Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Archambault et vir v. *Archambault* et al.; *from the Court of King's Bench for Lower Canada, Province of Quebec (Appeal Side); delivered the 16th July* 1902.

Present:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

THIS is an Appeal from a Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side), of the 29th May 1901, confirming the Judgment of the Superior Court, by which the action was tried in the first instance.

The action was brought for the purpose of setting aside the testamentary dispositions of a gentleman named Dr. Dieudonné Archambault, and certain gifts made by him in his lifetime, on the ground of his insanity, and on the ground that his testamentary dispositions and gifts were induced by the undue influence, cajolery, and threats of the first Respondent, Miss Georgiana Archambault (hereinafter called the Respondent), who was the Defendant in the action.

The first Appellant (hereinafter called the Appellant), who was the Plaintiff in the action, is the daughter and only child of Dr. Archambault.

In order to make the case, which has been argued before their Lordships, intelligible, some short account should be given of the history and relations of the parties.

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Dr. Archambault, the testator, whose testamentary dispositions and gifts *inter vivos* it is sought to set aside, died in July 1896 at the age of 65. He was by profession a medical man, and seems to have had a considerable practice in Montreal. Many years ago—it is said in the year 1866—he had the misfortune to be affected with a syphilitic disease of some kind, caught, it is said, from attending a woman in childbirth. He apparently was not aware of what had affected him, and the disease was neglected. In 1875 he lost his wife, to whom, apparently, he was very much attached. She left an only daughter, the Appellant, who was then thirteen years of age. The illness which Dr. Archambault thus contracted in the year 1866 appears to have affected his bodily health very seriously. He suffered from excruciating pains in his limbs, and otherwise his health was obviously affected. It is said that his mind was also affected by it. It is possible that it had some effect on his mental vigour, but the extent, if any, to which his mental faculties were affected is one of the issues of the suit, and their Lordships will deal with it presently.

Upon the death of his wife, Dr. Archambault induced his niece, Mademoiselle Georgiana Archambault, the Respondent, to come and manage his household, which she did, giving up a situation in which she was earning her living as governess, or teacher, in some teaching institution. She remained with him from the year 1875 to his death, in the year 1896—altogether 21 years of her life. There is not the slighest suggestion by any witness either on one side or the other that she in any way neglected the duties she had undertaken, or that she did otherwise than manage the doctor's household with great care and attention, and she also devoted much attention and care to Dr. Archambault, whose bodily weakness increased until his death.

So things went on until the Appellant attained the age of 21 years, which was about the year 1882 or 1883. She soon afterwards married a gentleman named Labadie. It is said that she married Labadie rather against her father's will, and that he did not approve of the marriage. This at least is certain, that for some years after the marriage, and indeed until the doctor's death, there was some estrangement between the daughter and her father. Whose fault it was, of course, is in dispute between the parties. The one side attribute it to the daughter's neglect of her father, and the other side attribute it to the influence upon her father of the Respondent, who, it is said, poisoned Dr. Archambault's mind against his daughter.

In the year 1893 Dr. Archambault gave up his practice in Montreal, and he then retired with his niece to a place called St. Lin, in the neighbourhood of Montreal, where he either bought or hired a house in which he resided until his death. A brother of the Respondent, named Jules Archambault, came to reside with him, and assisted the Doctor in the care of his business matters, his investments and other matters of that character.

Their Lordships will now turn to the testamentary dispositions made by this gentleman. On the 15th September 1885 he made his first will. By that will he gave an annuity of $260 to the Respondent, and he gave the residue of his property to the Appellant as his universal legatee, with a *substitution* in favour of her children. On the 17th August 1887 the Respondent's annuity was, by a codicil, increased to $300. On the 2nd March 1892, about the time when he gave up practice and retired from Montreal, he made a second will, by which he revoked his former will and codicil, and bequeathed to the Respondent his household furniture and various personal articles, including his surgical instruments and so forth; and he also gave her the use and usufruct of a lodging in

one of the houses which belonged to him, with a right to lease the same for her benefit; and instead of an annuity of $300 a year he gave her a legacy of $6,000. The residue was given, as in the former will, to the Appellant, in life-rent, with a *substitution* in favour of her children. After they went to St. Lin Dr. Archambault made various presents of money to the Respondent, and he also gave her a building property in Montreal which he had bought as a speculation, and on which he had built houses. The result of these gifts was that at the testator's death his property consisted, including the subjects of these gifts, of about, speaking in round numbers, $100,000, of which the Respondent would receive altogether, in legacies and gifts, about $30,000, and the Appellant would receive the residue. It is said that the residue was not so much as the sum mentioned, which would be $70,000, and that it was not more than $60,000, or even less than that; but in round figures it may be taken, their Lordships think, that the niece profited by this gentleman's bounty to the extent of one third of the estate, the daughter and her children being entitled to the other two thirds.

