ELIZABETH RUSSELL.....APPELLANT; 1882

*May 2, 3.

AND

1883

PIERRE LEFRANÇOIS *et al*.....RESPONDENTS *Jan'y 11.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Will, validity of—Insanity—Legacy to wife,—Error—False cause—Question of fact on appeal, Duty of Appellate Court.

P. L., executor under the will of the late *W. R.*, sued *W. C. A.*, curator of the estate of *W. R.* during the lunacy of the latter, to compel *W. C. A.* to hand over the estate to him as executor.

After preliminary proceedings had been taken, *E. R.* (the appellant) moved to intervene and have *W. R's.* last will set aside, on the ground that it had been executed under pressure by *D. J. M.*, *W. R's.* wife, in whose favor the will was made, while the testator was of unsound mind. The appellant claimed and proved that *D. J. M.* was not the legal wife of *W. R.*, she having another husband living at the time the second marriage was contracted. *W. R.*, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about $16,000. On the 4th October, 1878, *W. R.* made a will by which he bequeathed $4,000 and all his household furniture and effects to his wife *J. M.*, $2,000 to his niece *E. R.*, $1,000 to *F. S.* for charitable purposes, and the remainder of his estate to his brothers, nephews, and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving $800 to his wife *J. M.*, $400 to each of his nieces *M.* and *E. R.*, and $400 to his brother, with reversion to the nieces if not claimed within a year, and the remainder to *E. R.* On the 27th November, 1878, *W. R.* made another, which is the subject of the present litigation, and by which he revoked his former wills and gave $2,000 to *F. S.* for the poor of the parish of *St. Rochs*, and the remainder of his property to his "beloved wife *J. M.*" On the 10th January following *W. R.* was interdicted as a

* PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

1883

RUSSELL v. LEFRANÇOIS.

maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece *E. R.*, sister of the appellant. Chief Justice *Meredith* upheld the validity of the will, and his decision was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of *Canada*:

Held (1) [reversing the judgments of the courts below, *Ritchie*, C.J., and *Strong*, J., dissenting,] that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind.

(2.) That, as it appeared that the only consideration for the testator's liberality to *J. M.* was that he supposed her to be "my beloved wife *Julie Morin*," whilst at that time *J. M.* was, in fact, the lawful wife of another man, the universal bequest to *J. M.* was void, through error and false cause.

(3.) That it is the duty of an Appellate Court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case (1).

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Lower Canada* (appeal side) affirming a judgment of Chief Justice *Meredith*, of the Superior Court of the Province of *Quebec*.

This was an action by *Pierre Lefrançois*, one of the respondents, as executor to the last will and testament of the late *William Russell*, of the 27th of November, 1878, against *Henry Charles Austin*, to account for his administration as curator of *Russell's* property, who, before his death, had been interdicted for insanity.

The appellant, *Elizabeth Russell*, a niece of the deceased, intervened in the cause, and, both as one of his heirs at law and as a special legatee by a former will, impugned the validity of the will of the 27th of November, 1879, on the grounds:—

(1) Application to the Privy Council for leave to appeal from the judgment of the Supreme Court of *Canada* was refused.

1883

RUSSELL v. LEFRANÇOIS.

1st That *Russell* was not of sound mind when he made this will.

2nd. That the will did not express his true intentions, but was the result of undue influences exercised by *Julie Morin*, one of the respondents, who, taking advantage of the testator's mental and physical weakness and incapacity, caused this will to be made in her favor.

3rd. Because the will was made through error as to the quality of the universal legatee, *Julie Morin*, who was not the wife of *Russell* but a married woman who lived with him in adultery.

4th. That the will was against good morals.

5th. That the formalities required by law had not been observed.

After the petition of the appellant to be permitted to intervene had been received, *Julie Morin*, the sole universal legatee named in the will, was made a party to the action, and both she and *Lefrancois* separately contested the intervention by a general denial of all the allegations of the appellant's petition.

A great number of witnesses were examined in the cause as to the condition of the testator's mind when he made his will, and the Superior Court came to the conclusion that the will was valid, and dismissing the petition of the appellant, it ordered the defendant *Austin* to render an account of his administration of the testator's estate and property. The will was as follows:

"I will and direct that all my just debts be paid and satisfied as soon as possible after my decease.

"I give and bequeath unto reverend *J. P. Sexton*, priest of *St. Roch* of *Quebec*, to be used as he may deem fit and proper for the benefit of the poor inhabitants of the city of *Quebec*, the sum of two thousand dollars.

"And as to the rest and residue of my said estate of which I may die possessed, I give and bequeath the

1883

RUSSELL v. LEFRANÇOIS.

same unto my beloved wife, *Julie Morin*, as her own absolute property.

"I hereby nominate and appoint *Pierre Lefrancois*, of *Levis*, culler, as executor to this my last will and testament, in whose hands I do hereby divest myself of the whole of my said property, giving him power to prolong and carry out the execution of this my said last will beyond the term allowed by law, hereby revoking all former wills and codicils at any time heretofore by me made, and declaring the present to be my only true will and testament."

The evidence is reviewed at length in the judgments hereinafter given.

Mr. *Irvine*, Q.C., and Mr. *Cook* for appellants, and Mr. *F. Andrews*, Q.C., Mr. *Bethune*, Q.C., and Mr *Fitzpatrick* for respondents.

The points relied on and cases cited, appear sufficiently in the judgments.

RITCHIE, C.J.:—

I have given to this case very considerable and anxious consideration, and having had an opportunity of reading the judgment of Mr. Justice *Strong*, with which I entirely concur, I have come to the conclusion that this appeal ought to be dismissed. I cannot discover anything to justify this court in reversing the judgment of the Superior Court and of the Court of Queen's Bench. On the contrary, I concur with Mr. Justice *Strong* that, on the whole evidence taken together, the balance of that evidence is in favor of the capacity of the testator to make the will at the time and in the manner in which he did. I cannot discover from the evidence that the testator was under any delusion that could have influenced the testamentary disposition he made of his estate by his will, nor any-

thing to show that at the time he directed the preparation of the will, and at the time he executed it, he was incompetent to manage his own affairs, or that he did not fully understand the character and effect of what he was doing, nor can I discover any evidence that *Julie Morin* exercised any undue control over him, or that he was in any way unduly influenced or intimidated; on the contrary, the evidence, I think, satisfactorily shows that the making of the will, and the disposition of his property as contained therein, were his own spontaneous acts, and I think that the strong evidence of the notaries before whom the will was executed (they performing a public duty in the preparation of wills), and the evidence of the other transactions before other notaries and with other persons with whom the testator transacted important business involving large amounts before, about the time and after the making of the will, very conclusive.

On this point the case has been so fully discussed and the evidence so thoroughly analyzed, that I have only a few words to add.

I cannot but think that the learned Chief Justice in the Appellate Court below attaches too much weight to the consideration which seems also to have impressed Chief Justice *Meredith*, viz. :– that this will was a very unjust will towards the niece. They do not, it appears to me, give sufficient consideration to the position of *Julie Morin* in reference to the testator. I think there is nothing in this case which could lead the mind of any party to the conclusion that, at the time *Julie Morin* contracted marriage with the testator, either she or the testator had any idea that she was not in a position, free from her previous marriage engagements and in a position to enter into an honest *bonâ fide* and legitimate marriage contract with the testator. I think also they have not thoroughly appreciated the con-

1883

RUSSELL v. LEFRANÇOIS.

Ritchie, C.J.

dition of the testator—that he was a man in years and afflicted with a serious cutaneous disorder of a very aggravated, painful character—some of the witnesses speaking of his sufferings as intense and his sores something horrible to look at—necessarily therefore requiring a great deal of care and attention at the hands of those with whom he was residing. They also do not appear to have considered the fact, that when he made his marriage settlement on *Julie Morin*, he only provided for her receiving $400. I think it not unreasonable to assume, in accordance with what is mentioned in several cases, that this small amount was, in all probability, fixed with a view, considering the respective ages of the parties, that the wife might be dependent upon the will he would make and not be altogether independent of her husband, with a view of securing that attention and care he so much needed.

I think also the learned Chief Justice of the Court of Queen's Bench, for whose opinion I have the most profound respect, did not consider sufficiently the just claims of the wife, on the one hand, and on the other, that the conduct of the niece to this old man was not such as to secure a continuance of his favor, but that, on the contrary, he had ceased to retain his affection for her; and while there is not a particle of evidence in this case to show that there was the slightest unfair control used by *Julie Morin* over the testator, the evidence of the parties as to the execution of the will in favor of the niece shows the direct opposite. The niece on that occasion was received kindly by the uncle, who evidently had, if the testimony is true, just cause of complaint against her, because she had, contrary to his commands, introduced into his house, as an associate, a person towards whom, he, rightly or wrongly, thought he had cause to entertain feelings of great hostility, and who also, no doubt, felt much annoyed at her opposi-

tion to his marriage—notwithstanding which, when she comes to him he receives her kindly, gives her $500, and then seeks that she shall become reconciled to *Julie Morin*, who was living with him and believed by him to be his wife. Instead of responding to the wishes of her uncle, she, on the contrary, exhibits the greatest hostility and reluctance to any compromise or any terms of friendship with *Julie Morin*, and while apparently willing to make a will in her favor, he did not wish to do so without the consent of his wife.

Naturally enough, she, for whom provision had been made only to the extent of $400 by the marriage settlement, does not appear to have approved of the contemplated will, but though disapproving, she does not appear to have interposed any obstacle to the execution of the will, or attempted in any manner to control or intimidate the testator.

Miss Russell's account of what then occurred is as follows:—

After the will had been read to Mr. *Russell*, he said: "I must ask my wife's permission to sign it." He went into the kitchen and spoke to Mrs. *Robitaille*. He came back and said, "She will not permit me to sign that will." I said, "What was the use of bringing Mr. *Austin* here and giving him all that trouble, if you did not intend to sign it." He went back again and spoke to Mrs. *Robitaille*. I heard her say to him "Je ne veux pas, laissez moi tranquille." My uncle returned and said she would not allow him. I said, "Well, uncle, will you not do something for me, you know I am not strong and cannot work." He then took the pen and said, "I do not care, I will sign it." My uncle took the pen and signed the will in presence of Mr. *Austin* and Mr. *DeBeaumont*.

After it was executed, he again tries to bring about a reconciliation between his wife and his niece, but the niece shows no disposition to conciliate the old man, but actually refuses to shake hands with *Julie Morin*. Miss *Russell's* description of the last scene of that interview is as follows:—

My uncle went into the kitchen and seated himself along-

1883

RUSSELL v. LEFRANÇOIS.

