IN THE HIGH COURT OF THE DOMINION OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

PERRY ET AL

Appellants

- and -

CANADA (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANTS
PERRY ET AL

COUNSEL FOR THE APPELLANTS

Team #

PART I – STATEMENT OF FACTS

A. Overview

1. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees each individual the equal benefit of the law. The *Civil Marriage Act* denies this to vulnerable minorities.

2. The *Act* limits marriage to monogamous relationships. This infringes the dignity of polygamists, casts women as unable to make decisions in their best interests, and imposes a Christian definition of marriage on a multi-faith society. This is an affront to our fundamental notion of equality.

3. The government cannot justify these violations. There are more effective and less invasive ways to combat any potential harms of polygamy. The measure is an irrational, unfocused, and disproportionate response to the government's concerns.

B. Background facts

(1) The *Civil Marriage Act*

4. Section 2 of the *Civil Marriage Act* ("the *Act*") defines civil marriage in Canada as "the lawful union of two persons to the exclusion of all others". Polygamous unions cannot be recognized as marriages under this law.

Civil Marriage Act, SC 2005, c 33, s 2.

(2) The Pesherson family

5. John Hudson, Julie Perry, and Mona Sherwood have maintained a loving, stable, and committed relationship for fifteen years. They have three children together: Sam, Kayla, and Molly. Julie is a family doctor, and Mona is an entrepreneur who runs her own bicycle repair business. John stays home to care

for the children, who are well-adjusted, well behaved, and are doing well in school.

Wilson Moot Official Problem, at 1, 6 [*Official Problem*].

6. Although Julie, Mona, and John have an extensive network of family and friends, society's prejudices impose difficulties on their family. Julie, Mona, and John are reluctant to display the true nature of their relationship in public. Sam has been teased by his classmates for having two moms.

Official Problem, *supra* para 5 at 3, 6.

7. Julie, Mona, and John all feel predisposed to polygamy. None of them has ever experienced a fulfilling monogamous relationship. Their feelings of predisposition are supported by the expert evidence of evolutionary biologist Dr. O'Harra, who explained that polygamous orientation may be derived in part from biological determinates.

Official Problem, *supra* para 5 at 3-4.

(3) Social science evidence

8. The trial judge, Dakana J., made several findings of fact about the potential harms of polygamous relationships. These findings were made with the important caveat that the evidence she relied upon largely examined polygamy in insular societies far different from our own.

Official Problem, *supra* para 5 at 4.

C. Procedural history

9. The Appellants brought an application challenging s. 2 of the *Civil Marriage Act.*

10. Dakana J. found a violation of the Appellants' equality rights, but held that it was a reasonable limit under s. 1 of the *Charter*.

Official Problem, *supra* para 5 at 1-2.

11. The Ontario Court of Appeal upheld Dakana J.'s decision. In her dissenting judgment, Blin J.A. asserted that the provision cannot be saved under s. 1. She found that the legislation was not minimally impairing as it captures healthy polygamous relationships. She found that the provision is unlikely to discourage polygamy, and denies women in existing polygamous relationships the full protection of family law.

Official Problem, *supra* para 5 at 7.

PART II – STATEMENTS OF POINTS IN ISSUE

12. The Appellants submit that:

(1) Section 2 of the *Civil Marriage Act* violates s. 15(1) of the *Charter* on the grounds of polygamous orientation and marital status;

(2) Section 2 of the *Civil Marriage Act* violates s. 15(1) of the *Charter* on the ground of sex;

(3) Section 2 of the *Civil Marriage Act* violates s. 15(1) of the *Charter* on the ground of religion;

(4) These violations are not saved under s. 1 of the *Charter*; and

(5) The words "to the exclusion of all others" should be struck from s. 2 of the *Act*.

PART III – SUBMISSIONS

A. Section 2 of the *Act* violates s. 15(1) of the *Charter* on the grounds of polygamous orientation and marital status

13. Section 15(1) of the *Charter* states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [*Charter*].

14. Section 2 violates s. 15 because it satisfies the framework set out in *R v Kapp*, the leading case interpreting equality rights:

> (1) It imposes distinctions on the basis of enumerated and analogous grounds; and
>
> (2) These distinctions perpetuate disadvantage through stereotyping and prejudice.
>
> *R v Kapp*, 2008 SCC 41 at paras 17-18, [2008] 2 SCR 483 [*Kapp*].

(1) Section 2 of the *Act* imposes a distinction on the analogous ground of polygamous orientation

(a) Section 2 of the Act creates a distinction on the basis of polygamous orientation

15. The law draws a distinction between polygamous and monogamous relationships. Monogamous couples are permitted to marry; polygamous unions are not.

