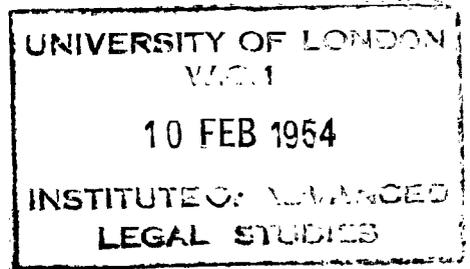


~~27, 1953~~

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# In the Privy Council

No. 35 of 1952 <sup>33583</sup>

ON APPEAL FROM THE SUPREME COURT OF CANADA

BETWEEN:

**J. LUCIEN DANSEREAU,**

**Appellant**

— and —

**COLETTE BERGET and FANNY  
IRENEE GABRIELLE COLIN,**

**Respondents**

AND BETWEEN:

**FANNY IRENEE GABRIELLE COLIN,**

**Appellant**

— and —

**COLETTE BERGET and J. LUCIEN DANSEREAU,**

**Respondents**

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**CASE FOR RESPONDENT COLETTE BERGET**

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**Appellant**

— and —

30 **COLETTE BERGET and J. LUCIEN DANSEREAU,**

**Respondents**

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## CASE FOR RESPONDENT COLETTE BERGET

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40 1. These are consolidated appeals from a Judgment of the Supreme Court of Canada dated 2nd October, 1951 dismissing with costs the appeal of J. Lucien Dansereau and the intervention of Fanny Colin against a Judgment of the Court of Queen's Bench for the Province of Quebec dated 28th April, 1950. The latter Judgment had reversed the Judgment of the Superior Court of the District of Montreal rendered on 5th March, 1948, which had rejected Respondent Colette Berget's petition that the letter, Exhibit P-1 and P-1A, be admitted to probate as the last will and testament of the late Eugene Berthiaume and that a prior probate of a will dated 14th March, 1935 in favour of J. Lucien Dansereau be set aside. By its Judgment, upheld by the Supreme Court, the Court of Queen's Bench ordered that the letter, Exhibit P-1 and

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p. 360

p. 324

p. 260

p. 587 & 688

- Record P-1A, be admitted to probate and that the prior probate of the will of 1935 be set aside.
2. The late Eugène Berthiaume, the maternal uncle by marriage of the Respondent Colette Berget, died at Spring Lake, New Jersey, on August 31st 1946.
3. The late Mr. Berthiaume had, during the twelve years preceding his 10 decease, made the following testamentary dispositions:
- p. 690 (a) On March 14th 1935, a Holograph Will (Exhibit P-2) instituting J. Lucien Dansereau, his Universal Legatee and Testamentary Executor;
- p. 517 (b) On September 28th 1943, an Authentic Will before Mtre. Leonard Leger, N.P., instituting his wife, Dame Fanny Colin, his Universal Legatee (Exhibit P-3);
- p. 664 (c) On April 6th 1946, an Authentic Revocation of the Will of September 28th 1943, before the same Notary. (Exhibit P-4). This Revocation was also endorsed by the deceased on the original of the Will (Exhibit P-3), J. Lucien Dansereau and Me. Edouard Masson Q.C. signing as witnesses; 20
- p. 687 (d) On August 21st 1946, a Holograph Will in the form of a letter (Exhibit P-1-a), in which the deceased instituted Colette Berget his Universal Legatee, and probate of which is sought by the present proceedings. 30
4. Colette Berget was a member of the household of the deceased from the time she was eleven years old and was treated by him as his own child.
- p. 163 & 165 p. 255 5. During the Summer of 1946 the deceased had prepared for him in New York a Will in the form derived from the Laws of England, instituting Colette Berget his Universal Legatee. Although he signed this Will his signature was not witnessed.
- p. 687 6. The letter (P-1-a), which is in issue in this case, reads as follows: 40

21 aout, 1946

“Ma bien chère Colette,

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

Je suis content d'apprendre que tu passes un temps plaisant au

cours de tes vacances et te dis à bientôt.

Record

Ton oncle affectionné  
(signé) Eug. Berthiaume.”

7. Although J. Lucien Dansereau, was aware of the existence of the Will in favour of Mrs. Berthiaume (P-3) and of the fact that that Will contained a clause revoking all previous wills, he made a Petition for Probate of the 1935 Will in his favour (P-2) immediately after the death of the *de cujus*. This Probate was granted on September 4th 1946. p. 690

8. Colette Berget in her Petition, after alleging the death of the late Mr. Berthiaume and describing the various testamentary dispositions noted above, prayed for judgment as follows: firstly, that the letter (P-1-a) be admitted to probate as the Last Will and Testament of the late Eugene Berthiaume and, secondly, that the Probate granted of the Will in favour of the Appellant (Exhibit P-2) be cancelled, annulled and set aside *à toutes fins que de droit*. p. 264

9. The Appellant Dansereau, having obtained time to contest in writing, made a Motion by way of dilatory exception alleging that the Petition constituted an illegal joinder of causes of action. This Motion was dismissed by the Honourable Mr. Justice Pierre F. Casgrain, on December 17th 1946, and his Judgment was unanimously maintained by the Court of King's Bench sitting in Appeal on April 29th, 1947. p. 266

10. Dansereau then made a Motion by way of exception to the form upon the following grounds: (1) the Petition contained an illegal joinder of causes of action; (2) Miss Berget lacked the necessary interest to attack the Will (P-2) since, at the date of its alleged revival on April 6th 1946, only the abintestate heirs had an interest in contesting it; (3) her Petition alleged that Probate of the 1935 Will (P-2) had been granted by “the Court” and since this must be interpreted to mean a Judge of the Superior Court, the Superior Court had no jurisdiction to set it aside (the Probate in question was, in fact, granted by a Deputy Prothonotary, as appears from the Exhibit P-2); and (4) the Probate of a will can only be attacked by direct action. This Exception to the Form was dismissed by the Honourable Mr. Justice Pierre F. Casgrain on the 28th day of May, 1947. p. 25

11. With his written Contestation, Dansereau filed a Partial Inscription-in-Law directed against paragraphs 7 to 14 inclusive of the Petition, which paragraphs alleged the Will in Mr. Dansereau's favour (P-2), its revocation by the Will in favour of the deceased's wife (P-3) and the revocation of the latter (P-4), with the conclusion that the Will in Mr. Dansereau's favour (P-2) was of no effect and that the Probate which had been granted in respect of it should be annulled. This Partial Inscription-in-Law was based upon the following contentions: (1) Colette Berget not being the abintestate heir of the deceased did not have the required interest to attack the Will in favour of p. 29

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Mr. Dansereau, (2) the existence of a later will does not give rise to a right to demand the nullity of a probate made in respect of an earlier one: (3) the Superior Court had no jurisdiction; and (4) a non-contentious petition was not the proper procedure in the circumstances. All these grounds, except the second, had previously been urged in respect of the aforementioned Exception to the Form. This Partial Inscription-in-Law was not argued before the Practice Court but was dismissed by consent of both parties and left for adjudication by the trial Judge.

p. 267

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p. 31

12. The Appellant Dansereau's written Contestation contained over one hundred paragraphs and made allegations which may be grouped under the following headings; (1) that the letter (P-1-a) was not a will but had been written by the deceased with a view to inducing Colette Berget to take his side in several pending legal actions; (2) that Colette Berget had alienated the affections of the deceased in such a way that he would not have wished her to be his heir; and (3) that the Revocation (P-4) of the Will in favour of the deceased's wife (P-3) revived the Will in Dansereau's favour (P-2).

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p. 51 & 55

13. Dame Fanny Colin intervened in the case on 11th June, 1947 alleging that she was the widow of the late Eugene Berthiaume and that the Exhibit P-1 did not constitute a will but a mere promise proffered by Mr. Berthiaume to his niece in order to obtain her co-operation in various pending legal proceedings. Dame Colin desisted from her intervention on 18th June, 1947, the day before the hearing began in the Superior Court, but intervened afresh in the Supreme Court of Canada.

14. Questions of jurisdiction have been raised by counsel for Mr. Dansereau and Dame Colin respectively. These questions of jurisdiction have to do with several stages of the proceedings and prior to embarking upon a consideration of them it may be well to discuss briefly the nature of probate and probate proceedings under the laws of the Province of Quebec.

15. It seems to be well settled that judgments granting probates of wills do not constitute *res judicata* between the parties and that any interested person may, in subsequent proceedings, raise anew the issues which were before the court on the application for probate (*Mignault vs Malo*, (1872) L.R. 4 P.C. 123; *Wynne vs Wynne*, (1921) 62 S.C.R. 74; *Amiot vs Dugas*, (1929) S.C.R. 600; *Billette vs Vallee*, (1931) S.C.R. 316; *Latour vs Grenier*, (1945) S.C.R. 749; 40 *Mignault*, Volume 4, page 313; *Langlier*, Volume 3, page 139).

16. The effect of probate in Quebec is twofold: first, it enables the Prothonotary to issue certified copies of the will, which copies are authentic; secondly and more important, the probated will will be considered *prima facie* valid until contested (Civil Code, Article 857, 5th Report of the Codifiers, page 178). The legatee whose will has been probated will be considered as the true legatee until the probate is set aside upon contestation; payment of the moneys owing to the estate to such a legatee would be valid (Civil Code, Articles 870 and 1145).

17. There can be no doubt that the Superior Court has jurisdiction in matters of probate (Article 857 of the Civil Code and 1430 of the Code of Civil Procedure). Record

18. Is this jurisdiction limited to an enquiry into the formal validity of the will as distinguished from any substantive issues or is the jurisdiction unlimited embracing both form and substance? In *Mignault vs Malo (Supra)*,  
10 the Judicial Committee expressed doubts as to whether the court on an application for probate would entertain any allegation or plea as to the merits as, for instance, a plea of insanity or undue influence. It is submitted respectfully that under the terms of Article 858 of the Civil Code the Superior Court jurisdiction on an application for probate is not limited to a superficial examination of the document tendered as a will, but extends, to quote Article 858, "to all that relates to the will". Thus in a proper case, the court could hear and decide whether the testator was of sound mind or was under undue influence when he wrote the document. In brief, any issue relating to the will  
20 may be placed, it is submitted, before the Superior Court on an application for probate. This is not to say that the judgment of the Superior Court becomes *res judicata* between the parties; as has been pointed out in paragraph 15 above, *res judicata* does not apply to probate judgments in Quebec. The point, however, is that the Superior Court, on an application for probate, has power to go into all that relates to the will, although its conclusions would not carry with them the force of *res judicata*.

19. Whether or not jurisdiction extends beyond an enquiry into the formal validity of the will there was undoubted jurisdiction in the Superior Court to hear the Respondent Colette Berget's petition and to decide whether the letter  
30 should be admitted to probate or not.

20. Was there jurisdiction to set aside the prior probate in favour of the Appellant Dansereau? It is submitted that there was, whichever theory is accepted as to the extent of the jurisdiction of the Superior Court in matters of probate. If that jurisdiction extends to the merits of the case, it is obvious that a prior probated will revoked expressly or by implication by a later will is not a will at all and should not be admitted to probate and its probate should be cancelled; if, on the other hand, the Superior Court's jurisdiction is restricted to an enquiry into the formal validity of the will, a mere consideration  
40 of the date of the later will will annul and cancel the former one and again its probate should be cancelled. It would be, of course, against all common sense to admit to probate a will which would be shown to the court to have been entirely revoked.

21. It would also be contrary to common sense to have two wills, the later in date of which revokes expressly or by implication the former will entirely, probated. Of which will would the Prothonotary issue copies to creditors and debtors of the estate, not to speak of the legatees? Only one such will can be *prima facie* valid; if the court can reach a decision as to which one it is, then the other will is not entitled to the presumption of validity, but on the contrary

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must suffer from a presumption of invalidity and should not be probated. If it has been probated, then upon a further petition for probate of the later will the probate of the first must be set aside.

