Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dame Marie Louise Herse and another v. *Joseph Dufaux and others, from the Court of Queen's Bench (Appeal side), Lower Canada; delivered 14th December*, 1872.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

IN the year 1825 M. Pierre Roy, then of Montreal, by a notarial instrument dated the 21st of May, 1825, acknowledged and declared that he had made a donation by act *inter vivos* of a certain piece of land situate in one of the suburbs of Montreal, whereon five houses had then been built, the rest consisting of meadow, orchard, and garden ground.

The terms of this instrument, on the construction of which the principal question raised by this Appeal depends, will have to be considered more particularly hereafter. It is not, however, disputed that the donation purported to be made by the donor to his son, Maître Joseph Roy, his heirs and assigns, in acknowledgment and reward of services rendered by him; that in dealing with the beneficial enjoyment of the property the instrument reserved the usufruct to the donor himself for life, and afterwards gave it to Joseph, also for life only (both life-interests being expressed to be "à titre de constitut et précaire sa vie durante"); that it further contained a provision whereby any site, not exceeding forty feet of frontage by ninety feet of depth, on which Joseph might build a house, was to become his absolute property,

subject to the stipulation that he was not to sell it during the donor's life, and that the land, other than those parts on which Joseph should exercise this privilege, was effectually given after his death to his children born in wedlock. The question to be determined in this cause arises upon the construction of the provision which the act of donation made in the event, which happened, of Joseph dying without such children.

Pierre Roy, who seems to have been possessed of considerable property besides that which was the subject of the donation, died on the 16th of August, 1832. He left a will dated the 15th of December, 1821, and a codicil dated the 12th of December, 1831. The latter is material only in that being made after the donation, it expressly confirmed the will which was made before the donation. His legal heirs were his son Joseph, and his granddaughters by a deceased daughter. The latter were Madame Grothé, the Appellant, and Madame Dufaux, the mother of the Respondents. Whether a third granddaughter, Catherine, who is said to have died young and unmarried, was then alive, does not very clearly appear. She was alive at the date of the donation, but in the argument it has been assumed that she died before her grandfather.

The will of Pierre Roy gave to his son Joseph the enjoyment and usufruct during his life of all the property, moveable or immoveable, which the testator should leave at his death; the absolute interest in such property to pass on the death of Joseph to his children born in wedlock; and it provided that in default of such children Joseph should have the power to dispose of such property at his discretion, and without being bound to follow any rule of equality or proportion, amongst the testator's grandchildren, who were to be content with the share so to be assigned to them. The will contained further provisions to the effect that the share of any grandchild dying without children born in wedlock should go to her uterine sisters; and that if all should die without children born in wedlock, whatever they had received from the testator should go over as thereby directed.

Joseph Roy died unmarried in 1848. By his will dated the 2nd of September in that year he disposed, without making any express distinction between the

three different classes of property, of what belonged to himself in his own right; of what unquestionably passed under his father's will; and of the land which was the subject of the donation of May 1825. The latter, with the exception of the sites upon which he had built two houses, he gave to the Respondents, the children of Marguerite Dufaux (then deceased). Of the two sites and the houses thereon he gave one to a daughter of the Appellants, since deceased; and the other to the Appellant Madame Grothé for life, with remainder to her children. Of the whole mass of property disposed of he is said to have made, subject to a few legacies, a tolerably equal division, according to its then value, between the Grothés and the Dufaux. He vested the administration of his estates in a M. Dubois and M. Joseph Dufaux (the father of the Respondents) jointly, but with a direction that if they could not agree they should divide the administration,—Dubois administering that part of the estate which was given to Madame Grothé or her children, and Dufaux administering the property given to his children, the Respondents, who were then minors. The will also contained an express clause that if any of his legatees or their descendants should dispute any of the clauses or dispositions of the will, he should forfeit his rights under the will, which were in such case to pass to the co-legatees who should respect the testator's last wishes and intention.

