Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Morrison v. Dambourgès, from the Court of Queen's Bench of Quebec, Canada; delivered 21st February, 1871.

Present:—

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
THE JUDGE OF THE HIGH COURT OF ADMIRALTY

THIS is an Appeal from the Court of Queen's Bench of the province of Quebec, in Canada. That Court sustained a Judgment which had been given by what is called the Superior Court, and from both these Judgments the Appeal is now prosecuted to their Lordships.

The question in dispute is the validity or invalidity of a Codicil made by a gentleman of the name of François Xavier Boucher, who is represented to have been a person of large property, who died at Maskinongé, in Lower Canada, at the age of eighty-three, on the 19th of August, 1861. He was a widower at the time of his death. His wife had died in February, 1857; on the occasion of the illness which preceded her death a niece of the deceased, Madame Cloutier, came to live with the deceased, for the purpose, originally, of nursing his wife in her last illness. Madame Cloutier, also called Agathe Dambourgès, came for that purpose, and after the death of the wife Madame Brunelle, also called Emelie Dambourgès, came afterwards at the request of the deceased to remain with her sister. These two ladies were the nieces of the testator. On the 25th January, 1858, M. Boucher had made a Will before two notaries public, in

which he had given specific legacies to several of his children and grandchildren and some small charitable bequests, and by which he divided the residue of his property into seven parts, bequeathing, as their Lordships understand, one part to each of his seven children or their families. On the 2nd of March, 1860, the testator made a Codicil before the same notaries public, gentlemen of the names of Guillet and Landry, and he left to the Respondent Dame Agathe Dambourgès, in consideration of her past and future care of him, the bed he should be using at his decease and an annuity of £30 a year, with an express condition that if she left his house before his decease she was to forfeit the benefit she received under this bequest. On the 4th May, 1860, he appears to have had a paralytic seizure, the effect of which was to deprive him of the use of his right side and in some degree to affect his speech. There is no doubt, however, that he recovered very considerably from this attack, and did various acts of business indicative of perfect capacity for the doing of such acts before the execution of the second Codicil. The execution of the second Codicil took place on the 24th October, 1860, before the same notaries public before whom he had made his Will and his first Codicil. The general effect of this Codicil was to make some alteration in the specific legacies of the Will, but there is no alteration in the bequest to Madame Cloutier in the Codicil of the 2nd March, 1860, nor in this second Codicil did he make any bequest to the other Respondent in this case, Madame Brunelle.

Now the third Codicil, which is the one in dispute, is dated the 12th of January, 1861, and it is in these words:—"Ce aujourd'hui le 12 Janvier "1861. Je, François Boucher, Ecr., résident à Mas- "kinongé, voulant ajouter Egangée aux disposi- "tions de mon testament solennel passée par devant "Maître Guiyet, Notaire en la dite paroisse, et son "confrère Notaire au le 25 Janvier 1858. Je dé- "claire que je lêgue à Dame Emilie Dambourges, "ma nièce, et Dame Agathe Dambourges, aussy ma "nièce, une part d'enfants dans tous ce qui me "reste à divisée après ma mort, exceptez la Sei- "gneurie, en considération des Bons Soins qu'elle "m'ont prodig pendant ma maladie, je Confirme

"mon Dit Testament dans tous les disposition, aux "quelle je n'ai pas dérogé par mon présent codicile, "fait Et Ecrit et signé par moi en ma maison les "ans et jours susedites. FRS. BOUCHER."

The effect of this Codicil is to place, for the first time, the two Respondents, so far as the disposition of his property is concerned, in the relation of children to the testator, that is to say, he gave them a child's share in all his property except his seigneurie, according to the words which have been read, as a recompense for their great care of him, and in other respects he confirmed his Will and made no reference to his former codicils.

Their Lordships have no reason to doubt that this reference to the former Will, without the specific mention of the two intervening Codicils would not have the effect suggested by counsel of invalidating those instruments. It is to be observed, in passing, that the language used in this Codicil is, to a certain extent, language of reference to a former testamentary instrument, not merely because he refers to the Testament in terms, but because he gives a child's share of all his property to these two ladies.