21A. Article 1310 of the Code of Civil Procedure contains provisions for an appeal from the prothonotary to a judge of the Court upon application (in French “requête”, i.e. “petition”) by any interested party. Viewed in this light, that part of the Respondent Colette Berget’s petition which deals with the setting aside of the earlier probate may be considered as an appeal to the judge from the judgment of probate rendered by a deputy prothonotary, Mr. Hervé Roch. 10

21B. The sole authority purporting to have any direct bearing on the point relied on by the Appellant Dansereau in this connection was the case of *Charette v. Rousseau*, 9 Q.P.R. 395. That decision held that where a judgment of the Prothonotary was to be revised, “if collateral or supplementary evidence is needed to show that the proceedings were null, a direct action should be instituted”. No reasons were given. It will readily be seen that, even if that decision were well founded, which we submit it was not, the present situation does not fall within its scope as the Respondent Colette Berget does not allege that the proceedings leading to the Judgment of Probate were null. No doubt the provisions of Articles 857 C.C. and 1430 C.P. were complied with. She alleges only that a subsequent will exists which is a total disposition of the deceased’s estate, and that the Probate granted previously must be removed to make way for it. 20

21C. The Judgment quoted above has, in any case, been overruled. Bruneau, J. in *Bourdeau v. Phoenix*, 61 S.C. 418, held that, to set aside the Judgment of the Prothonotary in a Tutelle matter the correct procedure was by Petition and not by direct action. Marchand J. in *Pagé v. Paré*, 43 Q.P.R. 122 and Pratte, J. in *Angers v. Angers*, 78 S.C. 288, both received Petitions in revision of Prothonotarys’ Judgments where considerable collateral and supplementary evidence was adduced. 30

21D. Appellant Dansereau also argues that, even if the Respondent Berget had followed the correct procedure in attacking the Probate of the 1935 Will by Petition, she had failed to comply with the provisions of Article 33 C.P., which rules that decisions of the Prothonotary made in the absence of the judge must be attacked within three days, which Article is extended, by R.P. 72, to apply to decisions of the Prothonotary in non-contentious matters. The answer is that the Respondent was not bound to proceed within this time limit. It was laid down in the cases of *Pagé v. Paré* and *Angers v. Angers*, cited above, that R.P. 72 was *ultra vires*, and that Article 33 C.P. did not limit the provisions of Article 1310 C.P. 40

22. Thus there was ample jurisdiction in the Superior Court to hear and decide the second part of the Respondent Colette Berget’s petition for probate dealing with the setting aside of the prior probate granted to the Appellant

Dansereau.

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23. It has been contended that probate proceedings are essentially of a “gracious” or “non-contentious” nature and are not of a judicial nature. They are dealt with in the Tenth Part of the Code of Civil Procedure of Quebec which is entitled “Non-contentious Proceedings”. This part of the Code deals with such matters as the authentication of public registers, inspection of notarial documents, family councils, appointments of tutors, curators and judicial advisers, sales of property belonging to persons under legal disability, voluntary partitions and licitations and various matters having to do with estates, including probate.

24. It is obvious and indeed it is a fact which is confirmed by daily experience in the courts that in almost any of the cases covered by the Tenth Part of the Code there may be and very frequently there is contestation. The proceedings which may have begun in a “gracious” manner often flare up into the most contentious litigation. Indeed, it may be asserted that the only difference between the proceedings under the Tenth Part of the Code and the ordinary proceedings dealt with by the other parts is that under Part Ten a case begins by a petition wherein the court is asked to exercise its jurisdiction, whereas ordinarily the proceedings under the other sections of the Code begin by a writ of summons or of attachment or some special writ such as *mandamus*, *quo warranto*, etc. in the name of the Sovereign. Proceedings under the parts other than Part Ten are properly labelled actions, whereas under Part Ten they are simply petitions to the court. However, the dissimilarity between the two types of proceedings ends there for all practical purposes.

25. In non-contentious proceedings dealt with in Part Ten, an appeal is provided in Article 1310 from a Prothonotary to a Judge of the court; a further appeal is available under Article 44 (1) of the Code to the Court of Appeal. This surely is an indication that it was anticipated that the so-called gracious proceedings could and would take a litigious turn and that there would be two parties in conflict in the case with rights of appeal granted to the unsuccessful party. Furthermore, several articles in Part Ten deal in terms with contentious matters. For instance, Article 1322 deals with the case where a notary refuses to issue copies of authentic documents in his possession; in such a case the proper remedy is not an action by way of writ of summons, but a petition under Article 1322 for what is known in French as a “*compulsoire*”. The conflict then takes place between the petitioner and the notary respondent. The proceeding is entirely one of compulsion and is almost necessarily contentious. Articles 1326 and 1328 confirm the truly contentious nature of the proceedings. Where tutors or curators have to be named to minors or interdicts, conflict very often arises among various claimants to the office and sometimes among the paternal and the maternal sides of the family, each side wishing the tutor or curator to be selected from its ranks to the exclusion of the other side. In relation to the affixing of seals on the assets of an estate, much litigation can develop; yet the proceedings are all taken under Part Ten of the Code. See for instance Article 1369. Dealing again with estates, the whole

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chapter concerning inventories is fraught with opportunities for litigation.

26. The reports of court judgments in the Province of Quebec are full of litigious issues having been debated and decided under Part Ten of the Code. In respect of "compulsoires", see *Desrosiers vs Larivière*, 14 R. de J. 204; *Singer vs MacKay*, 14 R. de J. 100; *Gauthier vs Filiatrault*, 49 S.C. 260; *Desjarlais vs Desrochers*, 32 R. de J. 134. In respect of tutorships, curatorships and the appointment of judicial advisers, see *Bourdeau vs Phoenix*, 61 S.C. 418; *Gravel vs Joyal*, 21 Q.P.R. 399; *McIntosh vs Parisien*, 42 Q.P.R. 46; *J.L. vs T.*, 45 Q.P.R. 285. A recent case involving the putting into possession of a vacant estate under the Tenth Part of the Code is *Procureur Général de la Province de Québec vs Imperial Tobacco Company of Canada Limited*, (1949) S.C. 94. 10

27. The Appellants are in the extraordinary and, it is submitted, untenable position of alleging want of jurisdiction to hear and decide a contestation which they themselves placed before the court. The Appellant Dame Colin was not even a party to the case at the beginning, but she intervened to challenge the validity of the will on its merits. The Appellant Dansereau was a party to the case from the beginning, but it was he who placed before the court the issue of the substantive validity of the will. The Appellants, on their own theory, could not have gone beyond the enquiry into the formal validity of the will, i.e. whether it was properly written, dated and signed by the testator's own hand and whether by its very terms it expressed a testamentary intention. They chose to do more than that and endeavoured to show by voluminous evidence that the testator, notwithstanding the expressions used in the letter, had other intentions in mind than the making of a will. They lost in both the Court of Queen's Bench and the Supreme Court on all their contentions and they now strive to improve their position by disclaiming the Superior Court's authority and competence to hear the very issues which they put before it. 20 30

28. Dealing now with the jurisdiction of the Court of Appeal, it is submitted that there is undoubted jurisdiction in that court to hear an appeal from the Superior Court in probate matters because of the very clear text of Article 44(1) of the Code. Of course, the jurisdiction of the Court of Appeal is the same as the Superior Court in probate matters. If the latter could enquire into the substantive questions put forward by the Appellants, then the Court of Queen's Bench could do so also in reviewing the judgment of the Superior Court. On the other hand, if the jurisdiction of the Superior Court did not extend beyond an enquiry into the formal validity of the will, then the Court of Queen's Bench's jurisdiction was likewise limited. But even in that event, the Court of Appeal could review the Superior Court judgment and order probate of the will in favour of the Respondent Berget and the cancellation of the probate of the prior will, on formal grounds; it could also declare that the Superior Court had no jurisdiction to hear the contestation on the merits. It is clear that a court with appellate jurisdiction over judgments of another court in any particular matter can quite properly hold that the court below exceeded its jurisdiction in any particular respect. This is quite clear 40

from Articles 170, 171 and 172 of the Code of Civil Procedure dealing with declinatory exceptions. An example of such a judgment of an appellate tribunal is found in *Pereault vs Grand Trunk Railway of Canada*, 14 K.B. 245. Record

29. There remains to be dealt with the matter of the jurisdiction of the Supreme Court. Under Sections 2 and 36 of the Supreme Court Act, that court had jurisdiction to hear appeals on “final” judgments in “judicial proceedings”. Now, the judgment of the Court of Queen’s Bench is not *res* *judicata* (under the authorities cited in paragraph 15 above) in the sense that the validity of the will both formal and substantive can be brought into issue again on an action taken by any interested party, even one who had been a party to the probate. But such an action would not be an action for probate; probate is not obtainable on an action, but only on a petition under Part Ten of the Code of Civil Procedure. The action would be either to set aside the probate of a prior will or to have a certain will declared valid or both. Granted that in an action of this kind the parties would be bound by the decision as it would constitute *res judicata* between them; but it would not obtain the probate of any will. A will declared valid on an action would not benefit on that proceeding alone from the publicity which is appurtenant to probated wills in the Probate Division of the Superior Court; no copies of the wills would be available from the Probate Division. It is, therefore, true to say that insofar as probate is concerned, the judgment of the Court of Queen’s Bench is a final judgment in a substantial sense even if it does not enjoy to the full extent the force of *res judicata*.

30. The majority of the Supreme Court did not decide the question of jurisdiction. They did not have to; they had from the present Appellants an enormous mass of evidence (much of which entirely inadmissible) and arguments were addressed to them where the will in favour of the Respondent Berget was challenged from all angles. The majority of the Court could come to a decision to confirm the judgment of the Court of Queen’s Bench without deciding the question of jurisdiction, and this they did.

31. The minority were also of opinion on the evidence that the document was a will, but preferred dismissing the appeal for want of jurisdiction. Their statement on the merits was therefore an *obiter dictum*. This they did in order to discourage further litigation between the parties and save them the time and expense involved, by giving their opinion, on the material submitted to them, that the document was a valid will. Thus they were doing justice. The only matter at stake as to whether the Supreme Court had jurisdiction or not is one of costs; i.e. whether the Respondent Berget should have all her Supreme Court costs or only the costs of a motion to dismiss for want of jurisdiction; hardly a subject worthy of the Judicial Committee’s consideration.

32. It is submitted that neither Appellant suffers any prejudice from the judgment of the Supreme Court now under appeal. The fact is that ten appellate judges have given their opinion, two of them *obiter*, that the document was

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a valid will. Such an impressive unanimity of opinion among the judges of the Court of Queen's Bench and the Supreme Court must be most useful to all parties in tending to avoid future litigation on the same record. It is obvious, of course, that if another record were constituted with fresh evidence, then the judgments of the Court of Queen's Bench and the Supreme Court and even of the Judicial Committee could be varied upon an action taken to set aside the probate of the will in favour of Respondent Colette Berget, inasmuch as a probate judgment is not *res judicata*.