Ritchie, C.J.

side of Mrs. *Robitaille*. He asked me to go into the kitchen and speak to Mrs. *Robitaille*. I told him I would not. He said: "Come and speak to her for my sake, for she will punish me for what I have done to-day." I was all alone with my uncle. I went into the kitchen. I found Mrs. *Robitaille* there, and her sister Madame *Roy*, and also my uncle. He asked me to shake hands with Mrs. *Robitaille*. I refused. He insisted upon my doing so. I said: "I will do so to please you." Mrs. *Robitaille* said, reaching out her hand: "On ne refuse pas de donner la main à un chien." She gave me her hand and I took it. I kissed my uncle, and on going away, I said: "Will you permit me to come back and see you, as you are ill?" He said, "I will see." That is all that took place in the kitchen.

It is not wrong for a person in *Julie Morin's* position, by reasoning or persuasion, to obtain a will to be made in her favor, if she does not coerce the testator, she has a right to exercise legitimate influence by persuasion to induce him to make a will in her favor, though there is no evidence that such took place in this case. And was it not more reasonable that a will should be made in her favor, than that a will should be made to cut her off with a nominal sum, she who for days, nights and years cared for him when suffering from that grievous, loathsome disease, not only painful to him, but trying and offensive to the nurse? Can it be said that a will in favor of a wife so situated was unnatural or unreasonable? Who had the most claim on him, the niece or the wife? If there is any balance, in my opinion, the weight is decidedly in favor of the person who believed herself, and whom he believed to be, his wife, and who appears to have faithfully discharged towards him the duties of a wife. I think, under all the circumstances, considering the way in which the will was made, not made when she was present, but made before men whose sworn duty it was not to permit the testator to execute a will if they saw the least sign of insanity or incapacity to make the will, or had any reasonable grounds for

supposing that such insanity or incapacity existed, and considering that, although the appellant is now setting up that the testator was incapable to make a will in favor of *Julie Morin*, she is contending, notwithstanding, that a few days previous he had perfect capacity to make a will and give his property to the niece, when all this evidence, on which they now seek to establish incapacity, was just as patent and known to them as it is to-day; the will may have been the result of regard for *Julie Morin*, or of gratitude for the care and attention bestowed on him by her, or it may have been the result of persuasion on her part, or possibly all combined; but I can discover no evidence of illegitimate influence or pressure, overpowering or controlling the will of the testator, nor any kind of coercion or fraud practiced on him. On the contrary, he appears to have acted freely and independently, as his own will and pleasure dictated, and while his niece may have had strong claims on his affection and bounty, the disposition in favor of his wife to her exclusion was certainly a will in favor of one having a primary legitimate claim to his gratitude and testamentary consideration and bounty, and, as Chief Justice *Meredith* suggests, may be fairly attributable to the care and devotion with which it is proved she nursed, night and day, for a period of more than a year, a person sick and suffering, and whom she regarded as her husband; and such a will cannot be said to have been made to the exclusion of the natural object of the testator's bounty.

I can come to no other conclusion than that, upon the whole testimony, there was evidence of a disposing capacity, and that, at any rate, there is no such overwhelming evidence of incapacity as would warrant this court, under the authorities, in reversing the judgment of the Superior Court, confirmed, as it is, by four out of the five judges of the Court of Queen's Bench.

1883

RUSSELL v. LEFRANÇOIS.

Ritchie, C.J.

In addition to this, I agree entirely with my brother *Strong*, in his view of the law which should govern this case. I think, also, if there was "error," it is not competent on the record in this case for this court now to reverse the judgment on that ground.

I am sorry to differ with the majority of the court, on a case of this kind, but I must conscientiously express the honest conclusion to which my mind has been brought, after a careful consideration of all the circumstances.

I do not feel it necessary, as I said before, to refer to any of the other evidence, because it has been so elaborately gone into in the courts below, especially by the learned Chief Justice of the Superior Court.

STRONG, J.:—

I am unable to concur in the judgment of the majority of the court. The learned and experienced judge before whom this cause was heard in the court of first instance, and in whose presence several of the witnesses were examined, found that the testator, *William Russell*, when he made the will of the 27th November, 1878, which has been impugned by the appellant, was possessed of sufficient mental capacity for the performance of that act, and that the will he then made was not the result of any fraudulent practices, solicitations, or suggestions.

In the Court of Queen's Bench that judgment was affirmed by four of the five judges of whom that court was composed The question regarding the testamentary capacity of the testator being entirely one of fact, and depending altogether on the appreciation of the evidence of witnesses whose testimony was conflicting, I am of opinion that we ought not, sitting in a second Court of Appeal, to disturb the finding of the primary court, confirmed, as it has been, by a large majority of

the first Court of Appeal. In the case of *Gray* v. *Turnbull*, (1) Lord *Chelmsford* most distinctly affirms this principle as one applicable to appeals to the House of Lords in cases from *Scotland*. He says:

If there is to be an appeal on questions of fact (and I regret that there should be such) I think this principle should be firmly adhered to, namely: that we must call on the party appealing to show us irresistibly that the opinion of the judges on the question of fact was not only wrong, but entirely erroneous.

In *Hay* v *Gordon* (2) the Judicial Committee of the Privy Council recognise the same rule as applicable to that jurisdiction. They say:

Their lordships are not unmindful that they have on more than one occasion laid it down as a general rule, subject to possible exceptions, that they should not reverse the concurrent findings of two courts on a question of fact.

In *Lambkin v. S. Eastern R. Co.* (3), the Judicial Committee re-affirm the same principle as follows:

With respect to the verdict being against evidence, it appears to their lordships, as indeed they have before intimated, that the question of negligence being one of fact for the jury, and the finding of the jury having been upheld, or at all events, not set aside, by two courts, it is not open under the ordinary practice to the defendants.

In the case of the *Picton* (4), the learned Chief Justice of this court in giving judgment states the rule just adverted to with approbation, and applies it in a case not nearly so strong as the present. In that case the Chief Justice also refers to several authorities collected from English reports in admiralty and other appeals, affirming the rule in question. *Santacana* *Y. Aloy* v. *Ardevol* (5); *Reid* v. *Steamship* Co. (6); *Penn* v. *Bibby* (7); *Ball* v. *Ray* (8); The *Glannibanta* (9); *Bigsby* v. *Dickson* (10). And in the same case the judgment of Mr. Justice *Gwynne* contains the following passage:

(1) L. R. 2 Sc. App. 53.
(2) L. R. 4 P. C. C. 348.
(3) 5 App. Cases 352.
(4) 4 Can. S. C. R. 648.
(5) 1 Knapp 269.
(6) L. R. 2 P. C. 245.
(7) L. R. 2 Ch. App. 127.
(8) L. R. 8 Ch. App. 467.
(9) 1 Prob. & Adm. D. 283.
(10) 4 Ch. Div. 24.

1883

RUSSELL v. LEFRANÇOIS.

Strong, J.

Sitting in a Court of Appeal we should be satisfied beyond a doubt of the incorrectness of this finding before we should reverse it.

Such an interference upon a second appeal cannot be justified by any presumption that the second appellate court is in any better position to give a judgment than were the two preceding courts, for that presumption is, as regards the original court at least, entirely the other way, and therefore the policy of the law should be to discourage appeals on questions of fact, where there is anything like a balance of testimony, as useless and vexatious. Speaking for myself, I recognise in the rule laid down in the cases referred to in the Privy Council and House of Lords, one binding upon this court, and one which I shall feel compelled to follow, until the court of last resort adjudges otherwise. The unsatisfactory consequences which a contrary practice may lead to, are sufficiently exemplified in the result of the present appeal. The effect of the judgment now pronounced by this court being that this cause, the decision of which depends altogether on the credit to be accorded to one set of witnesses rather than to another, is ultimately decided for the appellant by the judgments of five judges against those of seven (including the judge who presided at the trial) whose finding is in favor of the respondent.

Whilst relying on the rule I have adverted to, I quite agree that there may be cases of gross error in drawing inferences from facts established by evidence beyond dispute, in which even second courts of appeal may be warranted in reversing, but it is only in such a class of cases that the jurisdiction should be exercised. A case, like the present, depending entirely on the weight of evidence, when there is anything like a balance of testimony, can never be said to form an exception to the general rule, which has for its support the great weight of authority already mentioned.

Further, I am of opinion, after the most attentive consideration which I have been able to give to the facts of the case as they appear in proof, taken in connection with the law, as laid down in the passages from *Laurent* and *Demolombe* referred to in the judgment of Mr. Justice *Cross*, and in the case of *Banks* v. *Goodfellow* in the English Court of Queen's Bench (1), that the conclusion of the learned Chief Justice of the Superior Court was entirely right, and if I were compelled to try over again the issues of fact, which he had to dispose of, I should unhesitatingly find, as he has done, that the appellant has wholly failed in establishing the testamentary incapacity of *William Russell*, at the time he made the impeached will of the 27th November, 1878.

But, entertaining the opinion already expressed, that we ought not to disturb the judgment of the two courts which have already dealt with the questions of facts involved in the appeal, I do not feel called upon to enter upon any analysis of the evidence for the purpose of demonstrating the correctness of these decisions, for I prefer to rest my judgment entirely upon the inadmissibility of any further controversy in this court on the question of the testator's sanity.

It is said, however, that independently of the testator's incapacity, the disposition in favor of the respondent as universal legatee is void upon the ground of error or false cause, inasmuch as the testator describes her as "*Julie Morin*, his dear wife," when she was in truth at that time the wife of another man.

This point does not appear to have been seriously urged before the Chief Justice of the Superior Court, though it was taken in the Court of Queen's Bench, where all the learned judges, except the Chief Justice, agreed in repelling it. I am of opinion in the first

(1.) L. R. 5 Q. B. 549.

1883

RUSSELL v. LEFRANÇOIS.

Strong, J.

place, that it is inadmissible in the present state of the pleadings. The declaration filed by the appellant, does not libel this as a ground for invalidating the legacy to her, neither does it take any conclusions founded upon this pretension of error or false cause, and at this stage of the action I do not think we ought to permit an amendment of the record for the purpose of raising the objection. Further, it appears to me that the judgment of the Court of Queen's Bench was, for the reasons stated in the opinion of Mr. Justice *Ramsay*, entirely correct. The great preponderance of authority appears to be in favor of the law as stated by *Furgole* (1), who founding himself upon the Digest (2), De Con. et Demonstr. "*sed plerumque doli exceptio locum habebit si probetur alias legaturus non fuisse*," says that when a testator gives a legacy to a legatee or institutes as heir a person whom he describes as a relation, (other than in the case of the institution of a son as heir,) it is not to be presumed that the relation or quality of the person was the final or determining cause, and that, therefore, the disposition is not to be considered as null if the person named afterwards turns out not to be related to the testator in the manner described, though it is open to the parties opposing the will or legacy to *prove* that the erroneous supposition of relationship was the sole determining cause, or, in the words of the text cited, "*alias legaturus non fuisse.*" The case of the institution of a son as heir is said to stand on a different ground

Parce que la fausse opinion de la filiation est présumée la cause finale de l'institution, et que sans cette qualité le testateur n'aurait pas disposé en sa faveur [*Furgole*, loc. cit.]

