

J. Lucien Dansereau - - - - - Appellant

v.

Colette Berget and Another - - - - - Respondents

AND

Fanny Irene Gabrielle Colin - - - - - Appellant

v.

Colette Berget and Another - - - - - Respondents

(Consolidated Appeals)

FROM

THE SUPREME COURT OF CANADA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER, 1953

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*Present at the Hearing :*

LORD NORMAND  
LORD OAKSEY  
LORD TUCKER  
LORD ASQUITH OF BISHOPSTONE  
LORD COHEN

[*Delivered by* LORD OAKSEY]

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This is an appeal by special leave from a judgment of the Supreme Court of Canada dismissing an appeal from a judgment of the Court of King's Bench of Quebec which had set aside a judgment, dated the 5th March, 1948, of the Superior Court of Quebec.

No petition for special leave to appeal from the Court of King's Bench of Quebec was presented.

The primary question therefore which arises for their Lordships' consideration is whether the judgment of the Court of King's Bench was a final judgment within the meaning of the Supreme Court Act (Revised Statutes of Canada 1927 c. 35 sections 2 and 36) and therefore appealable to the Supreme Court. The material sections of the Supreme Court Act are as follows:—

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

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

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

“ 36. Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction . . . where such judgment is,

(a) a final judgment ;”

Upon this question the Supreme Court does not appear to have come to a definite conclusion though Mr. Justice Rand and Mr. Justice Estey were of opinion that the Court had not jurisdiction.

The judgments of the Court of King's Bench and of the Superior Court of Quebec were delivered on a petition by the respondent Berget praying that a document dated the 21st August, 1946 be admitted to probate as the last will and testament of the late Eugene Berthiaume who died on the 31st August, 1946 and that the probate of a will of the same testator dated the 14th March, 1935 granted by a judgment of the Superior Court of Quebec on the 4th September, 1946 in favour of the appellant Dansereau be annulled and set aside. Mr. Justice Cousineau in the Superior Court dismissed this petition and upheld the probate of the will of the 14th March, 1935. The Court of King's Bench reversed this decision and granted probate of the will of the 21st August, 1946.

It has been contended on behalf of the appellants Dansereau and Colin that the petition was incompetent in that it combined in one petition a prayer for the probate of the will of the 21st August, 1946 with a prayer for the cancellation of the probate of the will of the 14th March, 1935 already granted on the 4th September, 1946 and that probate of a will once granted can only be contested by an action and not by petition.

It was admitted in the present case that the will of the 14th March, 1935 could have been contested in an action but it was argued that it could not be contested in a petition. It is however to be observed that on the granting of probate of a later will, namely the will of the 21st August, 1946 as the last will and testament of the deceased, it necessarily followed that the earlier will was not the last will of the deceased.

Their Lordships do not find it necessary to decide the complicated questions of procedure which have been argued before them as to whether an action or a petition is the more appropriate form of procedure. They think it clear upon the authority of the case of *Migneault v. Malo* ((1872) L.R. 4 P.C. 123) that according to the law of the Province of Quebec the grant of probate is not as in England conclusive even between parties who have contested the grant and they think therefore that probate can be cancelled on proof of a later will. It is true that in *Migneault v. Malo* their Lordships were not dealing with a case in which two wills had been produced but their Lordships said:—

“ At first sight it certainly appeared to their Lordships that this language (viz. the language of a Quebec Statute 41 Geo. III c. 4 s. 2) availed to introduce the law of *England* with respect to the conclusiveness of a probate duly granted into the law of *Canada*; and that where, as in the present case, a suit as to the validity of the Will had been contested in open Court, both parties appearing, pleading, and one examining, the other cross-examining, Witnesses, and probate had then been granted, the same question could not be raised again, at all events between the same parties, before another Tribunal; but that the production of the probate would operate as an estoppel to any such action. This, moreover, appears to their Lordships to be the true construction of the words, 'such proof shall have the same force and effect as if made and taken before a Court of Probate.'

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

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

“Upon the whole, it appears to their Lordships that, by the uninterrupted practice and usage of the Canadian Courts of Justice since 1801, the law has received an interpretation which does not affix to the grant of probate, even in the circumstances of this case, that binding and conclusive character which it has in *England*, and that according to that interpretation it was competent to the Respondent to impugn the validity of this Will by way of defence to the action brought by the Appellant for the payment of the annuity.”

It appears therefore that in that case although the validity of the will in question had been contested in open Court both parties appearing and probate having then been granted, the validity of the probated will was allowed to be contested again by the same party who had appeared and contested its validity before. In their Lordships' opinion this was a decision that probate of a will is not conclusive and does not create *res judicata* even between parties who have contested its validity and it is a decision which has been followed ever since.

In these circumstances their Lordships are of opinion that the judgment of the Court of King's Bench was not a final judgment within the meaning of the Supreme Court Act since the grant of probate is not conclusive and can be contested in appropriate proceedings and if that is so it cannot in their Lordships' view be said that a grant of probate determines a substantive right in a judicial proceeding within the meaning of the Supreme Court Act. Their Lordships therefore agree with Mr. Justice Rand and Mr. Justice Estey that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court of Canada having been made without jurisdiction the order of that Court should be varied so as to confine it to an order dismissing the appeal for want of jurisdiction and omitting that part of the order which affirms the probate of the will of 21st August, 1946. In view of the course the proceedings have taken in the Courts below their Lordships think that each party should bear his or her own costs both in the Supreme Court of Canada and before their Lordships' Board.

In the Privy Council

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J. LUCIEN DANSEREAU

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DELIVERED BY LORD OAKSEY