Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of King v. *Tunstall and others, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered 21st July* 1874.

Present:

LORD JUSTICE JAMES.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

Their Lordships have listened with great attention and interest to the very able arguments which have been addressed to them by both the learned counsel in support of the Appellant's case. Their Lordships will assume for the purpose of disposing of this Appeal that the old law was exactly as stated by the learned counsel; that is to say, that according to the *Coutume de Paris*, which was planted in Canada by royal authority as the law of Canada under the French dominion, the gift in question to Plenderleath would be an absolutely null and void gift, by reason of the doctrines of that law as to adulterine bastardy. They will assume that it was proved in point of fact that Plenderleath was an adulterine bastard; and that he would have been incapable under the old law of receiving such a gift as this, that is to say, a gift by way of substitution of the family estates, as to which it could not well be predicated that they were given by way of sustentation or aliment.

Their Lordships assume further for the purposes of this decision, that the doctrine of prescription would not apply to a case of this kind;

although if it were necessary to determine that point, they would have required further argument. It would have required further consideration to determine whether possession openly taken under a claim of right under an instrument of this nature, and under one construction of an Act of the Legislature, such possession being held during the whole of the lifetime of the person who had so taken it, and afterwards for a great many years by the successor, would or would not be brought within the description of possession under a "juste titre." Their Lordships assume, however, that the doctrine of prescription would not apply to this case.

The matter then resolves itself into a question which the courts in Canada have decided upon more than one occasion, and after a great interval of years, as to what was the conjoint operation of the English Act and the Canadian Act, and of the provision of the Canadian law which is embodied in the code as to the period at which the capacity of a substitute is to be ascertained.

At the time when the English Act was passed, it is clear that in the settlement of Lower Canada the Sovereign Legislature did not think fit to establish the old Canadian law without several notable exceptions.

One notable exception to which our attention was called very late in the argument was this, that no part of the old Canadian law would apply to lands given in common socage, from which it would follow apparently that, with regard to lands in common socage, it was perfectly within the power of the owner, whether by a gift *inter vivos*, or by a testamentary disposition, to give them to any person whatever, without any restriction arising from the character of the donee. It would be singular that there should be one law based upon the grounds of public morality

and public policy which would make a gift of anything but lands in common socage void, but which would make gifts of lands held in common socage perfectly good. It would be difficult to conceive how any principle of public morality or public policy could make the disposition as to one class of property void upon those grounds, and not void as to another class of property. But beyond that, the law of England having from the earliest period, from the time when testamentary dispositions were introduced, given absolute power to a testator to deal as he liked with his property, wholly regardless of any moral or natural claims upon him, the English Legislature introduced that law into Lower Canada. It is not immaterial to observe, as was pointed out by Mr. Justice Badgley in an argument which has been attacked for inaccuracy in some respects, but is nevertheless a very able and very learned argument, that in the old coutume as to testamentary power, the power to the extent to which it then existed is expressed to be a power which could be exercised in favour of "*des personnes capables.*" Those are the words. When the English Legislature came to deal with it, those words were left out—their Lordships do not say intentionally, but the omission is a matter that deserves observation and consideration, and might well have been observed and considered by the Canadian Legislature in passing their subsequent Act. To the owner of property was given unlimited and unqualified testamentary power, so far as he is concerned, and so far as his children or other persons who would under the old law have had paramount rights of succession, are concerned. But then a doubt arose, or might have arisen as to whether that removed any personal incapacity on the part of the donee or legatee to take. The Canadian Act (which was however

not passed until after the death of the testator in this case) put an end to such doubt as to the capacity of donees or legatees. It was argued, indeed, by the counsel for the Appellant, that the incapacity under the old coutume was an incapacity of the testator; that a man was to be deterred from or punished for adultery by making it impossible for him to make any provision for his adulterine bastard, beyond a bare subsistence; that therefore it was the adulterer's capacity to *give* to his adulterine issue, not the capacity of the latter to *take* from his adulterous sire, that was extinguished by the old law; and that such incapacity was not dealt with by the new law.

If that were clearly made out, then it appears to their Lordships that the first Act did everything that was necessary. If the capacity of the testator was alone to be dealt with, the first Act had given unlimited and unqualified capacity to every testator. But the old law had not only said, it shall not be lawful for the testator to give, but had gone on to say in terms frequently repeated, it shall not be competent for the offspring of the adulterous intercourse to take. Indeed these persons were declared to be the issue of a *damnatus coitus*, and strong expressions of that kind were used, from which it might be inferred and probably declared, that not only the testator was prohibited from giving, but that they were prohibited from receiving. Hence, when the English statute came, doubts and difficulties might well arise. Doubts and difficulties did, in fact, arise before the passing of the Canadian Act, not exactly in this particular case, but on the general question as to whether not only the capacity of a testator had been established, but whether the incapacity of a donee to receive had been removed. It seems to have been held that

the incapacity of a donee to receive had not been removed when it arose from a special principle of law, such as the incapacity of the guardian to receive from a pupil or ward a gift by a testamentary instrument. The object of such a principle of law could not of course have been to inflict any disability on the pupil, but to prevent a guardian from abusing the influence which he had in obtaining the gift. Therefore it might well have been held that such a restriction, based upon the necessity of preventing the undue exercise of a peculiar influence could not have been within the purview of the English legislature, which simply removed the general testamentary incapacity, the incapacity of making a testament to the disherison of the heirs. And the same question or a similar question might well have arisen as to the restriction on gifts to adulterine bastards. In this state of things the Canadian Legislature, having before it the English law, passed an Act which professed to explain as well as to amend the English Act; and it proceeds to recite that doubts and difficulties had arisen with respect to the construction of the English Act. These doubts and difficulties it was perfectly within the competency of the Canadian Legislature to deal with as they thought fit, being a mere matter of disposition of property in the colony, not affecting any imperial policy. They recite the difficulties, and then they go on to declare and enact that it shall be lawful for a testator to give to any person or persons whomsoever, with the single exception of gifts in Mortmain.