This distinction of the case of the son is, I apprehend, to be explained by the consideration, that the Roman Law, which was the law of the "pays de droit écrit" with reference to which *Furgole* wrote, required for the

(1) Vol. I, c. 15, sec. 4, p 271 et seq. (2) Lib. 35, tit. 1.

validity of the testament that an heir should be instituted, and further made the testament inofficious, if a son was passed over without being instituted, or in express words and for cause disinherited. It is true that *Menochius*, in his treatise, "*de Presumptionibus*," to which my brother *Taschereau* has referred, says presumption of error is applicable in a case exactly like the present, where the testator gives to a person described as his wife who afterwards appears not to have been his wife, but the commentators and writers both on the Roman and French law, who state the rule the other way, including *Muhlenbruch* (1), *Warnhoenig* (2), *Demolombe*, Trait. des Donat. & Test. (3), *Duranton* (4), and *Troplong* (5), (who all agree with *Furgole*), are so clear and decisive in the contrary opinion, and the reasons they give are so strong that, founded as they are on the clear words of the text in the digest, the single authority of *Menochius* ought not to outweigh them.

These writers show that it is not to be presumed from the mere statement of the quality of the legatee that it was the sole and determining cause of the disposition, or, in the words of the law cited from the digest, that otherwise the legacy would not have been given, and further that if the quality is not to be considered as the final cause of the testator's liberality, but if that may have been influenced by personal affection or other causes the error is not to be considered fatal. They further establish that in case of doubt the presumption is to be such as will uphold the disposition *ut res magis valeat quam pereat.*

Troplong, particularly in his Commentary on Donations and Testaments, puts this very clearly in the folowing extracts: No. 503:

(1) Vol. 3, pp. 253, 254.
(2) Vol. 3, p. 427.
(3) Vol. 1, Nos. 389, 390, 391.
(4) Vol. 9, p. 335.
(5) See post.

1883

RUSSELL v. LEFRANÇOIS.

Strong, J.

Mais si la qualité n'avait pas été la seule considération déterminante, si l'affection personnelle s'était mêlée à la libéralité, on ne pourrait plus dire qu'il y a eu erreur fondamentale dans la disposition.

No. 384:

Menochius semble croire qu'il suffit que la cause soit exprimée pour qu'elle doive être considérée comme finale. Cette opinion est avec raison repoussée par *Furgole* qui s'appuie sur les termes mêmes de la loi 7280 déjà citée. D'ailleurs, dans le doute il faut toujours se décider pour la parti qui tend à faire valoir la disposition. Or, la cause impulsive est plus favorable puisque malgré sa fausseté elle ne porte pas atteinte aux legs. Il semble donc que la cause doit être réputée impulsive, à moins qu'il ne résulte clairement qu'elle est finale.

Applying these principles of interpretation to the present case we must presume that the proposed relationship was not the sole cause which induced the testator's liberality, but that he was also influenced by his personal affection for the respondent. I come therefore on this part of the case also to the same conclusion as that arrived at by the Court of Queen's Bench. Although I admit English authorities ought not to be decisive on this head, so far as any question of law is involved (for, in that respect, it must of course depend entirely upon the rule of the French as derived from the Roman law,) yet, as it has been shown to be a question of interpretation, rather than one of law, it is not immaterial to notice that the English Court of Chancery has adjudged the question which arises here, the legacy to a person described by the testator as his wife and afterwards proved not to be his wife, in the same way as *Troplong* decides it, namely: that error is not to be presumed and the legacy is not vitiated by the false description of the legatee. This was the decision of the Master of the Rolls in the case of *Re Pett's* Will (1); See also *Schloss* vs. *Stiebel* (2); *Giles* vs. *Giles* (3); Theobald on Wills (4).

(1.) 27 Beav. 576.
(2.) 9 Sim. 1.
(3.) 1 Keen 685.
(4.) Ed. 2, p. 214.

Further, the appellant, *Elizabeth Russell*, sueing as she does, not as one of the testator's co-heirs, but merely as a particular legatee under the will of the 8th October, 1878, is not qualified to raise this objection. A decision in favor of the appellant founded on this pretence of error or false cause alone, of course supposes the will of the 27th November, 1878, to be in other respects a good will, for, on no principle that I can understand could it be said that the invalidity of the disposition in favor of *Julie Morin*, as universal legatee, contained in the will of the 27th November, on the ground of false cause or error, rendered the whole of that will null, so as to avoid the legacy to the Rev. Mr. *Sexton* and the clause of revocation contained in it; certainly the whole will could not for this reason be set aside in the absence of the Rev. Mr. *Sexton*, who is not a party to the action. And if this be so, it revokes all former wills, thus leaving this pretension one which can be only set up by the heirs *ab intestato*. Then it does not appear of what persons this class of heirs is composed, and at all events they are not all before the court as they ought to be, before we could declare the nullity of the legacy to the respondent for the cause alleged.

I am of opinion the appeal should be dismissed with costs.

FOURNIER, J., concurred with *Taschereau*, J.

HENRY J.:

After a full consideration of the circumstances in evidence in this case, I have arrived at the conclusion that on two issues raised, the appellant is entitled to the judgment of the court. I had some difficulty in arriving at that conclusion during the argument; but,

1883

RUSSELL v. LEFRANÇOIS.

Henry, J.

after a very careful consideration of the evidence, I think that it sustains the position, which has been taken by my brother *Gwynne*, as to the incapacity of the party to make the will in favor of *Julie Morin*, which is set up in this action. I need not repeat what my learned brother has so well and so exhaustively stated in regard to the position of *Russell* at and before the time when he made the will. Although on the occasion he appeared to the learned gentlemen in whose office the will was made, as being perfectly sound, he made a remark before he got to his own house, to a party, which would show clearly that he was not at all right in his mind. He was asked, had he made his will? He said he had. He was asked why he had made it, and he answered that, if he did not do so, his life was not safe. Here is a fact stated immediately on his making the will, which to a certain extent, goes to confirm the testimony that is given to sustain the position that when he made it he was not in his right mind, or that he was acting under coercion from fear of personal consequences. I take the same view precisely in regard to his conduct in his dealings with *St. Michel* that my learned brother has taken, and, taking it in all its bearings, I think that he was not, at the time of making his will, in his right mind. Now, if the evidence ended here, we might possibly entertain some doubt, but when in a very short time afterwards, we find that, on the application of *Julie Morin*, he was himself taken up as a lunatic and confined as such, we can easily trace back from that circumstance to the transactions which he was concerned in previously, and come to the conclusion that, at the time he made the will, he was not in his right mind. It is a principle in the law of evidence, that, if it is once shown that

1883

RUSSELL v. LEFRANÇOIS.

Henry, J.

a party is not in his right mind, in reference to a future transaction, the onus is thrown upon the party who wants to sustain the validity of that transaction to show that, although not at one time in his right mind, he had recovered and was *compos mentis*. Now, the evidence on behalf of *Julie Morin*, not only does not show this, but shows the very opposite. I need not repeat what has been so well said in regard to the evidence which has been given on this point.

In reference to the other point, viz.: admitting *Russell* was in his right mind when he made the will, is that will binding, and did it convey to *Julie Morin* the property which she claims under it? -- It appears to me, from a reference to the authorities, both those that are binding in *Quebec* and those that have been considered binding in *France*, and even going back to the Roman authorities, that a legacy made to a party whom the testator considered to be his wife at the time, but who was not, is not valid in law. We are not called upon to decide this case upon any principles of English law, but according to the law in force in *Quebec;* and I have arrived at the conclusion that, according to that law, even if the testator were in his sound mind when made his will, and bequeathed a legacy to one whom he honestly believed to be his wife at the time, but who was not, such legacy is void.

For these reasons, I think the appeal should be allowed, and that the judgment of this court ought to be in favor of the appellant. There are equities in the case in favor of *Julie Morin*, and a great deal might be said why it would be desirable that our decision should be otherwise, but we are not entitled to take them into consideration, if we come to the conclusion that the law prevents our consideration of them.

1883

RUSSELL v. LEFRANÇOIS.

TASCHEREAU, J.:—

L'action en cette cause fut instituée par l'intimée *Le François*, en sa qualité d'exécuteur du testament du défunt *William Russell*, en date du 27 Nov. 1878, réclamant la succession du dit *Russell* contre *Henry Charles Austin*, curateur à la personne et aux biens du dit *Russell* qui avait été interdit pour insanité d'esprit. Après le retour de cette action en Cour, la présente appelante obtint la permission d'intervenir pour contester la validité du dit testament, et mit en cause par son action *Julie Morin*, une des intimées, qui était instituée légataire universelle par ce testament.

Le jugement de la Cour Supérieure rejeta la contestation de la présente appelante et déclara le dit testament bon et valide. Ce jugement fut confirmé par la Cour du Banc de la Reine. Le Juge en Chef, Sir *A. A. Dorion*, différant.

Les raisons invoquées devant nous, contre ce testament et le legs universel fait à *Julie Morin* par icelui sont virtuellement réduites à deux, savoir : 1° L'insanité d'esprit du testateur ; 2° L'erreur du testateur quant à *Julie Morin*, *Russell* la croyant, lors de la confection de ce testament, son épouse légitime, tandis qu'en fait elle ne l'était pas, le premier mari de la dite *Julie Morin* étant alors encore vivant.

Le legs universel fait par ce testament du 27 Novembre 1878, (et le testament lui-même peut-être) sont-ils nuls par erreur ? C'est-à-dire *Russell* a-t-il testé en faveur de *Julie Morin* parce-qu'il la croyait sa femme ? A-t-il testé en faveur de madame *Russell* son épouse, ou bien en faveur de madame *Robitaille* ? A-t-il sciemment donné ses biens à la femme de *Robitaille*, commune en biens avec son mari, c'est-à-dire, a-t-il voulu donner ses biens à *Robitaille* ? Eût-il, lui, *Russell*, testé en faveur de cette femme, si *Robitaille*, son mari, fut survenu le 27 Novembre au

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

matin? Ou, en d'autres mots, quand *Russell* dit dans son testament: "Je donne à mon épouse bien aimée, *Julie Morin*" doit-on voir là apposée à sa libéralité la condition que cette *Julie Morin* est vraiment son épouse? Peut-on dire que si cette *Julie Morin* n'était pas alors et n'a jamais été son épouse légitime, *Russell* aurait ainsi testé en sa faveur? Il me semble que ces questions doivent se résoudre en faveur de l'appelante.