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33. To sum up these jurisdictional questions, it is the Respondent Colette Berget's contention that there was jurisdiction in the Superior Court (and consequently in the Court of Queen's Bench) to order probate of the will in favour of the Respondent Colette Berget and to set aside the probate in favour of the Appellant J. Lucien Dansereau whether one considers that the Superior Court ought to have limited itself to an enquiry into the formal validity of the document or that it could enter into the merits of the case as the Appellants, by their contestation and intervention, invited it to do. In the former alternative, the motives of the judgment of the Court of Queen's Bench would have been different, but the result would have been the same. The Court of Queen's Bench, under such alternative, could have avoided a holding that the will was valid on the merits and have ordered its probate and the cancellation of the prior probate merely on formal grounds. At the same time, the Court of Queen's Bench, in the same alternative, would have declared the Superior Court without jurisdiction to hear the substantive issues at stake. If the Court of Queen's Bench made a mistake on the extent of their jurisdiction, it was a useful one as it gave the parties the benefit of their opinion as to the substantive validity of the will on the record as constituted.

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34. The same considerations apply to the judgment of the Supreme Court. The entire matter resolves itself to one of costs in that court.

35. Now to enter upon a discussion of the merits of the case.

The letter (P-1-a) is a holograph will. Holograph wills originated in Roman Law and remained, in France, a valid form of willing in the *pays coutumiers*. They were permitted in the *Coutume de Paris* whence they were adopted into the law of Lower Canada (cf. Code Michaud, 1926, Article 126).

40

36. In France the Ordonnance of 1735 permitted the continued use of the holograph will in the *pays coutumiers* while forbidding it in the remainder of the Kingdom. Article 3 of this Ordonnance, however, specifically prohibited the making of wills in letter form which had always been permitted in the jurisdictions where holograph wills were valid. This prohibition was not repeated in the Code Napoleon. While it is true that on the promulgation of the Code Napoleon, Bigot-Preameneu, the "orateur du gouvernement" stated in his "exposé des motifs", that "les dispositions faites . . . par lettre missive ne sont pas admises" (Fenet, Vol. 12, p. 553), this declaration has always been discounted by the text writers. Baudry-Lacantinerie says, referring to

the above statement, “Elles ne peuvent suffire à perpétuer, sous l’empire du Code Civil, une restriction ancienne que ne reproduit aucun texte”.

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37. It is clear from the foregoing that it has always been permissible both in Lower Canada and in France to make a holograph will in the form of a letter, except, in the case of France, for a relatively short period before the promulgation of the Code Napoleon.

10

38. French doctrine and jurisprudence may accordingly be consulted for guidance in the interpretation of holograph wills, and it is upon that source that we shall principally rely, since there are very few decisions of the Courts of the Province of Quebec having a direct bearing on the points in issue in the present case. There is, however, one factor which must be borne in mind in this connection. The codifiers, while incorporating in the Quebec Civil Code the rules of wills derived from both France and England, nevertheless set as their objective the creation of a unified testamentary system which would be *Canadian*; there must exist, accordingly, certain underlying differences in the approach which is taken to the question in general by the Courts of France and of this Province.

20

39. This factor is thoroughly considered by Rinfret J. (as he then was) in the case of *Gendron v. Duranleau*, 1942 S.C.R. 321. At page 326 he says:

“Il convient de ne pas oublier que la base de la loi testamentaire dans le Québec est la liberté de tester ‘sans reserve, restriction ni limitation’ (article 831 C.C.) qui n’existe pas sous l’empire de la loi française.”

30

He points out that, in France, to make a will is considered to be a derogation from the legal order, and the French authors are therefore inclined to suggest that the Courts “doivent se montrer beaucoup plus exigeants sur l’accomplissement des formalités”. He goes on to indicate various articles of the Quebec Civil Code which have softened the rigidity of the Code Napoleon in respect of the formality of wills, notably Articles 839, 846 and 855 C.C. He concludes that, “on ne saurait donc strictement appliquer la jurisprudence et la doctrine telles qu’on les trouve en France”.

40 40. In support of the foregoing theory the present Chief justice cites the following passages from the Codifiers’ Report, Vol. 2, p. 171:—

“La forme des testaments traitée dans le section 2 offre une grande complication à cause de la co-existence des formes reconnues et admises dans l’un et l’autre droit, savoir celui de la France et celui de l’Angleterre. Les commissaires se flattent d’avoir au moyen d’amendements peu nombreux, rapproché ces éléments et ces formes de manière à présenter sur la matière un droit proprement canadien, qui ne s’éloigne pas essentiellement de l’une ou l’autre de ses origines.”

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And at page 173:—

“Les changements portent surtout sur la manière dont un testament doit être déclaré et reconnu par un testateur. Avec la latitude donnée par les formes anglaises, il eut été contradictoire de s'en tenir à la rigidité de la forme sacramentelle de *dicte et nomme*, telles qu'appliquées et interprétées . . . ces remarques rendent compte du but et de l'esprit dans lequel toute la section a été rédigée.” 10

In the same case, *Francoeur J.*, in the Court of King's Bench, (71 K.B. at 254) said:

“Des divergences profondes subsistent. Un fait certain, c'est que nos codificateurs, reconnaissant le principe de la liberté absolue de tester, ont apporté des tempéraments légitimes aux rigueurs de l'ancien droit.”

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41. Article 850 of the Quebec Civil Code governs the form in which holograph wills must be made, and reads as follows:

“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 same manner as other persons who know how to write.”

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The first paragraph of the above Article is identical with Article 970 C.N., with the exception that the latter makes the further requirement that the will be dated by the testator.

42. The writers are agreed that no particular form is required for a holograph will whether it be contained in a letter or otherwise.

*Mignault*, Vol. 4 at p. 268 says:

40

“Quand le testament est fait suivant une forme légale, le testateur n'est pas astreint à l'usage de termes sacramentels, il suffit que les termes qu'il emploie soient propres à exprimer sa volonté, et on interprète ces termes suivant leur signification ordinaire, en donnant à chaque disposition le sens qui résulte de l'acte entier;”

*Planiol et Ripert*, Vol. 5, No. 532:

“D'après l'article 970, trois formalités concomitantes à la

confection du testament sont indispensables: 1<sup>o</sup> rédaction entière par le testateur lui-même; 2<sup>o</sup> l'indication de la date; 3 la signature du testateur. Toute autre formalité est inutile." Record

See also in this connection Baudry-Lacantinerie, Vol. 11, No. 1837, to the same effect.

10 43. It was urged by the Appellants that to operate as a will a document must contain some of the words or expressions generally associated with wills, such as "I give and bequeath", "My Last Will and Testament", "I institute so and so", etc. *Mignault*, Vol. 4, at p. 270 goes on to say:

"La jurisprudence française offre de nombreuses applications de ces principes. Ainsi on a jugé que les mots *je donne* ou *je lègue* ne sont nullement nécessaires, une disposition sous forme d'une charge imposée au légataire universel ou a titre universel, ou en termes précatifs lorsque la volonté de disposer est constante, vaut comme disposition testamentaire."

20

The Judges of the Court of Queen's Bench found unanimously that the Will in question was valid as to form. Mr. Justice Pratte summed the question up as follows:

p. 341

"Certes, Berthiaume eut bien pu se contenter d'écrire: 'Je te lègue mes biens'. Mais comme la disposition testamentaire n'est assujettie à aucune forme sacramentelle, il était libre d'employer un langage moins technique."

30

It will be seen, moreover, in the cases referred to below that the principle that no particular formalities and no particular words are required in a holograph will has been universally accepted both in Quebec and in France.

44. In the light of the foregoing principles, it is submitted that it is apparent that the letter (P-1-a) is valid in form as a holograph will. It is entirely written in the hand of the deceased (see the evidence of Dr. Rosario Fontaine and Mr. Charles Hazen) and signed by him with his usual signature. It is unquestionably addressed to Miss Berget. It makes a total disposition of the deceased's assets. It is clearly made in contemplation of death. It contains none of the so-called sacramental words but such words are unnecessary if the intention is otherwise sufficiently shown.

p. 132 to 154

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45. The letter (P-1-a) contains all of the formal requisites of a holograph will. There remains to consider its substance in order to determine whether it expresses the necessary testamentary intention.

46. For convenience in reference, its text is again reproduced at this point:

"

21 aout, 1946

Record

Ma bien chère Colette,

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

Je suis content d'apprendre que tu passes un temps plaisant 10  
au cours de tes vacances et te dis à bientôt.

Ton oncle affectionné  
(signé) Eug. Berthiaume."

47. With respect to the first sentence of the letter, the Appellants appear to argue that because he could not see to the completion of his English-form Will (which all parties agree was the "testament" referred to), Berthiaume did not intend to give to his letter the effect of a will. Miss Berget's contention is the exact opposite. The testator expressly states that he cannot see to the completion of his English-form will, but "de toutes façons" he wants her to know that if he dies all that he has will belong to her. Is there not in this language clear evidence of Berthiaume's intention to give her, instead of the English-form Will which he was too ill to execute, a holograph document which would have the same effect? This conclusion appears to the undersigned to be irresistible. 20

48. The Appellants urge that the utmost significance should be attached to the fact that the foregoing testamentary disposition is couched in the conditional mode; according to the Appellants, French grammar and syntax call for the use of that mode when the affirmation is subject to a condition. The Appellants therefore argue that Berthiaume must have intended some conditions to apply to his bequest or must have intended merely to say that he would have liked to appoint her as his legatee but that he was not doing so for certain unexpressed reasons which must have been known to her. 30

49. Such an interpretation cannot be justified. The conditional mode is used in French for many purposes as will be seen presently. It must also be pointed out that conditional propositions are often expressed in the indicative and not the conditional mode. For instance, 40

"S'il vient, je pars."

Here clearly is a condition and yet the conditional mode is not employed.

50. On the other hand, while the conditional mode is often used in conditional propositions such as "S'il venait, je *partirais*", it is also used with propriety in many other senses. For instance, the conditional mode often serves as a future in respect of a past tense, without any condition being implied. Thus:

“Je savais qu’il viendrait”

Record

51. The conditional mode is also used to show surprise or indignation. Thus: “Quoi, je *trahirais* ma partie?”. Again no condition is implied.

The conditional mode is also used to soften the expression of a positive statement, usually for reasons of politeness. Thus: “Je voudrais vous voir” (i.e. je veux vous voir, but expressed in more polite terms); “*Pourriez-vous m’indiquer le chemin de la Gare Centrale?*” (i.e. Pouvez-vous m’indiquer etc.). No condition is implied at all.

52. The Grammaire de l’Académie at page 176 states the case as follows:

“Il (le conditionnel) sert aussi à adoucir une affirmation: Je voudrais bien vous parler. Il aurait voulu vous rencontrer . . .”

53. Brochet & Dussouchet, Nouveau Cours de Grammaire Française, 20 Cour Supérieure, 10e edition, Paris, 1901, p. 371, No. 819.

“819. Le conditionnel suppose une condition exprimée ou sous-entendue. Ex: Je serais heureux si vous suiviez mes conseils. —Je serais heureux de vous obliger (sous-entendu: si je pouvais).

“Le conditionnel marque parfois une simple supposition. Ex: Oseriez-vous le blamer? Je *m’arrêterais* à de vaines menaces! (Racine).

30 “Il s’emploie encore pour adoucir l’affirmation: Je *désirerais* être entendu; je ne *saurais* m’en plaindre; je *voudrais* inspirer l’amour de la retraite (La Fontaine)”

It is submitted on the basis of the above observations and authorities that the phrase “J’aimerais à te dire” in the letter in question involves no condition at all but is merely a softer way of saying: “J’aime à te dire”, meaning: “Il me fait plaisir de te dire.”

54. The English language furnishes an exact parallel of this form of speech. 40 Berthiaume could have said in English: “I would like to tell you that if anything should happen to me all my property belongs to you”. The phrase “I would like” would mean merely “I like” or, in other words, “it pleases me to tell you” or “it gives me pleasure to tell you . . .”

