Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Evanturel v. *Evanturel, from Canada; delivered 15th March,* 1869.

Present:

SIR JAMES W. COLVILE.
JUDGE OF THE ADMIRALTY COURT.
LORD JUSTICE SELWYN.
LORD JUSTICE GIFFARD.

THIS is an Appeal against two Judgments of the Court of Queen's Bench of Lower Canada—one of the 20th June, 1865, which reversed the Judgment of the Superior Court of the 5th September, 1864, and the other of the 18th of March, 1867, which affirmed the Judgment of the Superior Court of the 16th of May, 1866.

The subject of these Judgments and of the present Appeal is the validity of the testament of the late Marie Anne Evanturel, Widow, of Quebec. She died on the 10th of November, 1863, leaving five children surviving her, among whom were the Appellant, Emilie Malvina, wife of Edouard Rémillard; and the Respondent, the Honourable François Evanturel. These five children, if she had died intestate, would have been entitled in equal shares to her property.

The suit was begun by a claim to the succession of Madame Evanturel, entitled *pétition d'hérédité*, filed by the present Appellants in the Superior Court of Lower Canada on the 7th December, 1863.

In answer to this Petition the present Respondent, on the 5th January, 1864, replied by a peremptory and perpetual exception in law (*exception péremptoire en droit perpétuelle*), by

which he pleaded a testament made by his late mother, dated the 18th of May, 1861.

To this exception the Appellant replied by a general answer, and by a special replication in which they impugned the validity of the testament on the ground of incapacity or undue influence (*fraude, suggestion, captation, menaces, employés par le Défendeur*).

It may be convenient here to state that this allegation was disproved in the opinion of all the Judges in the Canadian Courts, and has not been insisted upon before their Lordships.

The Appellants in their special replication also relied on the invalidity of the execution of the testament. The mode of raising this latter issue is, according to the law of France and Lower Canada, to enter, by permission of the Court, a process which is called "inscription en faux." The Appellants having duly obtained this leave, filed their "*moyens de faux*," which were as follows:—

"1. That the pretended testament of the 18th May, 1861, was not *dicté et nommé* by the deceased to two Public Notaries, as falsely asserted in the pretended testament.

"2. That it was not *dicté et nommé* by her to two Public Notaries on the 18th May, 1861, as falsely asserted in the pretended testament.

"3. That an important part of the alleged testament, other than the preamble, was written and altered by some stranger's hand, other than that of the two Notaries who passed the testament."

It appears from the evidence that M. Petitclerc, a notary, went to the testatrix, in obedience to a summons, on the 16th of May, 1861; he found her alone: she told him that she desired to make her testament; she then and there expressed the dispositions and bequests which it was to contain. M. Petitclerc drew up a Memorandum in which they were concisely stated; the testatrix then told him to prepare her testament in conformity therewith, and to send it to her in order to its being examined by her Counsel; he drew up the testament on the same or on the following day. Madame Evanturel, on the 17th, had an interview with her Counsel, M. Casault, whom it appears that she had consulted on the subject of her will on the 15th and 16th of May; he wrote in the margin

of the will an alteration, subsequently cancelled and re-written by the notary; and on the afternoon of the 18th of May, Madame Evanturel went to the office of M. Petitclerc, bringing with her the draft testament, which he opened, and on perceiving M. Casault's alterations drew his pen through them; he then sent for a brother notary, M. Huot, who arrived: there was also present M. Casault. M. Petitclerc then asked the testatrix what were the dispositions which she desired to make, and she repeated in brief ("en raccourcis") as M. Huot says, "as if she had known them by heart," all the dispositions which are contained in the testament, though not exactly, it would appear, in the same terms and in the same order. M. Petitclerc then read the testament—she suggested certain corrections, and the addition of the following condition attendant on the bequests to her daughters: "Et que quant à celle ou celles qui voudront contester mon dit testament, le legs à elles fait de la dite rente soit non avenu et caduc." It appears that M. Petitclerc then re-read the testament with the corrections and addition which have been mentioned; the testatrix then declared that she could not write, and what Mr. Justice Taschereau calls the "énonce sacramentel," the essential formula, was put in the following words:—