It has been truly stated that in all cases it is a burden cast by the law upon a party propounding a testamentary instrument to prove that it has been executed by a person of sound mind, memory, and understanding; the degree of proof which is necessary to establish that position must vary according to the circumstances of each particular case, and a greater degree of proof is necessary when the mind of the testator is shown to have been affected in any degree since the execution of his last testamentary instrument, and still more so when this instrument varies to any considerable degree the former dispositions of his property. Looking at this instrument, so to speak, *à priori*, there is nothing unnatural, or, as the civilians would say, to borrow a term constantly employed in the old Prerogative Court of this country, there is nothing inofficious in this further distribution of his property, because the evidence establishes beyond all doubt that these two ladies, his nieces, had attended him, as one of the Judges says in this case, with a devotion more than filial, and, if that be a highly coloured expression, it is certainly correct, with regard to

the evidence, to say that the attention which they paid to him was from first to last that of the most careful and affectionate kind, and that the offices which they had to discharge were not only painful, but in many cases of a disgusting character, the rendering of which was of most essential importance to the decaying health and increasing infirmities of the Testator. This circumstance, however, only lays the foundation for the amount of proof which it is necessary that the party propounding this instrument should bring forward.

The next observation that occurs is with reference to the handwriting of this instrument. The first objection which was taken in the Courts below, and has been also maintained before their Lordships to-day to a certain extent, is that this instrument is not satisfactorily proved to be in the handwriting of the Testator. Now, the circumstances attending it may be briefly stated in the following way. It is, their Lordships think, quite satisfactorily proved by the evidence that it was the intention of the testator to make what is called an holograph instrument of this kind; that he for that purpose applied to a professional person with whom he had previous habits of acquaintance; that he required a blank formula which was to be filled up according to the circumstances of the person who wished for it, and that the formula was sent to him. The greater part of the paper, no doubt, is merely a recital or copy of the formula whichwas sent. Here their Lordships must observe that, among the many defects with which this case is attended in the way it has been sent up from the Courts below, their Lordships have not before them the original instrument, but merely this lithographed paper, nor have they the formula (though it is difficult to say whether that was produced in the Court below or not) from which this Codicil was copied. The evidence with respect to it establishes that all the particulars that related to the dates, to the sums, to the persons named, and to the reasons for which the legacies were left were supplied by the Testator himself, and form no part of the formula from which this instrument was copied. Added to those circumstances is the evidence of various witnesses, partly resting, indeed, on a comparison of handwriting, but partly on positive statement that this is in the handwriting of the Testator.

The Courts below had the opportunity of comparing this instrument with other papers written by the Testator, and, to a certain extent, their judgment seems to have been formed upon that comparison. Their Lordships have not before them any papers in the handwriting of the Testator, and of course upon that point they can form no opinion. But it is also to be observed that this Codicil was afterwards placed with the other testamentary instruments of the deceased,—viz. the two Codicils and the Will,—and was directed and superscribed, though their Lordships have before them no evidence as to the exact character of that superscription. So far as any inference arises from the custody of the document itself, a circumstance which Courts administering testamentary jurisdiction have always looked to as of importance in the case, it was found among the testamentary muniments of the deceased, sealed with his own seal, and directed with his own hand.

Upon the first part of the case,—viz. whether this document be or be not in the handwriting of the Testator,—their Lordships have come to the conclusion that there is no reason for supposing that the Courts below formed a wrong judgment upon this point; and they agree with those Courts in thinking that the evidence upon the whole establishes that this instrument was written by the Testator, that the allegation or suggestion of forgery is not sustained by the evidence. That fact is of no slight importance in its bearing upon the whole case, because it supplies a certain amount of that proof which it is necessary the propounder of an instrument should produce in order to satisfy the requisitions of the law.

The next objection which has been taken, both here and in the Courts below, is that at the time when the deceased wrote this instrument he was not of sound and disposing mind. It appears from the evidence that his first attack of paralysis was on the 4th of May, 1860, and that the second Codicil was made on the 24th October, 1860. It was not, however, till the 24th May, 1861, that it was thought necessary to make an application to the proper judicial authority, in order that the Testator might have such protection as the Law would give with respect to the transaction of

business. Originally it was intended to apply for what is called an Interdiction, but it seems to have been arranged with his full consent that this application should be abandoned, and that instead a Counsel should be appointed without whose assistance and inspection no acts of business should be done.

