell.

> am guilty, and ready to take the consequences.
>
> I have had to do this because, as I have told you, I was shut off from the ordinary avenue of approach to the public. Why? Because that $2,000,000. backed by a battery of big gun lawyers, as I told you before has scared the liver out of many people and perverted the course of justice.[36]

Referring to the press, he called the matter a good illustration of censorship.

> You know, you only read what you are allowed to read — what those who control the press think good for you to read, and precluded from reading what they think bad for you to know. Now, I am going to suggest to both of these papers in Winnipeg that they change their names. The one is not a "Free" Press, and the other is not a great "Tribune" of the people.[37]

By addressing a public meeting to discuss a case that had been heard in his court, Judge Stubbs overstepped the boundaries of judicial propriety. Although judges are allowed to make public statements of a non-political nature about the Canadian judicial system, Stubbs should never have addressed the Walker Theatre meeting. Marcus Hyman, a Winnipeg lawyer who ran as a mayoralty candidate in 1930 and 1931, before being elected as a labour M.L.A. in 1932, acted as chairman for the meeting. William Ivens, a Labour M.L.A. for Winnipeg, who had been sentenced to jail on a charge of sedition in March, 1920 for his part in the Winnipeg General Strike, was also on the podium. This alliance with the city's radical left, coupled with Stubbs' condemnation of the judges of the Manitoba Court of Appeal and Court of King's Bench, had far broader connotations than simply an irate judge trying to make his judgment on a controversial will case known to the public.

The judges of the Manitoba Court of Appeal and King's Bench met on February 25th to discuss Judge Stubbs' conduct. It was decided that:

> The judiciary of Manitoba has been made the object of unjustifiable attack by Judge Stubbs, and it has been unanimously decided by the judges of the Court of Appeal and King's Bench that the matter will be reported to the Minister of Justice at Ottawa, with a suggestion that appropriate action be taken.[38]

It was considered that, by publishing his pamphlet and his public utterances, Judge Stubbs had caused a disturbing influence on the public. "The Bench in Canada has always enjoyed the respect and confidence of the public, and anything that would tend to destroy that feeling is deprecated by the judges."[39] The complaint, filed in Ottawa, signed by all the judges of the Manitoba Court of Appeal and King's Bench, concluded as follows: "We beg to state that it is our considered opinion that Judge Stubbs has been guilty of misbehaviour within section 31 of the Judges' Act, and that the matter is not one for Contempt proceedings. It is therefore respectfully asked that a commission of enquiry be issued under the Judges Act".[40] Stubbs told the press in reply that he would welcome a full investigation if it would improve the chances of the Winnipeg charities profiting.

35. *Supra* n. 5.
36. *Ibid.*
37. *Ibid.*
38. *Supra* n. 1.
39. *Ibid.*
40. *Ibid.*

Two law officers of the Crown were delegated to review the complaint made by the Winnipeg judiciary against Judge Stubbs. The Minister of Justice, Ernest Lapointe, considered the recommendations of the officers and decided to take no action in the matter:

> First, what was alleged to have been said and done could not be considered judicial misconduct, and, second, if it was such, it was not a matter within federal competence, but was solely within provincial jurisdiction, as the judges of the Surrogate Court are appointed by the province and are not under federal jurisdiction.[41]

Grace M. Macdonald, neice of Alexander Macdonald, wrote Stubbs from Vancouver on February 24, 1930. She told him that she had carefully read the *Macdonald Will Case* pamphlet and all the articles that appeared in the newspaper. She alluded to a brief two week's visit she had with her uncle in 1922. "I visited with him, 'The Home for the Friendless' and 'The Free Kindergarten' and I know how very keenly interested he was in both of these charities and it gives me great pleasure to feel that he has now been vindicated. Trusting that the legislature will act as justice demands that your hands will be upheld."[42]

On March 24th 1930, S. J. Farmer suggested in the Manitoba Legislature that, if Judge Stubbs' behaviour were to be scrutinized in Ottawa, perhaps the provincial legislature should form a board of enquiry into every aspect of the case. Farmer proposed that a committee composed of the Attorney-General, W. J. Major, S. S. Garson, R. H. Mooney, J. McLenaghen, N. Mackay, and himself conduct a thorough investigation into the matter. Farmer felt that in the public interest the issue should be made clear. Farmer's motion was handily defeated.