The suit is, as has been said, for the purpose of setting aside the testamentary dispositions of the 2nd March 1892, and also the gifts *inter vivos* which were made to the niece; and the grounds upon which the suit is based are that the testator was *non compos mentis*, and that the dispositions in question were brought about by the undue influence and cajolery of the Respondent.

A great many witnesses were called—medical men and friends of the testator, who had known him for a long period—and in particular a gentleman who had known him well in his later years, the Curate of the Parish in which he died, and other clergymen who knew him during his later years. The evidence was extremely conflicting. Their Lordships having

had the medical evidence read to them at great length—not too great length, but fully—and having had an opportunity of considering the medical evidence put forward on behalf of the Appellant (the Plaintiff), are not surprised that the learned Judge who tried the action did not attach great weight to it. Their Lordships have not thought it necessary to hear Counsel on the other side, and therefore they have not had the advantage of their comments on the evidence of the Doctors; but it is enough for the present purpose to say that there was conflicting evidence, upon which it may be assumed in the Appellant's favour that the Judge might find either one way or the other without any charge of miscarriage of justice. Certainly there could be nothing like a miscarriage of justice in finding in favour of the Respondent upon the issue of the testator's state of mind.

Upon the other point—the undue influence of the Respondent—there is also conflicting evidence. The principal witnesses in favour of the present Appellant are a person named Mademoiselle Destroismaisons, who appears to have been a work-woman, or a person employed in some similar occupation by the Respondent in the household of the Doctor, and Mademoiselle Cauchon, a great-niece of the Doctor, who spent a month at his house at St. Lin within three years of his death, and who speaks to the Doctor being more or less under the influence of the Respondent. Mademoiselle Cauchon's evidence, taken alone, looked formidable, but it is fair to say that the cross-examination brought out the fact that the matters in which she represented that the Doctor paid implicit obedience to the Respondent were domestic matters in which you would expect an invalid to be obedient to the wishes expressed by his nurse, such as a matter of food, going out, and things of that character, and they are not matters which necessarily affected the state of his mind, or his testamentary capacity, or freedom from control in other respects. But, on

the other hand, there is the evidence, which their Lordships have had an opportunity of looking through, of the witnesses Hunault, Mesnard, and others. One of the strongest points made against the Respondent by the Appellant is that she poisoned the mind of the Doctor against his daughter, representing her as being a heartless person who was too glad to escape from his household by marriage, and who had completely neglected him. Now, the Respondent's witnesses put a totally different complexion on the relations between the Appellant and Respondent. They say, on the contrary, that Dr. Archambault—who had all the fretfulness and irritableness, apparently, of an invalid, in addition to a somewhat irritable character, illustrated by the violent expression of his opinion on public questions—seemed to have thought that he was neglected by his daughter, and seemed to have taken umbrage at her not visiting him oftener, and at her allowing herself to be engrossed by the domestic cares of her own family from attention to himself. These witnesses state that, when Dr. Archambault expressed himself in these terms regarding his daughter, his niece, the Respondent, was in the habit of endeavouring to mollify and soften his irritation with regard to his daughter, and that she would represent to him that his daughter had a house of her own to look after, that she had children to whom her attentions were primarily due, and that the cares of her household and her family were the causes of her apparent want of attention to her father. Those witnesses speak to the same effect as the Curate of St. Lin (where the Doctor resided in the latter part of his life) and the Vicar of the Parish; and two clergymen named Strubb and Filiatrault also speak of his mental capacity and the independence of his mind in all matters of business.

Their Lordships do not feel called upon to express any judgment of their own on these

issues which have been raised, and on which there is this conflict of evidence. The evidence has been considered by the learned Judge who tried the action and saw the witnesses. His Judgment is a short one, but none the worse for that, and it is expressed in these terms:—"Considering that the "Plaintiff has not proved that the said Dieudonné "Archambault was neither sound in mind nor "master of his will when he made the testaments, "codicils, and donations which are sought to be set "aside, and that it has not been established that "the said testaments, &c. were the work of the "fraud practised by, or the fear inspired by, the "Defendant on the sick brain of the said Dieu-"donné Archambault, but that it results in the "contrary conclusion from the documents in the "cause; that at all times when these testaments, "&c. were consented to and signed the said "Dieudonné Archambault enjoyed his mental "faculties; that he was in a state to dispose of "his goods, and exercised that right freely and "without suggestion on the part of the Defendant, "or of any other person, and without any fraud "or influence having induced him to make such "disposition; and that he preserved until his decease "the general administration of his goods and "control of his fortune." On that finding the learned Judge dismissed the action. It will be observed that the learned Judge finds not only that the evidence of the Plaintiff was insufficient to prove her case, but that the Defendant had affirmatively established the Doctor's competence and freedom from undue influence.

The case then came by way of Appeal before the Court of King's Bench. The Chief Justice, Sir Alexander Lacoste, was not sitting, for a particular reason which need not be mentioned, but the case was heard by four Judges of that Court, and their unanimous Judgment was delivered in a very full, and apparently very carefully considered Judgment

of Mr. Justice Bossé, with the result that after reviewing the evidence more fully than it had been reviewed in the Judgment of the Judge of first instance the Court of King's Bench unanimously affirmed the Judgment and dismissed the action.

