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27/1953

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IN THE PRIVY COUNCIL No. 35 of 1952

UNIVERSITY OF
16 FEB 1954
LEGAL STUDIES

ON APPEAL

FROM THE SUPREME COURT OF CANADA

B E T W E E N :

J. LUCIEN DANSEREAU ... Appellant

- and -

COLETTE BERGET and
FANNY IRENÉE GABRIELLE COLIN
Respondents

AND BETWEEN :

FANNY IRENÉE GABRIELLE COLIN
Appellant

- and -

COLETTE BERGET and J. LUCIEN
DANSEREAU ... ... Respondents

(Consolidated Appeals)

CASE FOR THE APPELLANT RESPONDENT

J. LUCIEN DANSEREAU

Record

1. This is an appeal from a judgment, dated the 22nd October, 1951, of the Supreme Court of Canada (Taschereau, Rand, Estey, Cartwright and Fauteux, JJ.) dismissing an Appeal from a judgment, dated the 28th April, 1950, of the Court of King's Bench of Quebec (Galipeault, C.J., St. Jacques, McDougall, Pratte and Bertrand, JJ.) which had set aside a judgment, dated the 5th of March, 1948, of the Superior Court of Quebec (Cousineau, J.). PP.369 - 378 PP.324 - 362 PP.269 - 319

2. The Superior Court had dismissed a non-contentious petition by the First Respondent asking (i) that a post letter dated the 21st August, 1946, be admitted to probate as the last will and testament P.4 L.18 et seq.

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of Eugène Berthiaume, (ii) that a judgment of the Superior Court dated the 4th September,1946, which had admitted to probate, a will, dated the 14th March, 1935, made by Eugène Berthiaume,in favour of the Appellant, be set aside and (iii) that the prothonotary of the Superior Court be ordered to make, in the records of the Court, the corrections and alterations as may be necessary in the premises.

P.2 L.11 / P.2 LL.15-16

3. The circumstances out of which the present appeal arises are the following: Eugène Berthiaume, publisher and journalist of the city of Montreal, died suddenly at Spring Lake, State of New Jersey, U.S.A. on the 31st August, 1946.

P.331 L.17 et seq.

4. He was the son of the late Honourable Treffle Berthiaume, founder of La Presse Publishing Company Ltd. which publishes in Montreal two newspapers named La Presse and La Patrie. He was the Chairman of the Board of said company.

P.299 L.22 et seq. / P.325 LL.10-11

5. The Appellant was one of the three Trustees of the late Honourable Treffle Berthiaume. He was interested in the said newspapers and he was also a director of La Presse Publishing Company. He was an intimate friend throughout his life of Eugène Berthiaume. Berthiaume constantly sought the Appellant's help and advice in his private affairs. The First Respondent was born in France. She was Berthiaume's niece by his second marriage, and had lived with him for about twelve years prior to his death. The Second Respondent was Berthiaume's third wife.

PP. 690 - 691 / PP. 476 - 480 / PP.517 - 518 / PP.664 - 665 / P. 681 et seq.

6. On the 14th March, 1935, Berthiaume made a holograph will leaving all his property to the Appellant. On the 2nd July, 1937,Berthiaume married the Second Respondent, and on the 1st November 1937, he made a holograph will leaving all his property to her. On the 28th September, 1943, Berthiaume made a will in notarial form revoking his previous wills and leaving all his property to the Second Respondent. On the 6th of April,1946, by a deed passed before the notary by whom the last-mentioned will was drawn, Berthiaume revoked the will of the 28th September, 1943. On the 5th of an unnamed month in 1946, Berthiaume prepared a will in English form leaving all his property to the First Respondent and appointing her mother, who is a resident of France, as his executrix. Berthiaume signed this document but it was not witnessed, and by the law of Quebec was therefore

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not a will. Berthiaume gave this document to the First Respondent, knowing that it was null, and several days after asked her to give it back to him, as she did. After his death the document was found among his papers, still unattested. PP.165 - 209

P.192 L.37

7. On the 21st August, 1946, Berthiaume wrote a letter to the First Respondent in which he mentioned this unattested document. This letter was as follows:- P.687

"Ma bien chère Colette, 21 aout 1946

Je me suis senti tres fatigué dernièrement et n'ai pas eu le temps de m'occuper de ton testament. De toutes façons j'aimerais a te dire que s'il m'arrivait quelque chose tout ce qui m'appartient est a toi.

Je suis content d'apprendre que tu passes un temps plaisant au cours de tes vacances et te dis a bientot.

Ton oncle affectionne

Eug. Berthiaume".

8. On the 4th September, 1946 (five days after Berthiaume's death), on the Appellant's application, the Superior Court of Quebec admitted the will of the 14th March, 1935, to probate. P. 690

9. On the 23rd September, 1946, the First Respondent presented a Petition to the Superior Court, asking that the letter of the 21st August, 1946, be admitted to probate and that the judgment of the 4th September, 1946, be set aside. P.2 et seq.

