Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Honourable John J. C. Abbott et al., v. *John Fraser* et al., *from the Court of Queen's Bench for Lower Canada; delivered 26th November,* 1874.

Present:

LORD JUSTICE JAMES.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE questions in this Appeal relate to the validity of a devise in the Will of Mr. Hugh Fraser, a merchant of Montreal, by which he devoted the bulk of his property, moveable and immoveable, to the purpose of establishing at Montreal an Institution, "to be called 'The Fraser Institute,' to be composed of a free public library, museum, and gallery."

The will bears date the 23rd April, 1870, and Mr. Fraser died on the 15th May in that year.

The devise in question is in the following terms:—

"I give, devise, and bequeath, the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Honourable John J. C. Abbott, and to the said Honourable Frederick Torrance, hereby creating them my universal residuary fiduciary legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely, to establish at Montreal, in Canada, an institution to be called the 'Fraser Institute,' to be composed of a free public library, museum, and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life, without distinction, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time, for the preservation of the books and other matters

and articles therein, and for the maintenance of order; and for that purpose to procure such charter or act of incorporation as my said trustees may deem appropriate to the purpose intended by me, namely, to the diffusion of useful knowledge by affording free access to all desiring it to books, to scientific objects and subjects, and to works of art; and to the procuring such books, subjects, and objects, as far as the revenue of my estate will serve, after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management, making always the acquisition and maintenance of a library the leading object to be kept in view. And it is my desire that three persons should be named by my said trustees, to compose with them the first Board of Governors of the 'Fraser Institute,' which it is my desire shall always be composed of five persons, professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by crime or offence, the conviction whereof shall vacate the tenure of office of the offender. And it is further my will and desire that my friend the Honourable John J. C. Abbott shall be the first President of the 'Fraser Institute,' and shall retain that position during his life. And so soon as the requisite charter shall have been obtained, containing all the powers necessary to carry out my design herein contained, I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the Corporation, to be thereby formed, to be called the 'Fraser Institute,' for the pnrposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created, it is my will and desire that Mr. Abbott, as the senior trustee, shall have a second or decisive voice, in the event of any difference of opinion between him and his co-trustee; and in the event of a vacancy occurring in the said trust from any cause whatever, whereby the number of trustees is reduced from time to time to one, it shall be the duty of the other, and he is hereby authorized to name a trustee to fill the vacancy so occurring, by a notarial instrument to that effect, and thereafter the senior trustee shall have a second or decisive casting vote, in case of difference of opinion. And I hereby confer upon my executors hereinbefore named, full power to settle and adjust all matters connected with my moveable property, and upon my trustees hereinbefore named power to sell and realize such of my estate and effects as they shall deem expedient, to acquire property wherein to construct suitable buildings, and to construct such buildings, and to proceed in all respects with all diligence in the carrying out of my desires hereinbefore expressed, up to such time as the property and estate hereby devised to them shall be conveyed over to the 'Fraser Institute.' I desire that the term of office of my executors be continued beyond the term limited by law, and until the duties hereby imposed upon them in the payment of special legacies be completed."

The suit which gives occasion to this Appeal was brought by the Respondents, as the heirs and representatives of the testator, to set aside the above bequest. The Judge of the Superior Court, Mr. J. Beaudry, dismissed the suit, but his decree was

by a majority of three Judges to two, reversed on Appeal by the Court of Queen's Bench.

The principal objections to the validity of the gift, relied on at the bar, were;—

1. That dispositions by will made to found a Corporation were prohibited by law, and the whole devise, therefore, failed. In support of this objection, the 2nd Article of an Edict of Louis XV, published in 1743, which, it was contended, had still the force of positive law, was relied on.

2. That if this were not so, the devise of the immoveable property was void, as being a gift in mortmain.

3. That the gift was to a society of persons, the "Fraser Institute," and that the Society not being in existence at the death of the testator, the whole gift failed.

The Civil Code (which was promulgated before the date of Mr. Fraser's will) is the primary source from which the law of Lower Canada is now to be drawn. When this Code contains rules on any given subject complete in themselves, they alone are binding, and cannot be controlled by the pre-existing laws on the subject, which can then be properly referred to only to elucidate, in cases of doubtful construction, the language of the Code. On the other hand, when the Code refers to existing laws, not formulated in its Articles, or in so far as on any subject it is silent, inquiry is permissible into the old law, and it will in many cases become a question of construction what and how much of that law remains in force, or is abrogated as being contrary to or inconsistent with the provisions of the Code. (See Article 2613.)

The general power of testamentary disposition is found in Article 831 of the Code.