Sans doute comme le disent *Furgole* et *Demolombe*, sur l'erreur comme cause de nullité des testaments, on ne peut être trop prudent et trop réservé pour l'admission de cette cause de nullité, et il faut démontrer que le disposant n'aurait pas fait la libéralité s'il n'eût pas été dans cette erreur. Mais, ici, il me semble qu'il ressort de toute la cause, et du testament lui-même, que *Russell* n'a fait cette libéralité à *Julie Morin* qu'uniquement parce qu'il la croyait sa femme. Et le fait que lui et elle étaient, lors de la date du testament, de bonne foi, ne me paraît ici d'aucune conséquence. La question de fait à établir par l'appelante est l'erreur de *Russell* sur la qualité de *Julie Morin*, et qu'il a fait ce testament parce qu'il la croyait sa femme.

Le fait que *Julie Morin* était alors aussi dans l'erreur, ne peut affecter la cause sous notre droit civil, les autorités sont unanimes à enseigner que, si, en fait, il est établi que le testateur n'a légué à une personne qu'en considération d'une qualité qu'il lui supposait, qu'il apparaisse que le testateur était dans l'erreur quant à cette qualité de la personne en faveur de qui il a testé, la disposition est nulle (1). Dans *Merlin* (2), la doctrine sur la matière est clairement résumée comme suit.

Après avoir établi, qu'en général, un legs, accompagné d'une fausse démonstration du légataire, n'est pas

(1) Toullier 5, No. 654; Demolombe 1 Don. Nos. 389,391.

(3) Rep. Vo. Legs. Sec. 2, par 2, No. 4.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

rendu nul à cause de cette fausse démonstration, l'article ajoute :

La fausse démonstration pourrait cependant emporter la nullité du legs, si elle avait sa source dans une erreur du testateur, et s'il existait de fortes raisons de croire que celui-ci aurait disposé autrement dans le cas où il eût été mieux instruit. Par exemple que *Titius*, dans la fausse opinion que *Mévius* est son fils, lui fasse un legs conçu en cette forme : "Je donne et lègue telle chose à *Mévius* "mon cher fils ;" il est certain que le légataire ne pourra rien prétendre, parceque le testateur n'a été porté à disposer en sa faveur, que par la persuasion que c'était son fils, et que cette qualité n'existe pas. C'est la décision expresse de la loi 5, C. *de testamentis*, et de la loi, 4 C. *De hœridibus instituendis*. La loi 7 de ce dernier titre dispose de même par rapport à celui qui a institué comme son frère une personne qui ne l'était point ; et, ce qu'il y a de remarquable, elle prouve que l'erreur de droit vicie, aussi bien que la simple erreure de fait, le legs dans lequel elle a causé une fausse démonstration de personne.

Pour concilier ces textes avec ceux qu'on a précédemment cités, il faut, dit *Voët*, distinguer le cas où le testateur a appeler son fils ou son frère, un légataire qu'il savait bien n'être point tel, et qu'il aimait néanmoins comme s'il eût été réellement, d'avec celui où, trompé par de fausses apparences, il a gratifié comme son fils ou son frère, une personne qui n'avait point cette qualité et qu'il aurait passé sous silence s'il avait sû qu'elle lui était étrangère. C'est au premier cas qu'il faut appliquer les loi 58 § 1, de *Heredibus instituendis*, et 33 D. *De conditionibus et demonstrationibus ;* et c'est au second qne s'adaptent les lois 5 C. *de testamentis*, 4 et 5, 1 C, *de Heredibus instituendis*.

Furgole des Testaments (1) ; *Troplong* (2).

Il me semble clair que d'après cette autorité, le testament de *Russell* en faveur de *Julie Morin* ne peut être maintenu. Si la disposition d'un testateur qui, trompé par de fausses apparences, donne à quelqu'un, le croyant son fils ou son frère, uniquement parcequ'il le croyait son fils ou son frère, est nulle et sans effet, pourquoi la disposition de *Russell* en faveur de *Julie Morin* ne serait-elle pas aussi nulle et sans effet ? Peut-on douter, en face des termes de ce testament et des faits de la

(1) Ch. 5, sect. 4, 7 et 15. (2) 1, No. 502.

cause, que c'est à sa femme, et à sa femme seulement que *Russell* entendait léguer, et que s'il eût sû que *Julie Morin* était la femme de *Robitaille* et non la sienne, non-seulement il ne lui aurait jamais fait cette disposition le 27 nov. 1878, mais l'aurait chassée de chez lui et n'aurait plus voulu la voir.

Mr. *Sexton* n'aurait pas voulu lui administrer les sacrements, eut-il su que *Robitaille* était vivant, avant que cette femme eut été éconduite de la maison. Une autorité dans le même sens se trouve dans *Montvalon*, Traité des successions (1). L'auteur y cite un arrêt de 1727, où un legs, conçu en ces termes: "Je lègue à "*François Benoit*, mon petit neveu et filleul" fut déclaré nul, il apparaissant que le testateur s'était trompé en croyant que *François Benoit* était son filleul. La démonstration de filleul fut présumée la cause finale du legs.

Et *Menochius* dit que, si la cause finale d'un legs, celle en considération de laquelle il est fait, se trouve être fausse ou ne pas exister, on ne peut douter que la disposition tombe. *Menochius*, de Presumpt. (2). Et plus loin il ajoute, qu'une cause finale d'un legs est quand le testateur l'a fait à cause de la parenté ou de l'affinité du légataire avec lui ; et que s'il est découvert que cette cause est fausse et n'existe pas, le legs tombe. Ainsi, si quelqu'un, croyant un tel son fils ou son frère, ou son neveu, l'institue son légataire, et qu'il se découvre que le testateur était dans l'erreur, et que le légataire n'est pas ou son fils, ou son frère, ou son neveu, la disposition tombe.

A la première page, au par. 8., *Menochius* cite, en l'approuvant, le passage suivant de *Balde*, qui est d'une application remarquable à la présente cause. "*Quod si testator legavit uxori, vel eam instituit, credens esse legitimam uxorem, si apparet deinde matrimonium nullum,*

(1) T. 1er P. 525.

(2) Vol. 2, p. 45. No. 4.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

dispositio corruit ; nam præsumitur quod si scivisset eam non fuisse uxorem legitimam, non ita legasset, vel hæredem fecisset."

C'est bien là le cas actuel, le cas entre *Russell* et *Julie Morin*. Il lui a légué, la croyant sa femme légitime "*credens esse legitimam uxorem.*" Il était dans l'erreur, et elle n'était pas sa femme, le legs qu'il lui a fait est donc nul, car il est présumé, et c'est là, d'après *Menochius* et les autres auteurs cités, une présomption qui ressort des mots "Je lègue à mon épouse bien-aimée" qu'il ne lui aurait pas légué, s'il eût sû qu'elle n'était pas vraiment son épouse. Il ressort d'ailleurs ici, non-seulement des termes du testament lui-même, mais aussi de toute la preuve dans la cause, que c'est à sa femme légitime que *Russell* entendait léguer.

Un article de *Claude Henrys*, avec des observations par *Bretonnier*, adopte entièrement cette doctrine (1). Comme exemple, l'auteur dit que l'institution où le legs fait par le testateur à un étranger qu'il croyait être son frère n'est pas valable, quand l'erreur est découverte, comme le dit *Godefroi*: "*institutus ut frater a fratre errante, recti non est institutus.*"

Et *Duranton* dit (2) :

> Quoiqu'en principe l'erreur sur la qualité du légataire ne vicie pas le legs, néanmoins si l'on devait présumer que c'est cette qualité, crue vraie pour le testateur, qui a déterminé celui-ci à faire la disposition, le legs devait être déclaré nul par voie d'exception, comme fait d'après une fausse cause.

Les lois 4 C. de *Hered. Inst.* et 5 C De *Testamentis*, nous offrent des exemples de ces cas où le legs est nul, et leur décision serait incontestablement applicable dans notre droit.

Dans ce sens, un arrêt de 1812, dans la succession *Pétiot*, cité à *Dalloz* (3), a jugé que le testateur,

(1) Œuvres de Claude Henrys vol. 4, pp. 68, 74 et 76.

(2) Vol 9, No. 345.

(3) Rep. Vol. 16, Vo. Disp. entre-vifs et test, No. 244.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

qui a institué pour son héritier un enfant après l'avoir légalement reconnu, est censé n'avoir agi ainsi que parce qu'il croyait que c'était son enfant naturel, et que, par suite, l'institution n'est pas valable s'il est reconnu que l'institué n'est pas l'enfant naturel du testateur.

"Mais," dit l'intimée, "suivant l'article 163 C C., le mariage, quoique nul, produit les effets civils, s'il a été contracté de bonne foi, et, en conséquence, j'ai droit au legs à moi fait par le testament de *Russell*." C'est là, il me semble, une erreur grave. Sont-ce les effets civils de son mariage dont il s'agit ici? Le testament de *Russell* est-il un des effets civils de son mariage? Indubitablement non. Or, ce sont seulement les effets civils du mariage, c'est-à-dire, ceux que lui donne son contrat de mariage, ou en l'absence du contrat de mariage, ceux que lui donne la loi, ceux en considération desquels le mariage putatif a été contracté, qui sont donnés à la femme putative par l'article du Code. *Toullier* du mariage (1); *Boileux* (2); *Pothier* (3); *Marcadé* (4).

Mais ici, son mariage n'est pas son titre, son contrat de mariage n'est pas en question. Ce testament, *Russell* pouvait le révoquer, s'il n'eut pas perdu la raison, quand il lui aurait plu de ce faire, et ceci, que *Julie Morin* ou lui fussent de bonne foi ou non sur leur mariage. Et s'il l'eut révoqué, *Julie Morin* pourrait-elle dire "Je réclame ce legs, *Russell* n'avait pas le droit de le révoquer parce que c'est un des effets civils de mon mariage putatif avec lui?"

Je vois que *Bretonnier* (5), adoptant l'opinion d'un commentateur du nom de *Mantica*, est de l'avis que la femme putative, a, dans ce cas, droit au legs à elle fait

(1) Nos. 660, 661.
(2) P. 190 et seq.
(3) Mariage, Nos. 437 et seq.; Communauté, Introd., No. 17.
(4) 1 Vol. p. 525 et seq.
(5) Œuvres de Henrys (loc. cit.)

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

par son mari, quoique celui-ci l'ait fait par erreur. Mais je ne puis en venir à cette conclusion.

Pour moi, il me semble clair, qu'étant établi en fait, que *Russell* n'aurait pas légué à *Julie Morin* s'il eût sû qu'elle était la femme d'un autre, en droit la disposition ainsi faite par erreur tombe, et doit être traitée comme non avenue.

On pourrait peut-être remarquer dans le cas actuel que, comme par l'article 838 C. C., la capacité de recevoir par testament se considère au temps du décès du testateur, *Russell* ayant légué à sa femme, et *Julie Morin* n'étant pas sa femme, même putative, lorsque lui, *Russ ll*, est mort, ce legs pour cette autre raison est nul.