10. The Appellant in answer presented, first, a dilatory exception to oblige the First Respondent to declare her option between the different conclusions of her petition, because he contended that they were of different nature and subject to different proceedings and jurisdictions. Said exception was dismissed on 17th December, 1946 (Casgrain,J.), and by judgment dated the 26th April, 1947, the Court of Queen's Bench confirmed said judgment. On April 29, 1947, the Appellant filed an exception to the form in which he raised again the question of jurisdiction. On April 30th, the first Respondent requested the Appellant to contest the merits within eight days, notwithstanding said exception that was pending. P.10 et seq. P.262 P.266 et seq. P.25

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P.29

11. Then the Appellant presented an inscription in law, dated May 5th, 1947, in which he raised again the question of jurisdiction. Both said exception to the form and inscription in law were dismissed by judgments dated May 28th, 1947, (Casgrain, J.)

P.267

P.31

12. By his contestation, dated May 7th, 1947, the Appellant alleged under reserve of his other rights that the letter was not a will, but only a device employed by Berthiaume in proceedings between himself and the Second Respondent, which had been pending at the time of his death. The Appellant

P.35

alleged that the First Respondent had instigated the Second Respondent to start criminal proceedings against Berthiaume for assault; that the First Respondent had herself made a deposition in those proceedings very adverse to Berthiaume; that Berthiaume believing this deposition to be incomplete and untrue had been very anxious to persude the First Respondent to give evidence in his favour, and had made her believe that he might make a will in her favour, if she would do so; that the unattested will sent to the First Respondent and the letter of the 21st August, 1946, were part of Berthiaume's efforts to persuade the First Respondent; and that the reason for his failure to perfect the will was that the First Respondent had not agreed as yet to do as he wished.

P.269 et seq.

13. The Petition came on for hearing before Cousineau, J., and evidence was given on both sides. The learned Judge gave judgment on the 5th March, 1948, dismissing the Petition. It was, he said, well settled that a letter could be a valid holograph will, but only if under the circumstances of the case it disclosed a settled intention to make a will by the act of writing the letter, and not merely a design of making a will in the future, even though the dispositions to be contained in the will might be set out in the latter. The letter of the 21st August, 1946, was written like an ordinary letter, and if Berthiaume had intended by that letter to dispose of his property he could easily have used unequivocal words. It was very significant in the learned judge's view that he used the conditional mood. This indicated that his resolve was subject to a condition; that he wished to make the First Respondent understand that he would like to leave her his property, but was not doing so for reasons, known to her, at which he was hinting. It showed that there was something

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preventing him from making an absolute disposition. If Berthiaume had not had time to attend to "ton testament", how could he had intended to make a new will in writing the letter? He had sent the unattested will to the First Respondent in order to show that he was thinking of making her his neiress, but had not finally decided to do so, and he might well have had the same object in writing the letter. He had made a holograph will in 1935, an authenticated will in 1943, and a will in English form (the unattested will) in 1946; but never before had he tried to dispose of his property by letter. The letter was ambiguous and equivocal, and did not constitute an absolute disposition of Berthiaume's property. For these reasons the learned judge thought that the letter was not prima facie a holograph will. On the question of law the learned judge cites the following authorities:

Demolombe, Code Napoleon, first edition, vol. 21, page 119.

Beaudry-Lacantinerie "Traite de Droit Civil", vol.2 pages 2 and 46, no. 1922.

Planiol "Precis de Droit Civil", vol. 3, bottom of page 594.

These authorities are cited at length in the appendix to this case.

14. The learned judge further says that the intention of the writer had to be gathered from the document itself, but if the document was not clear it was permissible to clarify the intention by external evidence. The learned judge therefore examined the evidence, and came to the conclusion that it confirmed his view that the letter was not a holograph will. He found that the first Respondent in her testimony did not disclose everything she knew. He considered as significant the fact that immediately after the death of Berthiaume the first Respondent and her lawyer did not consider the letter as a will. And after a complete analysis of the circumstances disclosed by the evidence, he comes to the conclusion that Berthiaume did not complete the will in English form intentionally, because it was not his intention to bequeath his property to the first Respondent and that his only purpose in writing said letter was to obtain the support of the first Respondent in the settlement of his legal troubles.

P.294 L.26 et seq.

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15. The First Respondent appealed from this judgment to the Court of Queen's Bench (Appeal Side),
P.329 and that Court, on the 28th April 1950, allowed the appeal, admitted the letter to probate, and set aside the judgment of the 4th September, 1946. Pratte, J. summarized the evidence and the contentions of the Appellant, and said there was nothing in the evidence to indicate that the letter was not a will, but merely a pretence used by Berthiaume to gain the help of the First Respondent against the Second Respondent. In any case, Berthiaume's motive would not matter if the letter contained the elements of a will; and the expression of a condition was not the only use of the conditional mood; it was also used to make a softened affirmation, without any idea of a condition. By the words "I should like to tell you ...." Berthiaume had meant simply "In case I should die, I am glad to tell you ... or I should like you to know now .... that everything belonging to me is
PP.342 - 343 yours". McDougall, J. and Galipeault, C.J. agreed with the judgment of Pratte, J. St. Jacques, J.
P.330 et seq said there was no evidence that Berthiaume had
P.350 et seq refrained intentionally from completing the will made in English form. The correspondence produced included a letter written by Berthiaume himself in which he used the words "I should like to tell you" obviously without any conditional meaning. Berthiaume had intended the letter of the 21st August, 1946, to take the place of a will if he should die without completing the unattested will. In his opinion, it was impossible on the evidence to attribute to Berthiaume the Machiavellian intentions alleged by the Appellant, but Berthiaume's motive could not in any case affect the meaning of his words.