16. Polygamous orientation can either be considered an analogous ground in its own right, or as a part of the recognized analogous ground of marital status.

(b) Polygamous orientation is an analogous ground

17. In *Corbiere v Canada*, the Supreme Court clarified that an analogous ground is a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity".

> *Corbiere v Canada (Minister of Northern Affairs)*, [1999] 2 SCR 203 at 219, 173 DLR (4th) 1 [*Corbiere*].

18. Polygamous orientation is changeable only at unacceptable cost to personal identity. Abandoning polygamy would force the Peshersons to end a loving, committed, and stable relationship of fifteen years, and would sever parent-child bonds. The Peshersons feel that they are predisposed towards polygamy. It is a part of who they are.

> *Official Problem*, *supra* para 5 at 1, 3.

19. A group's historical disadvantage is a further consideration in recognizing an analogous ground. Polygamists have been historically disadvantaged. Polygamy was long believed to be an "abominable practice". Until only recently, this practice was criminalized.

> *Corbiere*, *supra* para 17 at para 23.
> *House of Commons Debates*, 6th Parl, 4th Sess, No 30 (10 April 1890) at 3175 (Sir John Thompson).
> *Criminal Code*, RSC 1985, c C-46, s 293.

20. Polygamists continue to face widespread prejudice in Canadian society. The trial evidence shows that 96% of Canadians disapprove of polygamy. As a result, the Peshersons feel pressured to hide their relationship from others. Their son, Sam, is ridiculed at school and excluded from social activity.

> *Official Problem*, *supra* para 5 at 2-4.

21. The Peshersons' polygamous orientation is central to their personal identity, and it is a basis upon which they suffer disadvantage. Polygamous orientation should thus be recognized as an analogous ground under s. 15(1).

(c) Marital status includes polygamy

22. If polygamous orientation is not an analogous ground on its own, it falls within the ambit of marital status. Marital status was recognized as an analogous ground in *Miron v Trudel*. An individual's marital status includes their choice in conjugal relationship. This definition is reflected in provincial human rights legislation and the case law on marital status.

> *Miron v Trudel* [1995] 2 SCR 418 at 497, 23 OR (3d) 160.

23. The Supreme Court in *Andrews v Law Society of British Columbia* recognized that human rights legislation can aid in interpreting s. 15. Provincial human rights acts recognize many marital statuses, such as single, separated, and divorced. This indicates that marital status denotes an individual's particular conjugal arrangement.

> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at para 38, 56 DLR (4th) 1 [*Andrews*].
> *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 44(1)(g).
> *Human Rights Code*, RSO 1990, c H19, s 10(1).

24. The Court in *Miron* recognized marital status as an analogous ground because it "touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice". Polygamy is clearly embraced by this freedom.

> *Miron, supra* para 22 at 497.

(2) The distinction perpetuates disadvantage through prejudice and stereotypes

25. The distinction created by s. 2 of the *Act* exacerbates the disadvantage faced by polygamists through stereotyping and prejudice, and thus satisfies the second stage of the *Kapp* framework.

> *Kapp*, *supra* para 14 at para 17.

26. Section 2 of the *Act* perpetuates polygamists' disadvantage by denying them access to marriage, a "fundamental societal institution". This exclusion is an affront to their dignity and self-worth.

> *Halpern v Canada (Attorney General* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (CA) [*Halpern* cited to OR].

27. The Supreme Court in *M v H* recognized that denying a benefit to a particular class of relationships reinforces the stereotype that those relationships are less worthy of protection. Similarly, s. 2 of the *Act* implies that polygamists are "incapable of forming intimate relationships of economic interdependence".

> *M v H*, [1999] 2 SCR 3 at para 73, 43 OR (3d) 254 [*M v H*].

C. Section 2 of the *Act* violates s. 15(1) of the *Charter* on the ground of sex

28. Section 2 adversely affects women by promoting the view that they are unable to make decisions in their own best interests. It does not suggest this about men. This distinction amounts to discrimination.

(1) Section 2 of the *Act* imposes a distinction on the ground of sex

29. Even though the *Act* is facially neutral – neither men nor women can form a legally recognized polygamous relationship – it imposes an adverse effect on women. The Supreme Court confirmed in *Andrews* that facially neutral

provisions can constitute discrimination, stating, "identical treatment may frequently produce serious inequality."

Andrews, supra para 23 at 164.