"Every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, either in favour of his consort or of one or more of his children, or of any other person capable of acquiring and possessing, and without reserve, restriction, or limitation, saving the prohibitions, restrictions, and causes of nullity mentioned in this Code, and all dispositions and conditions contrary to public order or good morals."

The restriction mentioned in the Code relating to Corporations is contained in Article 836.

"Corporations and persons in mortmain can only receive by will such property as they may legally possess."

The capacity of persons to acquire by testamentary disposition is subsequently defined in a series of Articles under the head, "Of the capacity to receive and give by Will." (Title 2, cap. 3, sect. 1.)

The Code appears to embody the legislation, having for its object the freedom of testamentary disposition, which was contained in the Quebec Act 14 Geo. III, c. 83, and the Provincial Statute 41 Geo. III, c. 4. It was held by this Tribunal in a late case (King *v.* Tunstall and Others), that the combined effect of these statutes was to abrogate the old law which prohibited gifts by will to adulterine children.

Article 869 was also strongly relied on by the Appellants, as being specially designed to meet such a bequest as the present. It is as follows:—

"A testator may name legatees, who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law. He may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

It could not be denied that the establishment of a public museum, library, and gallery, was in itself, and apart from the manner of its foundation, "a lawful purpose." But it was contended for the Respondents that, as the disposition of the property in favour of the Institution was ultimately to be carried into effect by means of a Corporation to be thereafter created, the purpose to be thus carried into effect was not "within the limits permitted by the law."

It is to be observed that the testator does not attempt to create or found a Corporation, but having devised his property to trustees to establish the Institute, directs them to procure for that purpose legal incorporation by means of a Charter or an Act of Parliament.

Now there is no express prohibition to be found in any Article of the Code against such a testamentary disposition; although there are express provisions defining the restrictions and disabilities to which Corporations are subject with regard to acquiring and holding immoveable property.

Thus Article 836, already cited, which is found in the chapter on Wills, allows Corporations to receive by will only such property as they may legally possess.

Then, under the head of "Disabilities of Corporations," is—

"Art. 366. The disabilities arising from the law are—

"1. Those which are imposed on each corporation by its title, or by any law applicable to the class to which such corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

"3. Those which result from the same general laws imposing, for the alienation or hypothecation of immoveable property held in mortmain, or belonging to corporate bodies, particular formalities, not required by the common law."

The Counsel for the Respondents, however, did not rely on this part of the case upon the provisions of the Code; but insisted, and this was their main contention, that the 2nd Article of the King's Edict of 1743 was still in force, nd rendered the whole devise null.

That Article is as follows:—

"Défendons de faire aucunes dispositions par acte de dernière volonté pour fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans l'Article précédent, ou au profit des personnes qui seraient chargées de former le dit établissement, le tout à peine de nullité; ce qui sera observé quand même la disposition serait faite à la charge d'obtenir nos lettres patentes."

The establishments mentioned in the preceding Article are—

"Aucune fondation ou nouvel établissement de maisons ou communautés religieuses, hôpitaux, hospices, congrégations, confrairées, collèges, ou autres corps ou communautés ecclésiastiques ou laïques."

It was contended that, notwithstanding the Statutes relating to Wills already referred to and the Code, this Edict was still the governing law upon the subjects to which it relates, and in support of this contention, some decisions in the Canadian Courts, and the case of "The Chaudière Gold Mining Company, *v.* Desbarats and others, recently before this Tribunal (see L. R. 5 Privy Council Appeals 277) were referred to.

The question in those cases, however, turned upon the capacity of existing corporations to acquire and hold immoveable property without the licence of the Crown. Article X of the Edict prohibited such

acquisitions without the express permission of the King, signified in a particular manner, viz., by his letters patent registered in his "Conseils Supérieurs" of the Province. But in their Lordships' view it is not necessary to resort to this article of the Edict for the law on the point decided in the cases referred to. Article 366 of the Code contains in itself a distinct rule on the subject. It no doubt refers to "the general law of the country respecting mortmain and bodies corporate;" but it at the same time interprets that law by the following words: "prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown." This general law may have been originally founded on the tenth Article of the Edict, but the law is now virtually contained in the Code itself, into which the article of the Edict has been transferred.

In the case of the Chaudière Gold Mining Company *v.* Desbarats, indeed, the counsel on both sides argued on the assumption that Article X of the Edict was still in force. But their Lordships were then much disposed to take the view that the Code was, on the question then under discussion, declaratory of the law.

It is said in the Judgment:—

"Their Lordships, however, cannot consider it to be their duty at this day to construe the edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity."