P.355 et seq 16. Bertrand, J. concurred in the conclusion of the other learned Judges, but with hesitation. He quoted from text writers to show with what difficulty the idea that a letter might be a will had been evolved. Berthiaume had made the unattested will, shown it to the First Respondent, and then got it back. His reason for taking it back was not known, so the will could hardly be taken as a guide to his intentions. Since this will had reached the stage of being signed and was mentioned in the letter, the letter ought to be read merely as a promise to complete that will. It would have been easy for Berthiaume to complete the will between the 21st August and his death, had he wished to do so. To interpret the letter as a will

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was to make a perfect will out of the unattested will. However, the learned judge's doubt was not strong enough to lead him to dissent.

17. The Appellant appealed to the Supreme Court of Canada, and the Second Respondent intervened in the appeal by leave. At the hearing of the appeal it was suggested from the Bench that there was no jurisdiction to hear the appeal, because the judgment of the Superior Court admitting the letter to probate was not a final judgment determining the rights of the parties. On the 2nd October, 1951 the Supreme Court dismissed the appeal. Rand, J. (with whom Estey J. concurred) said that article 858 of the Civil Code meant that a grant of probate in Quebec still left it possible to dispute the will by action or other appropriate proceeding. The jurisdiction exercised in the grant of probate was essentially non-contentious. The Privy Council had decided, in Migneault v. Malo (1872) L.R. 4 P.C. 123, that a grant of probate after an issue had been raised and witnesses heard, did not prevent the contestation of the will in later proceedings. That case showed that the issues raised in the present case were beyond the jurisdiction both of the Superior Court and the Court of Queen's Bench. The learned Judge had considered the facts, and agreed with the judgment of the Queen's Bench. Nevertheless, since the Courts below had no jurisdiction to decide the substantive rights of the parties, the Supreme Court had no jurisdiction to hear the appeal, and on that ground it must be dismissed.

P.369
P.376

18. Taschereau, J. (with whom Cartwright and Fauteux, JJ. concurred) said that a judgment granting probate only had the effect of authorizing the delivery of certified copies of the will. It was a provisional proof of the will, which could still be upset by subsequent contestation. The judgment of the Queen's Bench, therefore, had not finally determined the rights of the parties; but since there had not been a full argument on the point, and the learned Judge thought the appeal should be dismissed on its merits, it was not necessary to consider the matter of jurisdiction any further. The Court of Queen's Bench, in his opinion, had clearly held that they ought not to look at anything outside the terms of the letter in deciding whether to admit it to probate. In any case, the learned Judge agreed that there was nothing in the evidence to show that Berthiaume had not had a testamentary intent. The object of the letter was

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to tell the First Respondent that, whether Berthiaume had time to complete his will or not, she was to be his heiress. It was a complete testamentary disposition. The words "I should like to tell you" meant "I want to tell you", the conditional mood being often used in the same sense as the indicative.

ARGUMENT

The contentions of the Appellant on the questions of jurisdiction are the following:

19. By the Supreme Court Act (R.S.C. 1927 c.35 as amended by 13 Geo. 6 c.37) it is provided:

"2. In this Act, unless the context otherwise requires. . . . . .

(b) 'final judgment' means any judgment, rule, order, or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;
. . . . . .

(c) 'judicial proceeding' means and includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative or executive jurisdiction;
. . . . . .

36. Subject to sections forty and forty-four an appeal to the Supreme Court of Canada lies from a final judgment or a judgment granting a motion for a motion for a nonsuit or directing a new trial of the highest court of final resort in a province, or a judge thereof, pronounced in

(a) a judicial proceeding where the amount or value of the matter in controversy in the appeal exceeds two thousand dollars, or

(b) proceedings for or upon a writ of "habeas corpus" or 'mandamus'."

20. The relevant provisions of the Code of Civil Procedure are as follows:

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"44. An appeal also lies to the Court of King's Bench, sitting in appeal. -

1. From any judgment rendered or order given by a judge in any non-contentious proceeding under the provisions of the tenth part of this code;

. . . . . .

TENTH PART

NON-CONTENTIOUS PROCEEDINGS

1430. Any judge of the Superior Court, at any place where the said court or the Circuit Court is appointed to be held, in 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, out of Court, but in term or out of term, have and exercise within and for the district in which such place as aforesaid lies, the same power and authority as are vested in the court exercising superior original jurisdiction by Article 857 of the Civil Code in what respects the probate of wills.

The proceedings shall form part of the records of the Superior Court at the place where they are held, or of the Circuit Court at such place; if the Superior Court is not held there.".

21. The Civil Code contains the following articles:

"842. Wills may be made:

1. In notarial or authenic form;

2. In the form required for holograph wills;

3. In writing and in presence of witnesses, in the form derived from the laws of England.

850. Holograph wills must be wholly written and signed by the testator, and require neither notaries nor witnesses. They are subject to no particular form.