55. The Appellants also appear to contend that because the testator used the words “J’aimerais à te dire”, he did not say what he would have liked to say but merely said that he would have liked to say it. This, it is submitted, is mere quibbling. If one says: “I would like to tell you a story but for certain reasons I can’t”, that is one thing, but if one says: “I would like to tell you that I am having difficulty in my new job”, that is something else.

Record

In the first case, the thing which one would like to tell remains untold; in the second it is told and the phrase "I would like to tell" (or in French "J'aimerais à te dire") means merely "I like to tell" or in other words "it gives me pleasure to tell".

p. 340  
p. 374

56. The notes of Mr. Justice Pratte, in this connection, with which the remainder of the Court of King's Bench concurred are particularly interesting. See also the notes of Mr. Justice Taschereau in the Supreme Court. 10

57. The Appellants' contention that the expression "S'il m'arrivait quelque chose" did not necessarily refer to Berthiaume's possible death, is completely untenable and was unanimously rejected by the Courts below. This expression is a well known euphemism in many languages to express the stark concept of death. The exact parallel exists in English: "If anything should happen to me". And in the context of the letter, that meaning is inescapable. The letter refers to a will which Berthiaume did not have time to execute. He then goes on to say that "s'il m'arrivait quelque chose, tout ce qui m'appartient est à toi". What else but death could be meant? 20

58. It is of some importance to note that after his use of the conditional (j'aimerais) and the indicative imperfect with the conditional preposition (s'il m'arrivait), Berthiaume suddenly uses the most peremptory of all modes and tenses: the present indicative: "Tout ce qui m'appartient est à toi".

59. It is clear from the foregoing that examination of the letter (P-1-a) itself demonstrates that it is valid in form as a holograph will and that it contains an unmistakable testamentary intention. The question then is this: Can the Appellants go beyond the document in question, as they have attempted to do, and were permitted to do by the trial judge, in an effort to prove that that document is not what it appears on its face to be? 30

60. It is submitted that this question must be answered in the negative, in accordance with a fundamental principle of both English and French law regarding the interpretation of wills, and which is expressed by *Baudry-Lacantinerie*, Vol. 11, No. 1845, ter, as follows:—

"Vainement allèguerait-on que ces indications et ces désignations ne correspondent point à la volonté du testateur, vainement offrirait-on de le prouver, soit par des documents ou des actes étrangers au testament." 40

61. *Pothier*, *Traité des Donations Testamentaires*, ch. vii No. 357, cites the following rule:—

"non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testatorem."

62. This rule finds a more general expression in art. 1234 of the Quebec Civil Code, which reads as follows:

“Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.” Record

If the letter is, on its face, a will, then it is a “valid written instrument”, and no verbal evidence whatsoever should be admitted tending, or designed, to prove that it is something else. We submit that the bearing of this article upon the present case is of importance and that its proper application in the trial court would have eliminated more than three quarters of the testimony given.

63. Although the foregoing principle is applied more rigidly in the civil than in the common law jurisdictions, the following quotations show the similarity in the approach to the question of both the Cour de Cassation and the Privy Council:—

*Christen v. Saint-Victor*, Sirey 1929. 1. 379

20 “Si l’interprétation d’un testament appartient aux juges du fait, leur pouvoir ne va pas jusqu’à leur permettre de refaire le testament, et, sous prétexte de se conformer à la volonté du testateur, de substituer à une disposition claire et précise une autre disposition produisant des effets légaux différents.”

64. *Auger v. Beaudry*, P.C. 48 D.L.R. 356 at p. 359 *Lord Buckmaster*:

“It is now recognized that the only safe method of determining what was the real intention of a testator is to give a fair and literal meaning to the actual language of the will.”

30 65. Only when the Court finds it impossible to decide from the terms of the document itself whether or not they demonstrate a testamentary intention can it seek for indications from evidence of extraneous facts. (Recueil des Sommaires 1924 No. 2315, *ibid.* 1925 No. 3243 and authorities cited therein).

66. We submit that a reading of the letter (P-1-a) makes it manifest that the *de cujus* intended to make the young lady his heir, and that no evidence can be received to the contrary.

40 67. Even assuming, however, that the words are not clear and that the Court finds itself in doubt, after studying the terms of the document in question, as to whether or not the requisite intention was therein expressed, is it entitled, by reason only of such doubt, to find that the document fails to qualify as a will?

68. The learned trial judge, accepting and reproducing the argument advanced by the Appellants, disqualified the document on this ground, holding that, in determining whether a will in letter form contained the necessary intention, a different, and more severe, standard ought to be adopted than when dealing with a holograph will in the “conventional” form.

Record

69. We respectfully submit that the interpretation of the terms of a will in letter form must follow the same rules as the interpretation of the terms of any other testamentary writing. It may be that in France, where wills in letter form were specifically prohibited for a great part of the 18th Century, and their validity somewhat doubtful, due to the silence of the Code Napoleon, for some years after its promulgation, the courts might, in the early part of the 19th Century have been hesitant to believe that a letter could contain a testamentary intention, on the ground that the *de cujus* would not have thought it possible to make a will in that form. In Lower Canada, however, the "lettre missive" has provided a valid means of willing since the establishment of the first courts, and no reason exists for any discrimination against it. 10

p. 282

70. It is to be noted, in any case, that the only post-code French author who commits himself to the proposition that letter-form wills are to be viewed with distrust is Demolombe, who is fully quoted in the Judgment of the trial judge. Baudry-Lacantinerie, Planiol and Ripert, Colin and Capitant, and Aubry and Rau merely point out that wills in letter form are no longer prohibited in France, and are valid provided that they do not express a mere promise, or declaration of future intention. 20

71. It is to be borne in mind, too, that with the great development of the postal services many important matters are now conducted by letter which would never have been entrusted to the mails in the time of Demolombe; he would have thought it equally rash and improbable, no doubt, for a contract to have been completed by post.

72. We conclude, then, that whatever the form of the document in question, the Court must approach it with an open mind. 30

73. For the Court to find that the document contains the necessary intention, it need not be able to point to any textual expressions to that effect. As *Charpentier and du Saint* say, at Vol. 35 p. 658, No. 332:—

"L'intention du testateur de faire une disposition du dernière volonté n'a même pas besoin d'être formulée textuellement."

74. Moreover, there must always be borne in mind Article 1014 of the Quebec Civil Code. That Article, which reproduces Article 1157 of the Code Napoleon, reads as follows:— 40

"When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none."

It is an expression of the maxim "*omnia praesumuntur rite esse acta*". The Supreme Court, in the case of *Métivier v. Parent*, 1933, S.C.R. 495, held that all of the rules of interpretation of contracts, and Article 1014 C.C. in particular, applied to the interpretation of wills. At page 498, *Rinfret J.* (as he then was) says:

“Le code civil édicte certaines règles d’interprétation des contrats (art. 1013 et suiv.). Les règles générales posées dans ces articles s’appliquent, par analogie, à l’interprétation des testaments, sauf à tenir compte de la différence qui sépare le contrat du testament.” Record

75. Article 1014 C.C. comes into play not only when a clause of a will is capable of two meanings, but also when it is a question of whether the necessary intention to will existed or not. Sirey, in his note to the case of *Leclerc v. Ray*, 1911, 2. 81, says, “Le doute doit être interprété en faveur du légataire dès qu’il s’agit de l’existence même du legs.”

76. In the case of *Arrighi v. Arrighi*, Sirey, 1854. 2 236, it was held:—

20 “Considérant que si les testaments ne sont pas entourés aujourd’hui de la même faveur que sous le droit romain, suivant lequel leur confection appartenait . . . au droit public . . . il n’en faut pas conclure que les formalités des testaments publics aient été dictées par un esprit d’hostilité contre le droit de tester; qu’elles ont pour leur but, au contraire, d’assurer la libre manifestation des dernières volontés et de prévenir les fraudes qui pourraient être commises dans la rédaction de ces actes; Considerant que la Cour de Cassation, si sévère d’abord pour tout ce qui rattache à l’observation de formalités testamentaires, est entrée plus tard dans une voie plus rationnelle et plus juste, en décidant qu’art. 1157 C.N. devait être appliqué en matière de testaments.”

30 77. This application of Article 1157 C.N. is approved by all of the French writers on the subject who appear to be in accord with the following principle, expressed by the Court in the case of *Burg. v. Keller*, Sirey 1870. 2, 317:

“Toutes les fois qu’une volonté libérale honnête se déclare avec aussi peu d’ambiguïté que dans l’espèce les magistrats doivent chercher les moyens légaux de la faire valoir.”

40 78. *Laurent’s* views on the attitude to be taken toward the question as to whether or not a testamentary intention exists are very pertinent to the present case. At page 179 of Vol. 13, he considers a case decided at Grenoble on July 18th 1838, where, in a document written and signed by himself, a son declared, “qu’il promet donner tout ce qu’il possède encore au monde à sa mère, en foi de quoi il signe”. It was held that he had not made a will.

*Laurent* remarks:—

“La cour ne s’est-elle pas trop attachée à la lettre de l’acte en décidant qu’il ne contenait qu’une *promesse de donner*? Entre-vifs, une promesse de donner serait translatrice de propriété (art. 1138), le mot *promesse* ne signifie donc pas, en droit, une simple intention,

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un projet. Et quand le disposant ajoute qu'il promet de donner *tout ce qu'il a en ce monde*, cela ne prouve-t-il pas qu'il entend disposer pour le temps où il ne sera plus? Cette promesse, dans sa pensée, était un acte sérieux, car il déclare qu'il le signe pour faire foi de ses intentions. Fait-on une déclaration pareille pour ne rien dire? Car c'est à cela qu'aboutit la décision de la cour de Grenoble."

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79. *Laurent* in the following pages attacks the traditional "mechanical" doctrine of interpretation of holograph wills, as exemplified in Merlin's *Repertoire*. After reviewing a number of Merlin's observations, he paraphrases the latter's principle of interpretation as follows:—

"Point de testament sans *expressions* qui indiquent *manifestement* l'intention de disposer à cause de mort."

Again at page 183, *Laurent* summarizes the reluctant and suspicious attitude advocated by Merlin:—

20

"La loi présume alors qu'on a rédigé un acte défectueux pour se dérober à des suggestions importunes en paraissant y céder; elle présume qu'en faisant semblant de disposer, on n'a réellement voulu faire aucune disposition."

80. The preceding satirical paraphrases are an accurate description of the approach made to the present case by the Appellants and the trial Judge.

81. On Page 184, *Laurent* cites a decision at Cannes on July 11th 1820, 30 where the testator died a few days after executing a document containing the words, "Je donne à . . . tout ce que je possède", wherein it was held that it was not a will, since the wording indicated an intention of making a gift. *Laurent* comments as follows:

"C'est là un exemple frappant de l'interprétation mécanique que nous avons combattue plus d'une fois et qui aboutit à faire dire au législateur ou à l'auteur d'un acte tout le contraire de ce qu'ils veulent dire. Est-ce qu'il est dans l'habitude des hommes de se dépouiller actuellement, irrévocablement de tous leurs biens? 40 Quand donc quelqu'un dit qu'il donne tout ce qu'il possède, doit-on admettre facilement qu'il entend faire une donation entre-vifs? Il dispose dans la forme du testament olographe; n'est-il pas naturel de supposer qu'il a voulu tester? Et pourquoi transformer en une mauvaise plaisanterie un acte que l'on fait à la veille de sa mort?"

He points out that the Cour de Cassation did not deal with the decision *au fond*.

82. *Girault*, "Les Particularités du Testament Olographe", at p. 22, ex-

presses the same impatience with formalistic interpretation of holograph wills, saying, "La loi offre au testateur un moyen simple de tester; ce moyen ne doit pas être un traquenard." Record

Laurent stresses the fact that the attitude taken by Merlin has not been adopted by the Courts of France in later years, which have as a rule followed the more reasonable principles which Laurent sets forth.