"Ce fut ainsi fait, dicté et nommé par la dite Dame veuve François Evanturel, testatrice, aux dits notaires soussignés, et son présent testament lui ayant été lu et relu par Maître Joseph Petitclerc, l'un des dits notaires, en présence de Maître Philippe Huot, son confrère, pour ce mandé, la dite Dame Evanturel a dit le bien entendre et comprendre, et y a persisté, à Quebec, en l'étude de Maître Joseph Petitclerc, l'un des notaires, l'an 1861, le 18me jour du mois de Mai, après-midi, sous le numéro 11,686. Et la dite Dame veuve François Evanturel a déclaré ne savoir ni écrire ni signer de ce requise, lecture faite et refaite.

"Signé sur la minute, demeurée en la dite étude.

"PHI. HUOT, N.P.

"JH. PETITCLERC, N.P."

It may be convenient here to dispose of the two "moyens de faux" which relate respectively to the date of the testament and to the alterations in a strange hand. It has scarcely been contended before this Court that the testament was "dicté et nommé" on the 16th of May; and such a contention, in their Lordships' opinion, cannot be sustained. The

question of the execution of the testament must be confined to the date of the 18th of May. With respect to the alterations in a strange hand, they are fully accounted for by the testimony of the witnesses and can in no way affect the decision in this case.

In the evidence given by the witnesses, MM. Petitclerc, Casault, and Huot, some discrepancies occur, and also in the two depositions of M. Petitclerc made at different times; but their Lordships entirely concur with the remarks of Mr. Justice Taschereau upon this subject, and are of opinion with him that their discrepancies are insignificant and do not affect the real and only question in this case, namely, the true construction of the law which governs the execution of this testament.

There is no controversy as to what that law is. It is the 289th Article of the "Coutume de Paris," as declared by the Parliament of Paris in 1580, and it is in these words:—

ART. 289.—"Pour réputer un testament solennel, il est nécessaire qu'il soit écrit et signé du testateur: ou qu'il soit passé pardevant deux notaires, ou pardevant le Curé de la paroisse du testateur, ou son Vicaire-Général, et un notaire; ou du dit Curé ou Vicaire et trois témoins; ou d'un notaire et deux témoins: iceux témoins, idoines, suffisants mâles et âgés de vingt ans accomplis, et non légataires, et qu'il ait été dicté et nommé par le testateur aux dits notaires, Curé ou Vicaire-Général, et depuis à lui relu en présence d'iceux notaires, Curé ou Vicaire-Général, et témoins. et qu'il soit fait mention au dit testament qu'il a été ainsi dicté, nommé et relu; et qu'il soit signé par le dit testateur et par les témoins: ou que mention soit faite de la cause pour laquelle ils n'ont pu signer."

It is contended by the Appellants that the provisions of this regulation have not been complied with, and that the testament is therefore invalid. They maintain that, according to the true construction of that regulation, and especially of the words "dicté et nommé par le testateur aux dits notaires," the testator must declare the dispositions which he desires to make, and that one notary at least, if not the two, must then and there write down these dispositions, and that unless this requisition of the law be obeyed, the testament is null.

This construction of the Coutume was adopted by M. Justice Taschereau in the Superior Court of Lower Canada; and, accordingly, he sustained

the *inscription en faux*, and pronounced against the validity of the testament. From this sentence an Appeal was prosecuted to the Court of Queen's Bench of Lower Canada. That Court reversed this decision, holding that the testament was duly executed. The Court was composed of five Judges; of these three, Chief Justice Duval, Mr. Justice Aylwin, and Mr. Justice Meredith delivered their Judgments in favour of the validity of the testament; while two, Mr. Justice Drummond and Mr. Justice Mondelet, dissented, and agreed with Mr. Justice Taschereau. From this sentence the present Appeal has been prosecuted.

The case has been fully argued before their Lordships, and we have now to deliver our opinion upon the true construction of the 289th Article of the "Coutume de Paris" in its application to the testament which is the subject of this litigation.

Some preliminary observations occur which it will be well to mention in this place. First, that the language of this "Coutume" does not require in express terms that the will should be written by a notary at the time of dictation; though it does require that the will should be read over in the presence of the notaries and of the testator; and secondly, that there is no declaration like that which is to be found in the Code Napoléon, that the formalities enjoined shall be observed on pain of nullity.