Deaf mutes, who are sufficiently educated, may make holograph wills, in the

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same manner as other persons who know how to write.

851. Wills made in the form derived from the laws of England whether they affect moveable or immoveable property, must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.

The rules respecting the competency of witnesses are the same as for wills in authentic form.

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 domicile, 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.

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."

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22. The Appellant humbly submits that under the law of Quebec a Petition for probate is a non contentious proceeding and does not confer jurisdiction to determine judicially substantive rights. Since the probate of a will gives effect to it until it is set aside upon contestation, the Appellant further submits, (i) that the Court had no jurisdiction to admit to probate a will which is incompatible or inconsistent with a will from the same testator already probated; and subsidiarily, (ii) that the Court had no jurisdiction to acknowledge the letter dated the 21st August 1946 as the "veritable et dernier testament" of Berthiaume, to grant the probate of said letter and to pronounce judicially the nullity of the substantive rights of the Appellant in the will of March 14, 1935, and in the judgment of September 4th, 1946, probating said will.

23. When the Appellant's application of the 4th September, 1946, was made, the judgment rendered was simply an administrative matter accepting provisionally the will of 1935 as the last will of Berthiaume. This was a mere grant of probate. However, when the application of the 23rd September was made by the first Respondent, in respect of the letter of the 21st August then there was to be contested between the two documents as to which is the last will. That became no longer non-contentious but contentious. The only recourse of the first Respondent was then to contest the Appellant's will by means of a writ of summons issued in the name of the Sovereign.

24. Without Article 44 of the Code of Civil procedur the Court of Appeal was without jurisdiction to hear the appeal of the first Respondent. Said article restricted the jurisdiction of the Court to a judgment in probate only. The court could not determine any contentious matters involving substantial rights. It is because the Court of Appeal went outside of the scope of a petition for probate that its judgment is ultra vires.

25. A judgment which is ultra vires is executory until it is set aside. If the present appeal is not maintained there will be no tribunal who could set aside the judgment appealed from. If new proceedings were instituted, no inferior court would dare to decide that the judgment appealed from is ultra wires of the Supreme Court. The only tribunal who could set aside said judgment is the

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Supreme Court. It would have then to reverse a judgment rendered by itself.

26. The Appellant respectfully submits that the question at issue between the parties is no longer open for consideration in a new action, unless it is decided that the Supreme Court of Canada had no jurisdiction to maintain the judgment of the Court of Appeal and unless it is decided that the judgment of the Court of Appeal is ultra vires.

27. The Supreme Court had no jurisdiction to confirm the judgment of the Court of Appeal, but it had jurisdiction to declare that the judgment of the Court of Appeal is "ultra vires". For all these reasons, the Appellant submits that on the question of jurisdiction the judgment of Rand and Estey, J.J. is right, and the judgment of the Superior Court ought not to have been reviewed upon appeal. In admitting a document to probate, the Superior Court merely identifies the document provisionally as a will, and the only purpose of this is to make it possible for authentic copies of the document to be presented to interested parties. The jurisdiction thus exercised by the Superior Court is purely administrative, so that the proceeding is not a "judicial proceeding" within the meaning of the Supreme Court Act. Furthermore, it is plain from article 858 that a grant of probate does not determine any substantive rights; so that, as the Appellant submits, the grant is not a 'final judgment' within the meaning of the Supreme Court Act.

28. The Appellant humbly submits that it was the duty of the learned Judges of the Supreme Court to decide the issue of jurisdiction before considering any other point in the case. The Appellant respectfully submits that Taschereau, J. and the other members of the majority were wrong in addressing themselves to the merits of the appeal without deciding whether they had any jurisdiction to hear it; and Rand and Estey, JJ. who held that the Supreme Court and the Court of Queen's Bench were without jurisdiction, should not have gone to express their views on the merits. The Appellant submits that the Supreme Court, being entirely without jurisdiction, could not, as it purported to do, affirm the judgment of the Court of Queen's Bench and order the Appellant to pay the costs; and the learned Judges of the Supreme Court, by passing judgment on the merits of the case and confirming the final judgment of the Court of Appeal have themselves rendered illegally a final judgment

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disposing of the substantive rights of the parties. By doing so they have gravely prejudiced the Appellant in any future proceedings which the Appellant may be entitled to bring.

29. The Supreme Court could assume jurisdiction only to reverse the judgment of the Court of Appeal as being ultra vires, because no more than the Courts below did it have jurisdiction to affirm and decide upon substantive rights.