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83. In view of the foregoing, it is clear that the Court should, if it finds itself in doubt as to whether a testamentary intention is expressed in the text of a document, apply the benefit of such doubt to the end that the document be given effect as a will. In the present case, the document is sufficiently clear that this rule need not come into play. If however, a court were to feel any hesitancy about declaring that the intention existed, the rules of interpretation mentioned above should be sufficient to dispel it.

The trial judge took for granted that there could be such thing as a "provisional" will, to avail in case the testator should die before completing the more formal document he had in mind. This finding received no support in the Court of King's Bench or in the Supreme Court.

Its incorrectness is, we respectfully submit, fully demonstrated by the decision in *Consorts Horup*, Sirey 1945. 1. 9. In that case the testatrix left the following holograph statement:—

30

"N'ayant jusqu'à ce jour pas encore fait mon testament, j'exprime sur la présente mes volontés en attendant d'écrire bientôt mon testament en bonne forme et dans les meme idées, car mes volontés sont déjà arrêtées et très nettes. Je ne veux pas que l'on cherche ma famille. La fortune que je laisse, je la tiens de mon mari, qui n'avait pas l'intention de laisser quoi que ce soit à sa famille. Moi j'ai la ferme volonté de ne rien laisser à la mienne non plus."

This document was held to be a valid will. Its similarity to the document here in question is striking, although it is not so reasonable (it left the estate vacant) or so clearly drawn as the late Mr. Berthiaume's letter. This decision makes it clear that, even though the deceased may be contemplating a formal will, *there is nothing to prevent his executing a document to avail in the interim*, and we submit that that is precisely what was done by the *de cujus* in the present case.

84. We would refer also, in this connection, to the following cases:

*Besancon*, 15 July 1908, (Daloz 1910. 2. 313)

The deceased left a holograph will with the word "projet" written across its corner. The Court held it to be valid, and remarked:

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“ . . . présomption . . . que Guillaume a écrit ce mot ‘projet’ parce qu’il songeait à transcrire sur timbre, comme il l’avait fait en 1902, un acte qu’il concevait comme imparfait en la forme à cause, notamment, des ratures qu’il contenait.”

*Bourges, 3 July 1905, (Sirey 1906. 2. 71).*

At the head of a holograph document there were written the words, “à 10 recopier”. The Court held the will valid:

“Considerant que le *de cujus* a pu avoir la pensée de lui donner une forme plus solennelle, comme indique le mot ‘à recopier’, mais que cette intention n’est pas l’indice d’une modification des résolutions manifestées.”

85. The view taken by the French Courts of the situation where a letter or other holograph document, satisfactory as to form, refers to an imperfect, but clearly testamentary, disposition is enlightening. In the case of *Dufour v. Dufour*, (Daloz 1927. 1. 48), the deceased made a holograph will but failed to date it (a formality required by Article 970 C.N. but not by 850 C.C.). He wrote a letter to the proposed heir some months later, in which he expressed substantially the same intention as that set forth in the inoperative will to which he referred. It was held that it appeared clearly from the letter what his intention was, and that taken together with the inoperative will, the letter was a valid testamentary disposition. 20

86. In *Pastore v. Goucet*, (Daloz 1934. 460), a holograph will was sent by the deceased to his proposed heir enclosed in a letter. The date of the will was doubtful. The letter, which was dated, said in part, “Je te lègue tout ce que je possède”. It was held that the letter “a une valeur testamentaire incontestable”, and that while it confirmed and completed the holograph will it was in effect a will itself. 30

87. In the case of *Simonard v. de Beaufort*, (Daloz, 1865. 2. 49), where a note attached to a will gave instructions to cover certain eventualities, the note was held to be a valid will. The commentator said, “que c’est par les dispositions combinées de l’écrit olographe produit et du testament avec lequel il se confondait et ne faisant qu’un dans la pensée du testateur, que la succession doit être régie.” This decision was followed in *Milleret v. Lejeune* (Daloz, 1893. 2. 496). 40

88. There are many decisions of the French Courts to the effect that the lack of signature or date on a holograph will may be remedied by the notation on the envelope containing it, or on an annexed document, (*Lacombe v. Martin*, Sirey, 1943. 1. 80, and decisions referred to), indicating the willingness of the French Courts to give effect to testamentary intention by reading them in conjunction with ancillary documents.

89. In *Dumas v. Ville de Vannes*, (Daloz 1900. 2. 557), the deceased left an envelope containing a holograph will and a subsequent letter listing the legacies contained in the will, adding a new one of 10,000 fr. in favour of the Town of Vannes, and showing a total. This letter was held to be a will, the Court saying that the existence of the more formal will “ne lui enlève, d’ailleurs, pas le caractère testamentaire qui appartient à toute disposition de dernières volontés réunissant les conditions prescrites par l’article 970 du Code Civil.” Record

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90. The following cases are cited for their value as an indication of the line followed by French jurisprudence in cases similar to the present:

*Thierry v. Forest*, Gazette du Palais, 1909. 2. 339.

The deceased wrote a letter to a friend enclosing funds and instructed him that these funds were to remain in his hands and upon the death of the deceased one-half of them were to be given to a third party and one-half kept by him. The deceased also made a will appointing a universal legatee. The Court held that a letter must be considered to be a holograph will, “s’il apparaît qu’il a voulu disposer et a effectivement disposé par cet acte même,” and gave effect to the letter in question.

20

*Charpillon v. Moiro*t, Sirey, 1873. 2. 174.

The deceased wrote to a friend of her husband’s as follows:—

30

“Mon Cher Arsène, connaissant les sentiments de mon mari à votre égard, je les approuve, etc . . . je vous donne et lègue ce que je possède . . . pour en jouir après mon décès.”

The letter was held to be a valid will and the Court made the following statement:—

“Qu’il est parfaitement indifférent que la testatrice ait employé telle ou telle forme de langage pour exprimer sa volonté:— Qu’il suffit que cette volonté résulte clairement des termes de l’acte et que ces termes démontrent l’intention de disposer après soi.”

40 *Burg v. Keller*, Sirey, 1870. 2. 317

The deceased, who was in Mexico, wrote to a friend in France saying:

“Comme je suis un peu chargée d’argent je t’envoie ci-inclus 1000 francs, que tu garderas avec les autres, et dont tu seras propriétaire, si toutefois la destinée m’empêche de revoir la France et ta charmante famille.”

This letter was held, in the first instance, to be a valid will had it not been that it was only signed with the deceased’s first name, and the Court

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made the following statement:

“Toutes les fois qu’une volonté libérale honnête se déclare avec aussi peu d’ambiguïté que dans l’espèce les magistrats doivent chercher les moyens légaux de la faire valoir.”

The document was maintained as being sufficient to release the person to whom the letter was addressed from a debt owing to the Estate in the same amount. 10

*Savy v. Savy*, Dalloz, 1863. 2. 117

The deceased made an authentic will in favour of her nephew. At the suggestion of the Abbé Meunet she wrote to the latter saying that she had instructed her universal legatee to hand over to the Abbé 10,000 francs for certain purposes. The nephew denied that the letter to the Abbé was a will saying, firstly, that it was a mere “project” and, secondly, that it was a reference to an alleged agreement which was not proved. The Court held that the letter to the Abbé was itself a will. 20

*Callardeau v. Pineau*, Sirey, 1918-19. 2. 108.

The testator wrote to a Notary as follows:—

“Partant de Mauge ce soir, je ne vous dis pas où mais il est certain que personne ne me reverra plus. Je vous prie d’en avvertir mes parents et de partager le peu que je possède de la façon suivante . . .” 30

This document was signed and dated and was held to be a valid will, the Court noting that in such a case of doubt Article 1157 C.N. (our Article 1014 C.C.) was to be applied.

91. As mentioned above, there are but few decisions of the Courts of Quebec having a direct bearing on the points in issue in the present case.

92. A recent case which offers a useful review of the jurisprudence is that of *Larose v. Eidt*, 1945, S.C. 276, in which *Duranleau, J.* made the following statement of the law:— 40

“Notre jurisprudence, en cela conforme aux jurisprudences et doctrines anglaises et francaises, signale l’importance qu’il y a de respecter les dernières volontés d’un testateur et les tempéraments légitimes au rigorisme de la forme qu’il faut parfois apporter pour garantir le respect des intentions du *de cuius*.”

“Considérant qu’il incombe aux tribunaux d’interpréter libéralement les dispositions légales concernant la forme des testaments

en vue de respecter et de donner effet aux dernières volontés Record  
évidentes d'un testateur."

In that case the deceased had written out a document making dispositions of a testamentary nature, but had not signed it at the end. On the reverse side it bore, in his writing, a date, the word "will", and his name and occupation. It was held to be a valid holograph will.

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93. In the case of *Gendron v. Duranleau*, (71 K.B. 243), in which the Supreme Court's confirming judgment had been quoted earlier, judges of the Court of King's Bench made the following statements:—

*Hall, J.* at p. 248

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"This principle (that expressed by many French decisions that all efforts should be made to overcome technical obstacles in order to give effect to the testator's intentions) should have *even greater* force in the interpretation of our code."

*Walsh, J.* at p. 251, said:

"Since our law sought to get away from the more severe French law, why now exact, not only a declaration, but in effect something so nice and fine, so precise and emphatic that it will amount to an express declaration . . ."

94. In the case of *Corriveau v. Lord*, 70 S.C. 500, the deceased left a will  
30 whereby the Plaintiff inherited one-quarter of his estate and the Defendant three-quarters. Fairly convincing proof was adduced by the Plaintiff to the effect that the deceased had, immediately before his death, evaluated the amount which the Plaintiff would receive at \$1300, being roughly equal to certain contributions which she had made to the household. The Estate turned out to be not sufficiently large to give the Plaintiff that amount of money as her one-quarter share.

*Marchand, J.*, after pointing out that in order to uphold the Plaintiff he would have, in effect, to change the terms of the will so as to give the Plaintiff  
40 one half of the estate instead of one-quarter said:—

"Considérant que les tribunaux n'ont pas l'autorité de modifier les dispositions testamentaires; que leur seule autorité est de les interpréter, de les annuler dans les cas qui le commandent."

The following cases indicate the attitude taken toward such matters in common law jurisdictions where holograph wills are recognized.—

*Re Swords* (1929) 3 D.L.R. 564, was an application for probate contested by the abintestate heir. Three letters were sought to be proved as a

Record

holograph will. The pertinent portions of them were:

“1. You know Moose I have no one that needs the place and if I should happen to kick off, you would be the one to get it.”

“2. I would like to be buried at Athabasca after my burial expenses are paid I want you to have the rest of my land and personal property, except my watch which I want you to give your 10 oldest boy.”

“3. If anything happens that the operation is not successful I want you to have everything all my real estate and personal property after my debts are paid.”

The Alberta Supreme Court held this to be a valid will.

*Re Moir* (1942) 1 D.L.R. 338, was a contestation of probate in which the document in question was a list commencing “Grace Thompson gets 20 carving set . . . etc.” and continuing in the same terms, naming other persons and articles. In spite of the fact that there was no mention of impending death, no nomination of an executor nor any express indication that the document was to be considered a testamentary disposition, it was held to be a valid holograph will.

95. The document in *re Mitchell* (1924) 1 D.L.R. 1039, was a letter addressed to “Dear Jeannie” in which, *inter alia*, the writer complained of his health. On the reverse side he had written “keep all the things and the money 30 you can get and give Jimmy my watch and Archie anything he wants; get as much of my things as possible and may the Lord be good to you so hoping this will find you well I remain. Yours W.M. May God help me.” This was held to be a valid will.