(a) Negative stereotyping constitutes an adverse-effect distinction

30. Although stereotyping is typically considered at the second stage of the *Kapp* framework, the perpetuation of stereotypes can constitute a distinction and satisfy the first step. Stereotyping is intrinsically harmful and recognizing it as a distinction accords with the purpose of s. 15.

31. In *M v H*, the Supreme Court recognized that stereotyping is intrinsically harmful. In that case, the impugned measure excluded same-sex common-law couples from the spousal support protections available to opposite-sex common-law couples. The Court found that in addition to the financial implications, the exclusion "promote[d] the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection". This case demonstrates that stereotyping constitutes a distinct harm, apart from the statutory benefit.

M v H, supra para 27 at paras 72, 73.

32. Recognizing stereotypes as a distinction in their own right accords with the objective of s. 15. *Charter* rights must be interpreted by considering their purpose. The Court in *Law v Canada* stated that the purpose of s. 15 is "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice..." A law that promotes stereotypes offends this

purpose. An interpretation of the equality guarantee that upholds such a law would constitute a "thin and impoverished vision of s. 15(1)".

> *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155-156, 55 AR 291.
> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 51, 156 DLR (4th) 385 [*Law*].
> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 73, 151 DLR (4th) 577.

(b) Section 2 of the Act promotes negative stereotypes about women

33. The exclusion of polygamous relationships from the definition of marriage creates a distinction by promoting the stereotype that women cannot make intelligent life decisions.

34. The Supreme Court has defined stereotyping as "a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess."

> *Law*, *supra* para 32 at para 64.

35. Section 2 of the *Act* portrays women as prone to enter harmful relationships, against their best interests. The objective of the provision demonstrates this view. At trial, the Attorney General stated that the exclusion is designed to discourage the formation of polygamous relationships, because they are harmful to women and children. The government believes that legislative intervention is necessary to make choices for women – this suggests women cannot make these choices on their own.

> *Official Problem*, *supra* para 5 at 2.

(2) This distinction perpetuates disadvantage through prejudice and stereotypes

36. The Supreme Court has recognized that women are historically disadvantaged. Canadian society has depicted them as unable to exercise judgment on important matters. For example, the common law deemed women incapable of holding public office, and they could not vote in federal elections until 1918. By tapping into this prejudice, s. 2 of the *Act* discriminates against women.

> *Newfoundland Treasury Board v NAPE,* 2004 SCC 66 at para 45, [2004] 3 SCR 381.
> *Chorlton v Lings* (1868), LR 4 CP 374, at 382.
> *An Act to Confer Electoral Franchise Upon Women*, 1918, c 20.

D. Section 2 of the *Act* violates s. 15(1) of the *Charter* on the ground of religion

37. The law is facially neutral towards religion, but produces unequal effects. It forces all Canadians who want to get married to do so monogamously. For some non-Christians, this constitutes adverse-effect discrimination.

(1) The law imposes a distinction on the ground of religion

38. Christianity requires marriages to be monogamous. In *Hyde v Hyde and Woodmansee*, the English common law used a definition of civil marriage that mirrored the Christian ideal: "...marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others". Canada inherited this ideal from the common law, thus requiring civil marriage to be monogamous, heterosexual, and permanent.

St. Augustine, "On Marriage and Concupiscence" in Philip Schafer et al, *Anti-Pelagian Writings* (Edinburgh: T & T Clark, 1887) Book I, Chapter 10.
Hyde v Hyde & Woodmansee (1866), LR 1 P&D 130 at 133 (Eng), cited in *Halpern*, *supra* para 26 at para 1.

39. Courts and legislatures have since removed the requirements of permanence and heterosexuality, but left intact the requirement of monogamy.

Halpern, *supra* para 26 at 161.
Divorce Act, RSC 1985, c 3 (2nd Supp) s 8(1).
Civil Marriage Act, *supra* para 4, s 2.

40. This vestige of Christian doctrine creates a distinction. It gives a benefit to Christians in Canadian society: state blessing of their relationships. Meanwhile, the state denies this blessing to relationships founded in different faiths or non-conformity with the dominant group.

(2) The distinction perpetuates disadvantage through prejudice and stereotypes

41. Individuals disagreeing with monogamy for reasons of conscience or religion already bear a burden in Canada. As noted, polygamy has been punished by law and condemned by the majority. Their relationships are portrayed as less meaningful, committed and worthy of recognition as Christian ones.

42. The distinction entrenches the views of the dominant culture at the expense of vulnerable minorities. As the Court recognized in *Big M*, this "creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on

believers and non-believers alike." By doing so, the law creates a disadvantage for non-Christians by reinforcing society's prejudicial views against them.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at para 97, 60 AR 161 [*Big M*].