10 30. The Appellant humbly submits that on the interpretation of the letter of the 21st August, 1946, the reasoning of the trial judge and of Bertrand, J. of the Court of Appeal is to be preferred to that of the other learned Judges of the Court of Queen's Bench. In this letter Berthiaume refers to the unattested will in English form as a document which apparently he was unwilling to have completed. There is no proof of any obstacle or reason why said will has not been completed. In the
20 Appellant's submission this letter was not intended to take provisionally the place of the will to which it refers, but only to give the Respondent information about the contents of a will which Berthiaume was not willing to complete; and it should not, therefore, be admitted to probate. Normally, a disposition "mortis causa" takes the form of a will and it is only in very rare and exceptional cases that a will takes the form of a post letter. A Court must be careful before
30 accepting a post-letter as being sufficiently serious to contain the final disposition "mortis causa" of the property of the signor because in such a case the burden of proof of the intention to make a will rests with the addressee. Said letter of August 21st is not a will according to its text and it must be interpreted in the light of the incomplete will to which it refers. It is essential to the validity of a will that at the time of its execution the testator had the animus
40 testandi; and the burden that the will was the voluntary and conscious act of the testator lies on him who propounds the will. From this general principle that animus testandi is essential, it follows that where a document purported to be a will is executed with all the formalities, yet if it is intended by the person executing it not to have any testamentary operation but is executed for some collateral object e.g. to be shown to the legatee to induce him to comply with the pretended
50 testator's wishes, it is a nullity and probate should be refused.

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31. On the facts the Appellant humbly submits that all the judges in Appeal have agreed with the trial judge on the evidence and the circumstances of the case. There were concurrent findings of fact. The appeal judges have differed, however, in drawing inferences. The circumstances of the case as they appear from the evidence pertinent to the issue involved, concern the unprovoked assault of the 10th February, 1946, by Berthiaume against his wife, the actions in separation and the complaint for assault which followed, the regrets of Berthiaume and his efforts to reconciliate, the successful opposition of the first Respondent to the reconciliation of Berthiaume with his wife and to the amicable settlement of the proceedings pending, the declarations of affection by the first Respondent for the second and her promises that she would never go back with Berthiaume, the abandonment of the second Respondent by the first and her secret departure to meet Berthiaume in New York, the drafting by Mr.Mariano, Berthiaume's lawyer in New York, of the unfinished will in the English form, the posting of the letter dated the 21st August, 1946, the secret marriage of the first Respondent with the life-guard of the Sussex Hotel where she lived on the 30th August 1946, and the sudden death of Berthiaume on the following day. The Appellant humbly submits that these circumstances lead to the conclusion that Berthiaume did not have the intention to make a will. He wanted the first Respondent to know that "ton testament" was yet to be completed.

P.624 et seq.
P.621 et seq.
P.665 et seq.
P.252 L.15
P.253
PP.109,110,111
P.162 LL.20-21
P.117 L.37 et seq.
P.173 L.15
P.174 L.2 et seq.

32. The faits et gestes and attitudes of the first Respondent, the deceased, his wife, and their conduct one towards the other, lead to the conclusion that Berthiaume did not have the actual and definite intention to make a will when he wrote said letter.

33. The Appellant respectfully submits that the judgment of the Supreme Court and of the Court of Queen's Bench (Appeal Side) should be declared ultra vires and null and void and the first Respondent's petition should be dismissed for the following amongst other

R E A S O N S

1. Because the rights the first Respondent is claiming by her petition are contentious and substantial and under article 857 of the Civil Code the Supreme Court, the Court of Appeal and the

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Superior Court had no jurisdiction to adjudicate such rights on a petition for probate.

2. Because once a will has been probated another will inconsistent or incompatible with the first cannot be probated, In such a case the recourse is by way of an ordinary contentious action which must begin with a writ of summons issued in the name of The Sovereign.

AND SUBSIDIARILY:

10 3. Because the letter of August 21st,1946 is not prima facie a will.

4. Because in the case of a post letter the burden of the proof of the intention of the signor to make a will rests, in all cases, upon the addressee.

5. Because a will cannot be provisional; what is provisional is not final, and the intention of the testator to make a will must always be actual, definite and final.

6. Because the circumstances of the case lead to
20 the conclusion that the intention of Berthiaume was not to make a will; he wanted the first Respondent to understand that "ton testament" was yet to be completed and that she was not yet his legatee when she received said letter.

7. For the other reasons given in the judgment of the trial judge and of Bertrand, J. of the Court of Appeal.

EDOUARD MASSON.

A P P E N D I X

AUTHORITIES OF THE APPELLANT

In support of the Appellant's contention that the Court have no jurisdiction, the Appellant cites the following additional authorities, to wit:

CODE OF CIVIL PROCEDURE

Article 43, 1. Unless where otherwise provided by statute, an appeal lies to the Court of King's Bench, sitting in appeal, from any final judgment rendered by the Superior Court, except. -

a) In matters of certiorari;

b) In matters in which the sum claimed or value of the thing demanded is less than two hundred dollars.

Article 44, 1. An appeal also lies to the Court of King's Bench, sitting in appeal, -

From any judgment rendered or order given by a judge in any non-contentious proceeding under the provisions of the tenth part of this code;

Article 50 Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the Province are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

Article 76 - Whoever seeks to obtain a thing or a right which is denied him, must sue for it, before the proper court.

Article 117 - Every action before the Superior Court is instituted by means of a writ of summons, in the name of the Sovereign; saving the exceptions contained in this Code, and other cases provided for by special laws.

Article 118 - This writ of summons is drawn up either in French or in English, is signed and attested by the prothonotary, and is issued by the latter, upon the written requisition of the plaintiff.