96. A case which has provided considerable precedent in these matters is *Whyte v. Pollok*, 7 A.C. 400 (H.L.). The document here was headed “Notes of intended settlement by Walter Whyte of Bankhead”. *Lord Watson* stated in his judgment upholding the document as a will:—

“A mere ambiguity occurring in the descriptive title written 40 by the testator cannot qualify the terms nor destroy the validity of the document which it professes to describe when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify enquiry; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance.”

97. The following statement occurs in *Corpus Juris*, Vol. 68, p. 717:—

“As in the case of other wills, testamentary intention is necessary to the validity of the holographic will. No particular words are necessary to manifest the *animo testandi*; thus the paper need not refer to itself as a will. *Indeed, it has been held that a document may be good as a holographic will where expressing the testator's testamentary desire, notwithstanding he did not consider it a will.* Moreover, the fact that the holographic instrument concerns itself with matters other than the disposition of property will not nullify its effect as a will.” Record

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98. A leading American case is that of *re Button's Estate*, 209 CAL. 325. The document here was a seven hundred word letter, of which twenty-seven words were claimed to constitute a will. The word “will” occurred nowhere in the letter. The Supreme Court of California maintained the Probate of the document as a holographic will. In this case the maxim “*omnia prae-sumuntur rite esse acta*” was applied and reference was made to the case of *Lloyd v. Roberts*, 12 Moo. P.C. 158.

20

99. The doctrine by which reference may be made to extraneous evidence to discover the intention of the deceased is aptly expressed as follows by *Baudry-Lacantinerie*, Vol. 11, No. 1847:

“Si les juges appelés à interpréter une disposition testamentaire, doivent principalement et d'abord rechercher l'intention du testateur dans le testament, rien ne les empêche de compter et d'éclairer cette intention, lorsque les termes du testament la laissent douteuse, par des preuves recherchées et obtenues en dehors du testament”.

30

100. We shall now (while adhering to our contention that the clarity of the present document renders extraneous evidence inadmissible) consider the rules governing what is acceptable as evidence in the situation contemplated by *Baudry-Lacantinerie* above, and the manner in which such evidence may be made.

101. The object of the Court in the interpretation of a will is expressed by *Phipson* (8th Ed. p. 57) as follows:—

40

“With regard to the *limits* of interpretation, it is to be remembered that the function of the court is merely declaratory of what is *in* the document, not speculative as to what was probably intended to be there.”

In support of this statement, *Phipson* cites *River Wear Commissioners v. Adamson*, 1877, 2. A.C. 743, 764 and *Higgins v. Dowson*, 1902, A.C. 1, 6. He goes on to quote the decision of the House of Lords in *Gibson v. Minet*, 1 H. Bl. 615, as follows:—

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“Moreover, the meaning imputed must be one which the words are reasonably adequate to convey; all latitude of construction shall submit to this restriction, that the *words may bear the sense* which by construction is put upon them. If we step beyond this line, we no longer construe men’s deeds, but make deeds for them.”

102. A concise statement of the meaning to be sought by the Court in the 10 questioned document is set out thus by *Phipson*:

“Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.”

No matter what evidence the Court may consider, the document remains the same. As stated in *Re Bywater*, 18 Ch. D. 17, 22, words must be expunged or supplied *by construction alone*, and not by evidence.

*Duff, J.*, in *Carter et al. v. Goldstein*, 63 S.C.R. 207, said at p. 216:— 20

“It is trite law . . . that speculation or conjecture as to the motives that may have influenced the testator in giving to his bequests the form in which we find them cannot warrant a refusal to give effect to the fair and literal meaning of the actual language he used.”

103. When evidence is admissible in this connection, there are two categories which may be considered: (i) declarations of intention by the testator prior to his decease; and (ii) collateral circumstances of a nature to demonstrate 30 such intention.

104. To both of these categories the rule excluding hearsay evidence must be applied, and the evidence adduced must be relevant to the issues.

105. Evidence of declarations of intention by the testator is *inadmissible* if the wording of the document is clear since, in that case, the best evidence is in such wording itself; evidence of the declaration is hearsay. However, where the Court finds that such ambiguity exists as to justify going outside the document, evidence of declarations by the testator is admissible. (*Phipson*, 40 *Evidence*, 8th Ed., p. 319, *Roscoe on Evidence*, p. 32). In such a case the evidence is deemed not to be hearsay, but *original* evidence; as such, it makes proof only that the declaration was made, not that the declaration was true.

106. To be eligible, in the case of ambiguity, a declaration of intention must be in accompaniment of some act that is relevant, and it must be contemporaneous with it. *Roscoe*, at p. 56, says:—

“The admissibility of the declaration depends not *merely* on its accompanying an act, but on the light which it throws upon

an act which is, *in itself*, relevant and admissible evidence.”

Record

*Phipson*, at p. 72, says:—

10 “How far bare declarations of intention, made on occasions prior or subsequent to, but unconnected with, an act, are admissible either (a) to prove the intention or (b) to explain the act, seems doubtful . . . the general rule has hitherto been to exclude such declarations for both purposes, except when tendered against a party as admissions.”

107. We have before us evidence made by the Appellant Dansereau of only two declarations by the deceased, and neither of them, we submit, is either relevant or indicative of any particular intention. However, we shall now consider them from the point of view of the rule set forth above.

108. The two declarations of which evidence was made on behalf of the Appellant were (a) the statements made by the deceased to Dansereau after Colette Berget had testified in the separation case and (b) the statements made by the deceased to the Appellant and to the Hon. Lucien Gendron that he hoped or expected that she would testify on his behalf.

p. 222

p. 259

109. Neither of these declarations purport to be contemporaneous with the execution of the Will P-1-a. The first was contemporaneous with no act at all, relevant or otherwise, and cannot, therefore, be interpretative of any act. The second was, perhaps, supposed to have been contemporaneous with the alleged efforts of the deceased to obtain his niece's support, but we have no evidence to show whether he was then making such efforts, had already made them successfully or never got around to making them at all before he died.

110. There is, however, one clear and admissible declaration of intention by the testator in the record, and that is the draft English-form Will (I-48). That is was contemporaneous with the letter (P-1-a) is established by the reference made to it therein, and its relevancy could not be more immediate. It contains a categorical statement of intention. Written declarations made before the execution of a will have probative force *when the terms of the debated will conform* to such declarations. (*Gould v. Lakes*, 6 P.D. 1, *Re Hutchison*, 18 T.L.R. 240, *Phipson*, 8th Ed. p. 322). There is no evidence in the record other than that of Colette Berget as to how and when the draft Will (I-48) was made. Why it was made appears from its text. It is admitted by the Appellants that the deceased made it. Although the trial Judge accepted the Appellants' allegations to the effect that this document was drawn by the deceased for certain dishonest reasons, these allegations were not borne out by the evidence and the draft Will (I-48) must be taken as an admissible, *and conclusive*, declaration or intention.

p. 681

111. We shall now pass to a consideration of the evidence of “collateral facts” to which the Court may refer in interpreting a will.

Record

112. The following statements from *Taylor* on Evidence, 9th Ed., express a long established principle as to how strictly the Court should limit itself in considering such evidence:—

No. 588: “In all these cases the principal points for consideration are, whether the circumstances and declarations offered in proof were so connected with the *main fact* under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one *continuous transaction*”.

No. 316: “The rule confining evidence to the points in issue not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving even the issues themselves. Thus, it excludes all evidence of collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute. The reason is, that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead . . . the judge . . . shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference.”

Although the principle expressed in the foregoing statements is clear, its application is difficult in some cases. No such difficulty exists, however, in respect of the evidence made in the present case.

113. *Mignault*, Vol. 4, p. 271, referring to *De Salaberry v. Faribault*, 11 R.L. 621, makes the following statement of what collateral facts may be considered in a case of the present nature.

“ . . . que cependant il est 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 a celle du legs, et les usages de l'endroit où le testateur demeurait.”

114. The only evidence made on behalf of the Respondent Colette Berget apart from proof relating to the letter (P-1-a) itself, was that which falls within the limits set by *Mignault*, namely, that the Respondent was the niece of the *de cujus*, and had occupied the position of a daughter in his household since childhood; that he had no children of his own; and that he had made certain other testamentary dispositions, all of which had been revoked when he wrote the letter in question.

115. On behalf of the Appellants, on the other hand, a great deal of evidence was made which was entirely inadmissible.

p. 210 to 244

116. At the trial, Counsel for Respondent Colette Berget objected strenu-

ously to all the evidence of collateral facts adduced by the present Appellant Dansereau. Record

The learned trial Judge, while admitting from time to time that the evidence sought to be made seemed to be irrelevant, accepted the assurance of Counsel for Appellant Dansereau that this evidence would be linked up later with the issues, and, in all but a few very minor instances, admitted  
10 whatever evidence was offered under reserve of the objections. No mention of the reserved objections appeared in his Judgment appealed from. As Mr. Justice St. Jacques pointed out three-quarters of the testimony of the Appellant Dansereau himself should have been disallowed. p. 353

117. In the following paragraphs we shall discuss the purported evidence of collateral facts made by the Appellant Dansereau, referring at the same time to the allegations of the Appellant's Contestation in respect of which it was adduced.

20 118. In paragraphs 12 and 13 of his Contestation the Appellant Dansereau p. 32 alleged that the female Respondent was the instigator if not the principal cause of the civil and criminal proceedings directed by the deceased and his wife against each other in the Spring of 1946. Not one word of proof was adduced in support of this allegation.

119. In paragraphs 14, 15, 16, 17 and 18 the Appellant Dansereau p. 33 alleged that the Respondent Colette Berget testified against her Uncle in the course of the separation proceedings in a damaging and defamatory manner, and in so doing, (a) accused him of committing a criminal offence; (b) testified for  
30 purposes of gain; (c) testified although she knew her Uncle was seriously ill and (d) testified in order to have her Uncle expelled from his home, so that she could live there more freely with her Aunt on the latter's prospective alimony.

120. It is quite clear that the *de cujus* did assault his wife, and, in fact, p. 324 injured her seriously enough so that she had to go to hospital. The Respondent Colette Berget was summoned as a witness to testify as to this assault, and she had no alternative but to do so. In any case, there is nothing to show that her Uncle was shocked and distressed at her giving evidence, or even much  
40 surprised. It appears from the Appellant Dansereau's account that the deceased's only reaction in the circumstances was fear that his niece would leave him. It is probable that after he had regained his composure he blamed no one but himself and, possibly, his wife, for the whole incident. Nothing in the record indicates that his feeling for his niece was altered by her testifying in the separation case.

121. The only criminal offence mentioned in these depositions was the assault, which the witness could hardly be expected to deny had taken place.