The effect of this legislation upon the very will in question has been repeatedly considered by the Canadian Courts. In the year 1834 a suit was instituted disputing the title of Plenderleath, who had been in possession for many years. In that suit it was held by the Court of First

Instance that the Canadian Act had had the effect of removing any incapacity of Plenderleath to take under the substitution in his favour. The Court of Appeal reversed, or, rather, discharged the judgment of the Court below upon a technical ground, that is to say, they said that no judgment ought to have been given at all, because the Plaintiffs had not made out any right to sue. Although they had in fact the very character in respect to which the present suit is brought, they had not so pleaded and so proved it as to render it possible, according to the view of the Supreme Court, to come to a final decision. The Court said it was a suit between persons who had not shown themselves to have any *locus standi* to claim a decision at all.

The Court of Appeal, however, took great care to give an elaborate judgment, in which they adopted exactly the same view of the main question in the cause as that taken by the Court of First Instance. That was a great many years ago, and until the institution of the present suit no further attempt was made to disturb the possession under the testamentary gift in question. In the present case the Court of First Instance has taken the same view. The Court of Appeal, by a majority, takes the same view, and that has been the law apparently understood in Canada from the time when the matter was first mooted in this particular case, and has been received during the greater part of this century. It would appear to be the view of the law which the Commissioners took when they framed the Code, leaving the law so to stand as to testamentary gifts, although they preserved or re-enacted the old French law so far as regarded gifts *inter vivos* to adulterine bastards.

It appears to their Lordships there is great ground for holding that view as to the effect of the Canadian law; and their Lordships feel that

they ought on the construction and effect of a Canadian Act affecting the law of real property there to be very much governed by that which has been the concurrent decision of the Courts in Canada during the lapse of years. No doubt a difficulty arises from the general principle of law that an Act should never be construed as retroactive or retrospective, unless express language or necessary inference compel such a construction. It is, however, to be observed that the Canadian Act is a declaratory Act as well as an enacting one, or, more properly speaking, it is in this respect strictly declaratory. For although the words in the English version of the Canadian Act are words of futurity, "It shall be lawful" in the French version (French being the language of the people), it is, "Il est et sera loisible;" and if it was then lawful it must have been always lawful under the English Act, although some had doubted it. Moreover, it appears to their Lordships, that the difficulty (if any) is entirely removed in this case by the peculiar provision of the old law derived from the Roman law, which has been incorporated into and now forms part of the Canadian Code (s. 838), to the effect that wherever there is a limitation by way of substitution, the time when the substitution opens is the time with reference to which the capacity of the substitute to take is to be determined. It is difficult to say to what class of cases that would apply if not to this. It is suggested indeed that this provision was inserted in the code with regard to the possibility that the intended substitute might not be in existence, or might not have acquired a particular character or qualification at the date of the will or at the death of the testator, and that it applied in such cases only. There is no such limitation expressed in the Code, and it was conceded, and properly conceded, that if the incapacity were clearly a

personal incapacity of a general character (as distinguished from an incapacity to take from a particular person), for instance, as that of a felon, a person *civiliter mortuus*, an alien, or a person under any peculiar personal incapacity of that kind, then in that case, if the incapacity were removed before the substitution opened, the question would have to be determined with reference to the moment when the substitution opened. In the judgment in the original case to which reference has been made a great number of authorities are cited, and there is a passage from Ricard, in which it is thus stated: "Quant aux dispositions conditionelles lorsque "la condition s'étend au delà du décès du tes- "tateur, le droit romain n'exigeait la capacité "du donataire qu'au tems de l'accomplissement "de la condition, parceque c'est à cette époque "que le droit est ouvert et que le testateur est "censé avoir prévu que le donataire pouvait "devenir capable avant l'évènement de la con- "dition. C'est comme s'il avait dit, je donne à "Titius, s'il est capable de recevoir, lorsque telle "condition arrivera." It would be difficult to say that this doctrine would not apply to the present case, the case of an Englishman who giving to his natural child a Canadian property might well be supposed to say, "I give it to him, if, as I hope, "the Canadian law has been or shall be assimi- "lated to the law of England and his incapacity "be removed before the gift takes effect." The matter is very fully discussed in Ricard, but it is not necessary to read more than has been quoted.

Indeed it was said that such a principle is not to be applied to this case; that the attempt to make this gift is such a violation of law on the part of the testator that it is to be struck out just as if it were a gift *pro turpi causâ* or *contra bonos mores*. Their Lordships are unable to take that view. Nobody surely can suppose that it is

a crime in a man to express by his will his wishes as to what should be the devolution of his property after his death, or that it should go in a particular direction,—even although that direction should be in favour of an adulterine bastard,—leaving it open to the law to say whether the wish shall or shall not take effect. There is nothing immoral, nothing wrong in the expression of such a wish, nothing to prevent the ordinary application of the ordinary principles of law to the case. And, therefore, even if the old incapacity of adulterine bastardy had not been effectually removed by the English Act, it had before the substitution opened been removed by the intervening Canadian legislation.

Their Lordships are of opinion that the decisions of the Canadian Courts ought not to be disturbed, and they will humbly recommend to Her Majesty that the Judgment of the Court of Queen's Bench ought to be affirmed, and this Appeal dismissed with costs.