E. The violations are not saved under section 1 of the *Charter*

43. Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Charter, *supra* para 13, s 1.

44. The violation of the Appellants' equality rights is not a reasonable limit under s. 1. The Supreme Court in *R v Oakes* provided a four-step test to assess limitations under s. 1. To justify a limit, the government must prove that:

(1) the objective of the impugned legislation is pressing and substantial;

(2) a rational connection exists between the legislation and its objective;

(3) the legislation minimally impairs the Appellants' rights; and

(4) the benefits of the legislation outweigh its deleterious effects.

Section 2 fails this test because it is not rationally connected to its objective, not minimally impairing of the Appellants' rights, and disproportionate in its effects.

R v Oakes, [1986] 1 SCR 103 at 138-139, 26 DLR (4th) 200 [*Oakes*].

(1) Concerns with the government's stated objective

45. Several elements of the government's objective fail the first step of the *Oakes* analysis, which asks whether an objective is "sufficiently important to justify overriding a *Charter* right".

Oakes, *supra* para 44 at 138.

46. An objective must be stated in specific terms. At trial, the Attorney General stated the purpose broadly: the protection of women and children from the "evils posed by polygamy". This submission ignored McLachlin J.'s warning in *RJR-MacDonald v Canada*, where she stated, "If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised."

> *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199 at para 144, 127 DLR (4th) 1 [*RJR-MacDonald*].

47. The trial judge identified a litany of potential harms associated with polygamy, ranging from loneliness to loss of autonomy. Placing all these harms in the same category – "evils" – exaggerates their importance and compromises the *Oakes* analysis. When stated broadly enough, any objective will be sufficiently important to justify a *Charter* violation.

48. Several elements of the government's stated objective fail the high standard of the *Oakes* test. Protecting a person from feelings of loneliness, jealousy, and low self-esteem, while worthy goals, are not sufficiently important to justify limiting a constitutional right.

49. In contrast, protecting women from decreased sexual, marital and reproductive autonomy; alleviating economic deprivation; increasing the self-sufficiency of women; and improving the educational and emotional well-being of children are sufficiently important to justify limiting a *Charter* right.

(2) Section 2 is not rationally connected to its objective

50. Any measure enacted by the government must be "carefully designed to achieve the objective in question". Section 2 will not achieve its objective of

preventing harm to women and children because it is unlikely to discourage polygamous relationships.

Oakes, supra para 44 at 138-139.

51. A stronger deterrent than s. 2 did not prevent polygamous relationships from forming. Criminal law prohibited polygamy until only recently, but failed to effectively discourage it. John, Mona, and Julie, for example, carried on their relationship under the spectre of sanction for fifteen years. Section 2 of the *Act* is a weaker measure, and is unlikely to succeed where the *Criminal Code* failed.

Criminal Code, supra para 19, s 293.
Wilson Moot Official Clarifications, para 2.
Official Problem, supra para 5 at 3.

52. Section 2 will not prevent the formation of new polygamous relationships any more than it will discourage existing ones. Evidence shows that few Canadians are interested in polygamy. Permitting polygamous marriages is unlikely to spur these Canadians to enter polygamous relationships.

Official Problem, supra para 5 at 4.

53. Polygamy is fundamental to polygamists' personal identities. Evidence suggests a biological origin for polygamous orientation. The Peshersons feel predisposed to polygamy, and none of them has ever been fulfilled in a monogamous relationship. No provision, no matter how strong, will change who they are.

Official Problem, supra para 5 at 3.

(3) Section 2 does not minimally impair the rights of women and polygamists

54. A *Charter* violation will only be justified if the impugned law impairs the right as little as reasonably possible. Section 2 does not meet this requirement. The government can address any substantial harms targeted by the provision through less impairing means.

> *RJR-MacDonald, supra* para 46 at para 160.

55. Several countries have legal mechanisms that permit polygamous marriage while safeguarding against potential harms. Morocco, for example, protects women by providing them the opportunity to explicitly opt for a monogamous union in a marriage contract. Polygamous marriages will only be recognized after a judge has determined that all parties consent to the second marriage, and that spouses will be treated equally. Morocco also supports women at the dissolution of polygamous marriages through a system of property equalization.

> Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International Comparative Analysis* (Ottawa: Status of Women Canada, 2005) at 23-4.

56. Canada could create a similar system to address the government's concerns without needlessly violating the rights of polygamists. The Canadian legal system has the resources and expertise necessary to make subjective decisions about the best interests of families.

