Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Migneault v. Malo and another from Canada; delivered 3rd February, 1872.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE HIGH COURT OF ADMIRALTY.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from a Judgment of the Court of Queen's Bench for the Province of Quebec, which reversed the Judgment of the Superior Court for Lower Canada.

The litigation relates to the execution of a will, and the following short statement of facts is necessary.

Prudent Malo, a merchant of Belœil, died on the 25th of April, 1865, leaving an only daughter, and a property in moveables and immoveables of the value of about 8,000*l*. On the morning of this day Malo was dangerously ill, and being apprised of his danger by his medical attendant, desired him to fetch a notary named Brillon for the purpose of making his will. Brillon came and had an interview with the deceased, who said he wished to make his will, and it was arranged that two witnesses of the name of Blanchard should attest it; the deceased said that he wished to bequeath an annuity of 25 louis to the demoiselle Migneault, giving reasons for this wish; that he desired his debts to be paid; 25 louis to be given to the poor of his parish; the residue of all his property to his daughter, Madame Brousseau, for her life, and afterwards to her children born or to be born of her

present or any other marriage, and he named three executors. The deceased seems to have made a similar statement of his intentions to his medical attendant.

The notary and the witnesses arrived about 12 o'clock; in their presence the deceased said, "Je veux faire faire mon testament." He then said as folllows:—

"Je recommande mon âme à Dieu; je veux que toutes mes dettes torts soient payés; je veux que mes funerailles soient faites avec le moins de pompe possible, en laissant cependant cela à la discrétion de mes exécuteurs testamentaires; je donne aux pauvres de la Paroisse de Belœil cent piastres à leur être payés vingt-cinq piastres par an. Je veux qu'il soit payé à Mademoiselle. Mignault vingt-cinq louis par an pourvu qu'elle ne se marie pas. Je donne et lègue à ma fille, épouse de Jean Baptiste Brousseau, en jouissance tous mes biens tant qu'elle vivra, et la propriété je le donne aux enfants nés et à naître du mariage avec M. Brousseau, ou de toute autre mariage contracté par la suite. Je nomme pour mes exécuteurs testamentaires mes amis le docteur Allard, le docteur Rottot, et mon gendre Brousseau. Il dit alors que c'était toutes ses dispositions. Je veux aussi que la majorité de l'opinion de mes exécuteurs testamentaires prévalent dans le règlement de mes affaires."

The notary asked the witnesses if they clearly understood what M. Malo had stated; he then proceeded to write, and having made what may be called a religious preface, proceeded as follows:—

"Deuxièmement. Veut et ordonne le dit Sieur Testateur que toutes ses dettes soient payées et torts par lui faites reparés, si aucun se trouvent par ses exécuteurs testamentaires ci-après nommés.

"Troisièmement. Veut et ordonne le dit Sieur Testateur que ses obsèques aient lieu de la manière la plus modeste possible; laissant tout à la volonté et discrétion de ses exécuteurs testamentaires ci-après nommés.

"Quatrièmement. Veut et entend le dit Testateur qu'il soit payé à Demoiselle Louise Mignault annuellement sa vie durante, pourvû qu'elle ne change pas de nom, une somme de cent piastres.

"Cinquièmement. Donne lègue le dit Testateur aux pauvres de la Paroisse de Belœil une somme de cent piastres à leur être payée par payement de vingt-cinq piastres par an.

"Sixièmement. Quant à tous les autres biens tant meubles qu'immeubles, argent, or, en dettes et obligations, meubles de ménage et autres biens généralement quelconques que le Testateur délaissera et qui lui appartiendront à son décès sans en excepter."

When he had finished his last word the Testator died; before therefore the bequest to his daughter,

and the appointment of the executors was written, and before he had signed the paper.

It appears that the two witnesses afterwards retired to another room and wrote as follows:—

> "Nous soussignés ayant été requis par feu Prudent Malo comme témoins de son testament, étant rendus auprès de lui avec M. Brillon, Notaire, il s'exprima ainsi : se tournant vers M. Brillon, il lui dit : 'Vous allez écrire mon Testament. D'abord que mes dettes soient payées, qu'une pension de 100 dollars par année soit payée à Delle. Mignault tant qu'elle ne changera pas de nom. Je donne aux pauvres de la paroisse de Belœil une somme de 100 dollars payable 25 dollars par année. Que mes services funéraires soit faits avec modération à la discrétion de mes Exécuteurs testamentaires.
>
> "'Tous mes autres biens en jouissance à ma fille et en propriété à ses enfants nés et à naître de son présent mariage et tous autres mariages qu'elle pourra contracter.
>
> "'Je nomme mon ami J. B. Allard, mon ami le Doctr. Rottot et mon gendre Brousseau mes Exécuteurs testamentaires, qu'une majorité des trois prévale dans leurs délibérations.'
>
> "Belœil, 25 Avril, 1865.
>
> (Signé) "ELZEAR BLANCHARD,
> "V. BLANCHARD."