It is true that Articles I and II of the Edict are not in like manner reproduced in the Code; but the question arises whether, even if they survived the cession of the Province to the English Crown, they continue to have, since the Statutes on Wills above referred to and the Code, the force of law.

It is open to considerable doubt whether the first nine articles of the Edict, which all relate to the foundation of corporations, retained the force of law after this cession; first, because the forms and regulations they prescribed then became out of place; and, secondly, for the substantial reason that the articles, which had for their object to put fetters on the King's own power, could not, it may fairly be contended, be of force to control the sovereign will of the English Crown, whose prerogative it

would be, after the cession, to establish corporations. And it is to be observed that no instance has been shown where, since the cession, the law of these Articles has been put in force.

But however this may be, their Lordships cannot but think that the second Article of the Edict is abrogated by the Code, as being contrary to or inconsistent with its provisions.

The free testamentary power of disposition contained in Article 831, is given, "saving the prohibitions, restrictions, and causes of nullity *mentioned in this Code.*"

It has already been observed that no restriction directed against such bequests as the present is to be found in the Code, unless the prohibitions relating to gifts of immoveable property in mortmain (to be hereafter considered) can be held to apply to them. There is no such restriction with regard to moveable property.

Again, the introduction of the prohibitions with respect to immoveable property leads to the implication that no other restrictions relating to gifts to corporations, or for the purpose of founding them, beyond those expressly mentioned, were intended to be imposed or retained.

It is impossible to suppose that if the provision of the Edict in question was really in force at the time of the Code, and it was intended to preserve it, that the Code in dealing, as it does fully, with testamentary dispositions, and in a series of Articles under a distinct head with "the capacity to receive and give by will" (see Title 2, cap. 3, sect. 1), should have omitted all mention of it. Their Lordships, therefore, think they cannot treat the second Article of the Edict as a part of the existing law of the Province relating to wills, and if this be so, there is nothing in that law, so far as the objection now under consideration is concerned, to affect the validity of the bequest of the moveable property.

But it is contended, secondly, that as regards the immoveable property the devise falls within the direct prohibition contained in Articles 366 and 836 of the Code. Article 366 is limited by its terms to the acquisition of immoveable property only; and Article 836 must be limited by construction to such property. It is to be observed that Article 836 appears to be founded on cap. 34, sec. 3 of the

Consolidated Statutes of Lower Canada, which section embodied the provision of the 41 George III, cap. 4, sec. 1.

Both Articles relate to gifts to corporations already formed. And the question is whether a devise like the present, by which the property is given to fiduciaries, and is to pass from them to a Corporation only in the event of its being lawfully created with permission to possess it, is within their scope. The devise in this case is to trustees for the primary purpose of establishing an Institute, and for effecting that purpose, they are to obtain a Charter or Act of Incorporation.

It is said that this is, in effect, devising indirectly lands to a Corporation, having no license from the Crown or other legal power to hold them. But is this really the case? The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it. If a corporation with power to hold the property should be granted, the acquisition of it by such Corporation would, before it vested, be sanctioned by law: whilst if it were not created, there could be no infraction of the law against holding in mortmain.

Apart, therefore, from the second Article of the Edict, there would seem to be nothing in principle or in positive law to render such a gift as the present illegal as a gift in mortmain. The direction to the trustees to procure a Charter or Act to incorporate a body empowered to hold the property and carry into effect the objects of the gift, necessarily implies a condition to be fulfilled previously to the vesting of the property; and the permission of the Crown to hold the lands would of necessity precede their acquisition by the Corporation, and render it lawful.

Commentators of high authority on French law have treated such dispositions, apart from the Edict, as clearly good, and numerous passages from their treatises to this effect are collected in the judgment of Mr. J. Badgley. It is sufficient to cite one; Ricard, "Traité des Donations," No. 613, says:—

"Lorsque les donations et les legs sont faits pour l'établissement d'un monastère, on ne pourrait pas opposer le défaut des

lettres patentes ; ce qui est juste, parceque ces sortes de dispositions sont présumées faites sous condition, et pour avoir lieu, au cas qu'il plaise au Roi d'agréer l'établissement."

The same doctrine was sanctioned, and the grounds on which it rests were very fully expounded by Lord Eldon in the case of Downing College, which in its circumstances bore some analogy to the present. (Attorney-General *v.* Bowyer, 3 Ves., 724.)