CIVIL CODE

Article 756 - A will is an act of gift in contemplation of death by means of which the testator, without the intervention of the person benefited, makes a free disposal of the whole or of a part of his property, to take effect only after his death, with power at all times to revoke it. Any acceptance of it purporting to be made in his lifetime is of no effect.

Maxwell "On Interpretation of Statutes", Vol. II, 9e Edition, page 377:-

" . . . . Enactments regulating the procedure in Courts seems usually to be imperative and not merely directory".

Page 388:

"Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with and if it be impossible the jurisdiction fails.

Page 395:

" If the statute which creates the obligation, whether private or public, provides in the same section or passage a specific means or procedure for enforcing it, no other method than that thus provided can be resorted to for that purpose."

P.B. Mignault - Droit Civil Canadien, tome 4 page 314

"La procédure sur la vérification du testament se fait ex parte . . . . . .

"La juridiction de l'autorité judiciaire en ces matières se nomme gracieuse ou non contentieuse, ce qui indique que ce n'est pas un procès qui s'instruit devant elle. Toutefois, elle peut ordonner la mise en cause

de l'héritier, et ce dernier peut, à mon avis, intervenir pour s'opposer à la vérification. Mais commele jugement de vérification ne l'empeche pas de contester le testament par action ordinaire, ce dernier recours lui fournira, le plus souvent, un remède plus utile, d'autant plus que l'autorité qui procède à la vérification du testament ne peut prononcer sur toutes les causes de nullité qui peuvent affecter un testament régulier quant à la forme. Le conseil privé a affirmé ces principes dans la cause de Mignault v. Malo (16 L.C.J., p.288; 3 R.L., p.606; 4 P.C. App., p.123), et le juge Tait a jugé, dans la cause de The St. George's Society v. Nichols, que la vérification d'un testament ne crée aucune présomption en sa faveur lorsqu'il est subséquemment contesté". 10

Mignault v. Malo (1872) L.R. 4 P.C. 123 20

Wynne v. Wynne (1921) 62 Can. S.C.R. 74

Amiot v. Dugas (1929) S.C.R. 600

Billette v. Vallée (1931) S.C.R. 316

Latour v. Grenier (1945) S.C.R. 749

In support of his contention that the letter of August 21st, 1946, is not a will and that extrinsic evidence is admissible, the Appellant cites the following authorities, to wit:

Demolombe, Vol. 21, 1ère édition, pp. 119 et suivantes: 30

"C'est toutefois une question très ancienne, dans notre droit, que celle de savoir si un testament olographe peut etre fait en la forme d'une lettre missive.

"L'article 3 de l'Ordonnance de 1735 s'y opposait formellement; - - - - - - - -

"Et il n'est pas inutile de savoir les motifs que ses interprètes en fournissaient.

"Les différentes manières de juger, disait Furgole, et les doutes qui pouvaient naitre pour savoir si les dispositions 40

contenues dans des lettres missives étaient sérieuses, ou si elles ne contentaient que de simples compliments ou des démonstrations d'affection, ont, avec fondement, déterminé le roi à abroger cette manière de disposer, et à déclarer nulles toutes les dispositions faites par lettres missives. (Des Testam. Cha. lll sect. VII, art. 20).

"Berthier écrivait de même:

"Les lettres missives, qui ne sont que l'image de la conversation, ne sont pas plus destinées à lier les hommes, que la conversation qu'elles imitent; et les expressions de libéralité y sont moins l'effet d'une volonté absolue et délibérée, que le témoignage obligeant d'une bienveillance, qui s'arrête cependant au simple projet (Sur Ricard, T.I.p.405)

"Ces motifs étaient assurément fort sérieux.

"Mais suffisaient-ils à justifier la prohibition absolue de l'article 3 de l'Ordonnance?

"Nous ne le pensons pas.

"Il y a, en effet, ici deux questions, qu'il ne faut pas confondre; la question de forme et la questoondde fond.

"En laforme, un testament peut il être contenu dans une lettre missive?

"Pourquoi donc pas!

"Il suffit pour que le testament olographe soit valable, qu'il soit écrit en entier, daté et signé de la main du testateur; il n'est, dit l'article 970, assujetti à aucune forme.

"Or, cette triple condition se rencontre, nous le supposons, dans la lettre missive qui renferme le testament.

"Donc, en la forme le testament fait dans une lettre missive est valable.

"Cette conclusion nous paraît irrésistible.

"On se récrie: une lettre missive n'est pas un acte, elle n'est pas destinée à faire un titre, elle ne suppose pas, de la part de celui qui l'écrit, la volonté sérieuse et définitive de faire un testament!

"Ceci est autre chose.

"Ce n'est plus la question de forme; c'est la question de fond.

"Et, à ce point de vue, nous admettions toute la gravité de l'objection.

"Il est vrai que dans l'exposé des motifs, M. Bigot-Préamenu a déclaré que :-

"Les dispositions faites verbalement, par signes ou par lettres missives ne sont pas admises. (Fenett. XII p. 555).

"Mais ce qui en résulte, ce n'est pas qu'un testament ne peut jamais être écrit dans une lettre missive, c'est seulement qu'on ne devra que très difficilement reconnaître, dans une lettre missive, l'intention sérieuse, la volonté définitive de faire un testament.