Si *Julie Morin* eût cessé d'être sa femme par sa mort naturelle, arrivée avant celle de *Russell*, le legs serait indubitablement nul. Art. 900 C. C. Elle a cessé d'être sa femme même putative et de bonne foi, par le retour de son premier mari, avant la mort de *Russell*. Sur le même principe, le legs à elle fait par *Russell* est nul. La dissolution du mariage putatif a eu lieu lors du retour du véritable mari de *Julie Morin* (1). Lorsque *Russell* est mort, elle n'était donc pas même sa femme putative. Mais il n'est pas nécessaire dans cette cause de considérer la question sous ce rapport; ce legs serait nul quand bien même *Robitaille* ne fût revenu ou découvert qu'après la mort de *Russell*. Ce legs, je le répète, ne peut pas être un des droits civils résultants à *Julie Morin* de son mariage, un droit acquis par son mariage, puisqu'il ne s'ouvre et n'est un droit qu'après la dissolution de son mariage.

Les droits résultants du mariage sont créés par le mariage même, quoiqu'ils ne s'exercent qu'à sa dissolution. Celui-ci a-t-il été créé par le mariage, lors du mariage? Indubitablement, non. Comment peut-on l'appeler un droit civil du mariage, s'il n'a pas été créé

(1) 1er Marcadé No. 703, par. 3.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

lors du mariage, s'il n'a pas été co-existant avec le mariage, s'il n'a dépendu, durant le mariage, que de la volonté de *Russell* seul. Si *Russell* eût dit tout simplement: "Je lègue à ma veuve," *Julie Morin* eût-elle jamais pu se prétendre légataire en vertu de ces mots? Voir *Morin* vs. *La Corp. des Pilotes* (1). Où s'il eût seulement dit: "Je lègue à ma femme" sans la nommer, *Julie Morin* eût-elle pu réclamer le legs?

Je ne fais pas allusion au fait que le mariage putatif de *Russell* avec l'intimée n'a pas été déclaré nul par une cour de justice, parce que cette objection n'a pas été soulevée par l'intimée en cette cause. Elle n'aurait d'ailleurs pu l'être. Mr. le Juge *Casault* a démontré clairement, dans la cause de la présente intimée contre la Corporation des Pilotes ci-dessus citée, pourquoi elle ne peut invoquer un tel moyen, et ce qu'en dit le Juge *Casault* s'applique entièrement à la présente cause, où dès avant la mort de *Russell*, et ce à la poursuite de l'intimée elle-même, la preuve de la constatation judiciaire de l'existence de son mari a été aussi produite. D'ailleurs, c'est encore comme épouse de ce même *Robitaille* qu'elle est en cause et qu'elle se défend ici; et elle-même, dans cette instance traite son mariage avec *Russell* comme nul, et n'ayant jamais existé.

L'intimée a soulevé devant nous l'objection que toutes les parties intéressées ne sont pas en cause. Cette objection vient trop tard. Comme le dit le juge *Loranger*, dans la cause de *Guyon* dit *LeMoine* contre *Lymais* (2):

> Le défaut de mise en cause de quelque partie au litige ne peut pas être invoqué comme moyen tendant à faire rejeter une demande. La partie qui l'invoque ne peut que demander à l'autre partie de mettre en cause celle dont l'absence paraît préjudiciable à l'adjudication sur le litige.

Et cette objection doit être prise *in limine*. Après avoir lutté contre l'appelante seule pendant deux

(1) 8 Q. L. R. 222. (2) 2 Rév. Lég. 398.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

ans, devant deux cours, l'intimée a mauvaise grâce à vouloir aujourd'hui empêcher cette cour de juger le fond de la contestation entre elle et l'appelante, sur une objection technique de cette nature. Elle a bien voulu engager cette contestation avec l'appelante seule, elle ne peut maintenant se plaindre de l'absence des autres parties intéressées. Il est sans doute regrettable que, dans une affaire de cette nature surtout, on n'ait pas vu à faire une cause telle que tout litige ultérieur sur ce testament fut impossible. Il était, il me semble, du devoir de l'exécuteur testamentaire de ce faire, et de voir à ce que toutes les parties intéressées fussent en cause. Faute par lui de ce faire, l'intimée pouvait elle-même les y appeler. Enfin la cour de première instance aurait peut-être dû elle-même l'ordonner. Nous avons cependant à prendre la cause telle qu'elle nous est soumise, et telle qu'elle a été devant les deux cours inférieures. Les parties souffriraient une criante injustice si nous refusions maintenant d'adjuger sur le litige pour un tel motif. Dans la cause de *Richer* v. *Voyer* (1), le Conseil Privé disait sur une objection semblable prise devant lui :

> Their Lordships would be most reluctant to dismiss this suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so.

Ici, il n'est pas absolument nécessaire que toutes les parties intéressées à cette succession soient présentes pour que nous décidions de la contestation que le demandeur, l'intervenante et la défenderesse *Morin*, ont bien voulu lier ensemble en l'absence des autres. Notre jugement ne pourra, il est vrai, affecter en loi ceux qui ne sont pas en cause ; mais il est à espérer, cependant, qu'il mettra virtuellement fin à toute contestation sur ce testament.

L'objection a été prise de la part de l'intimée que,

(1) 5 Rev. Lég. 600.

si le legs à *Julie Morin* est déclaré caduc, la révocation du testament du 8 octobre, fait par le testament du 27 novembre, n'en subsiste pas moins, et qu'alors l'intervenante appelante, *Elizabeth Russell*, n'a pas de *locus standi* dans cette cause, parce qu'elle ne repose, dans son intervention, ses droits à la succession de *Russell* que sur le testament du 8 octobre. Ceci est encore une objection que cette cour ne peut que voir que d'un mauvais œil à cet étage de la cause. Il serait bien malheureux qu'après une contestation si longue et si coûteuse, le litige entre les parties fût tout à recommencer par suite d'une objection de cette nature prise au dernier moment par *Julie Morin*. Dans la Cour du Banc de la Reine, on semble avoir cru, qu'en fait, c'était et à titre d'héritière et à titre de légataire, que l'intervenante demandait la nullité du testament du 27 novembre. Ceci a été nié devant nous par l'intimée, et, en référant à l'intervention et à la déclaration de l'appelante, il me paraît de fait incorrect. Ce n'est qu'à titre de légataire, par le testament du 8 octobre, que l'appelante est en cause. Si nécessaire, il faudrait donc lui donner le droit d'amender son intervention et sa déclaration contre *Julie Morin*, de manière à la mettre dans la cause comme héritière en loi de *Russell*. Ou bien encore, il serait possible pour elle de prétendre que l'erreur de *Russell* quant à *Julie Morin* rend le testament du 27 novembre nul en son entier, et que *Russell* n'a révoqué son testament du 27 novembre, que parce qu'il croyait que cette *Julie Morin* était son épouse légitime. Voir *Demolombe* (1). Cependant, comme j'en suis venu à la conclusion que ce testament du 27 novembre est aussi nul sur l'autre chef, c'est-à-dire pour cause d'insanité du testateur, je ne crois pas nécessaire de chercher à prévoir quelles seraient les conséquences dans l'hypothèse où il serait conclu que

(1) 5 Donat. p. 127.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

le legs à *Julie Morin* est nul, mais non les autres parties de ce testament du 27 novembre.

Une autre objection soulevée par l'intimée est que l'appelante dans son intervention, ses moyens d'intervention ou sa déclaration, n'a pas allégué l'erreur de *Russell* sur la qualité de l'intimée comme sa femme, et n'en a pas faite dans ces documents un de ses griefs contre le testament du 27 novembre 1878.

Cette objection ne peut prévaloir ici.

Devant la Cour Supérieure, (c'est l'intimée elle-même qui nous le dit,) l'appelante a invoqué ce moyen d'erreur.

At the trial, (dit l'intimée dans son factum devant la Cour d'Appel,) the intervening party urged in addition to the question of insanity the three following objections :

1st.....

2nd.....

3rd Assuming *Russell* believed *Julie Morin* to be his wife, which she knew she was not, the will is void for error.

Il appert aussi, par les notes du savant Juge en chef *Meredith*, que ce moyen de nullité contre le testament a été pris devant lui, et il prononce sur ce moyen. Devant la Cour du Banc de la Reine, le factum de l'appelante, page 107 du dossier ici, invoque aussi clairement ce moyen. Le factum de l'intimée, devant la même cour, répond à ce moyen, sans objecter qu'il n'est pas invoqué dans les documents écrits. La majorité des juges de la Cour du Banc de la Reine donnent aussi leur jugement sur ce moyen d'erreur. Il y a plus : ici même, devant cette cour, l'intimée, dans son factum, le traite comme un des points dans la cause, et le discute sans aucune objection à son admissibilité. Il n'y a qu'à l'audition finale que l'intimée a la mauvaise foi de soulever l'objection que ce moyen n'est pas invoqué par l'appelante dans son intervention et sa déclaration. Si cette objection eut été prise devant le juge en chef *Meredith*, l'appelante aurait certainement obtenu

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

la permission d'amender son intervention et sa déclaration de manière à couvrir ce point. Et en vertu du statut qui régit cette cour en pareille matière, nous devons ordonner maintenant un amendement dans ce sens, et traiter la cause comme si tel amendement était fait. L'intimée ne peut avoir ici une cause différente de celle qu'elle a eue devant les autres cours. Elle a obtenu un jugement sur ce chef d'erreur des deux cours provinciales, elle ne peut s'objecter à ce que cette cour aussi prononce sur ce chef. Ce serait encourager la mauvaise foi dans les procès que de permettre à une partie de surprendre son adversaire de cette manière. Il n'est pas question, je l'ai déjà remarqué, de la bonne foi ou de *Russell* ou de l'intimée sur leur mariage. Que *Russell* fut de bonne foi, c'est clair, qu'il fut dans l'erreur, est aussi clair.

Maintenant, si l'intimée eut été de mauvaise foi, si elle eût su que son premier mari était vivant, il n'y aurait plus lieu à contestation sur ce chef: elle n'aurait droit ni aux droits civils résultant de son mariage, ni à un testament qui alors aurait été obtenu par fraude. Mais je la traite comme si elle avait épousé *Russell*, croyant vraiment que son premier mari était mort; et, je dis que même, sur ces circonstances, le testament de *Russell* est nul, parce qu'il ne l'a fait que parce qu'il croyait que l'intimée était son épouse. Je traite ce testament comme s'il eut dit: "Je lègue à *Julie Morin*, parce qu'elle est mon épouse légitime, ou si elle est mon épouse légitime." Or, il appert que *Julie Morin* n'était pas son épouse légitime. Le fait qu'elle croyait l'être ne peut affecter le résultat de la cause. Je le répète, c'est parce que *Russell* était dans l'erreur, et ne lui aurait pas légué s'il n'eut été dans l'erreur que l'appelante doit réussir, et le fait que *Julie Morin* était aussi dans l'erreur n'affecte pas cette cause. Si d'un autre côté, *Russell* lui, n'eut pas été dans l'erreur, s'il eût su que

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

Robitaille vivait, il n'y aurait non plus lieu à litige, il aurait bien eu droit de léguer à Madame *Robitaille* et de l'appeler sa femme, quoiqu'il sût qu'elle ne l'était pas, et personne ne pourrait s'en plaindre.