On the 20th of July the Appellant, Dame Migneault presented a Petition to a Judge of the Superior Court, praying for probate of the will as contained in the two paper writings to which I have referred. Madame Brousseau and her husband, the Respondents, were cited to appear and did appear. The Appellant examined the witnesses whom I have mentioned in support of the will, and they were cross-examined on the part of the Respondents, who also put in an Answer, or, as it was termed "défense au fond en droit." They did not, however, produce any witnesses, though special time was allowed to them for so doing, but addressed an argument to the Court by their Counsel, against the validity of the will; and, on the 27th of December, the Court, consisting of a single Judge, Mr. Justice Monk, gave sentence in favour of the Appellants, and directed Probate to be granted of the two papers as together containing the will of the deceased, and condemned the Defendants in the costs.

In the month of September 1866, the Appellant brought her action in the Superior Court for the legacy, and for the costs awarded to her in the Probate Court; the action was formally contested by the Respondents, and it was arranged that the

evidence (subject to all exceptions) taken before the Court of Probate should be used. Mr. Justice Berthelot heard the cause and decided in favour of the Appellant, apparently on the double ground that the sentence of the Probate Court was valid,—

"Vû que la dite sentence du vingt-sept Décembre, mil huit cent soixante-cinq, est dans toute sa force et vertu, et doit avoir tout l'effet que lui donne la loi ;"

—and that the Appellant was entitled to succeed upon the merits. The case was next heard before the Court of Revision, composed of three Judges, two of whom were Judges Monk and Berthelot, who maintained their opinion, the other Judge dissented ; there was then an Appeal to the Court of Queen's Bench, consisting of five Judges, who unanimously reversed the sentence of the Inferior Courts.

From this decision the present Appeal has been instituted.

No controversy is raised as to the facts in this case. It is clear that the deceased was of perfectly sound mind—that he intended to make his will in solemn form, before a Notary and two witnesses, and to dispose of his property in the manner described in the papers of which Probate has been granted.

The contention is as to the law applicable to these facts.

The contention is two-fold :

The first is that the Probate granted is not conclusive, as a Judgment *in rem* or a Judgment *inter partes*. There is no doubt that a probate in England granted in solemn form after due citation of parties would have this effect. And it is certainly much to be lamented if a rule of law and practice so obviously conducive to the interests of justice and the quieting of litigation does not prevail in Canada. Their Lordships, therefore, desired this part of the case to be argued separately. The result is as follows:

Previously to the year 1774, and the passing of the Imperial Statute, 14 Geo. III., cap. 83, wills, according to the Common Law of Canada, could be made only in one of three ways :

1. Before two Notaries.
2. Before a Notary and two witnesses.

3. By a holograph writing which did not require witnesses.

The Statute (or Quebec Act, as it is usually called) 14 Geo. III, cap. 83, however, introduced another form of will, enacting (Section 10), "That it shall and may be lawful to and for every person that is owner of any lands, goods, or credits, in the said province, and that has a right to alienate the said lands, goods, or credits, in his or her lifetime, by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death by his or her last will and testament, any law, usage, or custom, heretofore or now prevailing in the Province, to the contrary hereof in anywise notwithstanding, such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England."

There appears never to have been, and not to exist at present, any Court which exercises a special jurisdiction with respect to wills.

A practice dictated by obvious convenience or necessity seems to have grown up in Canada, after the conquest of that country by England, of registering, or, as it was somewhat loosely termed, proving, wills made according to English law before a Judge of the Civil Court. This practice, the legal effect of which was very doubtful, continued till 1801, when a Provincial Statute (41 Geo. III., c. 4, s. 2, incorporated in the Consolidated Statutes, c. 34, s. 3), provided as follows:—"Whereas doubts have arisen touching the method now followed of proving last wills and testaments made and executed according to the forms prescribed by the laws of England, before one or more of the Judges of the Courts of Civil Jurisdiction in the province; be it therefore enacted that such proof shall have the same force and effect as if made and taken before a Court of Probate."

At first sight it certainly appeared to their Lordships that this language availed to introduce the law of England with respect to the conclusiveness of a probate duly granted, into the law of Canada; and that where, as in the present case, a suit as to the validity of a will had been contested in open Court, both parties appearing, pleading, and one examining, the other cross-examining, witnesses, and Probate had then been granted, the same

question could not be raised again, at all events between the same parties, before another tribunal; but that the production of the Probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, "such proof shall have the same force and effect as if made and taken before a Court of Probate."

Their Lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years, and they have therefore made as careful an investigation into this practice as the circumstances permit.