The Respondents have, under this disposition, been in the possession or enjoyment of the land in dispute since 1848, and the Appellant Madame Grothé has, under the circumstances to be afterwards considered, taken and enjoyed the benefits given by the will of Joseph to her. Nevertheless, on the 10th of September, 1861, she and her husband commenced the action, which has given rise to this Appeal, for the recovery of one moiety of the land included in the act of donation exclusive of the portions built upon by Joseph Roy, with mesne profits and damages. The claim, as stated in the declaration, is, in effect, that by the act of donation of the 25th of May, 1845, one moiety of this land was effectually assured to the Appellant, Madame Grothé, as one of the legal heirs of Pierre Roy, subject to such directions touching the enjoyment of it as he might give by his will; that he had given no such direc-

tions; and that the devise of the whole land by Joseph to the Respondents was made without regard to the act of donation and in violation of the Appellant's rights. The declaration also endeavoured to meet, by anticipation, any defence that might be founded on an alleged ratification of the will of Joseph Roy, by a notarial act of the 10th of October, 1848, by asserting that if that act was signed by the Appellants, which they denied, it was signed by them in ignorance of the act of donation, and of their rights under it; that they claimed, if necessary, to question its validity by an "inscription en faux"; and that it ought to be declared null, and of no validity, as against them; and no bar to their recovery of the moiety of the land in question to which they were entitled under the act of donation.

The defence by way of "exception péremptoire" insisted on the right of Joseph Roy to dispose, as he had disposed, of the land in question by his will; and opposed a ten years' prescription to the claim of the Appellants to set aside the act of the 10th of October, 1848. By a subsequent proceeding of the 18th of April, 1864, the Respondents obtained a Judge's order, made after hearing both parties, giving them liberty to add to their pleading allegations to the effect that the Plaintiffs had accepted the legacy in their favour contained in the will of the late Joseph Roy; that they had taken possession of the property so bequeathed to them, and still enjoyed it; and that they had thereby lost whatever right they might have had to contest any of the dispositions of the said will.

The cause was heard in first instance by Mr. Justice Smith, one of the Judges of the Superior Court, who decided it in favour of the present Appellants. The Respondents appealed from this judgment to the Court of Queen's Bench, which reversed it, and dismissed the Appellants' suit; one Judge of that Court, Mr. Justice Drummond, dissenting. The Appeal is from the last judgment. From what has been said it is obvious that the title of the Appellants depends upon the interpretation to be given to that clause in the act of donation which deals with the property in the event of Joseph Roy dying without legitimate children. The words of the clause are, "Et à défaut d'enfans nés en légitime mariage du dit Maître Joseph Roy, la propriété

demeurera, et appartiendra aux autres héritiers du dit donateur, qui en jouiront et disposeront conformément à ce qu'il en aura disposé et ordonné par son testament et ordonnance de dernière volonté."

The record shows that upon this clause, taken in connection with the rest of the instrument, at least four different constructious have been put.

1. Mr. Justice Smith says, "The qualification made by Pierre Roy in the character of the enjoyment of Joseph Roy, viz., "à titre de constitut et de précaire," clearly points out that it was not the intention of Pierre Roy to "grever" Joseph Roy with a substitution, but to give him a mere usufructuary right of enjoyment, and to give the property directly to the children of Joseph Roy, if he had any at the time of his death, and in the event of his death without children, then, and in that case the property was to belong and go to the other heirs of the donor, subject to the restriction expressed in the latter part of the donation. Joseph Roy died without leaving any issue. By the express terms of the donation, the property in question passed at once after his death to the heirs-at-law of Pierre Roy, and the enjoyment by Joseph Roy of the property during his lifetime only suspended the enjoyment of the heirs-at-law; but the title of the property vested in them by virtue of the donation itself, and it could not be taken away from them, or their title in any way touched, by the acts of either Pierre or Joseph Roy." And this construction is more fully expressed in the "considerations" upon which the formal judgment of the Superior Court is founded.