Je passe maintenant à la question de l'insanité du testateur, invoquée par l'appelante contre la validité du testament en litige.

A la page 641 du dossier, je remarque que l'un des savants juges de la Cour du Banc de la Reine dit sur cette question d'insanité :

> Again it is a question of appreciation of fact wholly in the discretion of the primary tribunal.

Et cite, à l'appui de cette proposition, deux arrêts de la cour de Cassation, où il a été décidé qu'en *France* un arrêt qui décide, en fait, qu'un testateur était, ou n'était pas, sain d'esprit lors de la confection de son testament, ne donne pas ouverture à cassation. Je crois que c'est une erreur de comparer dans cette cause la juridiction et les devoirs de la Cour du Banc de la Reine et ceux de cette cour à ceux de la Cour de Cassation, pour la simple raison, qu'en *France* la Cour de Cassation n'est pas une cour d'appel sur le fait, mais bien seulement sur le droit, tandis qu'ici, et à la Cour du Banc de la Reine et à cette cour, appel est donné, et sur le fait et sur le droit.

Sans doute, et c'est là, j'en suis certain, ce que le savant juge de la Cour du Banc de la Reine, dont j'ai cité les paroles, a voulu dire :

> Upon a question of fact, an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal, it must be shewn irresistibly that the judgment complained of, on a matter of fact, is not only wrong, but entirely erroneous (1).

Mais ce dictum, et autres du même genre, ne veulent

(1) *Gray* v. *Turnbull* L. R. 2 Sc. App. 54.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

pas dire que, sur une question de fait, une cour d'appel, devra toujours suivre l'opinion du tribunal de première instance. La loi eût été absurde, si tout en donnant droit d'appeler du jugement du tribunal de première instance sur une question de fait, elle eut dit ou supposé que la Cour d'Appel, sur toute question de fait, s'en rapportera à la décision du juge *a quo*. Aussi, le Conseil Privé disait dans une cause de *Canepa* v. *Larios* (1):

The judicial committee is not bound by the decision of the court below upon a question of evidence, although in general it will follow it.

Et dans "The *Glannibanta* (2)," la Cour d'Appel disait :

That the parties were entitled to have the decision of the Court of Appeal, on questions of fact as well as on questions of law, and that the court could not excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. Though it should always bear in mind that it has not heard nor seen the witnesses, for which due allowance should be made. The court added that, as a rule, a court of appeal will be disinclined to interfere, when the judge hearing the witnesses has come to his decision upon the credibility of witnesses as evinced by their demeanor, but otherwise, in cases where it depends upon the drawing of inferences from the facts in evidence.

Et dans *Bigsby* v. *Dickinson* (3), la cour décide que :

Although the Court of Appeal, when called on to review the conclusion of a judge of first instance after hearing witnesses *vivâ voce*, will give great weight to the consideration that the demeanor and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet, it will in a proper case act upon its own view of conflicting evidence.

Dans cette dernière cause *James*, L. J., disait :

Of course, if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened, but then that would be doing away with the right of appeal in all cases of nuisance for there never is one brought into court in which there is not contradictory evidence.

(1) 2 Knap. 276. (2) 1 P. and Ad. Div. 283.
(3) 4 Ch. Div. 24.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

Et *Bramwell*, L. J., ajoutait :

The legislature has contemplated and made provision for our reversing a judgment of a Vice-Chancellor where the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses and we have not. If we were to be deterred by such considerations as those which have been presented to us, from reversing a decision from which we dissent, it would have been better to say at once that, in such cases, there shall be no appeal.

Et dans *Jones* vs. *Hough* (1), *Bramwell* et *Cotton* L. JJ. disaient :

First, I desire to say a word as to our jurisdiction. If, upon the materials before the learned judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to and not accept his finding.

I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts which ever way they like. I have no doubt, therefore, that it is our jurisdiction, our power and our duty: and if, upon these materials, judgment ought to be given in any particular way different from that in which *Lindley*, J., has given it, we ought to give that judgment.

Dans la présente cause, aucun des témoins de l'appelante n'a été entendu devant le savant juge qui a rendu le jugement en cour de première instance, et il lui a fallu former son opinion, comme nous avons à le faire, sur la simple lecture des dépositions de ces témoins. Sous ces circonstances surtout, cette cour siégeant ici en appel de ce jugement, serait, il me semble, oublieuse de ses devoirs, si elle négligeait de former son opinion sur les faits de la cause d'après la preuve qui se trouve au dossier. Car, il ne s'agit pas ici de la crédibilité ou non crédibilité des témoins,

(1) 6 Ex. Div. 122.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

mais seulement d'une inférence de fait des faits prouvés, c'est-à-dire que, sur cette issue, la question à résoudre est : Faut-il inférer des faits prouvés le fait que *Russell* n'était pas *compos mentis* lorsqu'il a fait le testament attaqué. Nous ne devons pas manquer de prendre en considération, sans doute, que, sur cette question, l'intimée a, en sa faveur, l'opinion du savant Juge en Chef de la Cour Supérieure et de quatre des savants Juges de la Cour du Banc de la Reine. Nous ne pouvons oublier, non plus, qu'il ne suffit pas à l'appelante de créer des doutes dans notre esprit, mais qu'il lui faut nous convaincre qu'il y a erreur dans le jugement dont elle se plaint. Mais il n'est pas moins certain, que si, d'après nos propres lumières, et d'après l'examen de la preuve produite, nous en venons à la conclusion qu'il y a erreur, l'appelante a droit à un jugement en sa faveur de notre part. Le fait que deux tribunaux ont déjà décidé contre elle ne peut nous exempter de la responsabilité de décider d'après notre propre jugement. La loi nous en impose le devoir, en décrétant que, sur une question de fait, il y aura appel à la Cour Suprême des jugements de ces deux tribunaux, même lorsque tous deux ils en seront venus à la même conclusion. Elle nous ordonne de rendre ici, sur cette question de fait, le jugement que, dans notre opinion, formée d'après la preuve produite par les parties, la Cour du Banc de la Reine aurait dû rendre, quand bien même l'on trouverait dans la cause contre l'appelante le jugement du juge de première instance.

Sur cette question de l'insanité du testateur, lors de la confection du testament en litige, je me contenterai d'adopter en son entier le raisonnement du savant Juge en Chef de la Cour du Banc de la Reine L'exposé des faits de la cause, tels qu'ils ressortent de la preuve, et des principes de droit qui régissent la matière, est

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

donné si complètement par le savant Juge que ce que je pourrais en dire ne serait qu'une répétition oiseuse. Je n'ai donc que quelques remarques à faire sur cette partie de la cause.

Le savant Juge en Chef *Meredith* dit en terminant son jugement :

> Before closing these remarks I desire to advert to the statement sworn to by the Plaintiffs, that he and Madame *Robitaille* were anxious that Mr. *Russell* should make some provision for his niece. And now that the charge that Madame *Robitaille* caused the will to be made by fraudulent practices and suggestions has been declared unfounded, I allow myself to hope that they may, if permitted, give effect to the very reasonable wish so expressed. If not, and if Madame *Robitaille* should attempt to retain that part of the estate which represents the industry and good management of Miss *Russell* during the best part of her life, the case will, I presume, be taken before a higher tribunal, and there the adversaries of Madame *Robitaille* will be able to say that they formed a truer estimate of her character than I have done.

L'intimée, en faveur de qui le savant juge a rendu son jugement quoique avec tant de regret et d'hésitation, ne peut plus invoquer ce jugement pour se donner un caractère de droiture et d'honnêteté, et sur l'autorité du savant juge, " Her adversaries are able to say that they formed a truer estimate of her character than he, the learned Judge, did."

L'intimée a voulu soutenir devant nous, pour affaiblir le témoignage d'*Ellen Russell*, que quand ce témoin jure que *Russell* et l'intimée ont vécu en concubinage avant son mariage putatif elle a juré ce qui est faux et n'est pas corroboré. Pour ma part je crois que ce que le témoin a dit là-dessus est parfaitement vrai. Il est de principe que si quelqu'un, intéressé à contredire un fait prouvé dans la cause par son adversaire, néglige d'amener un témoin qui a nécessairement une connaissance personnelle de ce fait s'il existe, il admet que ce témoin prouvera aussi ce fait, tel que son adversaire l'a prouvé, surtout quand ce témoin est son ami ou lui est

favorablement disposé. Ici le demandeur sur l'issue entre lui et l'appelante pouvait amener *Julie Morin* comme témoin, et l'examiner sur le fait juré par *Ellen Russell*. Si *Julie Morin* eût pu jurer qu'elle n'avait pas vecu en concubinage avec *Russell*, *Lefrançois* l'aurait entendue comme témoin. C'est parce qu'elle se sentait coupable qu'elle n'a pas été amenée. L'intimée a voulu aussi diminuer la force du témoignage d'*Ellen Russell* en essayant à démontrer qu'elle était contredite sur plusieurs points par Mr. *Sexton*. A la simple lecture du témoignage de M. *Sexton* l'on voit que ce témoin a si peu de mémoire, tout respectable que soit son caractère, que son témoignage ne peut être d'aucun poids dans la cause. Il suffit de remarquer qu'il ne se rappelle pas à qui il a donné le certificat qui se trouve annexé au testament du 27 Novembre, et qu'il jure, à un endroit, qu'il était au confessional dans la sacristie quand on l'a appelé pour lui demander ce certificat, et qu'en un autre endroit, il jure qu'il était en haut, c'est-à-dire, chez lui, dans le presbytère, puisqu'il dit :

Some person came and asked for me and I came down stairs.

Puis, la raison qu'il donne pour jurer que ce n'est pas à l'intimée à qui il a donné ce certificat peut bien être appelée pour le moins extraordinaire.

Question.—Is it not a fact that Mrs. *Robitaille* called for that certificate at the church, and informed you that it was for the purpose of being handed to the Notary who was going to draw up the will in her favor?

Answer.—No. I do not remember that at all.

Question.—Will you swear that that did not occur?

Answer.—I will form the conclusion that I do not know what effect it would have if she had mentioned it?

Question.—That is your only reason?

Answer.—Yes.

Dans tout son témoignage, ce témoin ne peut que repondre "Je ne me rappelle pas."

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

Tant qu'au témoin *St. Michel*, l'on comprend quel intérêt il a, pour sa propre réputation, à ce que *Russell* ne soit pas dit avoir été fou avant décembre 1878. Cet intérêt perce dans tout son témoignage, et le frappe d'incrédibilité.