The propounder of this Codicil having so far satisfied the Law as to show *primâ facie* that this instrument was in the handwriting of the deceased, proceeds still further with the requisite proof by shewing that, at the time, so far as the evidence produced can be brought to bear on that subject, the intention originated with the Testator, and that the Codicil was *de facto* executed by him. The evidence of Madame Cloutier no doubt is open to all inquiry, and should be carefully sifted, but still there appears to their Lordships to be no reason for saying that, looking to all the evidence in this case, her testimony can be discredited, though of course it is liable to all the objections which arise from her being an extremely interested witness.

Upon the whole, their Lordships are of opinion that the burden of proof *primâ facie* incumbent upon the parties propounding the instrument has been discharged, and therefore the next question to consider is whether, the burden of proof being shifted upon those who opposed the instrument, they have satisfactorily discharged that burden, by establishing that this instrument was the result of undue influence on the part of the Respondents. The facts of the case do not appear to their Lordships to warrant that inference. The Codicil no doubt was secretly made—so far as this,—that it was made without witnesses or notary in an holograph form by the Testator, the law having prescribed that mode of execution of a testament for the express purpose of enabling testators who do not wish their intentions to be known to execute testamentary instruments. But at the same time, there is no question whatever that application was made to a professional person before the Codicil was made, and that it was brought, whether in a rough or in its executed shape may be doubted, to another professional person for his advice upon it. The circumstances attending the execution of it would not lead to any inference of undue influence.

Now their Lordships have been referred to a case of great authority in all Courts, and especially so in this,—the case of *Harwood* v. *Baker*, and their Lordships are not at all disposed to depart from the doctrine laid down in that case. It is very necessary, when the mind has been enfeebled and when that enfeebling of the mind is attended with bodily ailment, that the greatest vigilance should be exercised with respect to all testamentary instruments made by a person in that condition. In the case of *Harwood* v. *Baker*, their Lordships said that when the mind was so enfeebled as to be incapable of understanding more objects than one, and when that object was pressed upon it to the exclusion of all others, and the result was the disinheriting of all those who had previously enjoyed the testamentary bounty of the Testator, a great amount of proof was necessary to establish the instrument containing such a disposition. The circumstances of this case are in their Lordships' opinion wholly different. There is no exclusion of the parties who are the natural objects of the testamentary bounty of the Testator. There is no evidence of the forcing on the mind of the Testator of one object to the exclusion of all others. The bequest in itself, as has already been stated, is natural and proper, and in their Lordships' opinion the evidence produced on the part of the objectors to the Codicil, the Appellants, wholly fails to sustain that which they have taken upon themselves the burden of sustaining, viz. the proposition that this instrument was obtained by the undue influence of the Respondents.

There is one piece of evidence to which their Lordships paid considerable attention, namely, the evidence of Adams, a witness in no way discredited, who appears to have been a sort of Bailiff of the deceased, who speaks to having had frequent intercourse with the Testator in the months of January and February, who says that though the Testator was very ill, he was "*parfaite-*"*ment dans son bon sens*," and though there were several occasions upon which he did not indulge in his usual habit of talking,—for he says he was "*un* "*homme parlant*,"—nevertheless upon all these occasions when he went to the Testator on business he found the Testator in a condition to transact that business properly, always speaking with good

sense upon the matter which was before him. That is one portion of the evidence before us, and there are many others which might be referred to, which has made its impression on the minds of their Lordships.

Looking at all the evidence in this case, to which their Lordships have paid great attention, and weighing all the arguments which have been very ably addressed to their Lordships, they are satisfied that the decisions of the Courts below were right. The Courts below were unanimous in pronouncing this Codicil to have been executed by a competent Testator, and their Lordships have not before them any evidence which ought to induce them to come to a different conclusion from that at which those Courts arrived. Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the Court of Queen's Bench of Canada. There being no Respondents in this case, their Lordships say nothing about Costs.