122. No evidence was made to support the allegation that she so testified

Record  
p. 106 for gain nor that she knew her Uncle was seriously ill, if, indeed, he was, nor that her object was to evict him from his home. As a matter of fact, and as is alleged in paragraph 66 of the Appellant's Contestation, the deceased's residence and work were in New York, and the Montreal house had only been rented as accommodation for his wife. The latter testified that she considered it "ma maison".

p. 33 to 35 123. In paragraphs 19 to 25, the Appellant Dansereau alleged that "rumors" 10 reached Berthiaume that a criminal warrant was being issued for his arrest for theft, on the complaint of his wife and the Respondent Colette Berget, he fled to New York, the warrant was duly issued on his wife's complaint only and the deceased decided to stay in New York.

p. 108 124. No evidence was made that the deceased's niece had anything to do with the issuing of this warrant. The closest approach to evidence on this point was the statement by the deceased's widow — an interested witness — that the Respondent Colette Berget was "au courant" of the fact that a complaint was being made. This witness was pressed very hard by Counsel 20 for Appellant in an attempt to elicit a more damaging statement but without success.

p. 35 125. In paragraph 26, the Appellant Dansereau alleged that the deceased always thought that his niece had lied in testifying in the separation case. There was no evidence made in support of this allegation. Indeed the Appellant testified that when the deceased taxed his niece with having rendered p. 219 damaging evidence against him, and she replied that she thought she had told the truth, the deceased did not contradict her.

p. 35 & 36 126. In paragraphs 27, 27a and 28, the Appellant alleged that the deceased, to "se débarrasser" of the various legal proceedings, asked the Respondent Colette Berget to join him in New York; she at first refused, but later consented after being paid a considerable sum of money by the deceased; after her arrival in New York, the deceased asked her to give him an affidavit that her previous evidence was false and an assurance that she would testify in his favour in the future, to lay a complaint for theft against his wife and to accompany him on a trip to Paris. 30

p. 177 127. It seems clear that the deceased made many efforts to persuade his niece to join him in New York. No evidence whatsoever was made by Appellant that he achieved this through bribery. From the Respondent Colette Berget's testimony it appears that a sentimental appeal was made to her through the intermediary of one Georges Durand, that as a result she consented to interview her Uncle, and, at that interview, agreed to join him in New York. 40

128. As to the various requests alleged to have been made by the deceased after his niece's arrival in New York, no evidence was made. Some proof was adduced to the effect that the deceased hoped that his niece would cooperate in the solution of his troubles; however, not even the Appellant Dan-

sereau who quoted the deceased freely, and who was said to have been in constant communication with him, was able to offer evidence that the deceased had made any kind of a request of the Respondent Colette Berget as alleged. Even if such proof had been made, it would have been inadmissible as irrelevant, since no connection was established with the deceased's testamentary dispositions. Record

10 129. In paragraphs 29 to 31, the Appellant Dansereau alleges that the Respondent Colette Berget saw a prospect of financial gain in the situation, and pretended to hold back from agreeing to the various requests; the deceased, to overcome her objections, gave her an unwitnessed English-form Will which he had had prepared; he knew it was valueless; she persisted in her refusal to comply with his requests, and he took the Will back, pointing out that it was not in legal form, and saying that he would decide later whether or not he would execute it properly; she gave it back and heard no more about it. p. 36

130. It appears by the testimony of Colette Berget and by the document itself (I-48) that it was indeed signed without being witnessed, and, at some point, put in the Respondent Colette Berget's possession and later returned by her to the deceased. No other testimony was heard concerning the drawing of this draft will, or what was done with it subsequently. Nothing in the evidence tends to show that the Respondent Colette Berget either granted or refused her consent to anything, whether for financial or other motives. That the deceased had an ulterior motive in handing his niece the draft Will (I-48) is nowhere demonstrated. The suggestion is made that he deceived her into considering it to be a valid will, and that this act of simulated generosity was designed to win her support. The Respondent Colette Berget could not have been so deceived; it was evident on the face of the document itself that witnesses were required. In short, no evidence was made pursuant to these allegations which would permit any other meaning to be ascribed to the draft Will (I-48) than that which its text clearly expresses. p. 165

131. In paragraphs 34 to 36, the Appellant Dansereau alleged that the deceased wrote the letter (P-1-a) in the conditional because his niece still refused to accede to his requests; he did so to indicate to her that he would give her a legal will if and when she did yield; he never considered the letter (P-1-a) as a will; he was familiar with the law, by reason of the many legal actions in which he had been involved. p. 1

132. Of this group of allegations, only one has the support of any proof, namely, the allegation that the deceased had been much involved with the law. As for the letter (P-1-a) being written as an implied conditional and fraudulent promise, we can find no evidence to support such a proposition. True, it may be accepted by the Honourable Mr. Gendron's Affidavit that the deceased hoped or expected that his niece would cooperate with him, but further than that it is impossible to go without entering the realm of pure fantasy. The grammatical question involved has already been discussed as well as the views expressed by the trial Judge in this connection. p. 259

Record  
p. 37 & 38

133. In paragraphs 37 to 44a, the Appellant Dansereau alleged that during the Summer of 1946, while the deceased was living in New York and his niece was staying at a resort hotel at Spring Lake, New Jersey, she carried on a secret "aventure amoureuse" with a lifeguard, and married him on August 30th, 1946; she wrote to her Uncle notifying him of this fact immediately afterward, and he was "stupefied" at the news; he was chagrined because she would come under the authority of a husband and would no longer be free to carry out his requests; he went immediately to Spring Lake, and died on his arrival there, his niece being the "seule cause déterminante" of his death, in view of her selfish and ungrateful behaviour. 10

134. That the Respondent Colette Berget on August 30th, 1946, married a university student who was acting as lifeguard at the resort where she was staying is established. What led up to the marriage is not in evidence. It seems to be the case that the deceased was in ignorance of the marriage until after it had taken place. However, when we come to the reaction of the deceased to this news, we leave the realm of fact once more. As to whether he was pleased or displeased the evidence leaves us completely ignorant. Presumably, he would have been withholding his judgment until after meeting the bridegroom, a meeting which never took place. In any event what assistance would it be to us to know? The letter (P-1-a) had been written ten days before, and the deceased's feelings toward his niece subsequent to the time of writing have no relevancy. The allegation that Colette Berget caused her Uncle's death is, of course, completely gratuitous, and we can only suppose that it, like many of the allegations in this pleading, was made to assist in creating an atmosphere unfavourable to her. No attempt was made to prove it at the trial. 20

p. 39

135. In paragraph 46a, the Appellant alleged that the Respondent Colette Berget never interpreted the letter (P-1-a) as a will, for various reasons. 30

136. It is difficult to see why this allegation was made, since it is obvious that Colette Berget's views on the legal significance of the document are irrelevant. Would the Appellants agree that if the evidence had shown that she *had* considered the letter (P-1-a) a will, such a belief would have had any probative force? The pressing of this point by the Appellant Dansereau does, however, raise an interesting conjecture: supposing, as the Appellant alleges, that the Respondent had read into the letter (P-1-a) a disguised promise by her Uncle to make her his heir — a promise made subject to certain conditions of which she was well aware — would she, with such a prize being dangled before her eyes, have proceeded within two weeks to contract a marriage which might displease her Uncle and to *tell him about it*? On the contrary, she would have been very circumspect in her dealings and, if she had married, would undoubtedly have kept it a secret. 40

137. The foregoing allegations contain all of the statements of fact upon which the Appellant Dansereau relies to establish the invalidity of the letter (P-1-a) as a will. They may be summarized as follows:—

- (i) The Respondent Colette Berget behaved in such a way as to alienate the affections of the deceased so that he would not have wished to make her his heir; Record
- (ii) Although the letter (P-1-a) may look on its face like the demonstration of a testamentary intention, it was written with another very devious intention.

10

138. Probably the most significant fact arising out of the evidence is that, although the deceased was in daily communication with the Appellant Dansereau during the last months of his life, the Appellant had no evidence to offer of any statement made in his hearing by the deceased indicating, even indirectly, that he had turned against his niece. Nor did he testify as to any declaration by the deceased to the effect that he was attempting to obtain his niece's support by means of promises concerning his Will. The deceased, according to the Appellant, was, during the period in question, consulting him daily as to every aspect of his troubles and the means to be adopted in solving them. If the deceased had indeed evolved the subtle and ingenious plan to deceive his niece which is alleged, would he have failed to discuss it with the Appellant Dansereau? We submit that not only is there no proof to support the Appellant's contention, but that this same lack of proof furnishes positive evidence that the devious motives attributed to the deceased are a complete fabrication.

139. Various items of proof were offered on behalf of the Appellant Dansereau and accepted by the trial Judge in respect of matters which were not alleged in the Appellant's Contestation. Although it is submitted that this proof was illegal for that reason, it was cited by the trial Judge as forming part of his reasons for judgment and we shall, accordingly, deal with it in the following paragraphs.

140. Testimony was put in the record as to the events which took place in the deceased's apartment in New York after his death. Both the Respondent Colette Berget and the Appellant Dansereau apparently visited the premises, accompanied by their legal representatives, and went through the deceased's effects. Why the Court was asked to consider this incident we do not know, because it could have had no conceivable bearing on the testamentary wishes of the deceased. We can only suppose that it was introduced, to quote Taylor on Evidence, No. 316, "to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead . . . "

141. The next such item of evidence to be considered is the attempt to show that Colette Berget prevented a settlement being reached between her Uncle and Aunt in the Winter of 1946. This occurs in the cross-examination of Colette Berget, in the testimony of Me. Mario Lattoni and in the testimony of Mrs. Berthiaume. It is not clear what part Colette Berget played in those negotiations for settlement. She denied that she played any part; Me. Lattoni stated categorically that she told her Aunt to hold out for a much

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p. 250 to 253  
p. 111

higher figure than that offered; her Aunt, although subjected to persistent questioning by Counsel for Appellant Dansereau, would only go so far as to say that her niece had told her she would stay with her, and that that had influenced her against settlement. The remainder of this witness's testimony demonstrates clearly that her reticence was not due to a desire to help her niece's case.

142. In any event, this evidence could have no bearing on the present case 10 without proof that the female Respondent's Uncle knew, or had been told, that she was acting against his interests in this way, and *there is no such suggestion in the evidence*. It is purely "*res inter alios acta*", and can be given no weight in considering the question before the Court.

143. Another item of evidence which may be mentioned is that concerning the deceased's health. It seems to be common ground between the parties that Mr. Berthiaume's health was precarious, or at least that he considered it to be so.

p. 481

144. Exhibit I-50, which is a letter from Colette Berget's mother, pur- 20  
porting to entrust her daughter to Mrs. Berthiaume, seems to have been filed to suggest that Colette Berget was the ward of her Aunt rather than her Uncle. The deceased left France ahead of his wife, since he apparently had to make certain arrangements in order to get her out of France and into Canada. He left France in January 1941, and left his niece behind to follow with his wife so that this letter, dated 9th February 1941 and obviously part of the immigration arrangements, had necessarily to refer to his wife with whom his niece was to travel, and not to him. (See para. 65 of the Contestation.)

p. 42

p. 236 & 237

145. The Appellant Dansereau testified as to a telephone conversation he had with Colette Berget on the morning following the death of Mr. Berthiaume. The first thing he asked her was, "as-tu un testament?" After so testifying, he hastily attempted to explain away the inference created by his words, by saying that he wanted to know who the heir was, so that he would know to whom he should turn in making funeral arrangements, but it remains quite clear that, when the testator died, the Appellant viewed it as a probability that a valid will existed in favour of the niece. He ended by indicating that he thought it was a question of whether he or Colette Berget was the heir. This circumstance is incompatible with the whole contention of the Appellant. 40

p. 243

146. The last of the items of evidence made in respect of unalleged matters which we shall consider occurred when the Appellant Dansereau testified that he wrote to the lawyer Mariano in New York demanding the return of property belonging to the deceased which had been abstracted from the deceased's New York apartment (apparently with the Appellant's cooperation) and the Appellant *had the Respondent Colette Berget sign the letter*. This furnishes a clear indication not only of the Appellant's opinion as to the identity of the true heir, but, even more important, of that of Dr. Mariano, whose close connection with the testamentary activities of the deceased must

have put him in a position to know definitely what the latter's intentions were. Record

147. Dame Fanny Colin's intervention in the Superior Court repeated in substance the allegations in the contestation of the Appellant Dansereau that the letter P-1 was not a will because it indicated merely that Berthiaume wished to mislead his niece into believing that she would inherit his property. His motive in doing so was to obtain his niece's co-operation in solving his  
10 difficulties with his wife.