57. The government can achieve its objective without violating s. 15. A blanket ban on polygamy is unreasonable in the face of these alternatives.

(4) The deleterious effects of Section 2 outweigh the salutary effects

58. The final stage of the *Oakes* test considers the effects of the measure. A law can only survive if its benefits are greater than its negative consequences. The deleterious effects of s. 2 outweigh its salutary effects.

> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 95, 20 OR (3d) 816.

(a) Salutary effects

59. Section 2 of the *Act* has minimal salutary effects. Although the *Act* will likely dissuade a few people from exploring polygamy, the deterrent value of the provision is not nearly as strong as the government asserts. Furthermore, the evidence fails to prove that denying marital recognition to polygamous couples enhances the well-being of women and children.

(b) Deleterious effects

60. The deleterious effects of the provision on the Peshersons are numerous and severe. Section 2 denies them the ability to make the fundamental life choice to get married. This not only offends their dignity and promotes a stereotype, but is also counterproductive.

61. The provision suggests women need state protection from their own poor decisions. This perpetuates the stereotype that women are unintelligent and emotionally weak, which is harmful to their dignity and self-worth.

62. Exclusion from marriage offends the dignity of polygamists and non-Christians. In *Halpern*, the Ontario Court of Appeal explained why marriage is a fundamental societal institution: "Public recognition of marital relationships reflects society's approbation of the personal hopes, desires and aspirations that

underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity." Exclusion, conversely, can only diminish polygamists' and non-Christians' self-worth and dignity.

Halpern, supra para 26 at para 5.

63. The measure harms the groups it aims to protect. By denying recognition to polygamous relationships, the government excludes women from the protections of Canada's family law regime. The *Divorce Act*, together with provincial schemes such as the Ontario *Family Law Act*, protect women from the economic consequences of divorce through property equalization.

Family Law Act, RSO 1990 c F3.
Divorce Act, supra para 39.

64. The Supreme Court has emphasized the importance of these regimes, recognizing that divorce often causes women and children to "sink into instant poverty". The Court has also recognized that common law remedies such as constructive trusts do not protect claimants' interests as effectively as statutory protections. Statutory protections apply by default, while claimants must meet a heavy evidentiary burden to establish a trust. In practice, unmarried women face significant difficulty securing their interests.

Moge v Moge, [1992] 3 SCR 813 at para 60, 99 DLR (4th) 456.
M v H, supra para 27 at 119.
Peter v Beblow, [1993] 1 SCR 980, 101 DLR (4th) 621.

65. The harms the provision causes to women, polygamists, and non-Christians outweigh any benefit that the government hopes to achieve through its enactment. The legislation fails the *Oakes* analysis and cannot be upheld under s. 1 of the *Charter*.

PART IV – ORDER SOUGHT

66. The Appellants ask the Court to grant the appeal and that the words "to the exclusion of all others" be struck from s. 2 of the *Act*.

Counsel for the Appellants

PART V – LIST OF AUTHORITIES

LEGISLATION

Alberta Human Rights Act, RSA 2000, c A-25.5.

An Act to Confer Electoral Franchise Upon Women, SC 1918, c 20.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Civil Marriage Act, SC 2005, c 33.

Criminal Code, RSC 1985, c C-46.

Divorce Act, RSC 1985, c 3 (2nd Supp).

Family Law Act, RSO 1990 c F3.

Human Rights Code, RSO 1990 c H19.

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Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 151 DLR (4th) 577.

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M v H, [1999] 2 SCR 3, 43 OR (3d) 254.

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Newfoundland Treasury Board v NAPE, 2004 SCC 66, [2004] 3 SCR 381.

Peter v Beblow, [1993] 1 SCR 980, 101 DLR (4th) 621.

R v Big M Drug Mart Ltd, [1985] 1 SCR 295, 60 AR 161.

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SECONDARY MATERIALS

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House of Commons Debates, 6th Parl, 4th Sess, No 30 (10 April 1890) at 3175 (Sir John Thompson).

St. Augustine, "On Marriage and Concupiscence" in Philip Schafer et al, *Anti-Pelagian Writings* (Edinburgh: T & T Clark, 1887) Book I, Chapter 10.

INTERNATIONAL MATERIALS

Chorlton v Lings (1868), LR 4 CP 374 (Eng).

Hyde v Hyde & Woodmansee (1866), LR 1 P&D 130 (Eng).

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Appellants Respondent

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PROCEEDING COMMENCED AT RIVERVILLE

FACTUM OF THE APPELLANTS

Team #

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