Their Lordships, therefore, have concurrent Judgments of the two Courts below on what is solely a question of fact; and their Lordships are the more disposed to attach weight to the circumstance from the evident signs, which appear to anybody who will read the Judgment of Mr. Justice Bossé, of the care and pains which the learned Judges have taken to go through the evidence, and to form their own conclusion upon it, and not merely to adopt that of the Court below. Of course, even four Judges of the Court of King's Bench may err. Everyone is liable to error. No doubt the Appellant, and the Appellant's Counsel, think that the four Judges took a wholly erroneous view of the evidence. The Appellant's Counsel, however, has not succeeded in convincing their Lordships that they did so, and it is plain on the face of their Judgment that they have carefully discussed, analysed, and considered the evidence. It is not the practice of this Board to disturb a Judgment on a question of fact where the Courts below have unanimously agreed in their conclusion on the evidence, except where it is made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered. This is certainly not a case in which their Lordships would be disposed to depart from that practice, or in which they would feel called upon to express a decided opinion of their own upon the result to which the evidence leads their minds. In saying this they do not desire to be understood as saying that they see, from their perusal of the evidence, any reason whatever for believing that either the learned Judge of first instance or the

learned Judges in the Court of King's Bench have come to an erroneous conclusion.

There is only one other point to which reference need be made, and that is a point which has been raised by the learned Counsel who argued this case with great zeal, and very fully on behalf of his client, on Article 762 of the Civil Code, which in the English version, is in these words—"Gifts "purporting to be *inter vivos* are void as presumed "to be made in contemplation of death when they "are made during the supposed mortal illness of "the donor, whether it be followed or not by his "death, unless circumstances tend to render them "valid." The French is "*Si aucunes circonstances "n'aident à les valider.*" The learned Counsel contends that we ought to apply the rule laid down in that Article of the Code to the gifts which were made by the testator, Dr. Archambault, to the Respondent, during his lifetime. Now their Lordships think that the first answer to the argument which was put before them on that point is that this is not raised by the pleadings. There is no allegation, for example, that the gifts were made during the supposed mortal illness of the donor, which, of course, means during an illness of the donor which was supposed by those about him, and believed by himself, to be mortal in its character, that is, likely to result within a short period in his death. There is no allegation of that kind in the pleadings. The nearest approach to it which the learned Counsel can point to is, their Lordships think, in paragraph 19 of the declaration, which alleges the circumstances before-mentioned of the doctor contracting a syphilitic contagion, which was followed gradually by syphilitic rheumatism and progressive locomotory ataxia, and that those two maladies went on *en s'aggravant jusqu'à la mort.* That is very different from an allegation that a particular gift was made in expectation of death; very different, indeed, from the allegation which

would be required to base upon it any legal argument founded on Article 762 of the Code. This appears to have occurred to the Plaintiff's advisers themselves, for their Lordships are informed that an attempt was made to raise this point before the Judge of first instance; and as a means of enabling the learned Counsel for the Plaintiff to raise it, an application was made to the learned Judge to permit an amendment of the pleadings by introducing the necessary averments. That application, apparently, was not successful, and consequently the point was not allowed to be raised in the Court of first instance. The learned Counsel for the Appellants points out, with perfect truth, that the point is raised in his factum before the Appellate Court. That is quite true, but the application which had been made in the Court below was not renewed in the Appellate Court, and the Appellate Court had no materials, therefore, in the pleadings upon which they could deal with the point. As a matter of fact their Lordships are informed that the point was not argued in the Court of Appeal, at least, not fully argued; and certainly there is no trace in the very careful Judgment of Mr. Justice Bossé of the point ever having been brought to their consideration or ever having been considered by them. The inconvenience of raising for the first time on a final appeal a point which has not been the subject of consideration in the Courts below has been frequently pointed out, both here and in the House of Lords. Certainly it is a rule of practice at this Board that a new point will not be entertained by their Lordships which might have been met by evidence in the Courts below. It will at once appear from the terms of the Article of the Code which have been read, that this is a point which might have been met by evidence, because the whole enactment of the Article is made subject to the proviso "unless circumstances tend to render

them valid." Now, if this point had been taken in the Court below, namely, that these gifts were made at a time when the testator was suffering from a supposed mortal illness, and knew that he was so suffering, that might have been met by evidence to show that that was not the state of facts. It might have been met by evidence to show that, notwithstanding the state of bodily health in which the donor was, the gift was, nevertheless, made under circumstances which rendered it a valid gift.

Their Lordships are, therefore, of opinion that they cannot entertain this point; and they think that there are neither pleadings nor facts before them which would entitle them to do so.

In the result their Lordships will humbly advise His Majesty that the Appeal be dismissed. The Appellants will pay the Respondents' costs.