In respect to these particular words "dicté et nommé," it appears to their Lordships that they must be considered as conveying one idea, the latter word being only used to strengthen the former; and in this opinion their Lordships are justified by the opinion of the learned editor of "Ferrière," and of the decision to which he refers:—

"La première chose à observer est qu'il faut que le testament soit dicté et nommé par le testateur, sur quoy on a demandé autrefois, si des mots équivalants suffisoient, comme *proferez de sa propre bouche*, il a été décidé qu'ils ne suffisoient pas, la 'Coutume' disant dicté et nommé; mais que si un notaire ne mettoit que l'un des deux, ou dicté ou nommé, comme ils sont synonimes, qu'il n'y auroit point de nullité." (Vol. iv, page 133.)

It was admitted by the Counsel for the Appellants that it was not necessary that the notary should write "môt à môt" the dispositions of the testa-

ment as dictated by the testatrix, that he might put them in proper language and in proper order, and with whatever amplifications were necessary to give them due legal force and effect, and that the testatrix might dictate from a written and previously prepared instrument. And their Lordships are clear that this view is correct, having regard both to the reason of the thing, and to the decisions which have been given upon the particular Coutume, as well as those which have been delivered upon the far more rigorous language of the Article in the Code Napoléon, which are collected in Dalloz, vol. xvi, tit. 4, chap. 2, section 4, Article 2, section 2. (De l'écriture par le notaire.)

In forming our judgment upon the general construction of the Coutume, one of the primary considerations has necessarily been to ascertain what was the mischief which this law was framed to remedy, and upon this point there is really no room for doubt.

The authority of the commentator Claude de Ferrière has been much relied upon by both parties, and it is entitled to considerable weight in the explication of this law. After mentioning the various ways in which a *testament solennel* may be made under this Coutume, he adds: "Notre Coutume outre cela requiert dans les testamens plusieurs solemnitez, pour empêcher les fraudes et les suggestions. La première formalité est, qu'il ait été dicté et nommé par le testateur à celuy qui l'a reçû. La deuxième, qu'il soit relû au testateur, et qu'il soit fait mention qu'il a été *dicté, et nommé, et relû*. La troisième, qu'il soit signé par le testateur et par les témoins." (Ferrière, "Coutume de Paris," vol. iv, p. 18, ed. 1714.) And again, the same author, speaking of a will made *ad interrogationem alterius*, says: "La validité d'un testament ainsi fait, dépend beaucoup des circonstances, car les formalitez ne sont pas requises dans les testamens pour empêcher de tester, mais pour empêcher qu'ils ne fassent contre la volonté et l'intention des hommes, ainsi il paroît par les circonstances, que la disposition faite *ad interrogationem alterius* a été l'esprit de celuy qui l'a faite, elle doit être confirmée, ainsi cela dépend de la prudence des Juges." (Pp. 105, 106.)

This mischief of a fraudulent, or false, or extorted,

or even suggested, disposition, instead of the genuine expression of the testator's wishes, is certainly not incurred where, as in this instance, the testator is asked what his wishes are, where he deliberately expresses them, and where the instrument which contains them, though previously written, is read over to and approved by him. Their Lordships agree with the opinion of Mr. Justice Taschereau on this point: "Il y a peu de doute que dans le cas présent, le testament argué de faux en cette cause présenterait à mon esprit une idée très forte de l'expression vraie et complète des volontés de Madame Evanturel."

The execution of this testament not having sinned against the mischief which the law was intended to prevent, the consideration next in order appears to be, what interpretation did this law receive from contemporaneous exposition?

This exposition is derived from the "arrêts," or judicial decisions on the questiou, and is evidenced by the usage and practice of Notaries Public.