"Toutefois, de ces arguments mêmes il résulte que deux conditions y sont indispensables, à savoir:-

1. Que la lettre, d'où l'on veut faire résulter un testament, ne renferme pas seulement un simple projet, mais une volonté définitive et arrêtée.

2. Que la lettre réalise, par elle-même, et dès à présent, cette volonté; c'est-à-dire, que l'auteur de cette lettre ait entendu, en effet, disposer par la lettre même, et dès à présent; de telle sorte que la lettre étant une fois écrite, il n'y eut plus, dans sa pensée rien à faire pour accomplir sa disposition.

"On ne saurait donc voir un testament dans une lettre par laquelle celui qui l'a écrite annoncerait l'intention de faire des

dispositions; si sérieuse et si définitive que parût avoir été cette intention, et lors même que la lettre renfermerait, avec précision, et, dans les plus grands détails, les dispositions qu'il annonçait vouloir faire; car annoncer que l'on a le projet de faire, c'est évidemment ne pas les faire encore!

"Pas plus qu'il ne faudrait voir un testament dans une lettre par laquelle le souscripteur annoncerait qu'il a fait un testament, et cela, lors même qu'il s'y référerait de la manière la plus positive; bien plus! lors même que la lettre reproduirait, dans tous ses détails et avec la plus grande décision, les dispositions du testament qu'elle rappelle; car dans ce cas, non plus, la lettre elle-même n'aurait pas été considérée par lui comme un testament, ni comme devant être le titre dispositif!

"Il y a si loin, bien souvent, de la promesse à l'exécution!

"Et qui voudrait affirmer qu'il ne se trouve pas aussi des gens qui disent qu'ils ont fait un testament quand ils n'en ont pas fait."

Beaudry-Lacantinerie - Vol. II, p.46, No.1922:

"Le seule condition à laquelle les auteurs et les arrêrs s'accordent aujourd'hui à subordonner la validité d'un testament olographe présenté sous forme de lettre missive, c'est que les circonstances de la cause démontrent que le rédacteur de la lettre missive, invoquée comme testament, avait bien, en la rédigeant, l'intention de faire son testament et non point seulement d'indiquer un simple projet des volontés qu'il comptait ultérieurement faire figurer dans un testament dont il remettait à plus tard la réalisation.

"C'est là, dureste, une question abandonnée à l'appréciation souveraine des juges du fait."

Beaudry-Lacantinerie - Vol. II, page 2:

"Toutes les législations modernes y compris la législation anglaise s'accordent pour reconnaître au testament le caractère d'acte

solennel. Rien de plus juste du reste. On ne doit pas oublier que l'exécution d'une disposition testamentaire n'a lieu qu'après la mort du testateur, alors que celuici n'est plus là pour protester contre les volontés inexactes qu'on pourrait lui prêter. C'est précisément à raison du respect que méritent les volontés du testateur qu'on ne peut point considérer comme telles des volontés affirmées d'une façon quelconque."

Page 15:

"... sous prétextes d'interpréter la volonté du testateur, les juges ne sauraient aller jusqu'à créer cette volonté en tenant pour acquises des indications qu'en réalité le testament ne fournit point".

Planiol - Précis de Droit Civil - Vol. 3, note au bas le la page 594:-

"Le testament doit contenir l'expression actuelle de la volonté du testateur bien qu'il soit destiné à produire son effet seulement à la mort. Quand le rédacteur de l'acte parle au futur il peut y avoir doute pour savoir si on se trouve en présence d'une rédaction définitive ou d'un simple projet."

Pothier - Vol. I, page 403, No. 9:-

"Une lettre missive, par laquelle une personne écrirait à quelqu'un qu'elle lui fait un tel legs, quoiqu'écrite en entier, signée et datée de la main du testateur, ne peut passer pour un testament olographe, cette forme de testament étant expressément rejetée par l'ordonnance de 1735 (art. 3)."

Bugnet ajoute le commentaire suivant dans sa note no. 4, au bas de la page:

"Le Code n'a point renouvelé la prohibition de l'art. 3 de l'ordonnance; on peut donc soutenir aujourd'hui la validité d'un testament olographe, qui se présente sous la forme d'une lettre missive, pourvu qu'on y trouve tout ce qui est exigé par l'art. 970, C. civ. mais surout il faut qu'elle renferme la disposition actuellement faite des biens, et non pas seulement la manifestation d'un projet, ou l'expression d'une promesse de

disposer; c'est là une appréciation de fait et d'intention".

Planiol & Ripert. Traité pratique de droit civil français, livre 5, donations et testaments, page 552:

"On peut tester dans une lettre missive. L'article 3 de l'ordonnance 1635 prohibait ce moyen, mais devant le silence du code on l'admet aujourd'hui. Mais, on ne peut considérer comme un testament la lettre missive où il est fait une simple promesse; ou dans laquelle il est constaté qu'un testament antérieur a été rédigé".

Theobald on Wills 10ième Edition, p.21

"Evidence is admissible to show that a deed or other instrument of gift, which on the face of it not testamentary was not intended to operate till the death of the person executing it. And conversely evidence is admissible to show that an instrument on the face of it testamentary was not intended to be a will."