Il me paraît impossible de mettre de côte le témoignage du Dr. *Russell*, le Juge en Chef *Dorion* me semble l'avoir démontré clairement, et ce témoignage, étant admis, la cause est claire et l'insanité de *Russell*, et avant et après et le jour même de la confection de ce testament, est entièrement établie.

C'était d'ailleurs clairement aux intimés à prouver que *Russell* était *compos mentis* le jour en question. Qu'il ait été fou auparavant, qu'il ait été fou peu de temps après, ne laisse pas de doute. Or, sous ces circonstances, il doit être présumé avoir été fou ce jour-là jusqu'à preuve du contraire. La règle en pareil cas, en *Angleterre* comme pour nous, est que :

If it be shown that the testator was insane at any time prior to the date of the will, or within a few days after that date, the burthen of establishing his capacity to have made the will in question will be shifted on the propounding party (1).

Telle est aussi la règle du droit français : "Toutefois si le demandeur prouvait que soit avant, et surtout *peu de temps avant* la disposition, *soit après, et surtout peu de temps après*, le disposant n'était pas sain d'esprit ; notre avis est que l'espace intermédiaire s'y trouverait compris ; car enfin, on ne doit pas non plus exiger l'impossible, et la vérité est qu'il serait souvent impossible au demandeur de prouver l'insanité d'esprit du disposant au moment précis et rigoureux, où il a fait la disposition." Et dans ce cas c'est au défendeur qui soutient la validité de la disposition qu'il incombe de prouver qu'elle a été faite par le disposant dans un intervalle lucide. *Demolombe* (2), et autorités y citées. Non-seule-

(1) Taylor on Evidence, vol. I, sec. 342 and cases there cited.

(2) I Donat p. 388, 389.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

ment les intimés n'ont pas, tel que le démontre le Juge en Chef *Dorion*, prouvé que *Russell* fut *compos mentis* le jour de la confection du testament en question, mais l'appelante a établi positivement qu'il était *non compos mentis* ce jour-là.

Il est à remarquer que *Julie Morin* elle-même, dans sa requête pour faire interdire *Russell*, en janvier 1879, allègue que les faits qui indiquent l'insanité chez *Russell* sont que :

That he walks into the street half dressed and desires to be sent to jail, that he continually speaks of his money losses, his fear of poverty and starvation, and fear of eternal damnation; he threatens to destroy every thing in the house, and is continually giving away his wearing apparel and other effects.

Or, ce sont là précisément les symptômes qui d'après la preuve existaient en grande partie chez *Russell* dès avant le 27 novembre précédent l'interdiction. Il semble d'ailleurs qu'un homme qui se promène dans les rues avec un certificat dans ses poches qu'il n'est pas fou, ou qui a recours à un tel certificat pour faire ses transactions, tel que *Russell* a fait le 27 novembre même, est un fou. Je n'ai rencontré que dans une visite à un asile d'aliénés, quelqu'un qui m'ait offert un tel certificat. C'était à *Brattleboro*, d'un interne qui me suppliait de le faire mettre en liberté, et appuyant sa supplique d'une douzaine de certificats qu'il n'était pas fou.

Comme le juge *Dorion* le remarque, un fou peut bien faire un acte de sagesse, et peut bien dissimuler son insanité. Le fait que les notaires ne se sont pas aperçus que *Russell* était fou lors de la confection du testament en question n'a pas l'importance que l'intimée voudrait nous y faire voir.

"Les notaires n'ont pas reçu de la loi l'attribution, le pouvoir, de constater la sanité d'esprit du disposant (1). "Suffit-il donc, pour être sage," disait d'*Aguesseau*

(1) Demolombe Don. No. 355.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

"d'avoir fait un acte de sagesse." L'intimée irait jusqu'à dire que parce qu'un homme met son chapeau pour sortir dans la rue, il n'est pas fou.

Quand au testament du 27 novembre, comme le Juge en Chef *Dorion*, et le Juge en Chef *Meredith*, lui-même l'ont démontré, loin d'être un acte de sagesse, c'est un acte d'inique cruauté envers *Ellen Russell*; c'est un acte si contraire aux intentions si souvent exprimées de *Russell* qu'on ne peut l'expliquer que comme il l'a expliqué lui-même au témoin *Brown*, quand il dit: "I could not help it, because I was frightened she was going to poison me." "Ceci n'est pas vrai," dit l'intimée, "et il n'est nullement prouvé que j'ai jamais fait aucune menace à *Russell* pour en obtenir ce testament." Sans doute il n'y a rien de tel prouvé, mais le fait que *Russell* le croyait, le fait que ce pauvre homme avait dans l'esprit que sa femme voulait l'empoisonner, quand absolument rien n'était intervenu pour lui mettre une telle chose dans l'idée, ne démontre-t-il pas qu'il était fou halluciné, "*non compos mentis*." Et ce témoin *Brown*, un pilote comme *Russell*, un de ses amis, un homme qui le connaissait parfaitement bien, est un des témoins les plus respectables entendus dans la cause, un témoin désintéressé, qui lui n'a pas, comme *St. Michel*, profité de la faiblesse d'esprit de *Russell* pour s'enrichir. Tout ce que ce témoin jure je le crois entièrement. J'en dis autant du docteur *Russell*. Leurs témoignages sont intelligents, éclairés, désintéressés, vraisemblables, et d'ailleurs parfaitement corroborés. Une autre remarque, *Brown* jure que *Russell* a appelé l'intimée: "a damned prostitute," et ceci le 27 novembre même. *Russell* était alors sobre et ne buvait pas depuis longtemps. L'intimée peut-elle nier que pas autre chose que l'hallucination et la folie ont pu faire dire une telle chose à *Russell*?

Il me paraît futile d'essayer à faire croire que c'est

parce que la conduite d'*Ellen Russell* avec *Gilchen* lui avait déplu qu'il l'a déshéritée, puisque longtemps après les faits qui auraient pu lui déplaire, savoir le 8 octobre 1878, il a testé en sa faveur. Ceci démontre qu'il lui avait bien pardonné ce qu'elle pouvait avoir fait pour lui déplaire.

Les témoignages des *Lefrançois* ne peuvent peser dans la balance. Ils se sont ligués contre l'appelante en faveur de cette *Julie Morin*. Le père n'a de fait pris la présente action que pour *Julie Morin* et dans son intérêt. L'intimée a cité l'article 335 du Code Civil et prétend que ce testament ne peut être annulé parce que l'insanité de *Russell* n'existait pas notoirement lorsqu'il a fait ce testament. Ceci est une erreur. Cet article ne s'applique pas au testament (1). Il n'y a aucun doute là-dessus.

En conséquence je suis d'avis, avec la majorité de cette cour d'infirmer le jugement dont est appel. L'action de *Lefrançois* sera déboutée, et celle d'*Elizabeth Russell* contre *Julie Morin* maintenue. Quant aux frais, *Julie Morin* devra être condamnée à payer à *Elizabeth Russell*, ceux faits sur les issues entre elles: comme de raison, ceux de *Julie Morin* elle-même restent à sa charge. Quant à ceux d'*Elizabeth Russell* contre *Lefrançois*, ce dernier n'y peut être condamné qu'en sa qualité d'exécuteur testamentaire, et comme il serait inutile de prononcer une telle condamnation en cette qualité, puisqu'il n'a pas et n'aura pas les biens de la succession *Russell* entre ses mains, c'est contre *Austin, ès qual.*, que la condamnation à ces frais doit avoir lieu en faveur d'*Elizabeth Russell*. Ceux faits par *Lefrançois* lui-même, et de son côté, devront aussi être pris sur la succession, et nous avons cru devoir aussi entrer une condamnation contre *Austin, ès qual.* pour iceux: il sera par là condamné à les payer à *Lefrançois* ou à ses

(1) Grenier Donations, p. 289; Demolombe 1 Donat. Nos. 355-356.

1883

RUSSELL v. LEFRANÇOIS.

Taschereau, J.

procureurs. Les frais d'appel, et dans la Cour du Banc de la Reine et ici, doivent être considérés comme faits moitié par *Julie Morin* et moitié par *Lefrançois*, et aussi comme faits par *Elizabeth Russell*, moitié contre *Julie Morin*, et moitié contre *Lefrançois*.

Nous avons accordé la distraction des frais demandée en Cour Supérieure suivant *Morency* et *Fournier* (1).

GWYNNE, J.:—

To the judgment of my brother *Taschereau*, which I have had the opportunity of carefully considering, and in which I entirely concur, and to the admirable analysis of the evidence, and to the application of the law to that evidence, appearing in the very able and exhaustive judgment of the learned Chief Justice, Sir *A. A. Dorion*, I find it to be impossible for me to add anything. I desire, however, in connection with some observations appearing in the judgment of one of the learned judges of the Court of Queen's Bench in appeal, to say: that in my judgment this is a case in which there can be no doubt that it is not only competent for us, but that it is a duty imposed upon us to form and express our own independent judgment upon the questions of fact involved and upon the evidence given in relation to those facts; and if that evidence leads our minds to a different conclusion from that arrived at by the learned Chief Justice of the Superior Court, it is our duty to give full expression to our opinion. This is not a case which, in the judgment of the learned Chief Justice of the Superior Court, who rendered the original judgment in the case, turned upon the credibility of any of the witnesses; indeed all of the witnesses were not examined before him. The case before him turned, and still turns, upon a question as to the proper inference to be drawn from all the evidence, as to the mental

(1) 7 Q. L. R. 9.

1883

RUSSELL
v.
LEFRANÇOIS.

Gwynne, J.

capacity of the testator to make the will of the 27th March, 1878, which is impeached. In such a case, to hold that we should be concluded by the judgment of the learned Chief Justice of the court of first instance, or by the judgment of the Court of Queen's Bench in appeal, affirming his judgment, would be in effect to declare that in such a case there is no appeal.

So to hold would have relieved us from much labor and anxiety in this case, but would deprive the parties of a right which the law confers upon them. The fact, that a majority of the learned judges constituting the Court of Appeal, in the province of *Quebec* has affirmed the judgment of the learned Chief Justice of the Superior Court, only enhances the gravity of the duty imposed upon us to take care not lightly to reverse those judgments, nor without a thorough conviction in our own minds that they are erroneous.

Fully sensible of the great gravity of the duty thus imposed upon me, I am bound to say that the evidence which has been so exhaustively analysed by the learned Chief Justice of the Court of Queen's Bench in Appeal, has convinced my mind that, at the time of the execution by the testator of the will of the 27th November, 1878, he had not that sound and disposing mind and understanding which are necessary to make a good will and valid in law; indeed, I am convinced that his mental incapacity dates back to a period anterior to the transaction between the testator and *St. Michel* of the 2nd October previous, but as there is no issue before us, in this case, as to the validity of the wills of October, 1878, and as judgment against the validity of the will of November cannot set up, as valid, any previous will, it will be only necessary for us to treat here of the will of the 27th November, but in so doing we cannot lay out of our consideration evidence of the acts and conduct of the testator evincing the state of his

1883

RUSSELL v. LEFRANÇOIS.