2. Mr. Justice Drummond, the dissentient Judge in the Court of Queen's Bench, who held that the Judgment of the Superior Court ought to be affirmed, construed the act of donation as importing a regular substitution in favour of the children of Joseph Roy, and in their default of the donor's grandchildren, as his other heirs, treating Joseph Roy as the institute "grevé" with those substitutions. The right reserved to Pierre Roy to deal with the enjoyment of the property by his will he considered to be at most a right to "grever" the substitutes with further substitutions, and in no way to imply a power to revoke the substitution altogether, and dispose of the property otherwise. The learned Judge in this adopted and concurred in the interpretation put upon the act of

donation by Maître Truteau in the opinion which forms part of the Appendix.

3. The interpretation put upon the act of donation by the majority of the Court of Queen's Bench seems to be that it gave the property to Joseph Roy, "grevé" with a valid substitution in favour of his own children; but that in default of such children it created no further estates, but reserved to the donor the power of disposing of the property by his last will; and that such reservation was not contrary to law.

4. The opinion of Messrs. Peltier and Cherrier, which has been somewhat irregularly introduced by consent into the record, is to the effect that the act of donation created a valid substitution in favour of the legal heirs of the donor, other than Joseph, but subject to a condition which the donor had power to impose; and that the effect of that condition and of the will of Pierre Roy taken together was to revoke the substitution, to bring back the property into the general assets of Pierre; and to make it capable of passing under his will.

The very able arguments which have been addressed to their Lordships by the learned Counsel on both sides have been mainly directed to establisb either the second or the third of the above constructions. It seems to be now agreed that under the act of donation, notwithstanding the use of the words "à titre de constitut et précaire," Joseph Roy became to all intents the institute "grevé" with a substitution in favour of his own children: the only question being what is the effect of the subsequent limitation. On this point, viz., Joseph's character of "grevé," the present case is almost identical with that stated by Pothier (Traité des Substitutions, Sec. III, Art. 1) to have been decided in 1819.

It is desirable to determine in the first instance upon the construction of the instrument what intention the donor has expressed in the clause in question, without considering how far such intention was consonant with the law of Lower Canada.

The contention of the Appellants is that the terms "autres héritiers" imports certain *personæ designatæ*, viz., the legal heirs of the donor, other than Joseph Roy and his issue; that the clause operates as a valid and irrevocable substitution in favour of those persons, and that the last sentence of it is satisfied by supposing that the donor reserved to

himself the power of qualifying by his last will the enjoyment of the property by his substitutes, to the extent even of making them "grevés" with further substitutions. This construction, therefore, admits an intention in the donor to reserve to some extent a testamentary power over the subject of the gift; and *primâ facie* it seems more probable that if he reserved such a power at all, he would reserve one which enabled him to select the objects of his bounty, as well as to qualify and control their enjoyment of it. Do, then, the words admit of the latter construction? It may be granted that the terms "les autres héritiers," if found in a French instrument, would necessarily import the legal heirs of the donor other than Joseph and his issue to be ascertained at his death, even if they did not import the persons who were such presumptive heirs at the date of the gift. But it is to be observed that, owing probably in a great measure to the fact that the Statute Law of Lower Canada has engrafted on the old French law an unlimited power of disposition by will, the word "héritiers" has there acquired a signification wider than and differing from that which it would obtain in France. The 597th Article of the Civil Code of Lower Canada, after defining abintestate succession and testamentary succession, says, "The former takes place only in default of the latter;" and again, the persons on whom either of these successions devolves is called heir ("est désigné sous le nom d'héritier"). It follows from this, 1st, that it was competent to Pierre Roy at any time during his life, after the execution of the act of donation, to deprive his grandchildren of the character of "héritiers" in the proper sense of the term; and that, in such case, if they took the subject of the donation by a valid substitution they would take it only because they were presumptive heirs, or *hæredes viventis* at the date of the act; and 2ndly, that when using the term "autres héritiers" he may have meant the persons whom by his last will he should constitute his heirs, or, in other words, that he may have intended to reserve to himself the power not only of qualifying the enjoyment of the persons who were to take in default of Joseph and his issue, but of declaring who those persons were to be. Their Lordships agree with Chief Justice Meredith in thinking that this latter construction is the true one