Page 47:- Speaking about the privileged wills of soldiers and seamen:

"A will not found in the testator's possession cannot be established barely on the proof of the testator's handwriting."

This principle should apply "A fortiori" to an ordinary will.

Jarman on Wills, 8 Ed.

Page 28:

"It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents. And whenever any ground for suspicion exists, the burden of proving that the will was the voluntary and conscious act of the testator lies on him who propounds the will. The degree of proof required may vary with the circumstances of the case."

Page 30:

"From the general principle that animus testandi is essential to the validity of a will, it follows that where a document purporting to be a will is deliberately executed

with all due formalities, yet if it is intended by the person executing it not to have any testamentary operation, but is executed for some collateral object (e.g., to be shown to another person to induce him to comply with the pretended testator's wish), it is a nullity, and probate will be refused."

Page 38:

"And in another case, a paper addressed by a testator to his executors was held not to be testamentary, the same not being dispositive in terms, nor shown by extrinsic evidence to have been so intended. In this case Sir Herbert Jenner observed that there was this distinction in the consideration of papers which are in their terms dispositive and those which are of an equivocal character, that the first will be entitled to probate, unless, as in Nicholls v. Nicholls, they proved not to have been written animo testandi; whilst, in the latter, the animus must be proved by the party claiming under it".

De Salaberry vs. Fairbault, 11 R.L. p. 622:-

..... que c'est dans l'acte même que le juge doit rechercher la volonté du testateur, mais qu'il est cependant permis pour découvrir l'intention du testateur de constater par témoins sa situation personnelle, le degré de parenté du testateur avec les légataires, et leurs relations entre eux, l'importance de son patrimoine comparée à celle des legs, et les usages du pays ou de l'endroit ou le testateur demeure".

Lacombe vs. Mallette, 5 C.S. p. 193

"Comme il faut avant tout, dans une donation comme dans un testament, tenir compte de l'intention du disposant, laquelle peut s'inférer de l'ensemble de l'acte, de la nature et de la destination des choses données, des circonstances particulières de la vie du disposant ainsi que des liens de parenté qui l'unissaient au donataire, on ne saurait regarder la donation en question, malgré les termes impropres dont le notaire s'est servi, comme une donation de biens futurs .....

Mulligan vs Mulligan et al, 8 C.S. p. 103

"....l'intention doit prévaloir sur les mots (Démol, 21, no. 740); et il faut rechercher non pas ce que le testateur a dit, mais surtout et avant tout ce qu'il a voulu dire. La situation du testateur, sa fortune, le milieu où il a vécu, ses rapports avec sa famille, les liens qui l'unissaient avec les personnes qu'il a gratifiées, aideront nécessairement le juge à deviner sa pensée et interpréter son intention".

Demolombe Vol. 21, No. 741, p. 666

"Afin de découvrir l'intention du testateur, et de préciser la signification, qu'il attachait aux termes qu'il a employés, il importe de consulter sa situation personnelle, le milieu, s'il est permis de dire ainsi, dans lequel il était placé.

"Quels étaient ses parents?

"Quels sont ses légataires?

"Et quelles relations existaient entre eux et lui?

"Quelle est l'importance de son patrimoine comparée à celle des legs?

"Quelles étaient ses habitudes, son éducation, sa profession? .....

COCKLE'S CASES AND STATUTES ON EVIDENCE Sixth Edition

Page 64

Circumstantial evidence is admissible not only in the absence of direct evidence, but also in aid of direct evidence.

Page 250

When a question arises as to the contents, genuineness of identity of a will, whether existing lost or destroyed, statements or declarations made by the testator concerning such will, either prior thereto, as to his testamentary intentions, or (perhaps) subsequent

thereto, as to his testamentary acts, are admissible in proof thereof.

POWELL ON EVIDENCE - Tenth Edition - William Blake Odgers & Walter Blake Odgers

Page 113 - Facts Showing the State of Mind of a Party

In many cases the Court is only concerned with the acts of a party, and does not stay to inquire into the state of his mind when he did the act. In other cases, however, it is material, to ascertain whether the party, at the time when he did the act, was aware of a certain fact or had formed a certain intention, or conceived a fraudulent design. It is proverbially difficult to discover what is passing in the mind of a man. Hence, for this purpose the strict rules of evidence are relaxed, and inquiry may be made into other transactions in which that party was concerned, if they throw any light on the transaction in issue. In short, whenever the state of mind in which a party did an act is material, anything which that party said or did in the transaction is admissible; and so is anything which he said or did in any other transaction, previous or subsequent, if it tends to explain the state of mind when he did the act.

No. 35 of 1952

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CANADA

B E T W E E N

J. LUCIEN DANSEREAU ... Appellant

- and -

COLETTE BERGET and
FANNY IRENÉE GABRIELLE COLIN
Respondents

AND BETWEEN

FANNY IRENÉE GABRIELLE COLIN
Appellant

- and -

COLETTE BERGET and J. LUCIEN
DANSEREAU ... Respondents

(Consolidated Appeals)

CASE FOR THE APPELLANT RESPONDENT

J. LUCIEN DANSEREAU

BLAKE & REDDEN,
17 Victoria Street,
Westminster.

Solicitors for J. Lucien Dansereau.