Gwynne, J.

mind in the month of October. If the testimony of Dr. *Russell*, the only medical man who has been examined upon the subject—for his father only speaks of a much later period—be at all reliable, there seems to me to be no doubt of the testator's incompetency at the time of the execution by him of the impeached will. The learned Chief Justice *Meredith*, in the judgment delivered by him, does not treat the certificate given by Dr. *Russell*, on 11th November, for the purpose of giving effect to the *St. Michel* transaction, as detracting from Dr. *Russell's* credibility upon the ground of its being inconsistent with his oral evidence as to the testator's mental incapacity to make the impeached will; he rather, as it seems to me, accepts the doctor's explanation of the circumstances attending his giving that certificate and the object of giving it, and proceeds to refer to various business matters transacted by the testator during the month of November and to the impressions as to his capacity formed in the minds of divers persons during that month, and especially in the minds of the notaries who drew and attested the execution of the impeached will for the purpose, as it seems to me, of justifying the conclusion which the learned Chief Justice arrived at, that at the time of the execution of that will upon the 27th November, the testator had a sufficiently sound and disposing mind.

The learned Chief Justice, after referring to the certificate and to the Doctor's explanation of the circumstances under which it was given, says:

> But whatever may have been Dr. *Russell's* intention in giving that certificate, it may be presumed that it would not have been asked for, had not grave doubts been entertained as to *Russell's* sanity in some quarters, at the time; and the same remarks apply to the certificate obtained from the Rev. Mr. *Sexton* upon the 26th November, the day before the making of the will in question.

The learned Chief Justice then proceeds to draw attention to the other matters which led his mind to

1883

RUSSELL v. LEFRANÇOIS.

Gwynne, J.

the conclusion, that on the 27th November, the testator was of a sound and disposing mind, but he admits that, notwithstanding this being his opinion, the case is still not free from difficulty. Some of the Judges constituting the majority of the Court of Queen's Bench in Appeal, seem to have wholly set aside Dr. *Russell's* oral evidence, treating it as so contradicted by his certificate as to be wholly unworthy of belief. Mr. Justice *Ramsay*, upon this head, says:

> Dr. *Russell's* intentions may have been excellent, but I must necessarily set his testimony upon a matter of opinion, so contradicted, entirely aside.

From this remark of that learned Judge I conclude that he entertained the opinion, which I confess I entertain myself, that unless the testimony of Dr. *Russell* be wholly set aside and eliminated from the case, it is difficult, if not impossible, to maintain the validity of the will.

Before wholly eliminating from the case the only medical evidence given upon a subject, which is peculiarly within the range of the studies of the medical profession, we should be well satisfied of the necessity of shutting our eyes to evidence coming from a quarter from which we should naturally expect most light: while we must admit that as a point of casuistry the doctrine that the end justifies the means is unsound, and while viewing the question in that light, as a matter of conscience, it may appear to us, that it would have been better if the doctor had not given this certificate, even though his withholding it might, under the circumstances, have hopelessly embarrassed the case beyond all possibility of being rectified, and might have so affected the weak mind of his patient as to have aggravated his disease and have precipitated his death, still before we wholly reject the oral testimony of the doctor, as so incredibly inconsistent with the

1888

RUSSELL v. LEFRANÇOIS.

Gwynne, J.

certificate, and so contradicted by it, as to make him unworthy of belief, we should put ourselves in his place, and, judging the matter from his point of view, enquire whether the rejection of all the doctor's evidence as to the testator's mental incapacity is in reality the reasonable and logical sequence of his having given the certificate.

Upon the threshold of this enquiry, we find the doctor's reason, for interfering at all in the *St. Michel* transaction was his confirmed belief in the mental incapacity of his patient, and in the fact that such incapacity had been taken advantage of by *St. Michel*. The doctor gives his reasons for his belief in the then mental incapacity of his patient *Russell*, and these reasons are confirmed by very many other persons intimate acquaintances of *Russell*, of whom St. *Michel* himself is one.

Thoroughly convinced in his own mind that advantage had been taken of his patient's mental incapacity, the doctor spoke freely upon the subject among *Russell's* friends and acquaintances, saying:

> *St. Michel* has taken *Russell's* house from him and *Russell* is out of his mind, it is not a legal transaction.

The rumor of the transaction, and of the doctor's observation upon it, having got abroad, brought *St. Michel* to him, and to an enquiry by *St. Michel* whether he considered *Russell* to be in a fit state to transact business, the doctor replied: "No, that house is not yours."

Thereupon *St. Michel* said that he had paid upwards of $1,000.00 on the building of the house, that it was worth about $1,400.00, and he added,

> If you will give me a certificate to allow this transaction to be completed, I will give *Russell* the balance $400.00.

In reply to this proposition the doctor assented to give the certificate, upon condition that Mr. *Austin*,

1883

RUSSELL v. LEFRANÇOIS.

Gwynne, J.

Russell's own notary, should be employed, because the doctor knew that *Russell's* interest would be safe in his hands. He felt, no doubt, that *Austin* would not assent to the transaction being confirmed, unless the amount to be paid by *St. Michel* should be the fair value of the property. The doctor accordingly went to *Russell* and told him of *St. Michel's* offer, and that he would give $400.00 to *Russell*, if he, the doctor, would give the required certificate. *Russell*, as the doctor says, was very anxious to get the $400, and that the doctor should give the certificate, and he seemed then clearly enough to understand the particular matter so explained to him, by his medical adviser, although for the transaction of business generally, the doctor says, he was not at all sane, and could be easily led in any direction.

The papers to give effect to the *St. Michel* transaction having been prepared by M. *Austin*, and the $400 paid by *St. Michel*, the doctor, for the sole purpose of enabling that particular transaction to be perfected, gave the certificate. I confess that it appears to me rather singular that a man, so perfectly sane, as to be fit to transact any business, should be exceedingly anxious to get the doctor's certificate of his being sane, in order to get a particular transaction completed, which transaction consisted in the enforced rectification in the interest of *Russell*, brought about by the doctor, of a contract of sale, a few days previously entered into by *Russell*, whose mental capacity was not then sufficient to enable him to look after and protect his own interests. Now, from this evidence, which we must look at for the purpose of seeing under what circumstances the certificate was given, it is apparent to my mind, that notwithstanding what is contained in it, the doctor was well satisfied that his patient's mind was very seriously diseased, and that he was quite incompetent for the management

1883

RUSSELL v. LEFRANÇOIS.

Gwynne, J.

of his affairs generally, and that he gave the certificate for the special purpose of enabling a transaction to be consummated so as to secure to *Russell* the full value of the property in question, and which could not have been consummated without the certificate, and which, if not consummated, would have been attended with very great pecuniary loss to *St. Michel*, and might have involved *Russell* in a litigation which in his then state of health, might have been disastrous.

These then being the circumstances attending the giving the certificate, although in the minds of casuists, and when examined into, *in foro conscientiæ*, the doctor's conduct may be open to censure, I find it impossible to hold, as a legal proposition, that a certificate asked for because of a pretty generally prevailing belief in *Russell's* mental incapacity, and because of his doctor's remonstrances, that such his mental incapacity had been taken advantage of by *St. Michel*, and given to prevent *St. Michel* incurring the risk of losing the $1,000 already paid by him to the builder, or some portion thereof, and the costs of a possibly protracted litigation, and given, too, upon the express promise and condition that he should pay to *Russell*, the further sum of $400, which, with the $1,000 was considered the fair value of the property, should be taken as conclusive evidence of the then perfect mental capacity of the person whose alleged mental incapacity and the wrongful advantage taken of such incapacity constituted the moving causes for giving the certificate, and that we should therefore reject all the evidence given by the medical man who gave that certificate having a tendency to establish the mental incapacity of *Russell* to make the will which is impeached, made a fortnight subsequently to the day upon which the certificate was given.

The doctor in his evidence proceeds to say, that immediately after the day on which the certificate was

given *Russell* got worse daily, and that on the 27th November he was quite incompetent to make a will, that he continued growing worse, until early in January following he was interdicted and confined in an asylum as insane, the evidence of the doctor himself, that the symptoms of his insanity dated back three months, having been used by *Julie Morin* (the party maintaining the will of the 27th November) for the purpose of procuring the interdiction.

It is not, however, upon the evidence of the doctor alone, that my judgment is based. The evidence given by him, confirmed by numerous witnesses, relates to acts and conduct of the testator, betraying unmistakable symptoms of an enfeebled mind, such acts and conduct being identical with those which, in works treating of general paralysis of the insane, are declared to be invariable and unmistakable symptoms of the presence of a mental disease which in comparatively modern times has been termed and known as paresis, a disease which in its early stages may easily escape the observation of non-professional men, and even of professional men, who have not had much experience of it, and which, although for short periods, and for isolated matters, the patient suffering under it may be able to apply some trifling degree of mental faculty, nevertheless, so enfeebles the mind as to deprive it of that comprehensive grasp of subjects, that power of concentration and of continuous thought, the power of comparing, compounding and uniting the several parts of any subject under consideration, in short of that integrity of the mental faculties which is essentially necessary for the conduct of the general business of life, and more especially for the sane execution of that last great act of life, the disposition of property by will.

The evidence in the case does not appear to have been given with the view of determining, with scien-

1883

RUSSELL v. LEFRANÇOIS.

Gwynne, J.

tific accuracy, what is the particular medical term for the mental disease under which *Russell* was suffering —its symptoms singularly correspond with those laid down as unerring symptoms of paresis, but whatever may be the appropriate scientific name of the disease, the evidence leaves no doubt upon my mind, that from at least the period of the *St. Michel* transaction, the mental capacity of *Russell* was so enfeebled as to render him quite incapable of managing his affairs, as a sane man, and of making the will which is impeached. The evidence relating to matters transacted by *Russell*, during the month of November, has no effect upon my mind, some of those transactions are quite consistent with the existence of that feeble condition of mind to which the doctor and other witnesses bear testimony, while as to the moneys relied upon as received by him during the month, we know nothing of their disposition.

I am more impressed with the significance attaching to the giving to *Russell* of Mr. *Sexton's* certificate by the person who obtained it from him. That it was obtained for the purpose of being delivered to *Russell* to be used in the precise manner in which it was used, we can, I think, have little doubt, and such use of it appears to me rather to indicate the act of a person under an influence which his feeble mind feared to thwart or resist, than of a person in the full possession and enjoyment of his mental faculties unimpaired.

Appeal allowed with costs out of Estate.

Solicitors for appellant: *W. & A. H. Cook.*

Solicitors for respondents: *Andrews, Caron, Andrews & Fitzpatrick.*