and that it is supported by other parts of the act of donation, particularly by that which declares the donor's reason for making it to be his desire to acknowledge and reward the essential services rendered to him by his son; a desire accomplished by an irrevocable gift in favour of Joseph and his issue. They also agree with that learned Judge in thinking that some further confirmation of this construction is afforded by the provisions of the then existing will, which, it may be presumed, the donor had in his mind when he executed the act of donation—a will which he afterwards confirmed by his codicil, and ultimately left as the final expression of his wishes touching the disposal of his estate.

It is, however, contended that the intention thus attributed to the donor is inconsistent with the law of Lower Canada touching donations by acts *inter vivos;* and that the majority of the Court of Queen's Bench was in error in holding that the power, which it supposed the donor had reserved, was one which he could lawfully reserve, and one which, in the events that happened, he had effectually exercised. These propositions are now to be considered.

It has been assumed that the effect of the act of donation was to create a fiduciary substitution ("fidei-commissaria substitutio"), which completely satisfies the definition of such a disposition given by Thevenot d'Essaule de Savigny in chapter i, sec. 2, of his treatise; inasmuch as by it Pierre Roy passed the absolute property in the subject of the gift to Joseph, who took some beneficial interest therein, but became "grevé" with the obligation to transmit on his death the thing given to third persons, viz., his children. And such a disposition, being made by act *inter vivos,* must be taken to be subject to the general rule of irrevocability which is expressed in the old Coutumes by the words "donner et retenir ne vaut." Again, for the trial of the question now under consideration it must further be assumed that the "fidei-commissum" in question is what Thevenot (chapters xvii and xviii) terms "simple" and not "graduel," *i.e.*, that it extends only to one and not to several and successive classes of substitutes, the disputed clause being only the reservation of a right to the donor, and the question being the lawfulness of such a reservation.

Their Lordships are of opinion that for the law which obtains in Lower Canada they ought to look, in the first instance, to the Civil Code of that Province, which, though enacted after the commencement of this action, is admitted to be, when the contrary is not expressed, declaratory only of the law as it previously existed. And if this be so, it follows that the works of learned French authors, whether written before or after the promulgation of the Code Napoléon, are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code. They cannot control its plain letter or express provisions.

The 755th Article of the Code says, "Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing in favour of the donee, whose acceptance is requisite, and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, *or a valid resolutive condition.* Articles 811 to 816 explain what are the cases provided for by law; but none of them are material to the present question, unless it be the final clause of Article 816, which says, "The stipulation of all other resolutive conditions, when legally made, has the same effect in gifts as in other contracts." Again, Article 779 says, "A donor may stipulate for the right of taking back ("le droit de retour") the thing given, in the event of the donee alone, or of the donee and his descendants, dying before him. *A resolutive condition may, in all cases, be stipulated, either in favour of the donor or of third persons.*" Article 782 says, "It may be stipulated that a gift *inter vivos* shall be suspended, revoked, or reduced, under conditions which do not depend solely upon the will of the donor." And Article 713 says, "All gifts *inter vivos* stipulated to be reversible at the mere will of the donor are void. It is obvious that the law thus declared, however closely it may correspond with the ancient law of France, as contained in the Coutume de Paris, differs materially from the law as it exists under the Code Napoléon. The latter prohibits substitutions altogether, and avoids the instrument which attempts to create one, but retains the principle of the irrevocability of a gift by an act *inter vivos*, subject only to a "droit de retour," which it thus limits and defines:—"Le donateur pourra stipuler le

droit de retour des objets donnés, soit pour le cas du prédécès du donataire seul, soit pour le cas du prédécès du donataire et de ses descendans. Ce droit ne pourra être stipulé qu'au profit du donateur seul." (See Code Civil, Articles 894, 896, 951.) Nothing is said in these Articles of any resolutive condition other than this limited "droit de retour."