John Forlong and W. A. Irish, one of the witnesses to the alleged will of 1928, were charged with fraud and perjury. They elected to be tried by jury, but, in a preliminary hearing before Magistrate R. B. Graham, it was held that there was no evidence to place before a jury. One fact makes it difficult to support this ruling. Irish had been a witness to a will which was admitted to counsel to have been fraudulently witnessed. It had been suggested by Magistrate Graham that Stubbs assist in the preparation of the crown's case but Stubbs had refused because of his personal involvement in the case. But that did not mean he was detached. Judge Stubbs' disgust with the ruling knew no bounds. "If that is the way the law works," he said, "then I am in the wrong profession all these years."[43]

After the *Macdonald Will* episode, Judge Stubbs' judicial conduct became less dictated by the stern rules of law and more by his own personal convictions as to what the law should be. In the next two years, five more charges of misbehaviour were lodged with the authorities in Ottawa. These charges, plus those previously made, resulted in a Royal Commission being appointed on September 27th, 1932 to ascertain whether Stubbs had been guilty of judicial misbehaviour. After three months of evidence, Mr. Justice Frank Ford of the Supreme Court of Alberta, who acted as commissioner of the enquiry, found Stubbs guilty of judicial misbehaviour. By order-in-council Judge Stubbs was removed from the bench on June 1st, 1933.

41. *Ibid.*
42. Letter from G. M. Macdonald to L. St. G. Stubbs, Feb. 24, 1930.
43. *Supra* n. 2.

In his findings Commissioner Ford alluded to the adverse effect the *Macdonald Will* case had upon Stubbs:

> It seems to be highly probable that the conduct of the learned judge, subsequent to the judgment overruling his refusal of administration of the Macdonald estate to Mrs. Forlong, is due, perhaps with other contributing causes, such as the temperament to which he himself referred, to his having, by years of hard work and intensive application to the particular matter which he made peculiarly his own concern, so undermined his health that he could not understand with judicial equanimity that what [sic] he considered an affront to the dignity and standing of his own Court and what he considered to be a great wrong to the moral rights of the Winnipeg Charities. As he himself says, he was stunned. The scandalous interperateness of the language used at the Walker Theatre, in the letters to the Minister of Justice, and indeed throughout the enquiry before me is hardly capable of explanation except upon some such hypothesis.[44]

Several newspapers construed the Ford Commission's findings as suggesting that Stubbs had a strong degree of mental instability. Sometime later Stubbs asked his life-long friend and defense counsel, E. J. McMurray K.C., in a jocular manner. "Say E. J. if I got a certificate from Dr. Mathers [a Winnipeg psychiatrist] saying I am of sound mind and disposition, do you think I could have an action against Mr. Commissioner Ford for defamation of character?"[45]

Lewis St. George Stubbs was nominated as the first federal candidate for the newly founded C.C.F. party one week after his removal from the bench. He was defeated in a by-election held in the constituency of Mackenzie in Saskatchewan on October 24, 1933, by the Liberal candidate, J. A. MacMillan. However, in the 1936 provincial election in Manitoba, running as an independent candidate on a platform of human rights and social justice, Stubbs swept the polls. He received more votes than the entire cabinet of Premier Bracken, registering the largest majority in provincial history. Stubbs served as an independent M.L.A. for Winnipeg for twelve years.

As the Montreal Standard said, in summing up Stubbs' political career, "In the intervening years he has made himself the outspoken and fearless champion of every cause that has met with his principles, whether unpopular or not. And he has attacked with equal fearlessness 'what I deem wrong, without fear, affection of favour'."[46]

What is the significance of the *Macdonald Will* case? The motion to the Court of Appeal for a special grant of letters of administration raised interesting legal questions. The unprecedented behaviour of Judge Stubbs in publishing *The Macdonald Will Case* pamphlet and in giving his address in the Walker Theatre, suggest that there are limits to the independence of the bench. Stubbs used the bench as a sounding board for his ideas on inequality before the law and the protection of special privilege. His actions cost him his judicial career but he became a hero in the eyes of the common man.

44. *Supra* n. 1.
45. *Supra* n. 2.
46. *The Montreal Standard*, Sept. 14, 1946, at 7, col. 4.