It appears, in the first place, that no appeal has ever been instituted from a Decree or Grant of Probate made by the Court—that it is very doubtful whether any allegation or plea as to the merits, for instance, a plea or allegation setting up insanity or undue influence, could be propounded, or would be admitted on an application for Probate.

It is enacted by the 23rd section of the 78th chapter of the Consolidated Statutes of Lower Canada, in the year 1860, that "any Judge of the Superior Court, at any place where the said Court or the Circuit Court is appointed to be held, shall, in any Court or out of Court, in term or out of term, or in vacation, and any prothonotary of the Superior Court at the place where his office is therein held, shall, out of Court, but in term or out of term, have, and may exercise within and for the district in which such place as aforesaid lies, the same power and authority as is then vested in the Superior Court and the Judges thereof, in what respects the probate of wills, the election and appointment of tutors and curators, as well under the general law as under the provisions of chapter 87 of these Consolidated Statutes relating to Insolvent Debtors, or any other Act, the taking of the counsel and opinion of relations and friends in cases where the same are by law required to be taken, the closing of inventories, attestation of accounts, *insinuations*, affixing and taking off seals of safe custody, the emancipation of minors, the homologation or refusal to homologate proceedings had at any *avis de parents* called or held by or

before any notary, and other acts of the same nature requiring despatch; and the proceedings in all such cases shall form part of the records of the Superior Court at the place where they are had, or of the Circuit Court at such place, if the Superior Court be not held there."

(2.) "But the appointments and orders made by any prothonotary under this section, or made under the same by any Judge out of Court, shall be liable to be set aside by any Judge of the said Court, sitting in the same district in Court and term, in like manner and under the provisions of law in and under which appointments and orders made by one or more Judges out of Court, in matters requiring despatch may be set aside by the Superior Court (12 Vict., c. 38; 20 Vict., c. 44, s. 91.)

In the Civil Code of Lower Canada, which became law in 1866, therefore, before the making of the Will in question, it is enacted (section 3, § 856.) "The originals and legally certified copies of wills made in authentic form, make proof in the same manner as other authentic writings.

(§ 857) "Holograph wills and those made in the form derived from the laws of England, must be presented for probate to the Court exercising superior original jurisdiction in the district in which the deceased had his domicil, or, if he had none, in the district in which he died, or, to one of the Judges of such Court, or, to the prothonotary of the district. The Court, or Judge, or the prothonotary, receives the depositions in writing, and under oath of witnesses competent to give evidence, and these depositions remain affixed to the original will, together with the judgment, if it have been rendered out of Court, or a certified copy of it, if it have been rendered in Court; parties interested may then obtain certified copies of the Will, the proof, and the judgment, which copies are authentic and give effect to the will until it is set aside upon contestation.

" If the original of the will be deposited with a Notary, the Court or Judge, or the Prothonotary, causes such original to be delivered up.

(§ 858.) " The heir of the deceased need not be summoned to the probate thus made of the will, except it is so ordered in particular cases.

"The functionary who takes the probate takes cognizance of all that relates to the will.

"The probate of wills does not prevent their contestation by persons interested."

In the fourth Report of the Commissioners which preceded the enactment of the Civil Code, it is said (p. 179):

"The third section treats of the proof of wills and also of the preliminary probate, before a Judge, of such as have not been made in authentic form. A will frequently concerns several parties, by all of whom it would be difficult to have it acknowledged, though these persons and even third parties be interested in submitting its validity without delay to a preliminary test. The proceeding adopted for this purpose is well known in England and in this country under the name of probate; it is now particularly in use in England where wills have no form corresponding with our authentic form. In the old French law, as well as in the ancient practice in this country, traces are still found of a similar probate as regards holograph wills. It is not, however, necessary to extend the researches upon this point, the probate of holograph wills and of wills made in the English form having uniformly been effected in the same manner, which is that of the common form of probate adopted in England, where a more solemn form of probate is also practised, to which the parties interested are summoned and by which they are bound. This latter form of probate is not in use in this country, unless it be compared to a contested action before the Courts. The probate here takes place before a Judge and out of Court. Our provincial statute of 1801 merely says that the form of probate then in use shall continue to be practised." * * *

The "contestation" spoken of in the Report and the code, does not appear to mean, as it would in England, a suit in the Court of Probate, before probate is granted or enforced, but in some other suit, a suit before a Civil Court, in which the validity of the will is impugned.

Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice, since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of

this case, that binding and conclusive character which it has in England, and that, according to that interpretation, it was competent to the Respondent to impugn the validity of this will by way of defence to the action brought by the Appellants for the payment of the annuity.

Their Lordships think that they ought not to advise Her Majesty that a different construction ought now to be put upon the law.

With regard to the form of action adopted in this case, their Lordships do not find that any objection was taken to it in the Court below.

It remains to consider the second branch of contention. It has been argued on behalf of the Appellants,—

(1.) That though the deceased intended to make a will in solemn form, according to the French law, yet, if he did in fact make one, bad according to that, but good according to the English law, it is valid.