A resolutive condition (a term which comprehends the "droit de retour," however limited) is thus defined by Dalloz (Répertoire de Jurisprudence, Article 1740): "Il y a condition résolutoire, en matière de donations, lorsque la donation se réalise immédiatement, avec tous les effets qu'elle doit produire, au profit du donataire, mais sous la clause que, si tel événement incertain arrive, la donation prendra fin, et que les choses seront remises au même état que s'il n'y avait pas eu donation. Le donateur, qui était maitre de ne point donner du tout, peut évidemment ne donner que sous cette modalité. Mais quel sera l'effet de l'accomplissement de la condition résolutoire? On vient de dire qu'elle ne suspend point la réalisation de la donation: ainsi le donataire acquiert, dès à présent, la propriété même des biens. Mais lors de l'accomplissement de la condition, la donation sera résolue, c'est-à-dire que le donataire cessera d'être propriétaire des biens qui lui ont été donnés et livrés."

It is obvious from this passage that when a resolutive condition takes effect it operates as a revocation of the gift, and divests the donee of the property in the subject of the gift, which the act of donation had conferred upon him. If, then, it was competent to Pierre Roy by the law of Canada to stipulate by way of resolutive condition that, in the event of his son dying without lawful issue, the property should pass as he might direct by will, there can be no difficulty as to the *modus operandi* of the condition when it took effect. The proprietary right in this land thereupon ceased to be in Joseph Roy or his heirs: it fell again within the dominion of Pierre, and became capable of passing with the rest of his estate under his will.

Let us now try the legality of the supposed condition by the Articles of the Canadian Code. It does not sin against the principle of irrevocability, because its accomplishment does not depend solely

on the will of the donor, but on the happening of an event over which he had no control, viz., the death of Joseph without issue. If it be objected that it is not strictly a "droit de retour" within the meaning of the first clause of Article 779, because the event on which it depends is not that of the donee and his descendants dying before the donor; the answer is that it may nevertheless be "a valid resolutive condition," within the meaning of the latter clause of that section, which says that a resolutive condition may be stipulated either in favour of the donor alone, or of third persons. On the letter of the code the supposed condition seems to be a valid one. It has, however, been strenuously argued on behalf of the Appellants that the illegality of such a condition is established by the authority of writers like Demolombe and Troplong, who though they are professedly only commenting on the Code Napoléon, incidentally state what was the ancient law of France on this subject. Their Lordships desire to say nothing that may seem to derogate from the authority of these eminent jurists. It is, however, obvious that the works cited do not profess to be a complete or authoritative exposition of the old law; and that if they were, it would not follow that the law of Lower Canada, during the long period that has elapsed since the separation of that province from France, has not more or less departed from the stricter rules which even before the Code Napoléon may have obtained in France. However, their Lordships are not satisfied that these writers are so adverse to the contention of the Respondents as they have been represented to be. Both sides have appealed to M. Troplong's commentary on the 951st Article of the Civil Code, vol ii, paragraph 1261 to 1269. The Article is that which restricts the "droit de retour" within the limits above-mentioned. And the general object of the learned commentator is to show how particular provisions may fairly be construed to be reservations of a "droit de retour" rather than substitutions; the consequence being that in the former case the reservation, if within the limits prescribed by the Code, will be operative; and, if beyond those limits, will be simply inoperative: whereas such provisions, if construed as substitutions, would vitiate the whole disposition. He applies this reasoning to a stipulation for a "droit de retour"