1. In considering the various arrêts cited both in the Courts below and at the Bar before us, we must distinguish those in which the testament was merely acknowledged in the presence of two notaries, though twice read in their presence and approved by the testator, from the present case, in which there was an actual dictation by the testatrix of the whole of her testamentary dispositions, though the writing did not follow that dictation. Even with respect to arrêts of the former description, there are three reported by Ferrière: that of Machéco, in 1597; that of Pisany, in 1602; and that of Claude Pollaët, in 1616, which latter arrêt was also confirmed by the Appellate Court, in which the testaments, acknowledged indeed and in the last case also signed by the testator in the presence of two notaries, but not dictated, were pronounced to be valid. It will be borne in mind that the date of the declaration of the Coutûme is 1580; these arrêts, therefore, so far as their authority extends, have the force of a contemporaneous exposition.

There are, it is true, on the other hand, various arrêts to be found in the books, in which testaments acknowledged and approved by the testator in the presence of two notaries, and twice read over, have been pronounced null, on the ground of their not

having been "dictés et nommés," according to the Coutume; but there does not appear to be one in which a testament, dicté as this testament was, has been set aside on the ground, either that the dictation was insufficient, or that the writing ought to have followed the dictation. And lastly, upon this point it is to be observed, that in the cases of "Robitaille *v.* Bonneville," and "Routier *v.* Robitaille," decided by the Court of Queen's Bench for the district of Quebec by Chief Justice Sewell and Mr. Justice Kerr in the year 1829, in which cases the testament was "inscrit en faux" on the ground that it was not legally executed as a "testament solennel," that is, not "dicté et nommé" according to the law and as certified by the notary, Mr. Justice Meredith says, and no doubt with perfect accuracy:—

"The evidence adduced in that case has been placed before us, and from the depositions of the two notaries and other evidence, it appears that the second notary was not present when the will was written. And yet the will was held to be a good will.

"The case went to Appeal, and was disposed of, as the gentlemen of the bar are aware, upon a different ground, and all that is said in the report respecting the point now under consideration is:—

"'The Court below, however, considered that the will had been regularly made, and rejected the "inscription en faux,"'"

There is no doubt that jurists, both in Canada and in France, have differed upon the construction of this Article of the Coutume. Their discordant opinions are more or less reflected by the conflicting decisions above referred to, and also by the difference in the practice of notaries in Canada. The interpretation put by the usage of these officers, who perform a public duty in the preparation of wills, is by no means unimportant; and the result of the evidence upon this head is, that the practice of the leading notaries in the principal Canadian towns of Montreal and Quebec greatly preponderates in favour of the mode of executing a testament adopted in the case before us.

It appears therefore to their Lordships that, even if the French authority were admitted to be in favour of the stricter construction of the Article in question, the latter interpretation has, both by decision and by long usage, acquired the force of law in Lower Canada.

The 23rd Article of the Ordonnance des Testaments of 1735 and the 972nd Article of the Code Napoléon have been referred to, and the decisions with respect to them were considered by the Judges of the Court below, whose opinions were adverse to the validity of this testament. Their Lordships do not think it necessary or expedient to enter into an examination of these decisions. There is, however, an observation arising from the consideration of these two later acts of French legislation which is, perhaps, not irrelevant to the question before us. The Ordonnance requires that the notaries, or one of them, "*écriront les dernières volontés du testateur telles qu'il les dictera,*" and the Article of the Code Napoléon, that the testament "doit être écrit par l'un des notaires *tel qu'il est dicté;* and a subsequent Article provides that the prescribed formalities shall be observed *under pain of nullity*. The inference from the insertion of these additional formalities, and of the penalty by which they are guarded in this later legislation, is certainly not unfavourable to the liberal construction of the Coutume declared in 1580, under the authority of which the testament before us was made.

After a careful consideration of the law, and of the authorities applicable to this case, inasmuch as it appears to their Lordships, that the mode in which this testament has been executed is not obnoxious to the mischief which the Coutume intended to guard against, the testament being the expression of the undoubted wishes of the testatrix, and inasmuch as the force of contemporaneous exposition embodied and continued in the practice of notaries down to the present time is in favour of the validity of such an execution—an exposition in itself reasonable and sound—and having regard to the principle of the comparatively recent decisions of the Canadian Courts in "Robitaille *v.* Bonneville;" their Lordships will humbly advise Her Majesty that the Judgments appealed from ought to be affirmed, the validity of this testament pronounced for, and the costs of this Appeal paid by the Appellant.

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