Their Lordships have no doubt that this proposition is true.

(2.) It has been argued that, if the Judge was wrong in granting probate of both the papers, at all events the unfinished paper written by the Notary from the instructions of the deceased, was a valid instrument according to the law of England before the last Wills Act, and that they, the Appellants, are content to have probate of that paper alone.

Their Lordships are, therefore, relieved from the necessity of considering whether a nuncupative form of will was valid in Canada at the date of Prudent Malo's death, and before the recent Code came into operation; as to which, however, they desire not to be considered as expressing any doubt whatever, or whether a probate could be properly granted of a nuncupative will and unfinished instructions as together containing the will of the deceased.

The question before their Lordships is reduced within these limits, Is the paper of unfinished instructions such a document as would have been entitled to probate under the law in force in England before the present Wills Act? For if so it was before the promulgation of the Code, which appears

to have adopted the Wills Act, a good will in Canada under the provisions of the Quebec Act. Upon this point their Lordships entertain no doubt.

The law is very clearly laid down by a most experienced Judge, Sir John Nicholl: —

"The legal principles," he says, "as to imperfect testamentary papers, of every description, vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator, and *so* executed, as it is to be inferred on the face of the paper, that the testator meant to execute it. But if the paper be complete in all *other* respects, that presumption is slight and feeble, and one comparatively easily repelled. For intentions, *sub modo* at least, need not be *proved* in the case; that is, the Court will presume the testator's intentions to be as expressed in such a paper, on its being satisfactorily shown that its not being executed may be justly ascribed to some *other* cause, and not to any abandonment of those intentions so expressed, on his, the testator's, part. But where a paper is unfinished, as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for as above; but it must also be proved (for the Court will not presume it) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes: so that by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart or defeat, the testator's real wishes and intentions in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my judgment." . . . .

Montefiore *v.* Montefiore, 2 Addams, p. 357.

"If the instrument is (as it clearly is), in legal construction, one in progress merely and unfinished as to the body of the instrument, the legal presumption surely is that, had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of

Montefiore *v.* Montefiore, 2 Addams, pp. 359-60.

the instrument. I cannot assent to the proposition contended for by one of the Counsel, that if a testator dies while the instrument is in progress, that instrument, 'so far as it goes,' be its contents and effect what they may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate in the case of every unfinished paper is this: can the Court infer that by pronouncing for it it will carry into effect what it collects, from *all* the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it, but surely not if it sees reason to believe that, by so doing, it will defeat, or counteract, instead of giving effect to that wish."

In another case the same learned Judge said:—

Kooystea v. Buyskes and others, 3 *Phillimore*, pp. 530-31.

"The facts are satisfactorily established. I have no doubt in pronouncing this to be the will of the deceased, as far as to the appointment of the executor; but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the Court goes the utmost length to give effect to intention clearly proved and reduced into writing in the lifetime of the testator, yet it has never held that anything added to a will after death can be established. Death consummates the instrument; nothing can be added afterwards.

"The last clause must be pronounced against and struck out of the will.

"I have no doubt of pronouncing for the will without it."

It was suggested that these decisions, which were made in 1820-21, were judicial developements of the doctrine as to imperfect testamentary papers, and were not intended to be incorporated into the Canadian law by the Statute of 1801. But unfortunately for this argument, various decisions of Sir G. Lee, a most learned ecclesiastical Judge, in 1757, fully establish the doctrine which Sir John Nicholl in 1820-21, did not in truth develope, but declared to be the acknowledged existing law.

There can be no doubt that in this case it did completely express the wishes of the Testator, and therefore, tried by the principles laid down in these and other cases, the paper containing the

instructions written out by the Notary is entitled to probate.

It remains only to consider the objection that the evidence by which these instructions are proved to contain the testamentary intentions of the deceased is inadmissible according to the *lex fori*—that is, the Canadian French law; and for this position Article 1233, sec. 7, was relied upon, which requires that there must be "a commencement of proof in writing" (commencement de preuve par écrit), in order to admit the oral testimony of witnesses. If it were necessary to consider whether in this case this condition as to the commencement in writing had been fulfilled their Lordships would be strongly inclined to hold that it had been fulfilled; but in truth the case is not one to which the doctrine of the *lex fori* prevailing as to the admission of evidence is applicable at all. The law which introduced into the Colony the English law as to wills must be considered as having introduced it with all its incidents, and therefore with the admissibility of oral evidence, without which, indeed, the new law would be nugatory and of no effect.

Their Lordships have therefore arrived at the conclusion that the sentence appealed from should be reversed, that the Judgment of the Superior Court of Canada in favour of the Appellant should be affirmed, and that the Respondents should pay the costs of this Appeal and those of the Court of Queen's Bench in Canada.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—7/2/72.