to the donor or his heirs, arguing that it was not because the latter was really a substitution, but because its consequences were similar to those of a substitution, that the Code Napoléon limited the benefit of a "droit de retour" to the person of the donor, excluding his heirs. And he fully admits that by the ancient law such a reservation would have been valid, and that, if the donor happened to die before it took effect his heirs might have claimed the benefit of it. He says, "There will always be this essential difference between the 'droit de retour' and a substitution, that in the former case the heir comes forward as the representative of the donor and as exercising a right which would have come to him by reversion if an exceptional law had not deprived him of it; whereas the substitute is only a third person who is so far from exercising any rights of the donor that the latter, in making an institution and substitution, has shown that he does not wish to retain any of his rights, but that he abandons them all. He adds, "En un mot, dans le droit de retour, stipuleé même au profit des héritiers, la chose donnée remonte vers sa source; dans la substitution, elle s'en éloigne; dans l'un elle est censée rentrer dans la succession du donateur défunt, comme si elle n'en fût jamais sortie; dans l'autre, elle passe dans un patrimoine étranger." Troplong, therefore, must be admitted as an authority in favour of the proposition that a stipulation for a "droit de retour" to the donor or his heirs was permitted by the ancient French law. He no doubt afterwards comes to the conclusion that where the stipulation is for a "droit de retour" for the benefit only of a third person whether heir or not, and without mention of the donor, the stipulation is either altogether invalid, or can take effect only as a substitution; "le donateur n'étant pas du tout dans la stipulation deretour." But on this it is to be observed that if the stipulation really imports the reservation of a power to the donor on the happening of a certain contingency to dispose of the property by his will, it is in substance a "droit de retour" to him and his testamentary heirs, although he is not expressly named in the condition; its effect being to bring back the property into his succession as if it had never gone out of it. And the objection founded on the mere letter of the stipulation, viz., that it does not in terms

mention the donor, can hardly prevail against the words of the 779th Article of the Canadian Code which says, "A resolutive condition may in all cases be stipulated either in favour of the donor alone or of a "third person."

Their Lordships having to deal with an instrument, as to the construction and effect of which there has been so much difference of opinion amongst those conversant with such dispositions, and with the law to be applied to them, have naturally felt considerable doubt in this case. But the conclusion to which they have come is that the construction put upon the disputed clause by the majority of the Court of Queen's Bench is correct: and that there is nothing in the law of Lower Canada which is repugnant to that construction, or to the effect given to it.

They may further observe that even if the Appellants had succeeded in showing that the reservation implied in the construction put upon the clause by the Judgment of the Court of Queen's Bench was unlawful, they would not thereby have established their right to recover in this case. To establish their title they must show that the clause constituted a valid and irrevocable substitution in their favour. That consequence does not necessarily follow because the clause was not a valid resolutive condition, or even because it was not a resolutive condition at all. The argument for the Appellants assumed that the words might import the reservation of a power to the donor to "grever" the substitutes with further substitutions. Hence, if he did not intend to create, and did not create, an irrevocable substitution in favour of the other heirs, the clause may well be taken to reserve a power, which has not been duly exercised, to "grever" the institute Joseph Roy with further substitutions. But what would be the effect of holding either that the condition was altogether void, or that it reserved a power to create new substitutions in succession to the first, which had not been exercised? The effect would obviously be that there was no valid substitution after that in favour of Joseph's children; and that on the failure of that, the property became absolutely his, and capable of passing under his will. On this view of the case it would be only necessary to qualify the grounds of the Judgment, which would have to

remain a Judgment for the dismissal of the Appellants' suit. Their Lordships, however, have already intimated their opinion that the Judgment, as it now stands, ought to be affirmed.

This being so, it is unnecessary for them to decide the question of ratification, and they abstain the more willingly from the consideration of that question, because they have not the benefit of the Judgment of the Court of Queen's Bench upon it. They may, however, observe that whatever might have been their opinion as to the effect of the act of the 10th of October, 1848, they would have felt considerable difficulty in holding that there had not been "acceptation tacite" by reason of the receipt of the rents of the property bequeathed by Joseph Roy to Madame Grothé, and in distinguishing this case from that of Roy *v.* Gagnon (3 Lower Canada Reports). Nor, as at present advised, are they satisfied that Mr. Justice Smith was warranted in treating the amendment in the pleadings which had been made under a Judge's order, prononnced after hearing both parties, as "utterly irregular and insufficient to put the Plaintiffs to answer."

Their Lordships will humbly advise Her Majesty to affirm the Decree under appeal, and to dismiss this Appeal with costs.

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