148. No evidence was adduced by the Intervenant as she withdrew her intervention before the hearings began. The evidence put in by Appellant Dansereau in respect of the allegations in paragraph 147 above has been dealt with fully.

149. It is submitted that, since the letter (P-1-a) is a will, and since it appoints a universal legatee, it revoked all previous testamentary dispositions, including that in favour of the Appellant Dansereau (P-2), if the latter had  
20 been in force at the time the letter (P-1-a) was written. It is also submitted, however, that the 1935 Will in favour of the Appellant Dansereau (P-2) had already been revoked by the 1943 Will (P-3) in favour of the deceased's wife, as appears clearly by the documents themselves.

150. The Appellant Dansereau, on the other hand, devoted paragraphs  
47 to 98 inclusive of his Contestation to an attempt to advance the proposition that, although the deceased's 1943 Will (P-3), in favour of his wife revoked all former Wills, the Revocation of that Will itself (P-4) had the effect of re-  
30 viving the 1935 Will (P-2) in favour of the Appellant, in accordance with the terms of Article 896 C.C. The Appellant, in these fifty-two paragraphs, makes allegations designed to show that the "circumstances and the indications of intention" required by that Article were such, in the present case, as to demonstrate that the deceased must have intended his 1935 Will to return to full force and effect. p. 40 to 48

151. These allegations may be summarized as follows:

40 (a) The deceased did not want his wife, sisters, nephews and nieces or any of them to be his heirs, and demonstrated his desire clearly and frequently that the Appellant Dansereau be his Universal Legatee and Testamentary Executor in the event of his death without having left a will; the deceased and the Appellant had been friends from childhood and always had the greatest confidence in each other; their fathers had been friends and collaborators, having developed the newspaper "La Presse" together; the deceased had often declared that he would never forget what the Appellant's father had done for his father and for the said newspaper; the deceased always considered the Appellant's father as an advisor and a father. The Appellant rendered services to the deceased continually, particularly after 1918, in respect of various

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legal actions which the deceased had instituted concerning his father's estate.

(b) The deceased did not wish his wife to be his abintestate heir. An account is given here of the marriage of the deceased to Dame Fanny Colin, their arrival on this continent and the domestic troubles which subsequently developed culminating in the civil and criminal proceedings discussed elsewhere herein. 10

(c) During all his troubles the deceased turned to the Appellant Dansereau for comfort and the Appellant exerted all his efforts on the deceased's behalf. The deceased's attempts at settlement with his wife failed and the deceased decided to revoke the Will he had made in favour of his wife. (P-3).

(d) The deceased revoked the Will in favour of his wife (P-3) knowing that the Appellant would become his Universal Legatee and Testamentary Executor in virtue of the 1935 Will in his favour (P-2); the deceased gave up all hope of settling his affairs with his wife and went to New York, following which a warrant was issued for his arrest by his wife; his aversion for his wife was evidenced by the fact that he sent an agent to Paris to protect his goods there from her; on May 1st 1946 the deceased wrote to the Income Tax Department at Montreal with a view to having that Department make a claim for taxes against her. 20

(e) The deceased did not want his sisters, nephews and nieces to be his heirs because he considered them despoilers of his rights and had never ceased to engage in litigation against them since 1919. This litigation, both civil and criminal, is described in the Appellant's Contestation. 30

152. Supposing that the deceased's aversion to those persons who would have been his abintestate heirs was as pronounced as the Appellant Dansereau alleges (but did not prove), it would not flow from that fact that the deceased had any particular desire to make the Appellant his heir.

153. All that is alleged in support of the Appellant Dansereau's contention under this heading, is that he and the deceased were lifelong friends, as had been their fathers before them, and that the Appellant had given the deceased a great deal of moral and material assistance over a long period. A certain amount of testimony was given by the Appellant in this connection although without any of the detail in which it appears in the Appellant's Contestation. The allegation in the Contestation as to the circumstances in which the holograph Will of 1935 (P-2) was handed to the Appellant by the deceased and the latter's declaration on that occasion was not put in evidence. 40

154. No evidence was made nor was it even alleged that the deceased

indicated in any way, after revoking the Will in favour of his wife (P-3), that he intended the Appellant Dansereau to inherit his Estate. Record

155. It appears then that the Appellant's contention is based solely on the allegations that the deceased was inimical to his abintestate heirs and had cause for gratitude to the Appellant Dansereau. We submit that this is far from sufficient to satisfy the terms of Article 896 C.C. To succeed in virtue of that Article, we maintain that it must be shown positively that, at the time of revocation of a subsequent will, the testator had a testamentary intention toward that specific person in whose favour the previous Will had been made.

156. It is submitted that the following circumstances furnish a positive indication that the deceased had no such intention: when he revoked the 1943 Will (P-3) the deceased made an endorsement to that effect on the margin of the original, which marginal note was witnessed by the Appellant Dansereau and by Mtre. Edouard Masson, Q.C. In those circumstances is it possible that if the deceased had had the intention ascribed to him he would have failed to make that intention clear there and then? Even if, in spite of his knowledge of law, the deceased had not appreciated the dubious position in which he was leaving the Will in favour of the Appellant Dansereau (P-2), it is inconceivable that one of the two witnesses mentioned would not have brought the matter to his attention. Again, this renunciation was also made in notarial form (Exhibit P-4), on which occasion the Appellant was again a witness. If the deceased intended this document to operate not only as a revocation but as a revival of this previous Will in favour of the Appellant (P-2), it is incredible that neither he nor the Appellant would have so instructed the Notary so that the document would have been drawn accordingly. In this connection, we refer to the following remarks of *Mr. Justice Archambault* in the case of *Reid v. Thompson*, 36 R.L. 166:

“The entire absence, in the will of a business man of great wealth and experience *and made in the presence of a learned counsel at law*, of the words ‘substitution’, ‘institute’, ‘constitute’, ‘income’ or ‘revenue’ may create a convincing presumption of the testator’s intention not to establish a fiduciary substitution.”

157. We would draw the attention of the Board to the statement of *Mr. Justice St. Jacques* as to this pretended revival. p. 354

158. The Appellant Dansereau argued that the existence of a subsequent will does not give rise to the right to demand the annulment of a probate granted in respect of an earlier one, arguing that since, in this case, the 1935 Will contained the appointment of a testamentary executor while the letter (P-1-a) named no executor, the 1935 will must subsist for that provision alone.

159. Article 894 C.C. provides:

“Subsequent wills which do not revoke the preceding ones in

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an express manner, annul only such dispositions therein as are inconsistent with or contrary to those contained in the later will”.

This Article repeats the terms of Article 1036 C.N.

160. Whether dispositions are “inconsistent” or not is a matter of the intention of the testator in making the second instrument. It is *not* the case that if a provision of the first will covers a point not mentioned in the second, that the first will *must* be given effect in that respect. The two documents must be looked at as a whole and, if it appears that the testator intended, on making the second disposition, to start afresh, the first disposition is held to be entirely revoked, regardless of how many of its dispositions might be fitted in with those of the second. 10

*Mignault*, Vol. 4, p. 409, says:

“Je crois qu’il est également certain, comme principe général, que lorsque les deux dispositions sont incompatibles dans l’intention clairement manifestée du testateur, c’est-à-dire, lorsqu’on ne peut douter qu’il a voulu substituer la seconde à la première, on doit donner effet à cette volonté, alors même qu’en droit les deux dispositions seraient susceptibles d’exécution simultanée”.

161. At page 410, *Mignault* states that it is clear that if the second will contains a “legs a titre universel” the first must be considered revoked.

162. *Laurent*, Droit Civil, Vol. 14 No. 201, in considering Article 1036 C.N., concludes that what the legislators meant by “incompatible” dispositions were those which “ne peuvent pas se concilier”. He states that the whole of the dispositions must be considered, and their spirit determined, and that the incompatibility need not be a material one at all to cause a Court to decide that the earlier will was revoked by the later one. He points out that the question is sometimes raised as to why, if the testator wished to revoke the first will, he did not say so in the second, and supplies this answer: “Les juges n’ont pas à voir ce que le testateur aurait dû faire; dès qu’ils sont convaincus que le testateur a voulu révoquer ses testaments antérieurs, il n’en peuvent plus tenir aucun compte”. In the same sense he says, at No. 208, “Dans l’interprétation des testaments, on ne doit pas demander trop de pourquoi”. 30 40

Again, at No. 211, *Laurent* says:

“Une distribution complète de biens remplacée par une autre distribution de biens également complète implique un changement complet de volonté; cela paraît si évident aux testateurs que le plus souvent ils ne songent pas à inscrire une clause révocatoire dans l’acte qui contient l’expression de leurs dernières volontés . . . ce qui décide la question des volontés c’est que le testateur ne

se contente pas de déroger à son testament antérieur, il le refait, et il le refait en entier, donc il révoque ce qu'il avait fait." Record

163. We would also refer to the case of *Nelson v. Villeneuve*, 11 R.L. n.s. 306, where it was decided that, although the two wills in question were physically capable of simultaneous execution, the Court was at liberty to decide that they were incompatible, and that the earlier one had been revoked.

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164. The theory governing this question is clear. The authorities cited above were considering *bequests* contained in previous wills. It never, obviously, occurred to them that it might be argued that the appointment of a testamentary executor in the earlier will would survive the subsequent institution of another universal legatee, particularly when the executorship appointment was clearly made as ancillary to the legacy. We would refer also to Article 905 C.C., which provides that the testator "may" name a testamentary executor. In view of the permissive quality of that provision, it is obviously wrong to say that such a nomination is essential to a will.

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165. In conclusion, it is submitted on behalf of the Respondent Colette Berget that these appeals should be dismissed with costs for the following among other

#### *REASONS:*

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(a) There was jurisdiction in the Superior Court and in the Court of Queen's Bench to admit the letter Exhibit P-1-a to probate and to cancel the probate previously granted to the will in favour of the Appellant J. Lucien Dansereau, such jurisdiction extending to all issues relating to the said letter;

(b) Even if such jurisdiction had been confined to an enquiry into the formal validity of the will, the judgment of the Court of Queen's Bench would have been the same;

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(c) There was jurisdiction in the Supreme Court of Canada to hear the appeal of the Appellant J. Lucien Dansereau and the intervention of Dame Fanny Colin against the judgment of the Court of Queen's Bench inasmuch as such judgment constituted a final judgment in respect of probate;

(d) If the Supreme Court had no jurisdiction to hear the said appeal, its judgment would have been the same, i.e. the appeal would have been dismissed with costs of a motion for dismissal for want of jurisdiction;

(e) The issue of the jurisdiction of the Supreme Court narrows itself down to one of the amount of costs before that Court;

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(f) Even if it were shown that all the Courts below exceeded their jurisdiction in pronouncing upon the substantive issues, neither Appellant suffers any prejudice from the expressions of opinion by the judges of the Court of Queen's Bench and of the Supreme Court as to the validity of the letter Exhibit P-1-a as a will on the merits, inasmuch as the judgments of the said courts do not possess the force of *res judicata*; such expressions of opinion are useful to the parties as tending to avoid future litigation on the same issues on the record as constituted ("*boni judicis est ampliare jurisdictionem*;" "*interest rei publicae ut sit finis litium*"); 10

(g) The letter Exhibit P-1-a is upon the record as constituted the valid last will and testament of Eugene Berthiaume and should be admitted to probate and the probate granted to the prior will in favour of the Appellant J. Lucien Dansereau should be set aside; and

(h) The conclusion in paragraph (g) above is the same whether 20 the enquiry into the validity of the said letter as a will is confined to the formal aspects thereof or whether the substantive issues are also to be dealt with.

The whole respectfully submitted.

MONTREAL, July 2nd, 1953.

André Forget,

Of Counsel for Respondent  
Colette Berget

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