What the position of the trustees would be in case they failed to obtain a Charter or Act of Incorporation, was the subject of some discussion at the Bar. If consistently with the intention of the testator they could carry into effect the purpose of the devise, and establish and perpetuate the Institute by means of a perpetual succession of trustees, which their Lordships are not satisfied could be done by the law of Canada, it might be a question whether in such case the trustees would not be "gens de main morte," and the devise, therefore, of the immoveable property *ab initio* void by virtue of Article 836 of the Code. In that case Article 869 might not avail to protect the devise. It is true that by this Article a testator is empowered to appoint fiduciary legatees for charitable or other lawful purposes, but only "within the limits permitted by law." Now the Code undoubtedly prohibits the devise of immoveables in mortmain, and if the will had created trustees with power of perpetual succession, it might, as already observed, have been questionable whether the devise of the lands to such trustees would not have infringed this prohibition, and be, therefore, beyond the limits permitted by law.

But their Lordships think that this is not the character of the devise. It appears to them that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise. It is true the primary trust is to establish the Institute, but it is a cardinal part of the trust that, "for that purpose" the trustees are to procure a Charter or Act of Incorporation, and as soon as it shall have been obtained, they are directed to convey the property to the Corporation. There is no direction to convey to new trustees. The trustees are, indeed, empowered to sell such of the property as they deem expedient, to acquire property and to

construct buildings, and to proceed to carry out the testator's designs, but only "up to such time as the property hereby devised to them shall be conveyed over to the Fraser Institute."

Article 964 of the Code provides for the case of a "Legatee who is charged as a mere trustee to administer the property and to employ it or give it over in accordance with the Will, in the event of the impossibility of applying such property to the purpose intended;" and directs that, in such a case the property, unless the testator has manifested an intention that it shall be retained by the trustee, shall pass to the heir. Their Lordships consider that an impossibility to apply the property in accordance with the Will would in this case arise, if the trustees failed, after the lapse of a reasonable time, to obtain a Charter or Act of Incorporation, and that in that event the property would pass to the heirs under the above Article.

It was suggested that new trustees might be appointed in succession so long as the execution of the Will should last under Article 923 of the Code, which is as follows:—

"The testator may provide for the replacing of testamentary executors and administrators, even successively and for as long a time as the execution of the will shall last, whether by directly naming and designating those who shall replace them himself, or by giving them power to appoint substitutes, or by indicating some other mode to be followed, not contrary to law."

But it was not in this manner the testator designed that the purpose of his Will should be permanently carried into execution. It is true that he directs that three persons to be named by his trustees should compose with them the first Board of Governors of the Institute, which he desired should always be composed of five persons, and of which Mr. Abbott was to be President for life, with power to them to supply any vacancy caused by death or resignation; but this is the scheme he provides for the governing body of the intended Corporation, as is shown by the direction which immediately follows it, viz., "that so soon as the requisite Charter shall have been obtained containing all the powers necessary to carry out my designs herein contained," the property should be conveyed to the Corporation. Their Lordships having regard to the scheme of the Will, cannot think it was the intention of the

testator to create, or attempt to create, a Board of Governors in perpetuity without the authority of a Charter or Statute, and so endanger his devise, at least as regards the immoveables, as being an unauthorized gift in mortmain.

The third and remaining objection is that the gift failed, being a gift to a Society not in existence at the testator's death.

If the devise had been to a Society or a Corporation to be afterwards called into existence or created without the interposition of fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of First Instance in Des Rivières *v.* Richardson, Stuart's Reports, 218:—

"It may be admitted that, if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle."

But it was also said in the same case in the Court of Appeal:—

"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (*i.e.*, 'caduque') when left to an individual, or to a body politic and corporate, not in esse; yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution, as soon as it should please the Provincial Government to give to airy nothing 'a local habitation and a name.'"

That case no doubt differed in some of its facts from the present, as the Royal Institution had been, in some sense, incorporated before the date of the Will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordships on this point, having regard to Article 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to Article 838, which, in the case of legacies suspended after the testator's death in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees may carry the pur-

pose of the testator into effect if and when the Corporation of the Fraser Institute is duly incorporated. The transfer of the property to the Corporation is directed to be made by conveyance from the trustees, who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

It is evident that the charitable and lawful purposes mentioned in Article 869 were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequest be within the limits permitted by law.

Their Lordships, for the reasons given, think that the devise in question complies with these conditions and ought to be sustained; and they will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and direct that the suit be dismissed. But, considering that the law of Canada on the questions arising upon this will was in an unsettled state, their Lordships think that the heirs of the testator might reasonably dispute its validity, and that the parties, therefore, should pay their own costs of the litigation below and of this Appeal.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—28/11/74.